

Index

- Actual parenting, 70
- Adaptive rationality
  - Frank, Robert, on, 231
- Adolphe, Jane
  - on premarital agreements under Principles and in Canada, 351, 371
- Adoption
  - Convention on Intercountry Adoption, 399
  - parental rights of adoptive parents, Constitutional deference to state law, 56
  - in Spain, 5
- Adultery
  - Cicero on, 43
  - and fault, 254, 255
  - financial misconduct, relationship to, 246
  - intentional infliction of emotional distress claims
    - based on, 12
  - tort claims for in lieu of spousal support, 253
- African-Americans
  - cohabitation, growth among, 273
- Agency law
  - doctrine of necessities under
    - generally, 200
  - “compulsory agency” theory, 200
- Alcohol abuse
  - caretaking requirement for “de facto” parents,
    - exception to in cases of, 96
- ALI Principles. *See* specific topic concerned
- Alimony. *See* Spousal support
- Alternating residence. *See* Joint custody
- Alternative dispute resolution
  - in child support
    - advantages of, 417, 418
    - lack of serious use of, 422
    - overview, 410
  - mediation (*See* Mediation)
  - Principles neglecting as alternative to divorce, 23
- Amato, Paul
  - on divorce, 264
  - on shared parenting and parental responsibility, 462
- American Law Institute Principles. *See* specific topic concerned
- Anderson, Kermyt G.
  - on importance of biological ties to parental involvement, 102, 106
- Annulment
  - grounds for, 319
  - and premarital agreements, 359
- Antenuptial agreements. *See* Premarital agreements
- “Approximate time” standard
  - generally, 74, 78
  - Bartlett, Katherine, on, 75, 76
  - “best interests of child” standard, relationship with, 74
  - custodial responsibility, allocation of, 74, 75
  - exceptions, 76, 78
  - judicial discretion, 76, 78
  - past caretaking standard compared, 449
  - problems with, 76, 78
  - Scott, Elizabeth, on, 74, 444, 449, 454
  - significant decision-making responsibility, allocation
    - of, 75, 76
  - in West Virginia, 74
- Aquinas, Saint Thomas
  - on obligation
    - generally, 33
  - in *Summa Theologica*, 33
- Aristotle
  - on equality, 292
  - on fairness, 401
  - on obligation, 33
- Arizona
  - covenant marriage in, 265, 359
- Arkansas
  - covenant marriage in, 265, 359
- Ascription
  - Canada, as legal model for living under “Beyond Conjuality” Report in, 368, 369
- Assisted reproduction
  - and volitional child support obligation, 137, 138
- Assumption of parental role
  - agreements, 52
  - parenthood based on, 53
  - same-sex couples, 52
  - surrogate parents, 52
- Asymmetric parenthood, 121, 141
- Attempted murder
  - division of property, effect on under Principles, 184, 185
- Attorneys
  - protection of interests of children by

Attorneys ( <i>cont.</i> ) <ul style="list-style-type: none"><li>generally, 83</li><li>balancing parental rights with, 83, 84, 87</li><li>child abuse or neglect cases, 86</li><li>domestic violence cases, 86</li><li>guardians <i>ad litem</i> compared, 84</li><li>judicial discretion in appointing, 85, 86</li><li>neutral experts compared, 86, 87</li><li>in Wisconsin, 83</li></ul>	Beck, Ulrich <ul style="list-style-type: none"><li>on shared parenting and changes in attitudes of fathers, 468</li></ul>
Australia <ul style="list-style-type: none"><li>aboriginal populations, cohabitation among, 314</li><li>Australian Institute of Family Studies, research on parental responsibility, 461</li><li>child support in, 411</li><li>cohabitation in, 5, 314</li><li>division of property in, 475</li><li>Family Law Reform Act 1995, 461</li><li>joint custody in, 458, 459</li><li>past caretaking standard in, 451</li><li>recent developments in family law paralleling Principles, 3</li><li>shared parenting in<ul style="list-style-type: none"><li>children, wishes of, 465</li><li>community attitudes toward parental responsibility, changes in, 461, 462</li><li>fathers, changes in attitudes of, 467</li></ul></li></ul>	Beck-Gernsheim, Elisabeth <ul style="list-style-type: none"><li>on shared parenting and changes in attitudes of fathers, 468</li></ul>
Austria <ul style="list-style-type: none"><li>spousal support in, 479</li></ul>	Becker, Mary <ul style="list-style-type: none"><li>on “maternal deference” standard, 68</li></ul>
Ayres, Ian <ul style="list-style-type: none"><li>on contract law in family law context, 271</li><li>on penalty default rules in domestic partnerships, 270</li></ul>	Belgium <ul style="list-style-type: none"><li>polygamy in, 1</li></ul>
Babylon, Ancient <ul style="list-style-type: none"><li>contractual aspect of marriage in, 320</li></ul>	Benefits of marriage to children, 324
Backward-looking jurisprudence <ul style="list-style-type: none"><li>provisions of Principles regarding spousal support representing (<i>See</i> Spousal support)</li></ul>	Berger, Peter L. <ul style="list-style-type: none"><li>on social institutions, 501</li></ul>
Bacon, Francis <ul style="list-style-type: none"><li>on human understanding, 495</li></ul>	“Best interests of child” standard <ul style="list-style-type: none"><li>generally, 49</li><li>“approximate time” standard, relationship with, 74</li><li>“de facto” parents, inapplicable to continuing contact with, 94</li><li>decline of, 68</li><li>flexibility of, 88</li><li>imputation of income to stay-at-home parents, presumptions, 145</li><li>nonparents and custody, effect on, 49</li><li>“primary caretaker” doctrine, relationship with, 71</li><li>“psychological best interests,” 69</li></ul>
Bagley, Christopher <ul style="list-style-type: none"><li>on sexual abuse of children, 109</li></ul>	Scott, Elizabeth, on, 441, 442
Baker, Katharine A. <ul style="list-style-type: none"><li>“de facto” parents, on child support obligations of, 98</li><li>on parenthood, 121, 141</li></ul>	and separation agreements, 388
Bala, Nicholas <ul style="list-style-type: none"><li>domestic partnerships, on imposition of unwanted obligations under Principles, 279</li></ul>	“tender years” doctrine, relationship with, 68
Bankruptcy <ul style="list-style-type: none"><li>shielding marital wealth from creditors, effect on, 204</li></ul>	in United Kingdom, 441, 442
Bartholet, Elizabeth <ul style="list-style-type: none"><li>multiple parenthood, arguments against based on privacy, 55</li></ul>	“Beyond Conjuality” Report <ul style="list-style-type: none"><li>Adolphe, Jane, on, 351, 371</li><li>ascription as legal model for living under, 368, 369</li><li>autonomy as philosophy behind Report, 364</li><li>bias in, 366, 367</li><li>deconstruction of marriage threatened by, 370</li><li>diversity, highlighting of, 363, 364</li><li>equality as philosophy behind Report<ul style="list-style-type: none"><li>generally, 364</li><li>“equality within relationships,” 364</li><li>“relational equality,” 364</li></ul></li><li>equivalence of marriage and other relationships under, 366</li><li>legal framework for relationships, 365</li><li>legal models for living under, 367, 370</li><li>marriage as legal model for living under, 367, 368</li><li>methodology applied to statutes<ul style="list-style-type: none"><li>generally, 364, 365</li><li>alternative proposal, 366</li></ul></li><li>overview, 351</li><li>philosophy behind Report, 364</li><li>principled approach to protection of other relationships by state, 363</li><li>private contract as legal model for living under, 368</li><li>questions raised in, 363</li><li>registered domestic partnership as legal model for living under, 369, 370</li><li>role of state in influencing formation of relationships, 363</li><li>social nature of marriage, obscuring of, 365</li></ul>
Bartlett, Katherine <ul style="list-style-type: none"><li>on “approximate time” standard, 75, 76</li></ul>	Binary biological ideal <ul style="list-style-type: none"><li>and child support</li></ul>
Battery <ul style="list-style-type: none"><li>demise of interspousal immunity, effect of on divorce, 12</li><li>effect of availability of claims for on divorce, 12</li><li>intentional infliction of emotional distress claims combined with, 12</li><li>social consensus against, 18</li></ul>	

generally, 128, 130	<i>Friedman v. Friedman</i> , 335, 336
behavioral considerations ignored under Principles, 129	<i>Marvin v. Marvin</i> , 333
Child Support Formula under Principles, 128	dilution of parental authority by recognition of new parents in, 65
defined, 121	domestic partnerships in, 277, 278
economic plight of children in single-parent homes not alleviated by focus on, 129, 130	fixed-share division of community property compared to division of marital property under Principles, 182
empirical evidence of decline of, 129	imputation of income to stay-at-home parents in, 155, 156
retention for purposes of, 128, 136	marital agreements in
custody, rejection for purposes of, 128	enforceability, 386, 387
visitation, rejection for purposes of, 128	penalty clauses, 384, 386
Biological parents	“most appropriate” parent, determination of in, 62, 63
Constitutional protection of ( <i>See</i> Parenthood)	multiple parenthood, criticism of in, 54
“de facto” parents, empirical studies comparing generally, 102, 106	no-fault divorce, enactment of in, 252
parental investment, importance of biological ties to, 102, 106	“private ordering” in, 300, 304
wellbeing of children, importance of biological ties to, 93, 102	surrogate parents, recognition as legal parents based on assumption of parental role in, 52
Bix, Brian H.	unpaid child support in, 419, 420
on domestic violence, 402	Canada
on premarital agreements, 358, 372, 391	ascription as legal model for living under “Beyond Conjuality” Report, 368, 369
Blackmun, Harry	“Beyond Conjuality” Report ( <i>See</i> “Beyond Conjuality” Report)
on international law, 399	Canadian Charter of Rights and Freedoms, protection of economic rights under, 405
Blair, Tony	Canadian Law Reform Commission ( <i>See</i> “Beyond Conjuality” Report)
and Fathers4Justice, 442	cohabitation in, 313
Blumberg, Grace	division of property in, 475
domestic partnerships, on inadequacy of contract law in, 337, 338	domestic partnerships in
Blumstein, Philip	Adolphe, Jane, on, 351, 371
on financial attitudes in cohabitation, 310, 311	“Beyond Conjuality” Report, as legal model for living under, 369, 370
Bolen, Rebecca	obligations of parties under Principles compared, 280
on sexual abuse of children, 110	same-sex couples, 281, 283
“Bounded rationality”	underprotection of parties under Principles compared, 269
overstatement of problems with, 379, 380	marriage as legal model for living under “Beyond Conjuality” Report, 367, 368
and premarital agreements, 375	premarital agreements in
Brennan, William J.	Canadian Charter of Rights and Freedoms, protection of economic rights under, 405
on decline of family as social institution, 504	not binding in, 403
Breyer, Stephen	private contract as legal model for living under “Beyond Conjuality” Report, 368
<i>Grutter v. Bollinger</i> , citation of international law in, 399	rights of nonresidential parents, United Kingdom compared, 443
Brinig, Margaret F.	same-sex couples in, 1, 281, 283
on cohabitation, 276	shared parenting in, 465
on domestic partnerships, 269, 283	Carbone, June
Burke, Edmund	on gender wars, 392
on elitism, 489	on spousal support, 209, 233
Bush, George W.	spousal support, on kinds of compensable losses within, 259
interdependence of marriage, 292	Care givers
Bush, Laura	acknowledgment of paternity, effect of on custody, 49
interdependence of marriage, 292	as “de facto parents,” 50
Bush Administration	under existing custody law, 49, 50
marriage initiatives, Principles neglecting as alternative to divorce, 24	
Buss, Emily	
child rearing rights of biological parents, on protection of, 54	
Constitutional formula for recognition of parenthood, on problems with, 60	
California	
cohabitation in	

Care givers ( <i>cont.</i> )	Indiana, proposed rule in, 423
former care givers as “de facto” parents ( <i>See</i> “De facto” parents)	interim orders, need for, 423
legal parents, advantages of recognition as, 65, 66	legal system, inability of to reform family law, 420, 421
past caretaking standard ( <i>See</i> Past caretaking standard)	overview, 410, 411
“primary caretaker” doctrine ( <i>See</i> “Primary caretaker” doctrine)	problem-solving courts, use of, 422
as “psychological parents,” 50	conflict between parents, existing law encouraging, 410
relaxation of traditional preference against in custody matters, 50	Corrigan, Maura D., on, 409, 424
same-sex couples as, 49	culture of domestic relations litigation, need for changing, 410
Catholic law	custody, differential treatment under Principles generally, 133
contractual aspect of marriage under, 319	<i>Miller v. Miller</i> , 135, 136
Chambers, David	parents by estoppel defined differently, 124
on changes in family law, 505	“de facto” parents, obligations of, 98
Chaskalson, Arthur	decline of two-parent family
on enforcement of economic rights, 406	failure to address in Principles, 412, 413
Child abuse	Wilson, James Q., on, 413, 414, 415
caretaking requirement for “de facto” parents, exception to in cases of, 96	default judgments, problems with
protection of interests of children by appointment of attorneys or guardians <i>ad litem</i> , 86	generally, 418, 420
Wald, Michael, on, 497	early involvement of fathers as alternative to, 419
Child care	hiding or flight of obligors, encouraging of, 419
imputation of income to stay-at-home parents ( <i>See</i> Imputation of income to stay-at-home parents)	lack of immediate payments under, 418
Child custody. <i>See</i> custody	overview, 410
Child marriage	unemployed fathers, difficulties obtaining money from, 419
India, Child Marriage Restraint Act of 1929, 399	early involvement of fathers as alternative to default judgments, 419
UNICEF Report on Child Marriage, 399	economic impact of family fragmentation
Child neglect	generally, 413
caretaking requirement for “de facto” parents, exception to in cases of, 96	demographic statistics, 414
protection of interests of children by appointment of attorneys or guardians <i>ad litem</i> , 86	middle class, harm to, 413
Wald, Michael, on, 497	out-of-wedlock births, statistics on, 414
Child support	and poverty, 413, 414
generally, 121, 161	single-parent households and poverty, statistics on, 414
alternative dispute resolution in	Ellman, Mark Ira, on child support and spousal support, 253
advantages of, 417, 418	emotional impact of family fragmentation
lack of serious use of, 422	generally, 415, 418
mediation	alternative dispute resolution, advantages of, 417, 418
Indiana, proposed rule in, 423	children blaming selves for dissolution, 415
lack of mention in Principles, 417	empirical research on, 415
slowness of, 423	guidance for parents, need for, 418
overview, 410	and lingering conflict, 417
alternative methods for improving system, 139	mediation, lack of mention in Principles, 417
assisted reproduction and volitional obligation, 137, 138	minimization of, need for legal processes designed for, 415
in Australia, 411	protection of individual interests of parents, overemphasis on, 416
bargaining for custody under Principles, 140	and unmarried parents, 416
and binary biological ideal ( <i>See</i> Binary biological ideal)	emotional needs of children outweighing financial needs of children under Principles, 133, 134, 136
Child Support Formula under Principles and binary biological ideal, 128	estoppel, parenthood by
conciliatory process, proposal of	defined differently than for custody and visitation, 124
generally, 420, 423	rarity of obligation to pay under Principles, 124, 125
benefits to children under, 421	

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

511

- as relationship category for purposes of, 124
- Etzioni, Amitai, on, 135
- expansion of state power under Principles, effect of, 130, 133
- and family fragmentation
  - economic impact, 413
  - emotional impact, 415, 418
- formula in Principles, 413, 414
- functional approach, dangers of, 139, 140
- Hegel, Georg Wilhelm Friedrich, on, 135
- hiding or flight of obligors, default judgments as encouraging, 419
- imbalance between parental rights and obligations under Principles
  - generally, 121, 141
  - child support, relationship categories for purposes of, 124, 126
  - custody and visitation, relationship categories for purposes of, 122, 124
  - overview, 121, 122
- improvements in enforcement efforts, 418, 419
- imputation of income to stay-at-home parents (*See* Imputation of income to stay-at-home parents)
- inadequate payments to children, recognition in Principles, 411, 412
- interim orders, need for, 423
- interstate collection, difficulties with, 420
- judicial perspectives, 409, 424
- legal parents as relationship category for purposes of, 124
- Locke, John, on, 135
- mediation in
  - Indiana, proposed rule in, 423
  - lack of mention in Principles, 417
  - slowness of, 423
- in Michigan, 409, 410
- political difficulties in implementing Principles, 412 under Principles
  - generally, 411, 413
  - decline of two-parent family, failure to address, 412, 413
  - inadequate payments to children, recognition in Principles, 411, 412
  - political difficulties in implementing, 412
  - right of noncustodial parent to higher standard of living, problems with priority of, 412
- and “private ordering,” 287
- relationship categories for purposes of, 122, 124
- right of noncustodial parent to higher standard of living, problems with priority of in Principles, 412
- surrogate parents and volitional obligation, 137, 138
- and two-parent model (*See* Binary biological ideal)
- unemployed fathers, difficulties obtaining money from, 419
- unpaid child support
  - in California, 419, 420
  - government payments substituting for, 415
  - statistics on, 414, 415
- visitation, differential treatment under Principles
  - generally, 133
  - Miller v. Miller*, 135, 136
  - parents by estoppel defined differently, 124
- volitional obligation
  - generally, 136, 139
  - affirmative conduct requirement, 136
  - agreement requirement, 136
  - arbitrariness, 138
  - and assisted reproduction, 137, 138
  - inconsistency with other treatment of obligation in Principles, 138, 139
  - problems with requiring intent, 137, 138, 140, 141
  - voluntary payments in excess of requirements, 412
- “Children’s rights” movement, 69
- Cicero
  - on adultery, 43
  - on shame and family, 43
- “Civil Covenant”
  - generally, 397
  - overlap with “Economic Covenant,” 397, 398
- Civil law
  - contractual aspect of marriage under, 319
- Civil unions
  - in Connecticut
    - and Equal Protection, 281
    - obligations of parties under Principles compared, 280
  - in Vermont
    - and Equal Protection, 280, 281
    - obligations of parties under Principles compared, 280
- Classical liberalism
  - and marriage, 256
- Clinton, Bill
  - independence of marriage, 292
- Clinton, Hillary
  - independence of marriage, 292
- Clinton Administration
  - marriage initiatives, Principles neglecting as alternative to divorce, 24, 25
- Codebtors
  - spouses as, effect on shielding marital wealth from creditors, 206
- Coercion
  - adjustments to marital agreements and, difficulties in applying commercial principles to, 383
- Cohabitation. *See also* Domestic partnerships
  - African-Americans, growth among, 273
  - assimilation into marriage, effect of Principles as, 305
  - in Australia
    - generally, 5, 314
    - aboriginal populations, among, 314
  - blurring of distinction with marriage, 346
  - Brinig, Margaret F., on, 276
  - in California
    - Friedman v. Friedman*, 335, 336
    - Marvin v. Marvin*, 333
  - in Canada, 313
  - childbearing less likely than in marriage, 308, 312

Cohabitation ( <i>cont.</i> )	financial attitudes, 310, 312
commitment	Kiernan, Kathleen, on, 275
impact of provisions of Principles regarding	in Sweden, 275
cohabitation on, 232	<i>Marvin v. Marvin</i>
marriage compared, 274, 276, 309	generally, 214, 276, 333
common law partnerships, claims based on, 336	and contractual rights, 321
compensation for services, post-relationship claims	<i>Morone v. Morone</i> , 336
for, 335	in New York, 336
conduct, financial claims based on, 334, 335	in New Zealand
constructive trusts, claims based on, 321, 336,	generally, 314
362	aboriginal populations, among, 314
and contract law	Nock, Steven L., on, 276
generally, 271, 273	post- <i>Marvin</i> cases, 335, 337
agreements between cohabitants treated like	prevention of exploitation in as goal of Principles, 230
premarital agreements under Principles,	and “private ordering,” 288, 289
problems with, 341, 342	prosperity, marriage compared, 308, 323
family law, greater flexibility than, 271	purchase money resulting trusts, claims based on, 321
contribution, claims based on, 336	putative spouse doctrine, 362
as “de facto” parents ( <i>See</i> “De facto” parents)	quality of relationship, marriage compared, 312
default terms, imposition of, 229, 230	<i>quantum meruit</i> , claims based on, 321, 336, 362
dependent partners, greater financial protection of in	reasons for preferring as alternative to marriage, 269,
marriage, 346, 347	270
destigmatization of as goal of Principles, 230	restitution, claims based on, 336
disagreement between partners as to nature of	same-sex couples ( <i>See</i> Same-sex couples)
relationship, 316	and “selection” effects of marriage, 324, 325, 327
division of property, relationship to under Principles,	and shielding marital wealth from creditors, 206
163, 164	Smock, Pamela, on, 311, 313
divorce, resulting from high rate of, 277	stability, marriage compared, 273, 275, 276, 312
domestic violence, greater incidence in than in	statistics regarding, 333, 334
marriage, 273, 274, 309, 323	typical post-relationship claims, 334
duration, marriage compared, 273, 307, 308	unjust enrichment, avoiding, 321, 362
economic disadvantages of, 276	U.S. Fragile Family Study, 312
Ellman, Ira Mark, on anecdotal evidence of marriage	wrong message about marriage and cohabitation,
developing from, 314	Principles conveying, 322, 327
enforcement problems of post-relationship claims,	Colorado
337	marital property, property acquired in contemplation
in Europe, 313	of marriage deemed in, 167
existing state of law, 277, 281	Commitment
expectation of marriage in, 313	and cohabitation
express agreements, enforceability, 334	impact of provisions of Principles regarding
fairness as underlying basis for treatment under	cohabitation on, 232
Principles, 221, 222	marriage compared, 274, 276, 309
financial attitudes compared with marriage	fault, effect of treatment of under Principles on, 232,
generally, 310, 312	233
Blumstein, Philip, on, 310, 311	Frank, Robert, on importance of, 230, 231
Schwartz, Pepper, on, 310, 311	Scott, Elizabeth, on importance of, 231, 232
in Sweden, 312	spousal support, importance to ( <i>See</i> Spousal support)
in France, 5	Common law marriage
<i>Friedman v. Friedman</i> , 335, 336	and contractual aspect of marriage, 319
health, marriage compared, 323	and domestic partnerships
implied contract, claims based on, 334, 335	advantages of common law marriage over, 429, 430,
individualistic ethic in, 313	431
infidelity, greater incidence than in marriage, 309	evidentiary problems with factual inquiries,
in Latin America, 314	analogy to, 316
legislative response, considerations in, 273, 274	instability of, analogy to, 306, 307
Manning, Wendy D., on, 311, 313	not constituting revival of common law marriage,
marital property, property acquired prior to marriage	346
in domestic partnership deemed, 166	waiting period for domestic partnerships, problems
marriage, differences from	compared with, 318
generally, 274, 277	evidentiary problems with factual inquiries, analogy
empirical studies, difficulties with, 274, 275	to domestic partnerships, 316

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

513

- instability of, analogy to domestic partnerships, 306, 307
- mutual intention requirement, 426
- present intention requirement, 426
- problems in determining existence of, 426
- in South Carolina, 425, 426
- Toal, Jean Hoefer, on, 425, 431
- waiting period for domestic partnerships, problems compared with, 318
- Common law partnerships
  - cohabitants, claims based on, 336
- Community property
  - fixed-share division of community property compared to division of marital property under Principles
    - in California, 182
    - in Louisiana, 182
    - in New Mexico, 182
  - and shielding marital wealth from creditors, 198
- Comparative Constitutionalism* (Dorsen), 396
- Compensable losses
  - in spousal support (*See* Spousal support)
- Compensation for services
  - cohabitants, post-relationship claims for, 335
  - recharacterization of separate property as marital property, problems with Principles, 193
- Compensatory payments. *See* Spousal support
- "Compulsory agency" theory
  - and doctrine of necessities, 200
- Conference of Chief Justices
  - child support and problem-solving courts, 422
- Conference of State Court Administrators
  - child support and problem-solving courts, 422
- Confucianism
  - honor and family in, 42
- Connecticut
  - civil unions for same-sex couples in and Equal Protection, 281
  - obligations of parties under Principles compared, 280
- Consent
  - and marriage, 354, 355
  - premarital agreements, informed consent requirement generally, 375
  - rebuttable presumption of, 375, 376
- Consideration
  - marital agreements, required in, 383, 384
- Constitutional law
  - biological parents, protection of (*See* Parenthood)
  - decision-making regarding marriage as 14th Amendment liberty interest, 320, 327, 329
  - Due Process (*See* Due Process)
  - Equal Protection (*See* Equal Protection)
  - religious freedom, 395
- Constructive fraud
  - and shielding marital wealth from creditors, 200
- Constructive trusts
  - cohabitants, claims based on, 321, 336, 362
- Continuing contact with children
  - "de facto" parents (*See* "De facto" parents)
- Contract law
  - biological parents contracting for rights as relationship category for purposes of custody and visitation, 123
- Blumberg, Grace, on inadequacy of in domestic partnerships, 337, 338
- Canada, private contract as legal model for living under "Beyond Conjugality" Report in, 368
- and cohabitation
  - generally, 271, 273
  - agreements between cohabitants treated like premarital agreements under Principles, problems with, 341, 342
  - family law, greater flexibility than, 271
- and domestic partnerships
  - agreements between cohabitants treated like premarital agreements under Principles, problems with, 341, 342
  - existing remedies, Principles adding nothing to, 321
  - obligations under Principles not based on, 428
  - viewed as inadequate under Principles, 337
- Dorsen, Norman, on, 396
- Ellman, Ira Mark, on inadequacy of in domestic partnerships, 337, 338
- enforcement aspect of contracts
  - generally, 285
  - and premarital agreements, 286
- and family law
  - generally, 271, 273
  - Ayres, Ian, on, 271
  - cohabitation, less flexibility than, 271
  - Gernter, Robert, on, 271
- fault, failure to consider contract law as problem with critique of in Principles, 15
- historical tradition of marriage as contractual, 319, 320
- implied contract theory for domestic partnerships (*See* Implied contract theory for domestic partnerships)
- intimate relationships, difficulties in application to, 295, 296
- Joo, Thomas, on, 285
- Maine, Henry, on, 295
- marital agreements (*See* Marital agreements)
- and Married Women's Property Acts, 295
- Marvin v. Marvin and*, 321
- premarital agreements (*See* Premarital agreements)
- "private ordering" (*See* "Private ordering")
- Rawls, John, on, 286
- relational aspect of contracts
  - generally, 285, 286
  - and parenthood by estoppel, 290
- same-sex couples, inadequacy of, 321
- separation agreements (*See* Separation agreements)
- spousal support, preclusion as underlying theory of, 257
- sui generis* contract, marriage as, 356, 357, 358
- two distinct understandings of contract, 285
- Contribution
  - cohabitants, claims based on, 336



Contributions of spouses	and constructive fraud, 200
division of property, as basis of ( <i>See</i> Division of property)	divorce, view of by creditors
spousal support, as basis of ( <i>See</i> Spousal support)	generally, 202, 205
Convention on Intercountry Adoption, 399	exclusivity of remedy, 202, 204
Convention on Maintenance, 400	marriage, comparison of effect of, 202
Convention on the Elimination of All Forms of Discrimination Against Women. <i>See</i> “Women’s Covenant” and premarital agreements	secured creditors, effect of divorce on, 204
Convention on the Recognition of Foreign Judgments, 393	unsecured creditors, effect of divorce on, 204, 205
Corporations	and doctrine of necessities
international human rights agreements, model codes of conduct respecting, 398	generally, 200, 201
Corrective justice	under agency law, 200
generally, 472, 487	“compulsory agency” theory, 200
move toward under Principles, 473, 474, 479	equal protection considerations, 200, 201
Corrigan, Maura D.	quasi-contractual obligations, 200
on child support, 409, 424	and domestic partners, 206, 207
Cost-benefit analysis	exempt property, 197, 198
premarital agreements, regarding enforceability of	fraudulent transfers, 200
generally, 380	individual liability, 196, 202
inability of parties to protect interests, 380	interest rates, role of, 197
social benefits to marriage, 380	liens, role of, 197, 204
third parties, presence of, 380	marriage, view of by creditors
Covenant marriage	generally, 202, 205
in Arizona, 265, 359	divorce, comparison of effect of, 202
in Arkansas, 265, 359	overview, 195, 196, 207
declaration of intent, 265	Reilly, Marie T., on, 195, 207
hostility of Principles regarding covenant marriage, 359	secured creditors, effect of divorce on, 204
in Louisiana, 265, 268, 359	sureties, spouses as, 196
mandatory premarital counseling, 265, 359, 377	and tenancy by the entirety, 198
more restrictive divorce grounds, 265, 359, 377	and tenancy in common, 198, 199
and premarital agreements	unsecured creditors, effect of divorce on, 204, 205
generally, 377, 378	vicarious liability, 200
hostility of Principles regarding premarital agreements toward, 359	Criminal justice system
Principles neglecting as alternative to divorce, 23, 24	preference for, 13
and spousal support, 265, 268	problems with reliance on, 171, 173
unenforceability under Principles, 377	and prosecutorial discretion, 172
Coverture, 294, 295	Crippen, Gary
Craft, John	on past caretaking standard, 450
on sexual abuse of children, 108	Custody
Creditors, shielding marital wealth from	generally, 47, 120
generally, 195, 207	actual parenting concept, 70
bankruptcy, effect of, 204	“approximate time” standard ( <i>See</i> “Approximate time” standard)
change in divorce law contemplated in Principles, effect of	balance between doctrinal rule and judicial discretion, 68
generally, 205, 207	bargaining for child support under Principles, 140
and cohabitants, 206	Becker, Mary, on “maternal deference” standard, 68
and domestic partners, 206, 207	“best interests of child” standard ( <i>See</i> “Best interests of child” standard)
codebtors, spouses as, 206	binary biological ideal rejected for purposes of, 128
and cohabitants, 206	and care givers ( <i>See</i> Care givers)
collaborative relationship of debtors	child support, differential treatment under Principles
generally, 196	generally, 133
“marital like” collaboration, 199	<i>Miller v. Miller</i> , 135, 136
nature of collaboration, relevance of, 201, 202	parents by estoppel defined differently, 124
and community property, 198	and “children’s rights” movement, 69
	“de facto” parents ( <i>See</i> “De facto” parents)
	division of under Principles, 51
	emotional needs of children outweighing financial
	needs of children under Principles, 133, 134, 136



estoppel, parenthood by as relationship category for purposes of	generally, 123
parents by estoppel defined differently than for child support, 124	
expansion of state power under Principles, effect of generally, 130, 133	
<i>Painter v. Bannister</i> , 132	
“friendly parent” doctrine	generally, 71, 74
in Missouri, 73	
Uniform Marriage and Divorce Act not adopting, 73	
and grandparents	<i>Painter v. Bannister</i> , 132
under Principles, 132	
historical context, 67, 78	
joint custody ( <i>See</i> Joint custody)	
Kornhauser, Lewis A., on impact of uncertain rules, 68	
legal parents as relationship category for purposes of, 123	
Levy, Robert J., on, 67, 89	
Maryland, functional approach in, 139	
“maternal deference” standard, 68	
mediation	Grillo, Trina, on, 69
Schepard, Andrew, on, 69	
mental health professionals, proposals by, 69, 70	
Mnookin, Robert H., on impact of uncertain rules, 68	
necessity of identifying parents, 48	
and nonparents	“best interests of child” standard, 49
extraordinary circumstances, awarding custody in, 49	
preference for parents over, 49	
<i>Painter v. Bannister</i> , 132	
parenthood under existing custody law, 48, 50	
parenting plans ( <i>See</i> Parenting plans)	
past caretaking standard ( <i>See</i> Past caretaking standard)	
preference for parents over nonparents, 49	
and preference of children, 69	
“primary caretaker” doctrine	generally, 70, 71
“best interests of child” standard, relationship with, 71	
“degendered maternal presumption,” 70	
problems with, 71	
“tender years” doctrine, relationship with, 70	
protection of interests of children in ( <i>See</i> Protection of interests of children)	
psychiatrists, proposals by, 69, 70	
psychologists, proposals by, 69, 70	
quasi-property rights of fathers, 68	
relationship categories for purposes of, 122, 124	
shared parenting ( <i>See</i> Shared parenting)	
substantive standards for awarding	generally, 67, 78
difficulties in drafting, 87	
“tender years” doctrine	generally, 48
“best interests of child” standard, relationship with, 68	
decline of, 68	
“primary caretaker” doctrine, relationship with, 70	
third-party custody concept as alternative to test for status as “de facto” parents, 119	
two-parent model rejected for purposes of, 128	
uncertain rules, impact of, 68	
“winner/loser” mentality, moving away from, 70	
Custody evaluators	protection of interests of children by, 83
Czapanskiy, Karen	“de facto” parents, on problems regarding autonomy of, 99
Davies, Christie	on shame, 40
“De facto” parents	generally, 50, 53
absence of mother, risk of sexual abuse of children during, 112, 115	
adult not residing with child from infancy, risk of sexual abuse of children by, 115, 116	
agreement requirement, 94, 95	
Anderson, Kermyt G., on importance of biological ties to parental involvement, 102, 106	
attachment as important factor in continuing contact with, 117	
attractiveness of single mothers to sex offenders targeting children, 110, 112	
autonomy of, problems with, 99	
Bagley, Christopher, on risk of sexual abuse of children, 109	
Baker, Katharine A., on child support obligations of, 98	
“best interest of child” standard inapplicable to continuing contact with, 94	
biological parents, empirical studies comparing generally, 102, 106	
parental investment, importance of biological ties to, 102, 106	
wellbeing of children, importance of biological ties to, 93, 102	
Bolen, Rebecca, on risk of sexual abuse of children, 110	
care givers as, 50	
caretaking requirement	generally, 94, 95, 96
exceptions to, 96	
child support obligations of, 98	
cohabitants, risk of sexual abuse of children by, 107, 110	
Constitutional protection of biological parents, legal status of precluded by, 54	
continuing contact with children	attachment as important factor in, 117
“best interest of child” standard inapplicable to, 94	
criticism of Principles, 99, 100	
failure to consider negative repercussions in Principles, 101	

“De facto” parents ( <i>cont.</i> ) <ul style="list-style-type: none"><li>magnitude of shift proposed by Principles, 98</li><li>negative repercussions of, 106, 117</li><li>overview, 119, 120</li><li>“psychological parent” requirement, 117, 118</li><li>treatment of in Principles, 94, 98</li><li>unadulterated good, seen as in Principles, 94, 101</li><li>Uniform Marriage and Divorce Act compared, 98</li></ul>	and “private ordering,” 290, 291
Craft, John, on risk of sexual abuse of children, 108	private right of action under Principles, 97
criticism of treatment of under Principles, 99, 100	problems with expansion of rights for <ul style="list-style-type: none"><li>generally, 90, 94</li><li>Eekelaar, John, on, 92</li></ul>
custody, as relationship category for purposes of, 123, 124	residency requirement, 94
Czapanskiy, Karen, on problems regarding autonomy of, 99	in Rhode Island, 3, 52
defined in Principles, 51	rights of in Principles, 51
dilution of parental authority by recognition of <ul style="list-style-type: none"><li>generally, 64, 66</li><li>in California, 65</li><li>Constitution, permissible under, 64, 65</li><li>intermediate scrutiny standard generally, 64, 65</li><li>Principles, adoption in, 65</li></ul>	Russell, Diana, on risk of sexual abuse of children, 107
encouragement of litigation as problem with <ul style="list-style-type: none"><li>substantive rights of, 100</li></ul>	Salter, Anna, on risk of sexual abuse of children, 111
failure of test for status to separate good risk from bad, 117	San Francisco, empirical studies on sexual abuse of children in, 107
Fergusson, David, on risk of sexual abuse of children, 107	secondary status under Principles, 51
Finkelhor, David, on risk of sexual abuse of children, 115	sexual abuse of children, risk of ( <i>See</i> Sexual abuse of children)
Herman, Judith, on risk of sexual abuse of children, 112	standing concept as alternative to test for status, 117, 118
Hirschman, Lisa, on risk of sexual abuse of children, 112	stepparents, risk of sexual abuse of children by, 107, 110
Hofferth, Sandra L., on importance of biological ties to parental involvement, 102, 106	substantive rights under Principles <ul style="list-style-type: none"><li>generally, 97</li><li>encouragement of litigation as problem with, 100</li></ul>
inability of biological parents to excise from lives, 99	test for status <ul style="list-style-type: none"><li>generally, 94</li><li>agreement requirement, 94, 95</li><li>caretaking requirement<ul style="list-style-type: none"><li>generally, 94, 95, 96</li><li>exceptions to, 96</li></ul></li><li>failure to separate good risk from bad, 117</li><li>intervention concept as alternative to, 118, 119</li><li>refining to minimize harm while preserving good, 117, 119</li><li>residency requirement, 94</li><li>standing concept as alternative to, 117, 118</li><li>third-party custody concept as alternative to, 119</li></ul>
intervention concept as alternative to test for status, 118, 119	third-party custody concept as alternative to test for status, 119
King, Kathleen, on risk of sexual abuse of children, 96	treatment of under Principles <ul style="list-style-type: none"><li>generally, 94, 98</li><li>criticism of, 99, 100</li><li>failure to consider negative repercussions, 101</li></ul>
Lamb, Kathleen A., on importance of biological ties to wellbeing of children, 93, 102	in United Kingdom <ul style="list-style-type: none"><li>generally, 441</li><li>empirical studies on sexual abuse of children in, 109</li></ul>
Levy, Robert J., on exceptions to caretaking requirement for, 96	visitation, as relationship category for purposes of, 123
in Maine, 52	Wallerstein, Judith, on risk of sexual abuse of children, 111
majority of custodial responsibility precluded, 97	Williams, Linda, on risk of sexual abuse of children, 115
Manning, Wendy D., on importance of biological ties to wellbeing of children, 93, 102	Wilson, Robin Fretwell, on, 90, 120
Margolin, Leslie, on risk of sexual abuse of children, 108	Wisconsin, rights of in, 117
in Massachusetts, 3, 52	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief, 395
Murphy, Jane, on case law regarding, 98	Default judgments <ul style="list-style-type: none"><li>child support (<i>See</i> Child support)</li></ul>
negative repercussions of continuing contact with, 106, 117	Default rules <ul style="list-style-type: none"><li>in domestic partnerships (<i>See</i> Domestic partnerships)</li><li>imposition in spousal support (<i>See</i> Spousal support)</li></ul>
New Zealand, empirical studies on sexual abuse of children in, 107	Deinstitutionalization of marriage
Oregon, rights of in, 117	
presumptive access to records precluded, 116	
presumptive entitlement to decision-making responsibility precluded, 97	

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

517

- in Europe, 275, 276
- Dekeuwer-Défossez, Françoise
  - on joint custody, 460
- Denmark
  - division of property in, 473
  - same-sex couples in, 275
- Denning, Lord
  - on fault in spousal support and division of property in United Kingdom, 436
- Dewar, John
  - on parenthood, 469
- Dilution of parental authority
  - in California, 65
  - Constitution, permissible under, 64, 65
  - intermediate scrutiny standard
    - generally, 64, 65
    - Principles, adoption in, 65
  - by recognition of new parents, 64, 66
- Dissipation of assets. *See* Waste of assets
- Dissolution
  - limitation of mission of ALI to, 215
  - reason for use of term in Principles, 164
- Distributive justice
  - generally, 472
  - move away from under Principles, 473, 474, 479
- Division of property
  - generally, 163, 207
  - alimony, relationship with, 183
  - in Australia, 475
  - autonomy, curtailing of as criticism of Principles, 179, 180
  - "balance sheet" concept, 434
  - Blanchard v. Blanchard*, 173
  - in Canada, 475
  - characterization of property upon dissolution, 185, 193
  - cohabitants, relationship to under Principles, 163, 164
  - Colorado, property acquired in contemplation of marriage deemed marital property in, 167
  - consumption unit, spouses as, 484, 485, 486
  - context, placing Principles in, 166, 173
  - contributions of spouses as basis of
    - generally, 473
    - child care, 475, 477, 478
    - "comparison model," 474, 475
    - consumption, effect of, 476, 477
    - "contribution model," 477, 478, 479, 487
    - economic contributions, importance of, 484
    - equal contribution rule, rejection of in Principles, 474
    - housework, 475, 478
    - indirect contributions
      - generally, 475, 477, 487
    - in Australia, 475
    - in Canada, 475
    - in Norway, 475, 476
    - in United Kingdom, 475
    - labor, 474, 475
    - Silbaugh, Katharine B., on, 484
    - valuation of, 473, 474, 479
  - corrective justice
    - generally, 472, 487
    - move toward under Principles, 473, 474, 479
  - criticism of Principles
    - generally, 179, 181, 193, 194
    - autonomy, curtailing of, 179, 180
    - inaccurate assumptions regarding no-fault divorce, 180
    - internal inconsistency, 180
    - interstate uniformity, failure to promote, 179
    - judicial discretion, insufficient limitation on, 179, 180, 181, 183
    - uninformed treatment of economic matters, 180
  - Damone v. Damone*, 173
  - in Denmark, 473
  - dissipation of assets, in cases of
    - generally, 167, 169
    - in Illinois, 168
    - invasion of separate property, 168, 169
    - in Kentucky, 168
    - treatment in Principles, 168
  - distributive justice
    - generally, 472
    - move away from under Principles, 473, 474, 479
  - in domestic partnerships, 361, 427
  - dramatic departure from mainstream family law, Principles as, 181
  - educational degrees, 185
  - Ellman, Ira Mark, on, 173
  - equitable distribution
    - and adjustment of behavior
      - generally, 483, 487
    - inadequacy of results, 486
    - under Principles, 486
    - general rule, 185, 186
    - overview, 487, 488
    - rarely applied to, 166
    - Uniform Probate Code compared, 182, 183
    - waste of assets, in cases of, 167, 169
  - fairness as underlying concern regarding, 216, 219
  - and fault
    - generally, 169, 173
    - attempted murder, 184, 185
    - "catchall" factor, 169, 170
    - when consideration always required, 169
    - criminal justice system, problems with reliance on, 171, 173
    - elimination from consideration under Principles, 184, 185
    - Ellman, Ira Mark, on, 250
    - murder, 184, 185
    - in New York, 169, 170, 171
    - Principles, rejection of consideration of fault under, 169, 170
    - prosecutorial discretion, 172
    - relationship to under Principles, 164
    - relevant fault, consideration required, 169
    - Swisher, Peter Nash, on, 170, 171
    - Uniform Marriage and Divorce Act, rejection of consideration of fault under, 169

Division of property ( <i>cont.</i> ) <ul style="list-style-type: none"><li>financial misconduct justifying unequal division, 186, 191</li><li>in Finland, 473</li><li>Garrison, Marsha, on insufficient limitation on judicial discretion in, 181</li><li>in Germany, 473</li><li>gifts<ul style="list-style-type: none"><li>deemed separate property for purposes of division of property, 166</li><li>recharacterization as marital property, problems with Principles, 192, 193</li></ul></li><li>Glendon, Mary Ann, on insufficient limitation on judicial discretion in, 182, 183</li><li>Gregory, John DeWitt, on, 163, 175</li><li><i>Havell v. Islam</i>, 170, 171</li><li><i>Holman v. Holman</i>, 174</li><li>houses, effect of ownership of on, 484, 485, 486, 487</li><li>Illinois, equitable distribution of property in cases of waste of assets, 168</li><li>impact of Principles, gauging<ul style="list-style-type: none"><li>generally, 173, 174</li><li>potential impact of, 167</li></ul></li><li>inaccurate assumptions regarding no-fault divorce as criticism of Principles, 180</li><li>income tax treatment of, 183, 184</li><li>inconsistency between Principles and settled law, 167</li><li>inheritances deemed separate property, 166</li><li>interdependence between work of spouses ignored in Principles, 484</li><li>internal inconsistency as criticism of Principles, 180</li><li>interstate uniformity, failure to promote as criticism of Principles, 179</li><li>invasion of separate property in cases of waste of assets, 168, 169</li><li>investment unit, spouses as, 484, 485, 486</li><li>in Ireland, 473</li><li>judicial discretion, insufficient limitation on as criticism of Principles<ul style="list-style-type: none"><li>generally, 179, 180</li><li>division of community property compared, 182</li><li>elective share compared, 182</li><li>intestacy compared, 182</li><li>Uniform Probate Code compared, 182, 183</li></ul></li><li>in Kentucky<ul style="list-style-type: none"><li>generally, 174</li><li>equitable distribution of property in cases of waste of assets, 168</li></ul></li><li><i>Kittridge v. Kittridge</i>, 174</li><li>lack of influence of Principles over, 173, 174, 175</li><li>in Louisiana, 173</li><li>marital property (<i>See</i> Marital property)</li><li><i>Marriage of Altman</i>, <i>In re</i>, 167</li><li><i>Marriage of O'Neill</i>, <i>In re</i>, 168</li><li>in Massachusetts, 174</li><li>necessity for serious reform of family law<ul style="list-style-type: none"><li>generally, 177, 185</li><li>disparity of results between states, 178</li><li>expenses and time involved in proceedings, 177, 178</li><li>lack of guidance, 177</li><li>perception of unfairness, 178</li><li>unpredictability of economic consequences of dissolution, 177, 178</li></ul></li><li>need as alternative ground for under Uniform Marriage and Divorce Act, 218</li><li>in Netherlands, 473</li><li>nonfinancial matters, exclusion from consideration, 236</li><li>in North Dakota, 174</li><li>in Norway<ul style="list-style-type: none"><li>generally, 473</li><li>indirect contributions of spouses, 475, 476</li></ul></li><li>objective of Principles, 179</li><li><i>O'Brien v. O'Brien</i>, 169, 170</li><li><i>Partyka</i>, <i>In re</i>, 168</li><li>premarital agreements, relationship to under Principles, 164</li><li>professional licenses, 185</li><li>radical paternalism, Principles as model of, 163, 175</li><li>rational behind Principles, 183, 185</li><li>rational for imposing obligations under Principles, 434, 435</li><li>and reciprocity, 487, 488</li><li><i>Robinette v. Robinette</i>, 168</li><li>separate property (<i>See</i> Separate property)</li><li>shielding marital wealth from creditors (<i>See</i> Creditors, shielding marital wealth from)</li><li>spousal support, relationship with<ul style="list-style-type: none"><li>generally, 183</li><li>under Principles, 163</li></ul></li><li>Sverdup, Tone, on, 472, 488</li><li>in Sweden, 473</li><li>and time factor, 487, 488</li><li>Uniform Marriage and Divorce Act, need as<ul style="list-style-type: none"><li>alternative ground for under, 218</li></ul></li><li>uninformed treatment of economic matters as criticism of Principles, 180</li><li>in United Kingdom (<i>See</i> United Kingdom)</li><li>in Vermont, 173</li><li>waste of assets, in cases of<ul style="list-style-type: none"><li>generally, 167, 169</li><li>in Illinois, 168</li><li>invasion of separate property, 168, 169</li><li>in Kentucky, 168</li><li>treatment in Principles, 168</li></ul></li><li><i>Weber v. Weber</i>, 174</li><li>Westfall, David, on<ul style="list-style-type: none"><li>generally, 176, 194</li><li>problems with quorum requirement for ALI proceedings, 164, 165, 176, 177</li></ul></li></ul>	Divorce <ul style="list-style-type: none"><li>Amato, Paul, on, 264</li><li>cohabitation resulting from high rate of, 277</li><li>covenant marriage, more restrictive divorce grounds, 265, 359</li><li>creditors' view of<ul style="list-style-type: none"><li>generally, 202, 205</li><li>exclusivity of remedy, 202, 204</li><li>marriage, comparison of effect of, 202</li><li>secured creditors, effect of divorce on, 204</li></ul></li></ul>
--	--

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

519

- unsecured creditors, effect of divorce on, 204, 205
- default rules for financial protection of parties, 347
- fault (*See* Fault)
- grounds for as fault-based, 319
- mixed state of divorce law, 249
- protection of interests of children in (*See* Protection of interests of children)
- Divorce Culture, The* (Whitehead)
  - on autonomy model of family, 214
- Doctrine of necessities
  - generally, 200, 201
  - under agency law, 200
  - "compulsory agency" theory, 200
  - equal protection considerations, 200, 201
  - quasi-contractual obligations, 200
- Doctrine of self-executing treaties
  - international human rights law and incorporation of, 405, 406
- Domestic partnerships. *See also* Cohabitation
  - generally, 269, 349
  - ability of cohabitants to fairly distribute gains and losses ignored in Principles, 428, 429
  - automatic imposition of status at termination of cohabitation, 339
  - Bala, Nicholas, on imposition of unwanted obligations under Principles, 279
  - Blumberg, Grace, on inadequacy of contract law in, 337, 338
  - blurring of distinction with marriage, 346
  - Brinig, Margaret F., on, 269, 283
  - in California, 277, 278
  - in Canada
    - Adolphe, Jane, on, 351, 371
    - "Beyond Conjuality" Report, as legal model for living under, 369, 370
    - obligations of parties under Principles compared, 280
    - same-sex couples, 281, 283
    - underprotection of parties under Principles compared, 269
  - choice, Principles not fostering, 320, 327, 329
  - "common child" for purposes of, 427
  - "common household" for purposes of, 427
  - and common law marriage
    - advantages of over domestic partnerships as proposed in Principles, 429, 430, 431
    - evidentiary problems with factual inquiries, analogy to, 316
    - instability of, analogy to, 306, 307
    - not constituting revival of common law marriage, 346
    - waiting period for domestic partnerships, problems compared with, 318
  - conduct not required under Principles, 316
  - Connecticut, civil unions for same-sex couples in and Equal Protection, 281
  - obligations of parties under Principles compared, 280
  - consistency of family law, Principles as undermining, 306
  - and contract law
    - agreements between cohabitants treated like premarital agreements under Principles, problems with, 341, 342
    - existing remedies, Principles adding nothing to, 321
    - obligations under Principles not based on, 428
    - viewed as inadequate under Principles, 337
  - creation of under Principles, 338, 339, 360, 361, 426, 427
  - dependent partners, financial protection of
    - greater protection of in marriage, 347, 348
    - under Principles, 331, 339, 340
    - rights only arising at end of relationship, less protection when, 348
  - devaluation of marriage, Principles as causing, 306
  - disadvantages of Principles
    - generally, 318, 327
    - erosion of integrity of law, 319, 320
    - individual autonomy, conflict with, 320, 322
    - wrong message about marriage and cohabitation, conveying, 322, 327
  - disagreement between partners as to nature of relationship, 316
  - diversity of contemporary families, recognition of in Principles, 331
  - division of property in, 361, 427
  - Ellman, Ira Mark, on inadequacy of contract law in, 337, 338
  - end of relationship, rights only arising at
    - generally, 332
    - dependent partners, less financial protection of, 348
  - equivalence as rationale behind Principles
    - generally, 307, 315, 362, 363
    - lack of empirical evidence supporting, 307
  - erosion of integrity of law, Principles causing
    - generally, 319, 320
    - "checkerboard" pattern of law resulting from Principles, 312, 320
  - evidentiary problems with factual inquiries, analogy to common law marriage, 316
  - expectations of parties, importance of enforcing, 348
  - exploitation, importance of preventing, 348
  - fairness as underlying basis for treatment under Principles, 221, 222
  - Fineman, Martha, on oppression of women in marriage, 346
  - formality of marriage less important under Principles, 307
  - Garrison, Marsha, on, 305, 330
  - in Hawaii, 278
  - implied contract theory, proposal of (*See* Implied contract theory for domestic partnerships)
  - imposition of unwanted obligations under Principles, 269, 279, 320, 327, 329, 332
  - incontestability of status in cases of common children, 339, 340
  - individual autonomy, Principles conflicting with, 320, 322
  - intent not required under Principles, 316
  - intention of parties ignored under Principles, 429

Domestic partnerships ( <i>cont.</i> ) <ul style="list-style-type: none"><li>judicial discretion regarding enforcement, 339</li><li>judicial perspectives, 425, 431</li><li>legal duty, obligations under Principles not based on, 428</li><li>legislative response, considerations in, 273, 274</li><li>liberal reform, Principles not constituting, 320, 327, 329</li><li>“life together as a couple” for purposes of, 427</li><li>litigation, Principles as encouraging, 306, 316, 331, 340</li><li>marital property, property acquired prior to marriage in domestic partnership deemed, 166</li><li><i>Marvin v. Marvin</i>, 214</li><li>more limited status than marriage, 346</li><li>in Netherlands, 275</li><li>in Norway, imposition of unwanted obligations under Principles, 269</li><li>objectives of Principles, 360</li><li>obligations, unorthodox manner of imposing under Principles, 428, 429</li><li>opting-out provisions<ul style="list-style-type: none"><li>generally, 339</li><li>problems with, 317, 340, 341, 429</li></ul></li><li>paternalistic approach of Principles, 332</li><li>penalty default rules under Principles<ul style="list-style-type: none"><li>generally, 269, 283</li><li>assumption of contracting, problems with, 272</li></ul></li><li>Ayres, Ian, on, 270</li><li>bargaining, injury to relationship through, 272</li><li>criticism of, 271, 272, 277</li><li>Ertman, Martha, on, 272</li><li>Fuller, Lon, on, 272, 273</li><li>Gernter, Robert, on, 270</li><li>insurance, inability of parties to obtain, 271, 272</li><li>proposal of, 270, 271</li><li>“worst case” scenario, lack of contemplation of, 272</li><li>personal autonomy, Principles as diminishing, 306</li><li>Polikoff, Nancy, on oppression of women in marriage, 346</li><li>practicality as rationale behind Principles<ul style="list-style-type: none"><li>generally, 315, 318</li><li>presumptions, based on, 315, 316</li></ul></li><li>presumption of, 338, 427</li><li>and “private ordering,” 287, 288, 289</li><li>property under, 361</li><li>public policy disadvantages under Principles<ul style="list-style-type: none"><li>generally, 318, 327</li><li>erosion of integrity of law, 319, 320</li><li>individual autonomy, conflict with, 320, 322</li><li>wrong message about marriage and cohabitation, conveying, 322, 327</li></ul></li><li>quasi-contract, Principles adding nothing to existing remedies, 321</li><li>rationale behind Principles<ul style="list-style-type: none"><li>generally, 306, 307, 318</li><li>equivalence, 307, 315</li><li>practicality, 315, 318</li></ul></li><li>reasonable cohabitation period for, 338</li><li>reconstituting of family law under Principles, 361</li><li>same-sex couples (<i>See</i> Same-sex couples)</li><li>scope of Principles, 360</li><li>shielding marital wealth from creditors and, 206, 207</li><li>“significant period of time” for purposes of, 427</li><li>spousal support in, 361, 427</li><li>state paternalism, Principles as form of, 321</li><li>status, obligations under Principles based on rather than on contract, 426</li><li>“substantial injustice” standard for nonenforcement, 339</li><li>Toal, Jean Hoefer, on, 425, 431</li><li>undermining of traditional marriage in Principles<ul style="list-style-type: none"><li>criticism of, 331</li><li>overview, 356</li></ul></li><li>underprotection of parties under Principles<ul style="list-style-type: none"><li>generally, 269</li><li>Canada compared, 269</li><li>same-sex couples, 278, 280</li></ul></li><li>in United Kingdom (<i>See</i> United Kingdom)</li><li>Vermont, civil unions for same-sex couples in and Equal Protection, 280, 281</li><li>obligations of parties under Principles compared, 280</li><li>waiting period, proposal for<ul style="list-style-type: none"><li>generally, 317, 318</li><li>common law marriage, problems compared with, 318</li><li>Scott, Elizabeth, on, 317</li></ul></li><li>Wardle, Lynn D.<ul style="list-style-type: none"><li>on equivalence with marriage, 362</li><li>on undermining of traditional marriage in Principles, 346, 362</li></ul></li><li>wrong message about marriage and cohabitation, Principles conveying, 322, 327</li></ul>	Domestic violence <ul style="list-style-type: none"><li>Bix, Brian H., on, 402</li><li>caretaking requirement for “de facto” parents, exception to in cases of, 96</li><li>cohabitation, greater incidence in than in marriage, 273, 274, 309, 323</li><li>and criminal justice system, 172, 173</li><li>protection of interests of children by appointment of attorneys or guardians <i>ad litem</i>, 86</li><li>Westfall, David, on, 401</li><li>“Women’s Covenant,” as reason for incorporation of into family law, 401, 402</li></ul> Dorsen, Norman <ul style="list-style-type: none"><li>on contract law and premarital agreements, 396</li></ul> Drug abuse <ul style="list-style-type: none"><li>caretaking requirement for “de facto” parents, exception to in cases of, 96</li></ul> Dualist systems <ul style="list-style-type: none"><li>international human rights law, incorporation of in, 405</li></ul> Due Process <ul style="list-style-type: none"><li>deference to state law definition of property interests, analogy to deference to state law definition of parenthood<ul style="list-style-type: none"><li>generally, 57, 58</li><li>and curtailment of existing definitions, 61, 62</li></ul></li></ul>
--	--



Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

521

- Merrill, Thomas, on, 61, 62
- positivist trap, deference as, 61
- Duress
  - premarital agreements, lack of duress requirement generally, 375
  - rebuttable presumption of, 375, 376
- Earning capacity
  - spousal support, compensation for loss of generally, 480, 481
  - contributions of spouses as basis of, 481
- "Economic Covenant" and premarital agreements
  - generally, 397, 403, 405
  - "adequate standard of living" standard, 404
  - economic justice, notion of, 403, 404
  - furthering Principles, incorporation of as, 404, 405
  - jurisprudence of monitoring bodies, 406
  - overlap with "Civil Covenant," 397, 398
  - procedural requirements, 403
  - reasons for incorporation of, 403, 404
  - "substantial injustice" standard for nonenforcement, 404
  - unconscionability and, 404
  - United States not party to, 398
- Economic theory of marriage, 256
- Educational degrees
  - and division of property, 185
- Eekelaar, John
  - "de facto" parents, on problems with expansion of rights for, 92
  - on United Kingdom family law and Principles, 433, 445
- Egalitarian marriage
  - generally, 256
  - advantages of, 349
  - Ellman, Mark Ira, on, 263
  - Oldham, Thomas, on, 256
- Eisenhower, Dwight D.
  - Truman, Harry S., on, 497
- Elective share
  - fixed-share rule compared with division of property under Principles, 182
- Elitism and law reform
  - and American Law Institute, 490, 491
  - and decline of marriage and parenthood, 502
  - democratic ideals, conflict with, 495
  - and enforcement problems, 496, 497
  - ethos of Principles, 506
  - family law, special problems with, 494, 495
  - historical background, 490
  - homogeneity of legal academic profession, 495, 496
  - and inaccessibility of Principles, 499, 500
  - international law, relationship with, 495
  - and legal academic profession, 495
  - and need for public collaboration, 498, 499
  - problems with, 491, 492
  - Roe v. Wade*, attitudes toward, 495
  - Schneider, Carl E., on, 489, 506
  - shift in focus from class to identity, 492, 493
  - and social control, 500, 501
- social institutions
  - distrust of in Principles, 505, 506
  - role of, 501, 502
- technical skills and expertise as minimizing danger of, 494
- and therapeutic individualism, 502, 505
- and unintended consequences of laws, 497, 498
- in United Kingdom, 490
- working within established authority as minimizing danger of, 494
- Ellman, Ira Mark
  - on classical liberal view of marriage, 256
  - cohabitation, on anecdotal evidence of marriage developing from, 314
  - on consistency of law, 444
  - on criticism of fault in dissolution proceedings, 10
  - on division of property under Principles, 173
  - domestic partnerships, on inadequacy of contract law in, 337, 338
  - on egalitarian marriage, 263
  - on exclusion of nonfinancial matters from consideration in spousal support, 235
  - fault, on role of in division of property and spousal support, 250
  - on human rights law, 400, 406
  - on noncompensable losses, 260, 261
  - on premarital agreements and fairness, 393, 394
  - on spousal support
    - child support compared, 253
    - in United Kingdom, 437
- Embodied cognition theory, 293, 300
- Emery, Robert
  - on shared parenting and wishes of children, 465
- Employee stock options
  - earnings before marriage or future earnings as separate property, problems with Principles, 190, 191
- Equal Protection
  - Connecticut, same-sex couples in, 281
  - doctrine of necessities, equal protection considerations, 200, 201
  - Vermont, same-sex couples in, 280, 281
- Equitable distribution
  - in division of property (*See* Division of property)
- Equivalence
  - domestic partnerships, as rationale behind provisions of Principles regarding generally, 307, 315, 362, 363
  - lack of empirical evidence supporting, 307
- Ertman, Martha
  - on penalty default rules in domestic partnerships, 272
  - on "private ordering," 284, 304
- Establishment Clause
  - and religious freedom, 395
- Estoppel, parenthood by
  - generally, 50, 53
  - child support
    - rarity of obligation to pay under Principles, 124, 125
    - as relationship category for purposes of generally, 124

- Estoppel, parenthood by (*cont.*)  
    parents by estoppel defined differently than for custody and visitation, 124  
    custody, as relationship category for purposes of generally, 123  
    parents by estoppel defined differently than for child support, 124  
    defined in Principles, 51  
    dilution of parental authority by recognition of generally, 64, 66  
    Constitution, permissible under, 64, 65  
    intermediate scrutiny standard generally, 64, 65  
    Principles, adoption in, 65  
    equivalence with legal parents under Principles, 51  
    historical development, 214  
    and “private ordering,” 287, 290  
    and relational aspect of contracts, 290  
    rights of in Principles, 51  
    United Kingdom compared, 441  
    visitation, as relationship category for purposes of generally, 123  
    parents by estoppel defined differently than for child support, 124
- Ettelbrick, Paula  
    on marriage as social institution, 505
- Etzioni, Amitai  
    on child support, 135
- Europe  
    cohabitation in, 313  
    deinstitutionalization of marriage in, 275, 276  
    recent developments in family law paralleling Principles, 3
- European Convention for the Protection of Human Rights and Fundamental Freedoms  
    Ireland, dissemination of information regarding abortion in, 399  
    *Lawrence v. Texas*, citation of in, 399  
    nonresidential parents, contact with children under, 442  
    same-sex couples under, 440
- European Court of Human Rights  
    nonresidential parents, contact with children, 442
- European Social Charter  
    United Kingdom, protection of economic rights in under, 405
- Ex live-in lovers  
    as “de facto” parents (*See* “De facto” parents)
- Fabricius, William V.  
    and changes in attitudes of fathers and shared parenting, 467  
    and wishes of children regarding shared parenting, 465
- Fairness  
    Aristotle on, 401  
    cohabitation, as underlying basis for treatment under Principles, 221, 222  
    division of property, underlying concern regarding, 216, 219  
    domestic partnerships, as underlying basis for treatment under Principles, 221, 222
- Ellman, Ira Mark, on fairness and premarital agreements, 393, 394  
    premarital agreements, as underlying basis for treatment under Principles, 222, 225  
    and separation agreements, 388  
    as underlying concern of Principles, 215, 216
- Family fragmentation  
    and child support (*See* Child support)
- Family law. *See* specific topic concerned
- Fault  
    generally, 9  
    abolition of fault forcing consideration of fault “underground,” 17  
    absolutism, misunderstanding of as problem with critique of in Principles, 22, 23  
    abuse of, 17  
    and adultery  
        generally, 254, 255  
        intentional infliction of emotional distress claims based on, 12  
    agent of morality, fault justified as, 11  
    alternatives to divorce, Principles neglecting generally, 23, 25  
    alternative dispute resolution, 23  
    covenant marriage, 23, 24  
    different procedures for parties with children than for parties without children, 23  
    mandatory mediation, 23  
    marriage education programs, 23  
    marriage initiatives generally, 23, 24  
    Bush Administration, 24  
    Clinton Administration, 24, 25  
    marriage revitalization movement generally, 24  
    community-based programs, 25  
    discussion in legal literature, 25  
    overview, 9  
    premarital counseling, 23  
    therapeutic jurisprudence, 23  
    waiting periods, 23
- battery claims  
    demise of interspousal immunity, effect of, 12  
    effect of availability of on, 12  
    intentional infliction of emotional distress claims combined with, 12  
    social consensus against, 18
- causation, relationship with morality, 19, 21
- commitment, effect of treatment of fault under Principles on, 232, 233
- community standards as alternative to fault/no-fault paradigm, 9, 10, 25, 26
- contract law, failure to consider as problem with critique of in Principles, 15
- criminal justice system  
    preference for, 13  
    problems with reliance on, 171, 173  
    and prosecutorial discretion, 172
- critique of in Principles  
    generally, 10, 23

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

523

- availability of tort claims, based on, 10
- consistency of law, based on, 10
- Ellman, Ira Mark, on, 10
- limiting compensation to financial losses, based on, 10
- overview, 10, 13
- punitive nature of, 11
- distorted emphasis on economic considerations as
  - problem with critique of in Principles, 15
- and division of property (*See* Division of property)
- divorce, grounds for, 319
- duration of marriage, effect of, 13
- failure to adequately address arguments in favor of
  - fault as problem with critique of in Principles, 14
- FitzGibbon, Scott, on, 28, 45, 360
- forfeiture as alternative to tort claims, 13
- honor and ascription of fault, 35 (*See also* Honor)
- ideological narrowness of drafters as problem with
  - critique of in Principles, 26
- increased financial needs of spouse as exception to
  - repudiation of fault in Principles, 10
- intentional infliction of emotional distress claims
  - adultery, based on, 12
  - battery claims combined with, 12
  - effect of availability of on, 12, 13
- judicial discretion, misunderstanding of as problem
  - with critique of in Principles, 22
- lack of realism as problem with critique of in
  - Principles, 16, 17
- morality
  - causation, relationship with, 19, 21
  - misunderstanding of as problem with critique of in
    - Principles, 19, 21
- nonfinancial matters, elimination of fault as
  - justification for exclusion of from
    - consideration in spousal support
- generally, 239, 240
- circular reasoning employed by Principles, 239
- overview, 238
- reluctance to investigate intimate relationships,
  - based on, 239, 240
- and obligation, 29, 34 (*See also* Obligation)
- overview, 9, 10, 26, 27
- and premarital agreements, 360
- private relational interests, misunderstanding of as
  - problem with critique of in Principles, 18, 19
- problems with critique of in Principles
  - generally, 13, 16, 23
  - absolutism, misunderstanding of, 22, 23
  - contract law, failure to consider, 15
  - distorted emphasis on economic considerations, 15
  - failure to adequately address arguments in favor of
    - fault, 14
  - ideological narrowness of drafters, 26
  - judicial discretion, misunderstanding of, 22
  - lack of realism, 16, 17
  - morality, misunderstanding of, 19, 21
  - no-fault divorce not obviating value of
    - consideration of fault, 21, 22
  - overview, 9, 16
  - private relational interests, misunderstanding of,
    - 18, 19
  - public interest in marriage, failure to recognize, 18
  - questionable reliability of factual data, 14
  - public interest in marriage, failure to recognize as
    - problem with critique of in Principles, 18
  - punitive nature of, 11
  - questionable reliability of factual data as problem with
    - critique of in Principles, 14
  - and shame (*See* Shame)
  - social consensus favoring, 17
  - and spousal support (*See* Spousal support)
  - state-by-state analysis of role of fault
    - generally, 11
    - almost pure no-fault states, 11
    - full-fault states, 11
    - no-fault property but fault in alimony states, 11
    - pure no-fault property and almost pure no-fault
      - alimony states, 11
    - pure no-fault states, 11
  - tort claims
    - critique of fault in Principles based on availability
      - of, 10
    - effect of availability of on, 12, 13
    - forfeiture as alternative to, 13
    - preference for, 13
  - Uniform Marriage and Divorce Act, rejection of
    - marital misconduct as consideration under, 10
  - Wardle, Lynn D., on
    - generally, 27
    - and “private ordering,” 304
  - waste of assets
    - as exception to repudiation of fault in Principles,
      - 10
    - social consensus against, 18
  - Woodhouse, Barbara Bennett, on drafters’ “fear of
    - fault,” 26
- Fergusson, David
  - on sexual abuse of children, 107
- Financial misconduct
  - and spousal support (*See* Spousal support)
  - unequal division of marital property, justifying, 186
- Finch, Janet
  - on obligation and time, 443
- Fineman, Martha
  - on autonomy model of family, 214
  - on dependency and family, 297
  - on oppression of women in marriage, 346
- Finkelhor, David
  - on sexual abuse of children, 115
- Finland
  - division of property in, 473
- First Amendment
  - and religious freedom, 395
- FitzGibbon, Scott
  - on fault, 28, 45, 360
- Florida
  - past caretaking standard in, 3
- Forfeiture
  - tort claims, as alternative to, 13

- Former care givers
  - as “de facto” parents (*See* “De facto” parents)
- “Formless City”
  - and dissolution of family, 43
  - honor and instrumental good, 36
  - obligation
    - and instrumental good, 32
    - and noninstrumental good, 33, 34
  - Saxenhouse, Arlene, on, 31
  - and shamelessness, 39, 40
- Fourteenth Amendment
  - doctrine of necessities, equal protection considerations, 200, 201
  - marriage, decision-making regarding as 14th Amendment liberty interest, 320, 327, 329
- France
  - cohabitation in, 5
  - joint custody in, 459
- Frank, Robert
  - on adaptive rationality, 231
  - on importance of commitment, 230, 231
- Fraudulent transfers
  - and shielding marital wealth from creditors, 200
- French, Peter
  - on shame, 38
- “Friendly parent” doctrine
  - generally, 71, 74
  - in Missouri, 73
  - Uniform Marriage and Divorce Act not adopting, 73
- Fukuyama, Francis
  - on “Great Disruption,” xiii
- Fuller, Lon
  - on penalty default rules in domestic partnerships, 272, 273
- Functional status of parenthood, 53
- Gambling
  - financial misconduct, relationship to, 246
- Garrison, Marsha
  - division of property, on insufficient limitation on judicial discretion in, 181
  - on domestic partnerships, 305, 330
- Gays. *See* Same-sex couples
- Geldof, Bob
  - on joint custody, 459
- Germany
  - division of property in, 473
  - spousal support in, 479
- Gernter, Robert
  - on contract law in family law context, 271
  - on penalty default rules in domestic partnerships, 270
- Gifts
  - deemed separate property for purposes of division of property, 166
  - recharacterization as marital property, problems with Principles, 192, 193
- Gilbreth, Joan
  - on shared parenting and parental responsibility, 462
- Ginsburg, Ruth Bader
  - Grutter v. Bollinger*, citation of international law in, 399
- Glendon, Mary Ann
  - division of property, on insufficient limitation on judicial discretion in, 182, 183
  - family law in perspective, 489
  - Foreword by, xiii, xv
- Globalization
  - and family law, 392, 396
- Good faith
  - adjustments to marital agreements and, difficulties in applying commercial principles to, 383
- Goodwill
  - earnings before marriage or future earnings as separate property, problems with Principles, 189, 190
- Grades
  - “de facto” parents, empirical studies on children living with, 102
- Grandparents
  - benefits of marriage to, 326
  - and custody
    - Painter v. Bannister*, 132
    - under Principles, 132
  - rights of, Constitutional deference to state law, 59
- Gregory, John DeWitt
  - on division of property, 163, 175
  - international human rights, on incorporation of into family law, 406
- Grillo, Trina
  - on mediation in custody matters, 69
- Guardians
  - parental rights of, Constitutional deference to state law, 56
- Guardians *ad litem*
  - protection of interests of children by
    - generally, 83
    - attorneys compared, 84
    - balancing parental rights with, 83, 84, 87
    - child abuse or neglect cases, 86
    - domestic violence cases, 86
    - judicial discretion in appointing, 85, 86
    - neutral experts compared, 86, 87
- Hadfield, Gillian
  - on separation agreements, 390
- Hall, Jeff A.
  - and changes in attitudes of fathers and shared parenting, 467
  - and wishes of children regarding shared parenting, 465
- Hawaii
  - domestic partnerships in, 278
  - reciprocal beneficiaries in, 297
- Hazard, Geoffrey
  - on purposes of Principles, 215
- Health and Human Services Department
  - unpaid child support, statistics on, 414, 415
- Hegel, Georg Wilhelm Friedrich
  - on child support, 135
- Herman, Judith

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

525

- on sexual abuse of children, 112
- Himmelfarb, Gertrude
  - on morality, 503
- Hirschman, Lisa
  - on sexual abuse of children, 112
- Historical background of ALI, 490, 491
- Historical development of Principles, 165
- Hofferth, Sandra L.
  - on importance of biological ties to parental involvement, 102, 106
- Hofstadter, Richard
  - on elitism and legal profession, 490
- Home schooling
  - imputation of income to stay-at-home parents, effect of school as adequate child care alternative, 147, 148
- Homosexuals. *See* Same-sex couples
- Honor
  - generally, 35, 37
  - and ascription of fault, 35
  - and civil society, 37
  - components of
    - generally, 35
    - appreciation of respect by individual, 35
    - credit for fulfilling obligation, 35
    - obligation, fulfillment of, 35
    - respect of society, 35
  - and Confucian tradition, 42
  - and family, 41, 43
  - "Formless City" and instrumental good, 36
  - instrumental good
    - generally, 36
    - insufficiency of, 36
  - nature of, 35
  - noninstrumental good, 36, 37
  - and obligation
    - credit for fulfilling obligation as component of honor, 35
    - fulfillment of obligation as component of honor, 35
- Pericles on, 37
- in Plato's *Republic*, 36
- and reciprocity, 37
- and repudiation of fault in Principles, 44, 45
- and shame, 37, 40
- Wallerstein, Judith, on, 43, 44
- Wilson, James Q., on, 42
- Houses
  - division of property, effect of ownership of on, effect of ownership of on, 484, 485, 486, 487
- Hughes, Charles Evans
  - American Law Institute, as incorporator of, 490
- Human nature
  - and marriage, 352, 353
  - Pannikar, Raimundo, on, 352
- Human rights law and premarital agreements
  - generally, 392, 407
  - clearer legal boundaries fostered by incorporation of, 398
  - cognitive capacity, limits on as justifying restrictions on agreements, 394
  - consensus among divergent systems, incorporation of constituting, 397
  - and doctrine of self-executing treaties, 405, 406
  - dualist systems, incorporation of in, 405
  - Ellman, Ira Mark, on, 400, 406
  - existing impact of international law on family law, 399
  - family privacy, incorporation of as violating, 398
  - globalization, effect of, 396
  - goals of Principles furthered by incorporation of, 398, 400
  - greater respect for American decisions by foreign courts, incorporation leading to, 400
  - Gregory, John DeWitt, on, 406
  - Grutter v. Bollinger*, citation of international law in, 399
  - how incorporation would work, 405, 406
  - increased participation in private international law regimes, incorporation leading to, 400
  - Lawrence v. Texas*, citation of international law in, 399
  - monist systems, incorporation of in, 405
  - in Netherlands, 405
  - normative parameters lacking in American law, 406, 407
  - overview, 392, 393
  - reasons for incorporation of, 393, 400
  - and same-sex couples, 400
  - Scott, Elizabeth, on, 406
  - Stark, Barbara, on, 392, 407
  - vulnerable parties, protection of as justifying restrictions on agreements, 394, 396
- Illinois
  - equitable distribution of property in cases of waste of assets, 168
  - parenting plans in, 79
- Implied bad faith
  - and premarital agreements, 394
- Implied contract theory for domestic partnerships
  - generally, 349
  - autonomy of parties, 345
  - cohabitants, post-relationship claims based on, 334, 335
  - criteria for separating marriage-like from nonmarriage-like relationships, 342, 343
  - default rules, 332, 333, 342, 345
  - dependent partners, financial protection of, 347, 348
  - existing contract law, advantages over, 343, 344
  - expectations of parties, enforcing, 343
  - exploitation, reducing risk of, 343, 344
  - financial security, improving, 344
  - incremental rather than radical building on existing law, 344, 345
  - liberal values, compatibility with, 345
  - overview, 331, 333, 349, 362
  - presumptions, 342
  - Principles, advantages over, 344, 345
  - reasonable cohabitation period for, 342, 343, 344
  - Scott, Elizabeth, on, 349

Imputation of income to stay-at-home parents	exceptions for residential parents, 144, 145
generally, 142, 161	justification for differential treatment in Principles
<i>Addington v. Addington</i> , 154	generally, 150, 153
adequate child care alternatives, role of	avoiding gainful labor, risk of, 153
generally, 146, 148	concealing income, risk of, 153
deference to decisions of residential parents, 149	increase in household income as goal, 151
home schooling, effect of, 147, 148	more fair division of support obligation as goal,
lack of flexibility in Principles, 148	151
school, effect of, 147	responsibility considerations, 157, 160
younger and older children compared, 145, 147	risk of shirking obligations, 153, 157
<i>Bencivenga v. Bencivenga</i> , 155	lack of neutrality in Principles, 148
benefits of caretaking compared with increased	maximization of earnings based on residential
income, 158, 159	duties, exception for, 144, 147
best interests of child, presumptions, 145	parenting choices, 145, 146
in California, 155, 156	responsibility considerations as justification for
children under age six	differential treatment from nonresidential
children not similarly situated, 147	parents in Principles, 157, 160
exception for residential parents caring for, 144	<i>Roberts v. Roberts</i> , 157
older children compared, 145, 147, 160	<i>Rohloff v. Rohloff</i> , 153, 154
circumstances when income may be imputed, 143, 144	shirking obligations, risk of as justification for
demonstrated earning capacity, use of, 144	differential treatment of residential and
failure to differentiate between willful and	nonresidential parents in Principles
unavoidable lack of income in Principles, 151	generally, 153, 157
<i>Guskjolen v. Guskjolen</i> , 155, 156	avoiding gainful labor, 153
increase in household income	concealing income, 153
benefits of caretaking compared with, 158, 159	Strasser, Mark, on, 142, 161
goal of Principles, as, 151	<i>Tetreault v. Coon</i> , 159
justification for policy choices in Principles, 150, 160	<i>Thomas v. Thomas</i> , 154, 155
in Louisiana, 160	underemployment, in cases of, 143, 144
<i>Marriage of LaBass, In re</i> , 155, 156	unemployment, in cases of, 143, 144
<i>Marriage of Padilla, In re</i> , 156	in Vermont, 159
<i>Marriage of Scott, In re</i> , 149, 150	in Wisconsin, 157
<i>McAlexander v. McAlexander</i> , 154	Income
<i>McHale v. McHale</i> , 160	imputation to stay-at-home parents ( <i>See</i> Imputation
in Michigan, 153, 154	of income to stay-at-home parents)
more fair division of support obligation as goal of	Income tax
Principles, 151	division of property, treatment of, 183, 184
mothers, effect of disproportionate granting of	Incommensurability
custody to, 149	spousal support ( <i>See</i> Spousal support)
neutral position of Principles, 148, 150	tort claims, remedies for nonfinancial losses in
in New Jersey, 154, 155	compared to spousal support, 240
nonfinancial factors ignored in Principles, 152	India
in North Dakota, 155, 156	Child Marriage Restraint Act of 1929, 399
in Ohio, 154	Indiana
older children	child support, proposed rule regarding mediation in,
children under age six compared, 145, 147, 160	423
residential parent staying home with, 158	Infidelity
overview, 142, 143, 160	cohabitation, greater incidence in than in marriage,
and parenting choices	309
generally, 145, 146	and premarital agreements, 360
residential and nonresidential parents compared,	Wardle, Lynn D., on, 360
145, 146	Informal unions. <i>See</i> Cohabitation; Domestic
in Pennsylvania, 154	partnerships
prevailing minimum wage, use of, 144	Informed consent
rationale for in Principles	and premarital agreements
generally, 143	generally, 375
weakness of, 160, 161	rebuttable presumption of, 375, 376
residential parents <i>versus</i> nonresidential parents	Inheritances
children under age six, exception for residential	deemed separate property for purposes of division of
parents caring for, 144	property, 166



recharacterization as marital property, problems with Principles, 192, 193	Investments
Instrumental good	enhancement of marital property by spousal labor, valuation issues, 188, 189
and honor	Iowa
generally, 36	joint custody in, 458
insufficiency of, 36	shared parenting in, 457
and obligation	Ireland
generally, 32	dissemination of information regarding abortion in, 399
insufficiency of, 32	division of property in, 473
Intentional infliction of emotional distress	Islamic law
adultery, based on, 12	contractual aspect of marriage under, 319
battery claims combined with, 12	<i>mahr</i> and premarital agreements, 378, 379
effect of availability of claims for on divorce, 12, 13	Israel
Interest	religious agreements in, 395
shielding marital wealth from creditors, role of interest rates in, 197	Jewish law
Intermediate scrutiny standard	contractual aspect of marriage under, 319
in dilution of parental authority by recognition of new parents	<i>kebutah</i> and premarital agreements, 378
generally, 64, 65	John Paul II, Pope
Principles, adoption in, 65	on shame, 39
<i>Lawrence v. Texas</i> , 64	Johnson, Lyndon B.
<i>Troxel v. Granville</i> , 59	elitism and war on poverty, 492
International Bill of Rights, 397	Joint custody
International Covenant on Civil and Political Rights	generally, 69
generally, 397	in Australia, 458, 459
overlap with “Economic Covenant,” 397, 398	Dekeuwer-Défossez, Françoise, on, 460
International Covenant on Economic, Social, and Cultural Rights. <i>See</i> “Economic Covenant” and premarital agreements	in France, 459
International Covenant on the Elimination of All Forms of Racial Discrimination	Geldof, Bob, on, 459
<i>Grutter v. Bollinger</i> , citation of in, 399	in Iowa, 458
International law. <i>See also</i> specific agreement concerned	joint legal custody preferred over joint physical custody, 69
Convention on the Elimination of All Forms of Discrimination Against Women ( <i>See</i> “Women’s Covenant” and premarital agreements)	in Louisiana, 458
elitism and law reform, relationship with, 495	in Maine, 458
human rights law and premarital agreements ( <i>See</i> Human rights law and premarital agreements)	in Oklahoma, 458
International Covenant on Economic, Social, and Cultural Rights ( <i>See</i> “Economic Covenant” and premarital agreements)	and past caretaking standard, 457, 460
McCrudden, Christopher, on deference to, 495	Principles at odds with, 460
religious freedom less well developed in, 395	Royal, Ségolène, on, 460
International perspectives	Théry, Irène, on, 460
generally, 433, 506	in United Kingdom, 459
division of property and spousal support, 472, 488	in Wisconsin, 457
United Kingdom family law and Principles, 433, 445	Joint Problem-Solving Courts Committee
Interracial marriage	and child support, 422
overturning of ban on, 297	Joint venture model of marriage
Intervention	generally, 261, 263
“de facto” parents, intervention concept as alternative to test for status, 118, 119	egalitarian marriage compared, 263
Intestacy	Kay, Herma Hill, on, 262, 263
fixed-share rule compared with division of property under Principles, 182	Joo, Thomas
recharacterization of separate property as marital property, problems with Principles, 193	on “private ordering” and contract law, 285
	Judicial discretion
	and “approximate time” standard, 76, 78
	division of property, insufficient limitation on judicial discretion as criticism of Principles
	generally, 179, 180
	division of community property compared, 182
	elective share compared, 182
	intestacy compared, 182
	Uniform Probate Code compared, 182, 183
	domestic partnerships, regarding enforcement of, 339

Judicial discretion ( <i>cont.</i> ) <ul style="list-style-type: none"><li>misunderstanding of as problem with critique of in Principles, 22</li><li>Westfall, David, on, 22</li></ul>	child support, as relationship category for purposes of, 124
Judicial interviews <ul style="list-style-type: none"><li>protection of interests of children by, 83</li></ul>	custody, as relationship category for purposes of, 123
Judicial perspectives <ul style="list-style-type: none"><li>child support, 409, 424</li><li>domestic partnerships, 425, 431</li></ul>	defined in Principles, 51
Juvenile delinquency <ul style="list-style-type: none"><li>“de facto” parents, empirical studies on children living with, 102</li></ul>	recognition based on assumption of parental role <ul style="list-style-type: none"><li>agreements, 52</li><li>same-sex couples, 52</li><li>surrogate parents, 52</li></ul>
Kay, Herma Hill <ul style="list-style-type: none"><li>on joint venture model of marriage, 262, 263</li><li>on past caretaking standard, 455</li></ul>	status subject to quick change, 126
Kelly, Alicia <ul style="list-style-type: none"><li>on partnership theory of marriage, 217</li></ul>	Uniform Parentage Act, presumption of legal parenthood under, 125
Kentucky <ul style="list-style-type: none"><li>division of property and Principles in, 174</li><li>equitable distribution of property in cases of waste of assets in, 168</li></ul>	visitation, as relationship category for purposes of, 123
Kenya <ul style="list-style-type: none"><li>marital property law, effect of, 399</li><li>religious agreements in, 395</li></ul>	Legal positivism <ul style="list-style-type: none"><li>and marriage, 371</li></ul>
Kiernan, Kathleen <ul style="list-style-type: none"><li>on cohabitation, differences from marriage, 275</li></ul>	Levy, Robert J. <ul style="list-style-type: none"><li>caretaking requirement for “de facto” parents, on exceptions to, 96</li><li>on custody, 67, 89</li></ul>
King, Kathleen <ul style="list-style-type: none"><li>on sexual abuse of children, 96</li></ul>	Liberty <ul style="list-style-type: none"><li>marriage, decision-making regarding as 14th Amendment liberty interest, 320, 327, 329</li></ul>
Knowledge <ul style="list-style-type: none"><li>and obligation, 34</li><li>and shame, 38</li></ul>	Liens <ul style="list-style-type: none"><li>shielding marital wealth from creditors, role of liens in, 197, 204</li></ul>
Kornhauser, Lewis A. <ul style="list-style-type: none"><li>on impact of uncertain custody rules, 68</li></ul>	Lippman, Walter <ul style="list-style-type: none"><li>on morality, 500</li></ul>
Lack of critical review of Principles, 165	Locke, John <ul style="list-style-type: none"><li>on child support, 135</li></ul>
Lakoff, George <ul style="list-style-type: none"><li>embodied cognition, theory of, 293, 300</li><li>on metaphors in family law context<ul style="list-style-type: none"><li>generally, 293</li><li>body-based metaphors, 293, 300</li></ul></li></ul>	Louisiana <ul style="list-style-type: none"><li>covenant marriage in, 265, 268, 359</li><li>division of property and Principles in, 173</li><li>fixed-share division of community property<ul style="list-style-type: none"><li>compared to division of marital property under Principles, 182</li></ul></li><li>imputation of income to stay-at-home parents in, 160</li><li>joint custody in, 458</li></ul>
Lamb, Kathleen A. <ul style="list-style-type: none"><li>on importance of biological ties to wellbeing of children, 93, 102</li></ul>	Luckmann, Thomas <ul style="list-style-type: none"><li>on social institutions, 501</li></ul>
Lamont, Michèle <ul style="list-style-type: none"><li>on individualism, 504</li></ul>	Macdonald, Roderick <ul style="list-style-type: none"><li>legislative law as highest type of law, on misconception of, 371</li></ul>
Lasch, Christopher <ul style="list-style-type: none"><li>on “culture wars,” 491</li><li>on “Middle America,” 493</li></ul>	Maine <ul style="list-style-type: none"><li>“de facto” parents in, 52</li><li>joint custody in, 458</li></ul>
Latin America <ul style="list-style-type: none"><li>cohabitation in, 314</li></ul>	Maine, Henry <ul style="list-style-type: none"><li>on contract law and marriage, 295</li></ul>
Laumann-Billings, Lisa <ul style="list-style-type: none"><li>on shared parenting and wishes of children, 465</li></ul>	Mandatory mediation <ul style="list-style-type: none"><li>Principles neglecting as alternative to divorce, 23</li></ul>
Laws (Plato) <ul style="list-style-type: none"><li>on shame, 38</li></ul>	Manning, Wendy D. <ul style="list-style-type: none"><li>on cohabitation and marriage, 311, 313</li><li>on importance of biological ties to wellbeing of children, 93, 102</li></ul>
Laycock, Douglas <ul style="list-style-type: none"><li>on <i>Newdow</i> case dilemma, 58</li></ul>	Margolin, Leslie <ul style="list-style-type: none"><li>on sexual abuse of children, 108</li></ul>
Legal parents <ul style="list-style-type: none"><li>biological nonlegal parents as relationship category for purposes of custody and visitation, 123</li></ul>	Marital agreements <ul style="list-style-type: none"><li>generally, 382, 387</li><li><i>Borelli v. Brusseau</i>, 386, 387</li><li>in California<ul style="list-style-type: none"><li>enforceability, 386, 387</li></ul></li></ul>

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

529

- penalty clauses, 384, 386
- coercion and adjustments to agreements, difficulties
  - in applying commercial principles to, 383
- consideration requirement, 383, 384
- current doctrine regarding, 382
- enforceability, 386, 387
- financial sanctions for specific behavior, 384, 386
- good faith and adjustments to agreements, difficulties
  - in applying commercial principles to, 383
- Mehren v. Dargan*, 384, 386
- overview, 382, 384
- penalty clauses, 384, 386
- premarital agreement provisions of Principles applied to, 384, 386
- Uniform Premarital Agreement Act inapplicable to, 382
- Marital misconduct. *See* Fault
- Marital property
  - contributions to education, problems with Principles, 186
  - defined, 185
  - determination of
    - generally, 186
    - enhancement by spousal labor, problems with Principles, 188, 189
  - division of (*See* Division of property)
  - enhancement by spousal labor, problems with Principles
    - generally, 186, 189
  - marital property portion, determination of, 188, 189
  - overview, 186
  - "substantial time," definition of, 187, 188
  - property acquired during marriage deemed, 166
  - property acquired in contemplation of marriage deemed, 167
  - property acquired prior to marriage in domestic partnership deemed, 166
  - shielding marital wealth from creditors (*See* Creditors, shielding marital wealth from)
  - United Kingdom, no distinction between marital and separate property in, 436
- Market theory of marriage, 256
- Marriage. *See* specific topic concerned
- Marriage education programs
  - Principles neglecting as alternative to divorce, 23
- Marriage initiatives
  - Bush Administration, 24
  - Clinton Administration, 24, 25
  - Principles neglecting as alternative to divorce, 23, 24
- Marriage revitalization movement
  - community-based programs, 25
  - discussion in legal literature, 25
  - Principles neglecting as alternative to divorce, 24
- Married Women's Property Acts, 295
- Maryland
  - functional approach to custody and visitation in, 139
- Massachusetts
  - "de facto" parents in, 3, 52
  - division of property and Principles in, 174
  - international human rights agreements, adoption of, 398
  - same-sex couples in, 293, 297
  - "Maternal deference" standard, 68
- McCrudden, Christopher
  - international law, on deference to, 495
- Mediation
  - in child support
    - Indiana, proposed rule in, 423
    - lack of mention in Principles, 417
    - slowness of, 423
  - in custody matters
    - Grillo, Trina, on, 69
    - Schepard, Andrew, on, 69
  - Théry, Irène, on, 444
- Mental health professionals
  - custody, proposals regarding, 69, 70
- Merrill, Thomas
  - Due Process property interests, on analogy to deference to state law definition of
    - positivist trap, deference as, 61
    - relaxation of unbridled deference, 61, 62
- Metaphors in family law context
  - and "private ordering" (*See* "Private ordering")
- Meyer, David D.
  - on parenthood, 47, 66
- Michigan
  - child support in, 409, 410
  - imputation of income to stay-at-home parents in, 153, 154
- Minnesota
  - past caretaking standard in, 448, 449, 450
- Misconduct. *See* Fault
- Missouri
  - "friendly parent" doctrine in, 73
  - shared parenting in, 457
- Mnookin, Robert H.
  - on divorce negotiations, 499
  - on impact of uncertain custody rules, 68
- Monist systems
  - international human rights law, incorporation of in, 405
- Morality
  - causation, relationship with, 19, 21
  - fault justified as agent of morality, 11
  - Himmelfarb, Gertrude, on, 503
  - Lippman, Walter, on, 500
  - misunderstanding of as problem with critique of in Principles, 19, 21
  - Trilling, Lionel, on, 490
- "Most appropriate" parent
  - determination of, 62, 63
- Motherhood
  - categories of, 300
- Multiple parenthood
  - Bartholet, Elizabeth, on, 55
  - criticism of
    - generally, 53
    - in California, 54
  - possibility under Principles, 51
  - privacy arguments against, 55

Murder	Nicholls, Lord
division of property, effect on under Principles, 184, 185	on equitable distribution in spousal support and division of property in United Kingdom, 436
Murphy, Jane	No-fault divorce
“de facto” parents, on case law regarding, 98	California, enactment in, 252
Mutual funds	contractual aspect of marriage, effect on, 319
enhancement of marital property by spousal labor, valuation issues, 188	division of property, inaccurate assumptions regarding no-fault divorce as criticism of Principles, 180
National Center for Health Statistics	mixed state of divorce law, 249
out-of-wedlock births, statistics on, 414	New York, exception to no-fault divorce rule retained in generally, 191
National Longitudinal Study of Adolescent Health	Uniform Marriage and Divorce Act compared, 178
disengagement of fathers, research on, 468	Scott, Elizabeth, on, 261
Neale, Bren	and spousal support, 249, 252
on past caretaking standard, 456	Nock, Steven L.
Necessities, doctrine of	on cohabitation, 276
generally, 200, 201	Noncompensable losses
under agency law, 200	in spousal support ( <i>See</i> Spousal support)
“compulsory agency” theory, 200	Nonfinancial matters, exclusion from consideration
equal protection considerations, 200, 201	in division of property, 236
quasi-contractual obligations, 200	in premarital agreements, 236
Need	in spousal support ( <i>See</i> Spousal support)
division of property, as alternative ground for under Uniform Marriage and Divorce Act, 218	Noninstrumental good
spousal support, rejection of as ground for generally, 219, 221, 433	and honor, 36, 37
loss substituted for need as criterion for, 249, 250, 479, 480	and obligation
reasons for, 253	generally, 33, 34
Uniform Marriage and Divorce Act, problems with determination of need under, 252	Wilson, James Q., on, 41
Uniform Marriage and Divorce Act, problems with determination of need under, 252	Nonparents
Netherlands	“best interests of child” standard and custody, 49
division of property in, 473	extraordinary circumstances, awarding custody in, 49
domestic partnerships in, 275	preference for parents over in custody matters, 49
international human rights law, incorporation of in, 405	Nonresidential parents
same-sex couples in, 275	imputation of income to stay-at-home parents ( <i>See</i> Imputation of income to stay-at-home parents)
New Jersey	North Dakota
imputation of income to stay-at-home parents in, 154, 155	division of property and Principles in, 174
parenting plans in, 79	imputation of income to stay-at-home parents in, 155, 156
New Mexico	Norway
fixed-share division of community property compared to division of marital property under Principles, 182	division of property in generally, 473
New York	contributions of spouses as basis of, 475, 476
cohabitation in, 336	domestic partnership in, imposition of unwanted obligations under Principles compared, 269
division of property, consideration of “catchall” fault factor in, 169, 170, 171	Marriage Act of 1991, 476
no-fault divorce rule, exception to retained in generally, 191	Obligation
Uniform Marriage and Divorce Act compared, 178	generally, 29, 45
New Zealand	Aristotle on, 33
aboriginal populations, cohabitation among, 314	child support ( <i>See</i> Child support)
cohabitation in, 314	derivation of, 30
egg and sperm donors in, 1	and family, 40, 41
sexual abuse of children, empirical studies on in, 107	and fault, 29, 34
shared parenting in, 465	Finch, Janet, on, 443
	“Formless City”
	and instrumental good, 32
	and noninstrumental good, 33, 34

Saxenhouse, Arlene, on, 31	“biology plus caretaking” formula, 59, 60
and honor	classes of parents in Principles, 51
credit for fulfilling obligation as component of honor, 35	Constitutional protection of biological parents
fulfillment of obligation as component of honor, 35	Buss, Emily, on, 54
instrumental good	child rearing rights of, 54
generally, 32	criticisms of Principles based on, 54, 55
insufficiency of, 32	“de facto parents,” legal status of precluded by, 54
and knowledge, 34	dilution of parental authority by recognition of new parents permissible under Constitution, 64, 65
noninstrumental good	extension of parental status to nonparents precluded by, 54
generally, 33, 34	independent parental status for unwed fathers under Constitution, 59
Wilson, James Q., on, 41	intermediate scrutiny standard, 64, 65
overview, 29, 30	overview, 48
in Plato’s <i>Republic</i> , 30, 31, 34	“psychological parents,” legal status of precluded by, 54
and repudiation of fault in Principles, 44, 45	custody ( <i>See</i> Custody)
Saint Thomas Aquinas on, 33	“de facto” parents ( <i>See</i> “De facto” parents)
Saxenhouse, Arlene, on “Formless City,” 31	decision-making responsibility, assignment of under Principles, 51
and separation agreements, 391	Dewar, John, on, 469
and shame, 37	dilution of parental authority by recognition of new parents
and steadiness, 33	generally, 64, 66
volitional obligation ( <i>See</i> Child support)	in California, 65
Wallerstein, Judith, on, 43, 44	Constitution, permissible under, 64, 65
Wilson, James Q., on, 41	intermediate scrutiny standard generally, 64, 65
Office of Child Support Enforcement	Principles, adoption in, 65
unpaid child support, statistics on, 414, 415	by estoppel ( <i>See</i> Estoppel, parenthood by)
Ohio	under existing custody law, 48, 50
imputation of income to stay-at-home parents in, 154	functional status of, 53
Oklahoma	grandparents, rights of, 59
joint custody in, 458	guardians, parental rights of, 56
Oldham, Thomas	ideological narrowness of drafters as problem with new approach to in Principles, 53
on spousal support, 256	imputation of income to stay-at-home parents ( <i>See</i> Imputation of income to stay-at-home parents)
Opting-out provisions	independent parental status for unwed fathers under Constitution, 59
domestic partnerships	legal parents ( <i>See</i> Legal parents)
generally, 339	Meyer, David D., on, 47, 66
problems with, 317, 340, 341, 429	“most appropriate” parent, determination of, 62, 63
Oregon	multiple parenthood
“de facto” parents, rights of in, 117	Bartholet, Elizabeth, on, 55
Pannikar, Raimundo	criticism of
on human nature, 352	generally, 53
Parental autonomy	in California, 54
“de facto” parents, problems with, 99	possibility under Principles, 51
division of property, curtailing of autonomy as criticism of Principles, 179, 180	privacy arguments against, 55
parenting plans	new approach to in Principles, 47, 48, 53, 66
as reason for, 78, 80	noncustodial parents, lack of parental rights of, 56, 57
tension between autonomy and judicial control, 81	nonmarital biological fathers, lack of parental rights of, 60
problems in modifying, 87, 88	problems with new approach to in Principles
Parental involvement	Constitutional criticisms, 54, 55
“de facto” parents, empirical studies on children living with, 102, 106	ideological narrowness of drafters, 53
Parenthood	overview, 47, 48
adoptive parents, parental rights of, 56	
assumption of parental role, based on generally, 53	
agreements, 52	
same-sex couples, 52	
surrogate parents, 52	
asymmetric parenthood, 121, 141	
Baker, Katharine A., on, 121, 141	

Parenthood ( <i>cont.</i> )	spousal support, rejection of as ground for, 219, 221
state law definition of, Constitutional deference to	Uniform Marriage and Divorce Act embracing, 214, 293
generally, 56, 63	Uniform Probate Code embracing, 293
adoptive parents, parental rights of, 56	Past caretaking standard
“biology plus caretaking” formula, 59, 60	generally, 446, 471
Buss, Emily, on, 60	“approximate time” standard compared, 449
Due Process property interests, analogy to	in Australia, 451
deference to state law definition of	Crippen, Gary, on, 450
generally, 57, 58	“de facto” parents, past care givers as ( <i>See</i> “De facto” parents)
and curtailment of existing definitions, 61, 62	in Florida, 3
Merrill, Thomas, on, 61, 62	<i>Garska v. McCoy</i> , 448
positivist trap, deference as, 61	historical background, 448, 449
relaxation of unbridled deference, 61, 62	and joint custody, 457, 460 ( <i>See also</i> Joint custody)
<i>Elk Grove Unified School District v. Newdow</i> , 56, 59	Kay, Herma Hill, on, 455
grandparents, rights of, 59	in Minnesota, 448, 449, 450
guardians, parental rights of, 56	Neale, Bren, on, 456
independent parental status for unwed fathers	overview, 446, 447, 470, 471
under Constitution, 59	Parkinson, Patrick, on, 446, 471
<i>Lehr v. Robertson</i> , 59, 60	<i>Pikula v. Pikula</i> , 448, 449
<i>Michael H. v. Gerald D.</i> , 60	and predictability
“most appropriate” parent, determination of, 62, 63	generally, 449, 454
noncustodial parents, lack of parental rights of, 56, 57	choice of primary care giver, 450
nonmarital biological fathers, lack of parental rights of, 60	equal sharing of past caretaking, 451, 452
overview, 55	exceptions, effect of, 450, 451
<i>Prince v. Massachusetts</i> , 56	overview, 449, 450
<i>Stanley v. Illinois</i> , 59	visitation, effect on, 452, 454
<i>Troxel v. Granville</i> , 59	and role-divided marriage
unwed fathers, parental rights of, 59	generally, 454, 455
in United Kingdom	visitation, effect on, 455, 456
generally, 441, 443	Scott, Elizabeth, on, 449, 453, 454
“de facto” parents, English law compared, 441	and shared parenting, 456, 457 ( <i>See also</i> shared parenting)
estoppel, parenthood by, English law compared, 441	Smart, Carol, on, 456
residence orders, 441	in West Virginia, 3, 448
unwed fathers, independent parental status for under Constitution, 59	Paternity
Parenting plans	problems with leaving outside scope of Principles, 127
generally, 78, 82	Peabody Picture Vocabulary test
advantages of, 82	“de facto” parents, empirical studies on children living with, 102
difficulties in implementation, 82	Penalty default rules
in Illinois, 79	in domestic partnerships ( <i>See</i> Domestic partnerships)
individuals with custodial rights under as relationship category for purposes of custody and visitation, 123	Pennsylvania
judicial efficiency as reason for, 79	imputation of income to stay-at-home parents in, 154
in New Jersey, 79	paternalistic system, decline of in, 213
parental autonomy	premarital agreements, enforceability of in, 381
as reason for, 78, 80	Pericles
tension with judicial control, 81	on honor, 37
and “private ordering,” 80	Planiol, Marcel
protection of interests of children by, 83	on spousal support, 256
and separation agreements, 389	Plato
specific requirements, 80, 81	“Formless City” ( <i>See</i> “Formless City”)
state-by-state analysis, 79, 80	honor in <i>Republic</i> , 36
in Washington, 81	obligation in <i>Republic</i> , 30, 31, 34
Parkinson, Patrick	on shame
on past caretaking standard, 446, 471	in <i>Laws</i> , 38
Partnership theory of marriage	in <i>Republic</i> , 39
Kelly, Alicia, on, 217	Polikoff, Nancy
	on oppression of women in marriage, 346



Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

533

- Polygamy
  - in Belgium, 1
- Pound, Roscoe
  - public and private interests in marriage, distinction between, 18
- Practicality
  - domestic partnerships, as rationale behind provisions of Principles regarding
  - generally, 315, 318
  - presumptions, based on, 315, 316
- Premarital agreements
  - generally, 351, 407
  - Adolphe, Jane, on, 351, 371
  - and annulment, 359
  - balance between choice and protection of vulnerable parties under Principles, 375, 379, 391
  - benefits of, 356, 357
  - Bix, Brian H., on, 358, 372, 391
  - and “bounded rationality”
    - generally, 375
    - overstatement of problems with, 379, 380
  - in Canada
    - Canadian Charter of Rights and Freedoms, protection of economic rights under, 405
    - not binding in, 403
  - commercial contracts, tension with, 392
  - cost-benefit analysis regarding enforceability
    - generally, 380
    - inability of parties to protect interests, 380
    - social benefits to marriage, 380
    - third parties, presence of, 380
  - and covenant marriage
    - generally, 377, 378
    - hostility of Principles regarding premarital agreements toward, 359
  - current doctrine regarding, 372, 374
  - division of property, relationship to under Principles, 164
  - Dorsen, Norman, on, 396
  - and “Economic Covenant” (See “Economic Covenant” and premarital agreements)
  - economic interests, marriage reduced to by, 358
  - enforceability
    - cost-benefit analysis, 380
    - effect of on decision to marry, 381
    - employment agreements with restrictive covenants not best analogy, 380
    - living wills as best analogy, 380
    - in Pennsylvania, 381
    - spectrum of enforceability, 380, 381
    - under Uniform Premarital Agreement Act, 381
  - and enforcement aspect of contracts, 286
  - fairness
    - Ellman, Ira Mark, on, 393, 394
    - as underlying basis for treatment under Principles, 222, 225
  - fairness inquiry, 374, 375
  - and fault, 360
  - historical background, 372, 373
  - and implied bad faith, 394
  - and infidelity, 360
  - informed consent requirement
    - generally, 375
    - rebuttable presumption of, 375, 376
  - and international human rights law (See Human rights law and premarital agreements)
  - and Islamic *mahr*, 378, 379
  - and Jewish *kebutah*, 378
  - lack of duress requirement
    - generally, 375
    - rebuttable presumption of, 375, 376
  - limits to coverage, 375
  - marital agreements, provisions of Principles applied to, 384, 386
  - nonfinancial matters, exclusion from consideration, 236
  - overreaching, protection against, 357
  - overview, 372, 375
  - Pennsylvania, enforceability in, 381
  - “private ordering” and, inconsistency of Principles, 358
  - procedural guidelines under Principles
    - generally, 375, 376
    - benefits of, 381
  - and reaffirmation of marriage, 359
  - and religious agreements, 378, 379
  - and religious freedom, 394, 395
  - same-sex couples, infrequency among, 277
  - standard view of, 372, 373
  - Stark, Barbara, on, 392, 407
  - “substantial injustice” standard for nonenforcement
    - generally, 357, 358, 376, 377, 394
    - children, effect on, 376, 377
    - difference in outcome, 376, 377
    - and “Economic Covenant,” 404
    - short marriages, difference in circumstances in, 376
    - third parties, protection of, 376, 377
    - weakness of, 381
  - and unconscionability
    - generally, 394
    - “Economic Covenant,” 404
  - undermining of traditional marriage in Principles
    - generally, 351, 356, 371
    - “private ordering” and, inconsistency of Principles, 358
  - under Uniform Premarital Agreement Act
    - enforceability, 381
    - fairness inquiry, 374
    - historical background, 373
    - writing requirement, 374
  - in United Kingdom
    - generally, 439
    - European Social Charter, protection of economic rights under, 405
    - not binding in, 403
    - and “Women’s Covenant” (See “Women’s Covenant” and premarital agreements)
  - workable rules, attempt to provide in Principles, 357, 358
  - writing requirement, 374, 375

- Premarital counseling
  - Principles neglecting as alternative to divorce, 23
- Prenuptial agreements. *See* Premarital agreements
- “Primary caretaker” doctrine
  - generally, 70, 71
  - “best interests of child” standard, relationship with, 71
  - “degendered maternal presumption,” 70
  - problems with, 71
  - “tender years” doctrine, relationship with, 70
- Principles. *See* specific topic concerned
- Privacy
  - multiple parenthood, arguments against based on, 55
- “Private ordering”
  - generally, 284, 304
  - advantages of
    - generally, 291, 292
    - equality, 291
    - naturalness, 292
    - plurality, 291
  - application of Principles, 300, 304
  - in California, 300, 304
  - and child support, 287
  - and cohabitation, 288, 289
  - as conceptual basis for family law, 291
  - and contract law, 286, 288
  - and “de facto” parents, 290, 291
  - deferral of existing family law to, 284
  - and domestic partnerships, 287, 288, 289
  - Elisa B. v. Emily B.*, 301, 302
  - and equality
    - generally, 292
    - as advantage of “private ordering,” 291
    - Aristotle on, 292
  - Ertman, Martha, on, 284, 304
  - Joo, Thomas, on, 285
  - K.M. v. E.G.*, 302, 303
  - Kristine H. v. Lisa R.*, 302
  - metaphors in family law context
    - body-based metaphors, 293, 300
    - coverture as, 294, 295
    - handshake as, 297, 299
    - Lakoff, George, on, 293, 300
    - motherhood, categories of, 300
    - overview, 284, 285
    - under Uniform Marriage and Divorce Act, 293
    - under Uniform Probate Code, 293
  - and naturalness
    - generally, 293
    - as advantage of “private ordering,” 292
  - overview, 284, 286, 304
  - and parenthood by estoppel, 287, 290
  - and parenting plans, 80
  - and plurality
    - generally, 292, 293
    - as advantage of “private ordering,” 291
  - premarital agreements and, inconsistency of Principles, 358
  - problems in modifying, 87, 88
  - Rawls, John, on, 286
  - and same-sex couples
    - generally, 288, 289
    - problems with analysis, 293
- Private relational interest in marriage
  - misunderstanding of as problem with critique of in Principles, 18, 19
  - Pound, Roscoe, on distinction between public and private interests in marriage, 18
- Problem-solving courts
  - use of in child support cases, 422
- Professional licenses
  - and division of property, 185
- Property, division of. *See* Division of property
- Property law
  - domestic partnerships in United Kingdom, relevance to, 440
- Prosecutorial discretion
  - Armstrong; United States v.*, 172
  - division of property and fault, problems with reliance on in cases involving, 172
  - Newton v. Rumery*, 172
  - Wayte v. United States*, 172
- Protection of interests of children
  - generally, 82
  - by attorneys (*See* Attorneys)
  - by custody evaluators, 83
  - by guardians *ad litem* (*See* Guardians *ad litem*)
  - by judicial interviews, 83
  - by parenting plans, 83
- Psychiatrists
  - custody, proposals regarding, 69, 70
- “Psychological parents”
  - as care givers, 50
  - Constitutional protection of biological parents, legal status of precluded by, 54
  - requirement for continuing contact with children, 117, 118
- Psychological view of marriage
  - Schneider, Carl E., on, 255, 256
  - spousal support, rejection of fault as criterion for under, 255, 256
- Psychologists
  - custody, proposals regarding, 69, 70
- Public interest in marriage
  - failure to recognize as problem with critique of in Principles, 18
  - Pound, Roscoe, on distinction between public and private interests in marriage, 18
- Public policy
  - domestic partnerships, disadvantages under Principles
    - generally, 318, 327
    - erosion of integrity of law, 319, 320
    - individual autonomy, conflict with, 320, 322
    - wrong message about marriage and cohabitation, conveying, 322, 327
- Purchase money resulting trusts
  - cohabitants, claims based on, 321
- Putative spouse doctrine, 362
- Quantum meruit*
  - cohabitants, claims based on, 321, 336, 362

Quasi-contract <ul style="list-style-type: none"><li>and doctrine of necessities, 200</li><li>domestic partnerships, Principles adding nothing to existing remedies, 321</li><li>same-sex couples, inadequacy of, 321</li><li>spousal support, preclusion as underlying theory of, 257, 258</li></ul>	Russell, Diana <ul style="list-style-type: none"><li>on sexual abuse of children, 107</li></ul>
Quorum requirement for ALI proceedings <ul style="list-style-type: none"><li>problems with, 164, 165, 176, 177</li></ul>	Salter, Anna <ul style="list-style-type: none"><li>on sexual abuse of children, 111</li></ul>
Rape <ul style="list-style-type: none"><li>financial misconduct, relationship to, 246</li></ul>	Same-sex couples <ul style="list-style-type: none"><li><i>Baker v. State</i>, 280, 281</li><li>in Canada, 1, 281, 283</li><li>as care givers, 49</li><li>Connecticut, civil unions for in<ul style="list-style-type: none"><li>and Equal Protection, 281</li><li>obligations of parties under Principles compared, 280</li></ul></li><li>contract law, inadequacy of, 321</li><li>in Denmark, 275</li><li>egalitarian marriage, advantages of, 349</li><li>under European Convention for the Protection of Human Rights and Fundamental Freedoms, 440</li><li>and international human rights law, 400</li><li><i>Lawrence v. Texas</i><ul style="list-style-type: none"><li>generally, 213</li><li>intermediate scrutiny standard, 64</li><li>international law, citation of in, 399</li></ul></li><li>as legal parents<ul style="list-style-type: none"><li>assumption of parental role, based on, 52</li></ul></li><li>marriage<ul style="list-style-type: none"><li>anxiety regarding, 299, 322</li><li>Principles as paving way for, 280, 283</li></ul></li><li>in Massachusetts, 293, 297</li><li>in Netherlands, 275</li><li>premarital agreements, infrequency of among, 277</li><li>and “private ordering”<ul style="list-style-type: none"><li>generally, 288, 289</li><li>problems with analysis, 293</li></ul></li><li>quasi-contract, inadequacy of, 321</li><li><i>Rosengarten v. Downes</i>, 281</li><li>in South Africa, 1</li><li>in Spain, 5</li><li>underprotection under Principles, 278, 280</li><li>in United Kingdom, 440</li><li>Vermont, civil unions for in<ul style="list-style-type: none"><li>and Equal Protection, 280, 281</li><li>obligations of parties under Principles compared, 280</li></ul></li></ul>
Rawls, John <ul style="list-style-type: none"><li>on “private ordering” and contract law, 286</li></ul>	San Francisco <ul style="list-style-type: none"><li>international human rights agreements, adoption of, 398</li><li>sexual abuse of children, empirical studies on in, 107</li></ul>
Reaffirmation of marriage <ul style="list-style-type: none"><li>and premarital agreements, 359</li></ul>	Saudi Arabia <ul style="list-style-type: none"><li>family law in, 397</li></ul>
Reciprocal beneficiaries <ul style="list-style-type: none"><li>in Hawaii, 297</li><li>in Vermont, 297</li></ul>	Saxenhouse, Arlene <ul style="list-style-type: none"><li>on “Formless City,” 31</li></ul>
Reciprocity <ul style="list-style-type: none"><li>and division of property, 487, 488</li><li>and honor, 37</li><li>and spousal support, 487, 488</li></ul>	Schepard, Andrew <ul style="list-style-type: none"><li>on mediation in custody matters, 69</li></ul>
Reilly, Marie T. <ul style="list-style-type: none"><li>on shielding marital wealth from creditors, 195, 207</li></ul>	Schiavo, Terri <ul style="list-style-type: none"><li>elitism and attitudes toward case of, 493</li></ul>
Religious agreements <ul style="list-style-type: none"><li>generally, 378, 379</li><li>in foreign countries, 395</li><li>Islamic <i>mahr</i>, 378, 379</li><li>in Israel, 395</li><li>Jewish <i>kebutah</i>, 378</li><li>in Kenya, 395</li></ul>	Schneider, Carl E. <ul style="list-style-type: none"><li>on elitism and law reform, 489, 506</li><li>on noncompensable losses, 261</li><li>on psychological view of marriage, 255, 256</li></ul>
Religious freedom <ul style="list-style-type: none"><li>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief, 395</li><li>international law, less well developed in, 395</li><li><i>Elk Grove Unified School District v. Newdow</i> case, issue avoided by deference to state law definition of parenthood in, 58, 59</li><li>and premarital agreements, 394, 395</li><li>Sullivan, Donna, on, 395, 396</li></ul>	
<i>Republic</i> (Plato) <ul style="list-style-type: none"><li>honor in, 36</li><li>obligation in, 30, 31, 34</li><li>shame in, 39</li></ul>	
Residential parents <ul style="list-style-type: none"><li>imputation of income to stay-at-home parents (<i>See</i> Imputation of income to stay-at-home parents)</li></ul>	
Restitution <ul style="list-style-type: none"><li>cohabitants, claims based on, 336</li></ul>	
Rhode Island <ul style="list-style-type: none"><li>“de facto” parents in, 3, 52</li></ul>	
Rome, Ancient <ul style="list-style-type: none"><li>contractual aspect of marriage in, 320</li><li>shame and family in, 43</li></ul>	
Root, Elihu <ul style="list-style-type: none"><li>American Law Institute, as incorporator of, 490</li></ul>	
Royal, Ségolène <ul style="list-style-type: none"><li>on joint custody, 460</li></ul>	

Schools	and autonomy, 391
“de facto” parents, empirical studies on children living with, 102	and “best interests of child” standard, 388
imputation of income to stay-at-home parents, effect of school as adequate child care alternative, 147	challenges to, 388
Schwartz, Pepper	court approval, 388
on financial attitudes in cohabitation, 310, 311	current doctrine regarding, 388
Scott, Elizabeth	defenses, 388
on “approximate time” standard, 74, 444, 449, 454	deference in financial matters, 388
on “best interests of child” standard and custody, 441, 442	disclosure requirement, 389
domestic partnerships, on waiting period for, 317	enforceability, 389
on implied contract theory for domestic partnerships, 349	fairness standard, 388
on importance of commitment, 231, 232	frequency of, 387
international human rights, on incorporation of into family law, 406	Hadfield, Gillian, on, 390
on no-fault divorce, 261	less deference to, arguments for, 390, 391
on past caretaking standard, 449, 453, 454	and obligations, 391
Scott, James	overview, 387, 389
on unintended consequences of laws, 498	and parenting plans, 389
“Selection” effects of marriage, 324, 325, 327	under Principles, 389, 390
Self-executing treaties, doctrine of	“substantial injustice” standard for nonenforcement, 389
international human rights law and incorporation of, 405, 406	unconscionability standard, 388
Separate property	Uniform Marriage and Divorce Act, unconscionability under, 388
defined, 185	writing requirement, 389
earnings before marriage, problems with Principles generally, 189, 191	“Serial marriage,” 262
employee stock options, 190, 191	Sexual abuse of children
goodwill, 189, 190	absence of mother, risk of during, 112, 115
overview, 186	adult not residing with child from infancy, risk of by, 115, 116
future earnings, problems with Principles generally, 189, 191	attractiveness of single mothers to sex offenders targeting children, 110, 112
employee stock options, 190, 191	Bagley, Christopher, on, 109
goodwill, 189, 190	Bolen, Rebecca, on, 110
overview, 186	cohabitants, risk of by, 107, 110
gifts deemed to be	Craft, John, on, 108
generally, 166	“de facto” parents, risk of by, 106, 117
recharacterization as marital property, problems with Principles, 192, 193	Fergusson, David, on, 107
inheritances deemed to be	Finkelhor, David, on, 115
generally, 166	Herman, Judith, on, 112
recharacterization as marital property, problems with Principles, 192, 193	Hirschman, Lisa, on, 112
invasion of in cases of waste of assets, 168, 169	King, Kathleen, on, 96
recharacterization as marital property, problems with Principles generally, 192	Margolin, Leslie, on, 108
compensation for services, 193	New Zealand, empirical studies in, 107
distributions from trusts, 193	overview, 116, 117
gifts, 192, 193	Russell, Diana, on, 107
inheritances, 192, 193	Salter, Anna, on, 111
intestacy, 193	San Francisco, empirical studies in, 107
overview, 186	stepparents, risk of sexual abuse of children by, 107, 110
rational in Principles, 192	United Kingdom, empirical studies in, 109
United Kingdom, no distinction between marital and separate property in, 436	Wallerstein, Judith, on, 111
Separation agreements	Williams, Linda, on, 115
generally, 387, 391	Sexuality
	and marriage, 353, 354
	Shame
	generally, 37, 39
	Cicero on, 43
	Davies, Christie, on, 40
	and family, 43
	French, Peter, on, 38
	and honor, 37, 40

Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

537

- John Paul II, Pope, on, 39
- and knowledge, 38
- nature of, 37, 38
- and obligation, 37
- Plato on
  - in *Laws*, 38
  - in *Republic*, 39
- and repudiation of fault in Principles, 44, 45
- and Roman tradition, 43
- "Shameful City," 40
- "Shameless City," 39, 40
- Taylor, Gabriele, on, 38
- Wallerstein, Judith, on, 43, 44
- "Shameful City," 40
- "Shameless City," 39, 40
- Shared parenting
  - generally, 70, 461, 470
  - Amato, Paul, on, 462
  - in Australia
    - children, wishes of, 465
    - community attitudes toward parental responsibility, changes in, 461, 462
    - fathers, changes in attitudes of, 467
  - Beck, Ulrich, on, 468
  - Beck-Gernsheim, Elisabeth, on, 468
  - in Canada, 465
  - children, wishes of, 464, 466
  - community attitudes toward parental responsibility, changes in, 461, 462
  - Emery, Robert, on, 465
  - Fabricius, William V., on, 465, 467
  - fathers, changes in attitudes of, 467, 468
  - Gilbreth, Joan, on, 462
  - and governments, 469, 470
  - Hall, Jeff A., on, 465, 467
  - in Iowa, 457
  - Laumann-Billings, Lisa, on, 465
  - in Missouri, 457
  - in New Zealand, 465
  - nonresidential parents, benefits of closeness to, 462, 464
  - overview, 461
  - and past caretaking standard, 456, 457
  - problems with, 87
  - in United Kingdom
    - children, wishes of, 465, 466
    - fathers, changes in attitudes of, 468
- Silbaugh, Katharine B.
  - on contributions of spouses as basis of division of property, 484
  - on spousal support, 234, 248
- Smart, Carol
  - on past caretaking standard, 456
- Smock, Pamela
  - on cohabitation and marriage, 311, 313
- Social nature of marriage
  - generally, 355
  - "Beyond Conjuality" Report, obscuring in, 365
- South Africa
  - same-sex couples in, 1
- Sullivan Principles in, 398
- South Carolina
  - common law marriage in, 425, 426
- Spaht, Katherine Shaw
  - on spousal support, 249, 268
- Spain
  - adoption in, 5
  - same-sex couples in, 5
- Spousal support
  - generally, 209
  - and adaptive rationality, 231
  - agreement as to division of labor, effect of, 482
  - alternative conception of marriage, need for, 264, 268
  - analysis of Principles, 252, 261
  - in Austria, 479
  - authority regarding dissolution, ignoring tension over
    - divide between public and private, 225, 229
    - state-regulated status *versus* contract theory of marriage, 225, 229
  - backward-looking jurisprudence, Principles
    - representing
      - advantages of, 210
  - authority regarding dissolution, ignoring tension over
    - generally, 211
    - divide between public and private, 225, 229
    - state-regulated status *versus* contract theory of marriage, 225, 229
  - disarray within family law as goal, correction of as goal, 212, 215
  - disputes resolved at dissolution rather than at creation of relationship, 209
  - explicit *ex post* perspective, 209, 210
  - explicitness of agreements, lack of, 211
  - family behavior, role of family law in creating understanding of, 211, 268
  - historical development, 214
  - multiplicity of relationships, providing for, 210
  - overview, 209, 212
  - problems with, 210
  - "balance sheet" concept, 434
- Carbone, June, on, 209, 233
- care giver spouse, loss of earning capacity for as compensable loss
  - disproportionate share of caretaking, 258
  - fulfillment of moral obligation, 258
- child support compared, Ellman, Mark Ira, on, 253
- commitment, importance of
  - generally, 230, 233
  - cohabitation, impact of provisions of Principles
    - regarding, 232
  - fault, effect of treatment of under Principles, 232, 233
- Frank, Robert, on, 230, 231
- restatement of Principles as terms of marital partnership, 233
- Scott, Elizabeth, on, 231, 232
- compensable losses
  - generally, 258, 260
  - alternatives to, 259

Spousal support ( <i>cont.</i> ) <ul style="list-style-type: none"><li>Carbone, June, on, 259</li><li>care giver spouse, loss of earning capacity for<ul style="list-style-type: none"><li>disproportionate share of caretaking, 258</li><li>fulfillment of moral obligation, 258</li></ul></li><li>criticism of, 258, 259</li><li>higher living standard, loss of, 258</li><li>as improvement over existing law, 259, 260</li><li>investment in earning capacity of other spouse, 258</li><li>short marriage, disproportionate loss in, 258</li></ul> contract law, preclusion as underlying theory of, 257contributions of spouses as basis of <ul style="list-style-type: none"><li>generally, 473</li><li>child care, 482, 483</li><li>“contribution model,” 482, 487</li><li>earning capacity, compensation for loss of, 481</li><li>housework, 482, 483</li><li>indirect contributions, 479, 487</li></ul> corrective justice <ul style="list-style-type: none"><li>generally, 472, 487</li><li>move toward under Principles, 473, 474, 479</li></ul> and covenant marriage <ul style="list-style-type: none"><li>generally, 265, 268</li><li>in Arizona, 265</li><li>in Arkansas, 265</li><li>in Louisiana, 265, 268</li></ul> decline in frequency of, 479default terms, imposition of <ul style="list-style-type: none"><li>generally, 229, 230</li><li>on cohabitants, 229, 230</li><li>on married couples, 229</li><li>on unmarried couples, 229, 230</li></ul> disarray within family law as goal, correction of as <ul style="list-style-type: none"><li>goal of Principles</li><li>generally, 212, 215</li></ul> autonomy/choice/contract model <ul style="list-style-type: none"><li>advent of, 212</li><li>attacks on, 214</li><li>Fineman, Martha, on, 214</li><li>and Uniform Marriage and Divorce Act, 214</li><li>and Uniform Premarital Agreement Act, 214</li></ul> and <i>Lawrence v. Texas</i> , 213	emotional damages as noncompensable losses, 260, 261entitlement, Principles viewing as, 482equitable sharing of financial loss <ul style="list-style-type: none"><li>generally, 219, 221</li><li>as purposes of Principles, 215</li></ul> expectation damages as noncompensable losses, 260fairness as underlying concern regarding, 219, 221fault, rejection of as criterion for <ul style="list-style-type: none"><li>availability of other remedies at law, 253</li><li>and classical liberalism, 256</li><li>and economic theory of marriage, 256</li><li>and egalitarian marriage, 256</li><li>Ellman, Ira Mark, on, 250, 256</li><li>impossibility of assigning fault as reason for, 254</li><li>and market theory of marriage, 256</li><li>Oldham, Thomas, on, 256</li><li>Planiol, Marcel, on, 256</li><li>under psychological view of marriage, 255, 256</li></ul> Schneider, Carl E., on, 255, 256tort law, reliance on in lieu of <ul style="list-style-type: none"><li>generally, 253</li><li>adultery, tort claims for, 253</li></ul> financial misconduct, consideration of as alternative to Principles <ul style="list-style-type: none"><li>generally, 244, 247</li><li>and adultery, 246</li><li>division of property compared, 245</li><li>and gambling, 246</li><li>intertwining of financial and nonfinancial misconduct, 246, 247</li><li>prevailing state law regarding, 246, 247</li><li>and rape, 246</li></ul> forward-looking jurisprudence, need for in Principles, 210, 225, 230in Germany, 479higher living standard, loss of as compensable loss, 258investment in earning capacity of other spouse as <ul style="list-style-type: none"><li>compensable loss, 258</li></ul> and joint venture model of marriage <ul style="list-style-type: none"><li>generally, 261, 263</li><li>egalitarian marriage compared, 263</li><li>Kay, Herma Hill, on, 262, 263</li></ul> loss substituted for need as criterion for <ul style="list-style-type: none"><li>generally, 249, 250</li><li>kinds of compensable losses, 258, 260</li></ul> need, rejection as ground for <ul style="list-style-type: none"><li>generally, 219, 221, 433</li><li>loss substituted for need as criterion for, 249, 250, 479, 480</li><li>reasons for, 253</li><li>Uniform Marriage and Divorce Act, problems with<ul style="list-style-type: none"><li>determination of need under, 252</li></ul></li></ul> and no-fault divorce, 249, 252noncompensable losses <ul style="list-style-type: none"><li>generally, 260, 261</li><li>Ellman, Mark Ira, on, 260, 261</li><li>emotional or psychological damages, 260, 261</li><li>expectation damages, 260</li><li>Schneider, Carl E., on, 261</li></ul>
--	---



Cambridge University Press

0521861195 - Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution

Edited by Robin Fretwell Wilson

Index

[More information](#)

## Index

539

- nonfinancial matters, exclusion from consideration
  - generally, 234, 248
  - continuation of exchange of nonfinancial benefits
    - after dissolution
      - generally, 237, 238
  - assumptions in Principles, 242, 243
  - Ellman, Ira Mark, on, 235
  - emotional losses, financial losses as, 237
  - evaluation of, 236, 244
  - exchange of financial and nonfinancial benefits, 237
  - fairness of exclusion, 243, 244
  - fault, elimination of as justification for
    - generally, 239, 240
  - circular reasoning employed by Principles, 239
  - overview, 238
  - reluctance to investigate intimate relationships,
    - based on, 239, 240
  - financial misconduct, consideration of as
    - alternative, 244, 247
  - incommensurability as justification for
    - generally, 240, 242
  - deliberate ignoring of problem for social reasons, 241, 242
  - impracticality of devising metric, 241
  - inconsistency of Principles, 242
  - intrusiveness of devising metric, 241
    - presumption of equal exchange during marriage, 240, 241
  - tort claims, remedies for nonfinancial losses
    - compared, 240
  - justification for
    - generally, 238, 243
    - in Principles, 238
  - overview, 234, 235, 248
  - reason for exclusion, 235
  - relationship between financial and nonfinancial
    - matters as defining attribute of marriage, 236, 237
  - significance of exclusion, 236, 238
  - treatment under Principles, 235, 236
- partnership theory of marriage, rejection of as ground
  - for, 219, 221
- and postmodern marriage, 249, 268
- psychological damages as noncompensable losses, 260, 261
- purposes of alimony, 252, 258
- purposes of Principles
  - generally, 214
  - dissolution, limitation to, 215
  - equitable sharing of financial loss, 215
  - Hazard, Geoffrey, on, 215
  - preference for Principles over Restatement, 214
- quantification of loss and gain, 483
- quasi-contract, preclusion as underlying theory of, 257, 258
- rational for imposing obligations under Principles, 433, 434
- and reciprocity, 487, 488
- and “serial marriage,” 262
- short marriage, disproportionate loss in as
  - compensable loss, 258
- Silbaugh, Katharine B., on, 234, 248
- Spaht, Katherine Shaw, on, 249, 268
- standard of living, compensation for loss of
  - generally, 481
  - moral obligation as basis of, 481, 482
- Sverdup, Tone, on, 472, 488
- in Switzerland, 479
- and time factor, 487, 488
- tort claims
  - adultery, tort claims for, 253
  - preclusion as underlying theory of, 257
  - reliance on tort claims in lieu of, 253
- Uniform Marriage and Divorce Act, problems with
  - determination of need under, 252
- in United Kingdom (*See* United Kingdom)
- unjust enrichment, preclusion as underlying theory
  - of, 257, 258
- Standard of living
  - spousal support, compensation for loss of
    - generally, 481
    - moral obligation as basis of, 481, 482
- Standing
  - “de facto” parents, standing concept as alternative to
    - test for status, 117, 118
- Stark, Barbara
  - on international human rights law and premarital
    - agreements, 392, 407
- State interest in marriage, 355, 356
- Stay-at-home parents
  - imputation of income to (*See* Imputation of income
    - to stay-at-home parents)
- Stephen, James Fitzjames
  - on social institutions, 501, 502
- Stepparents
  - as “de facto” parents (*See* “De facto” parents)
- Stock options
  - earnings before marriage or future earnings as
    - separate property, problems with Principles, 190, 191
- Strange Death of Moral Britain, The* (Davies)
  - shame in, 40
- Strasser, Mark
  - on imputation of income to stay-at-home parents, 142, 161
- “Substantial injustice” standard for nonenforcement
  - domestic partnerships, 339
  - premarital agreements (*See* Premarital agreements)
  - separation agreements, 389
- Sui generis* contract
  - marriage as, 356, 357, 358
- Sullivan, Andrew
  - on liberationist view of marriage, 504, 505
  - on marriage as social institution, 502
- Sullivan, Donna
  - on religious freedom and gender equality, 395, 396
- Sullivan Principles in South Africa, 398
- Summa Theologica* (Aquinas)
  - obligation in, 33

Support	incommensurability, remedies for nonfinancial losses
child support ( <i>See</i> Child support)	in tort claims compared to spousal support,
spousal support ( <i>See</i> Spousal support)	240
Sureties	intentional infliction of emotional distress
spouses as, effect on shielding marital wealth from	adultery, based on, 12
creditors, 196	battery claims combined with, 12
Surrogate parents	effect of availability of claims for on divorce, 12, 13
as legal parents based on assumption of parental role,	spousal support
52	adultery, tort claims for, 253
and volitional child support obligation, 137, 138	preclusion as underlying theory of, 257
Surviving spouses	reliance on tort claims in lieu of, 253
elective share, fixed-share rule compared with division	Treasury securities
of property under Principles, 182	enhancement of marital property by spousal labor,
Sverdup, Tone	valuation issues, 188
on division of property and spousal support, 472, 488	Trilling, Lionel
Sweden	on morality, 490
cohabitation, differences from marriage in, 275	Truman, Harry S.
division of property in, 473	on Eisenhower, Dwight D., 497
financial attitudes in cohabitation in, 312	on elitism, 492
Swisher, Peter Nash	Trust law
on division of property and fault, 170, 171	domestic partnerships in United Kingdom, relevance
Switzerland	to, 440
spousal support in, 479	recharacterization of separate property as marital
	property, problems with Principles, 193
Taft, William Howard	Two-parent model. <i>See</i> Binary biological ideal
American Law Institute, as incorporator of, 490	
Taylor, Gabriele	Unconscionability
on shame, 38	and premarital agreements
Tenancy by the entirety	generally, 394
and shielding marital wealth from creditors, 198	“Economic Covenant,” 404
Tenancy in common	and separation agreements, 388
and shielding marital wealth from creditors, 198, 199	<i>Unexpected Legacy of Divorce, The</i> (Wallerstein)
“Tender years” doctrine	dissolution without obligation, honor or shame in, 43,
generally, 48	44
“best interests of child” standard, relationship with, 68	UNICEF Report on Child Marriage, 399
decline of, 68	Uniform Commercial Code
“primary caretaker” doctrine, relationship with, 70	different rules for different situations, analogy to
Termination of parental rights	family law, 288
individuals required by state law to support children	Principles compared, 291
following as relationship category for purposes	Uniform Marriage and Divorce Act
of child support, 124	adoption in eight states, 178
Therapeutic jurisprudence	and autonomy/choice/contract model of family, 214
Principles neglecting as alternative to divorce, 23	continuing contact with “de facto” parents under,
Théry, Irène	Principles compared, 98
on joint custody, 460	“friendly parent” doctrine, not adopting, 73
on mediation, 444	metaphors in family law context under, 293
Toal, Jean Hoefer	need
on domestic partnerships and common law marriage,	as alternative ground for division of property
425, 431	under, 218
Tocqueville, Alexis de	problems with determination under, 252
on American individualism, 502, 503	New York, exception to no-fault rule retained in, 178
Tort claims	partnership theory of marriage, embracing, 214, 293
adultery, tort claims for, 253	promulgation, 178
battery ( <i>See</i> Battery)	rejection of marital misconduct as consideration
fault in divorce, relationship with	under, 10
critique of fault in Principles based on availability	separation agreements and unconscionability under,
of, 10	388
effect of availability of on, 12, 13	Uniform Parentage Act
forfeiture as alternative to, 13	broad appeal required, 210
preference for, 13	presumption of legal parenthood under, 125

Uniform Premarital Agreement Act	Human Rights Act of 1968, 440
and autonomy/choice/contract model of family, 214	joint custody in, 459
broad appeal required, 210	parenthood in
enforceability under, 381	generally, 441, 443
fairness inquiry under, 374	“de facto” parents, English law compared, 441
historical background, 373	estoppel, parenthood by, English law compared, 441
marital agreements, inapplicable to, 382	residence orders, 441
writing requirement under, 374	premarital agreements in
Uniform Probate Code	generally, 439
fixed-share rules compared with division of property	European Social Charter, protection of economic
under Principles, 182, 183	rights under, 405
metaphors in family law context under, 293	not binding in, 403
partnership theory of marriage, embracing, 293	Principles compared with English family law, 433,
United Kingdom	443, 445
“best interests of child” standard in, 441, 442	recent developments in family law paralleling
Civil Partnership Act of 2004, 440	Principles, 3
custody in	same-sex couples in, 440
generally, 441, 443	sexual abuse of children, empirical studies on in, 109
“approximate time” approach, rejection of, 443	shared parenting in
and “best interests of child” standard, 441, 442	children, wishes of, 465, 466
nonresidential parents, rights of	fathers, changes in attitudes of, 468
generally, 442, 443	spousal support in
Canada compared, 443	generally, 433
Fathers4Justice, 442	“balance sheet” concept, applicability of, 435, 438
welfare of children as paramount consideration, 442	Denning, Lord, on, 438
“de facto” parents in	equitable distribution
generally, 441	blurring of distinction with need, 437
empirical studies on sexual abuse of children in, 109	general rule, 435
division of property in	good reason required for deviation from, 435
generally, 433, 473	Nicholls, Lord, on, 436
“balance sheet” concept, applicability of, 435, 438	fault, exclusion of, 438
Denning, Lord, on, 438	and legitimacy, 438, 439
equitable distribution	need
blurring of distinction with need, 437	blurring of distinction with equitable distribution,
general rule, 435	437
good reason required for deviation from, 435	Ellman, Ira Mark, on, 437
Nicholls, Lord, on, 436	meeting of as first objective, 435
fault, exclusion of, 438	welfare of children as first consideration, 438
indirect contributions of spouses, 475	United States Census Bureau
and legitimacy, 438, 439	single-parent households and poverty, statistics on,
marital and separate property, distinction not made	414
between, 436	Universal Declaration of Human Rights
need	generally, 397
blurring of distinction with equitable distribution,	family as fundamental group unit of society under, 41
437	Unjust enrichment
Ellman, Ira Mark, on, 437	cohabitants avoiding, 321, 362
meeting of as first objective, 435	spousal support, preclusion as underlying theory of,
welfare of children as first consideration, 438	257, 258
domestic partnerships in	Unmarried couples. <i>See</i> Cohabitation; Domestic
generally, 440	partnerships
common child, parents of, 440	U.S. Fragile Family Study, 312
and legitimacy, 439	
property law, relevance of, 440	Vermont
same-sex couples, 440	civil unions for same-sex couples in
trust law, relevance of, 440	Equal Protection and, 280, 281
Eekelaar, John, on English family law and Principles,	obligations of parties under Principles compared,
433, 445	280
elitism and law reform in, 490	division of property and Principles in, 173
European Social Charter, protection of economic	imputation of income to stay-at-home parents in, 159
rights under, 405	reciprocal beneficiaries in, 297

Vicarious liability <ul style="list-style-type: none"><li>and shielding marital wealth from creditors, 200</li></ul>	Washington <ul style="list-style-type: none"><li>parenting plans in, 81</li></ul>
Viladrich, Pedro Juan <ul style="list-style-type: none"><li>on legal positivism and marriage, 371</li></ul>	Waste of assets <ul style="list-style-type: none"><li>equitable distribution of property in cases of<ul style="list-style-type: none"><li>generally, 167, 169</li><li>in Illinois, 168</li><li>invasion of separate property, 168, 169</li><li>in Kentucky, 168</li><li>treatment in Principles, 168</li></ul></li><li>as exception to repudiation of fault in Principles, 10</li><li>social consensus against, 18</li></ul>
Visitation <ul style="list-style-type: none"><li>binary biological ideal rejected for purposes of, 128</li><li>child support, differential treatment under Principles<ul style="list-style-type: none"><li>generally, 133</li><li>and <i>Miller v. Miller</i>, 135, 136</li><li>parents by estoppel defined differently, 124</li></ul></li><li>continuing contact with children by “de facto” parents (See “De facto” parents)</li><li>“de facto” parents as relationship category for purposes of, 123</li><li>emotional needs of children outweighing financial needs of children under Principles, 133, 134, 136</li><li>estoppel, parenthood by<ul style="list-style-type: none"><li>parents by estoppel defined differently than for child support, 124</li><li>as relationship category for purposes of, 123</li></ul></li><li>expansion of state power under Principles, effect of, 130, 133</li><li>legal parents as relationship category for purposes of, 123</li><li>Maryland, functional approach in, 139</li><li>past caretaking standard, effect of, 452, 454, 455, 456</li><li>relationship categories for purposes of, 122, 124</li><li>two-parent model rejected for purposes of, 128</li></ul>	West Virginia <ul style="list-style-type: none"><li>“approximate time” standard in, 74</li><li>past caretaking standard in, 3, 448</li></ul>
Volitional obligation <ul style="list-style-type: none"><li>in child support (See Child support)</li></ul>	Westfall, David <ul style="list-style-type: none"><li>on division of property, 176, 194</li><li>on domestic violence, 401</li><li>judicial discretion, criticism of position of Principles on, 22</li><li>quorum requirement for ALI proceedings, on problems with, 164, 165, 176, 177</li></ul>
Waiting periods <ul style="list-style-type: none"><li>domestic partnerships, proposal for<ul style="list-style-type: none"><li>generally, 317, 318</li><li>common law marriage, problems compared with, 318</li><li>Scott, Elizabeth, on, 317</li></ul></li><li>Principles neglecting as alternative to divorce, 23</li></ul>	Weston, Kath <ul style="list-style-type: none"><li>on family choice, 505</li></ul>
Wald, Michael <ul style="list-style-type: none"><li>on child abuse and neglect, 497</li></ul>	Whitehead, Barbara Dafoe <ul style="list-style-type: none"><li>on autonomy model of family, 214</li></ul>
Wallerstein, Judith <ul style="list-style-type: none"><li>on dissolution without obligation, honor or shame, 43, 44</li><li>on sexual abuse of children, 111</li></ul>	Wiebe, Robert H. <ul style="list-style-type: none"><li>on elitism, 489</li></ul>
Wardle, Lynn D. <ul style="list-style-type: none"><li>on equivalence of domestic partnerships with marriage, 362</li><li>on fault<ul style="list-style-type: none"><li>generally, 27</li><li>and “private ordering,” 304</li></ul></li><li>on infidelity, 360</li><li>on undermining of traditional marriage in Principles, 346, 362</li></ul>	Williams, Linda <ul style="list-style-type: none"><li>on sexual abuse of children, 115</li></ul>
	Wilson, James Q. <ul style="list-style-type: none"><li>on decline of two-parent family, 413, 414, 415</li><li>on honor and family, 42</li><li>on obligation and family, 41</li></ul>
	Wilson, Robin Fretwell <ul style="list-style-type: none"><li>on “de facto” parents, 90, 120</li><li>Introduction by, 1, 7</li></ul>
	Wisconsin <ul style="list-style-type: none"><li>“de facto” parents, rights of in, 117</li><li>imputation of income to stay-at-home parents in, 157</li><li>joint custody in, 457</li><li>protection of interests of children by attorneys in, 83</li></ul>
	“Women’s Covenant” and premarital agreements <ul style="list-style-type: none"><li>generally, 400, 403</li><li>domestic violence as reason for incorporation of, 401, 402</li><li>furthering Principles, incorporation of as, 403</li><li><i>Grutter v. Bollinger</i>, citation of in, 399</li><li>jurisprudence of monitoring bodies, 406</li><li>reasons for incorporation of, 400, 401</li><li>United States not party to, 398</li><li>wage disparity as reason for incorporation of, 402, 403</li></ul>
	Woodhouse, Barbara Bennett <ul style="list-style-type: none"><li>on drafters’ “fear of fault,” 26</li></ul>