2001

Explaining Intuitions: Relating Mergers, Contribution and Loss in the ALI Principles of the Law of Family Dissolution

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EXPLAINING INTUITIONS: RELATING MERGERS, CONTRIBUTION, AND LOSS IN THE ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

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Follow me where I go what I do and who I know
Make it part of you to be a part of me
Follow me up and down all the way and all around
Take my hand and I will follow you

John Denver

I. INTRODUCTION

Lovers sharing a most intimate moment might well say to one another, "part of you is part of me." This expression reflects a common understanding about the nature of, and our aspirations for, romantic love. As John Denver's lyrics recited above suggest, a long-term committed relationship such as marriage is regarded by many as a relationship defined by sharing, interdependence, and care that profoundly affects the identity of individuals who have united their lives.[1] This description reflects the hope and ambition of many couples when they marry—and conduct during marriage often pursues this goal in many ways.[2] When a couple has children, it is even more apparent that the resulting set of enmeshed relationships shapes each participant's identity on a daily basis.

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1. Contemporary American culture continues to emphasize the idea of a "companionate marriage" where couples seek intense close relationships with one another, and with children, as part of their quest for personal happiness. *See, e.g.*, MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 14-16 (1981). Robert Bellah has made this observation based on conversations with individual Americans about love and marriage:

> [Couples] speak of sharing—thoughts, feelings, tasks, values, or life goals—as the greatest virtue in a relationship. One married woman (previously divorced) explained how she fell in love: "I think it was the sharing, the real sharing of feelings. . . . I let all my barriers down. I was really able to be myself with him—very, very comfortable. . . I didn't . . . have to worry. . . about what his reaction was going to be. I was just me. I was free to be me.

ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 91 (1985).

2. *See, e.g.*, Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2384-87 (1994).

For spouses who stand at the brink of divorce, reflection upon this paradigm is undoubtedly painful. It is an acute reminder that they face a most difficult struggle—spouses must begin the process of extracting themselves from the web of connections they have with each other. Milton Regan has poignantly captured the paradigm of interdependence and the dilemma it creates at divorce:

> Ex-spouses are not simply individuals who revert to their former identities as sovereign individuals. They have shared an experience that has affected them deeply, to the point where, in a sense, they are not the same persons as they were when they entered the marriage. . . . [At divorce] they are poised uneasily at the border: caught in a web of lingering influences from the place they are leaving, knowing they must begin to shape a new life in the unfamiliar territory they are entering.[3]

This sounds like the stuff of lovers and families and therefore presumably not of law. But as those in the legal field recognize, the law is no stranger to involvement in family relationships. Dissolution of marriage requires the state to resolve competing claims to wealth allocation among divorcing spouses and their children. However, constructing the basis for resolution of these claims has been a daunting challenge in family law. Legal decisionmakers and those who seek law reform must grapple with the nature and function of the marital relationship which inevitably plays a crucial role in the formulation of the law of marriage and its dissolution.

Scholarly literature over the last several decades has been flooded with often thoughtful and provocative explorations of possible theories for wealth allocation upon divorce. There is an on-going, wide-ranging search for a coherent theory on which the law of dissolution might be based.[4] In the meantime, because the field is in chaos (having had no cogent rationale for rules of dissolu-

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3. *Id.* at 2386. Regan describes the divorce transition as perceived by many to be a departure from the sphere of the family and an re-entry into the sphere of the market. *Id.* For a description of the dichotomy between the family and the market and its influential role in shaping legal reforms see generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

4. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 176-77 (1991); Glendon, *supra* note 1; ALLEN M. PARKMAN, NO FAULT DIVORCE: WHAT WENT WRONG? (1992); MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999); Margaret F. Brinig & June Carbone, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 1005-10 (1991); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 359-60 (1994); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor In Human Capital*, 28 U. KAN. L. REV. 379 (1980); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 578 (1990); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197; Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2445-46 (1994); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67, 85 (1993); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

tion), the nation is burdened with a dizzying patchwork of theory and results.[5] Adding enormous pressure and urgently needed direction to the search for theory is the current system's pervasive failure to provide economic justice for women and the children so often in their care. Women and children bear a disproportionate share of the financial losses triggered by dissolution. These facts are now sadly familiar and have been described at length elsewhere.[6] Any meaningful law reform effort must work to alleviate these injustices.

It is against this backdrop that the Reporters of the American Law Institute have taken on the formidable task of formulating a comprehensive set of rules governing dissolution of marriage and, just as importantly, of providing an explanation of the theory on which the law is based. The ALI's *Principles of the Law of Family Dissolution* recommend dramatic changes to current marital regimes and holds great promise for more equitable wealth distribution for women and children.[7] One of the most important changes is that, by design, the structure of the rules provides for presumptions of entitlement to wealth.[8] A non-titled spouse, typically the wife, can now claim an entitlement (a species of property) to economic resources—she need no longer resort to pleas for help and appeals to the "charity" of her husband. Importantly, the sections addressing property division and compensatory payments (a new term for reconceptualized alimony) also clarify and expand the range of claims spouses can successfully assert upon divorce, and thus should result in more generous and predictable financial awards to the lower-income spouse (again, usually the wife).[9]

The promise of these reforms, however, critically depends upon the acceptance of the theory underlying the rules for allocation. Unless the theory behind the *Principles* is unambiguous and persuasive, the *Principles* are at risk of rejection by decisionmakers and the advances they offer may be lost. Accordingly, the focus of this commentary will be an examination of the reasons behind the rules of wealth allocation between divorcing spouses through property division and compensatory payments—the areas which have been long in search of a coherent theory. Although partial explanations of the theories that underlie the rules are offered and have the potential to provide a cogent theory of marriage, the *Principles* fail to clearly and convincingly develop a foundation for compensatory payments following intermediate and long-term marriages. The theories need greater development and exposition, and perhaps even advocacy. This commentary is an effort to offer some ideas to fill in what the *Principles* leave unsaid.

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5. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS Introduction at 8 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES 1997].

6. It is estimated that women and the minor children in their household experience at least a 30 percent decline in their standard of living following divorce. *See, e.g.*, Greg J. Duncan & Saul D. Hoffman, *What are the Economic Consequences of Divorce?* 25 DEMOGRAPHY 641 (1988) (cited with approval by Stephen D. Sugarman, *Dividing Financial Interests on Divorce, in* DIVORCE REFORM AT THE CROSSROADS 130, 149 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

7. *See generally* ALI PRINCIPLES 1997, *supra* note 5.

8. *See id.* Introduction at 9.

9. For example, Ira Ellman, the Chief Reporter for the *Principles* and the Reporter for Chapter 5, anticipates that the size and reliability of financial awards will increase under the *Principles*. *See* Ira M. Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 882 (1999).

And the likely acceptance of the *Principles* is not all that is at stake. A theory of wealth allocation at dissolution has the potential to shape how we think about marriage and divorce—to influence what we bring as individuals and collectively to the institution. The *Principles* offer a distinct narrative about the marital relationship, one that parallels the excerpt quoted in the prelude to this piece. Marriage is understood as an experience defined by sharing that has long-lasting effects and profoundly shapes the individuals in the relationship. If this narrative, which has much to offer, is ultimately to become dominant, there is much work to be done in convincing decisionmakers that it is the appropriate model regarding the nature of, and our aspirations for, the marital relationship.

II. THE ALI THEORY OF WEALTH ALLOCATION: RELATING MERGERS, CONTRIBUTION, AND LOSS

The *Principles* make the sensible connection between property division and claims for post-divorce income sharing (alimony) by treating aspects of these claims against wealth together as a package.[10] Although the *Principles* do not explicitly link the theories for each claim,[11] the sharing theory that underlies the proposal for presumptive equal division of property is an integral part of the foundation for awarding compensatory payments to ex-spouses as well. Each claim will be discussed in turn below.

A. Sharing and Contribution as the Basis for Equal Property Division at Divorce

The Reporters describe the foundation for the presumption of equal division as a rough compromise between two dominant principles in current marital property systems: need and contribution.[12] It is a compromise because "[t]he equal division rule typically provides [the lower-earning] spouse more than he or she contributed financially, but less than a need-based rule might provide."[13] This comment does not explain, however, why contribution should be a determinant factor in property division or why a divorcing spouse should have a responsibility to respond to a former spouse's economic need.

The answer appears to be in another rationale for equal property division offered in the *Principles*: "[t]he equal division rule also follows from the sharing premise that necessarily underlies the choice of a marital rather than [a title] common-law property system."[14] Equal division is grounded not on the premise that spouses make equal financial contributions to the acquisition of assets—because they often do not—but on the supposition that "both spouses contributed

10. ALI PRINCIPLES 1997, *supra* note 5, Introduction at 6, 9.

11. The Reporters explain that in most jurisdictions "the policy basis for awarding alimony is largely indistinguishable from the basis for allowing one spouse *an enhanced share* of the marital property. Under existing law, "need" is the most common rationale for both." *Id.* Introduction at 9 (emphasis added). The unifying theme offered by the *Principles* is whether a spouse has incurred a compensable loss. *Id.* As discussed below, this theme refers not only to the basis for awarding an enhanced share of property but to a unified theory for sharing property to begin with, and for sharing income.

12. *See id.* § 4.15 cmt. b.

13. *Id.*

14. *Id.*

significantly to the entire relationship, whether or not they contributed [directly] to accumulation of property during it."[15] This factual premise of reciprocal spousal contributions reflects an assumption about the way the marital relationship functions—it is a relationship defined by sharing that does not lend itself to a financial accounting. The Reporters find support for this assumption in the fact that spouses who have an option for unilateral divorce (as every jurisdiction now provides) nonetheless stayed together for the duration of their marriage and so, "we may assume that both derive benefit from the marriage while it continues, and that therefore both have claims on the surplus value remaining at its end."[16] To attempt to retrospectively measure relative spousal contributions over the life of marriage, the Reporters rightly conclude, "would be impractical if not impossible."[17]

Beyond this, the *Principles* defer the question of whether one ex-spouse should have an obligation to respond to the other ex-spouse's economic need to the discussion of compensatory payments set forth in Chapter 5.[18] However, if there is an economic loss for which a spouse is entitled compensation under Chapter 5, recompense may be provided through an offsetting award of property if the circumstances make a lump-sum property award more appropriate than a longer term payment plan.[19] The "property offset" is just a choice of payment method and nothing more. The determination as to whether a spouse is entitled to a compensatory payment is separate from a spouse's basic entitlement to share in accumulated marital property. Accordingly, the core rationale for equal sharing of marital property appears to be a contribution principle—but rather than defining contribution to narrowly refer only to financial additions, the *Principles* recognize equal contribution to the marital relationship as a whole.[20] As the basis for property division at divorce then, the *Principles* openly adopt a view of marriage defined by pervasive sharing where both spouses provide valuable and widely variable resources to the marriage.

B. Contribution and Merger as the Basis for Compensatory Payments between Spouses

It is often the case that upon divorce a lower- (or no-) earning spouse is urgently in need of economic support. Yet it is not clear why, in a unilateral no-fault system of divorce, the former spouse should be responsible to respond to such a need. Through the availability of alimony, current divorce law (in theory) reflects the intuition that, after a long-term marriage, a higher-earning spouse may have some ongoing responsibility for the financial situation of the

15. ALI PRINCIPLES 1997, *supra* note 5, § 4.15 cmt. c.

16. *Id.*

17. *Id.*

18. *See id.* § 4.15 cmt. d.

19. *See id.* § 5.11(2)(c).

20. Another section of the property division chapter builds upon this principle: section 4.18 recharacterizes separate property as marital property over time in long-term marriages. *See id.* § 4.18. The rationale for this more extensive sharing is the same as that for compensatory payments discussed below. *See* ALI PRINCIPLES 1997, *supra* note 5, § 4.18 cmt. a.

lower-earning spouse. The challenge, accepted in the *Principles*, is to unpack the basis for that intuition.

1. Economic Conduct as a Basis for Ongoing Financial Obligations Following Divorce

In some fact patterns analyzed in the *Principles*, particularly given the modern inclination to link economic theory and family interactions,[21] it is fairly easy to explain the basis for recognizing one spouse's entitlement to share in the higher-earning spouse's income for a period of time following divorce. A particularly important and recurring fact pattern of this kind is the situation where one spouse (usually the wife) limits or forgoes development of a career in the labor market and instead dedicates her efforts to providing primary care for children, while the other spouse (usually the husband) provides income from market employment. The parties' joint economic and non-economic choices are evident and were made for the purpose of benefiting the interests of the entire family as a unit. However, at divorce, unless there is reallocation of the family wage from market labor, only one spouse—the home-focused spouse—will bear the serious economic losses that flow from these joint decisions. As the Reporters explain, "[t]his result is inappropriate because the cost of raising the couple's children is their joint responsibility."[22] Additionally, this kind of result is comfortingly familiar in contract law—the wife has relied, to her economic detriment, on an implicit promise of continued access to the family wage. Accordingly, the *Principles* provide a claim of entitlement to compensation for lost earning capacity (presumptively) experienced by a primary caretaker.[23]

The *Principles* also provide a claim in some circumstances for compensation for one spouse's financial contributions to the other spouse's education or training.[24] The basis for this compensation scheme should also be relatively noncontroversial. Like compensation for lost earning capacity by a primary caretaker, where a spouse receives economic support to pursue career enhancements, the couple has engaged in clear economic conduct and choices based on the expectation of a shared financial future. Therefore, a spouse who provides funds for tuition or other direct costs of the other spouse's education or training, or who provides the principal economic support of the family while the career enhancement is acquired, is entitled to reimbursement for such contributions, as long as the enhancement occurred relatively close to the time of the divorce.[25] Although the *Principles* do not categorize these compensation schemes in this way, the situations described in this section are quite clearly responsive to the parties' implied joint economic decisionmaking and conduct.

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21. *See, e.g.*, Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995).

22. ALI PRINCIPLES 1997, *supra* note 5, § 5.06 cmt. a.

23. *Id.* § 5.06

24. *See id.* § 5.15.

25. *See id.* To make a successful claim for reimbursement the claimant must also demonstrate that there was in fact a "substantial" enhancement to a career. *Id.*

2. Beyond Economic Conduct

A theory of wealth allocation based on evident financial exchanges between spouses such as those just described is likely to be persuasive in modern times based on its connection to readily-accepted market principles. However, the farther divorce wealth allocation theory moves away from fact patterns that demonstrate fairly clear and discrete economic exchanges, the more difficult the case has been for justifying an obligation for spousal compensation following divorce. In Section 5.05, the *Principles* provide for compensation for loss of the marital standard of living,[26] after a marriage of sufficiently long duration. This entitlement scheme implicitly reflects a theory about the meaning and function of the marital relationship that, at times, extends well beyond the spouses' economic conduct. In fact, the Reporters explicitly reject economic exchange as the basis for this kind of compensatory spousal payment: "exchange terms seem inapt because the parties define their relation by its non-financial aspects even though financial sharing is an important part of it."[27] If this scheme is to be accepted by legal decisionmakers (who likely have a strong economic orientation), a compelling case for its rationale must be made. However, in crucial ways, the *Principles* fail to clearly and convincingly develop a foundation for income sharing in the absence of evident economic conduct. The comments following Section 5.05 do provide partial explanations that have the potential to provide a cogent theory of marriage. The discussion below offers some ideas to fill in what the *Principles* leave unsaid.

Section 5.05 recognizes that following divorce a lower-earning spouse loses the expectation of the standard of living that was sustained by the higher-earning spouse's income. Although the economically inferior spouse may often seem "in need" of assistance, the Reporters abandon the current law's prevalent explanation of need as the basis for alimony.[28] The concept of need, the authors explain, is flawed in two respects: 1) simply observing that a former spouse is in need does not explain why an ex-spouse should be responsible to meet that need rather than the needy spouse's family, friends, or society; and 2) how do we define need?[29] "Need" could be limited to the basic necessities of life, or it could mean that a spouse is unable to maintain the standard of living attained during the marriage. Rather than basing alimony claims on the unsatisfying theory of need, the *Principles* reformulate the concept as compensation for losses that are disproportionately and unfairly borne by one spouse at dissolution.[30]

But what leads the Reporters to conclude that a loss has fallen "unfairly" on one spouse such that reallocation of loss is appropriate? One possible set of explanations is that of economic theory which animates the *Principles*' compensation structure for primary caretaker earning capacity losses and for reimbursement for financial contributions to career enhancements. However, the Reporters' sense, reflected in Section 5.05, that a significant disparity in former spouses' financial prospects is unjust is not based primarily on economics. The

26. *See id.* § 5.05.
27. ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. b.
28. *Id.* § 5.02 cmt. a.
29. *See id.* Introduction at 8-9.
30. *See id.*

Reporters offer theories of "differential risk" and "the principle of gradually merging responsibility" as the rationales for entitlement to income sharing after marriages of sufficient duration. Although the rationales are at times quite vague, having been only partially explicated, it can be inferred that it is the nature of non-economic conduct that occurs in (long-term) marriages, presumably in addition to economic conduct, that justifies income sharing for a period of time after divorce.

a) Differential Risk

In part, the Reporters attribute some courts' willingness to award alimony to a homemaker spouse in a long marriage to a perception that the homemaker faces a greater financial risk from the dissolution than does the "breadwinner" spouse.[31] Although the homemaker is the "classic" example, the risk differential applies to any economically dependent spouse.[32] At divorce, if the lower- or no-earning spouse loses access to the income of the higher-earning spouse, she will experience a severe financial loss whereas the higher-earning spouse will experience no loss, or one of much lesser magnitude, or perhaps even a gain.[33] The *Principles* take the position that, when the marriage exceeds a minimum duration, there should ordinarily be reallocation of this disparate loss of the marital standard of living.[34] The reallocation of loss is proportional to the length of the marriage in part because a wife's sense of financial loss itself increases with marital duration—her "economic dependence grows as the gap widens between the marital living standard and the wife's own earning prospects."[35] The longer the marriage, the greater the risk of loss differential. Restoration of undeveloped earning potential becomes more difficult as the wife grows older, whereas the husband is likely to have increased his earning capacity over a long marriage. Also, the wife's prospects for remarriage decline with time, while the husband's own remarriage prospects likely will not decrease to the same extent.[36]

This reasoning acknowledges that wives facing divorce are often financially vulnerable relative to their husbands, and recognizes a husband's obligation to mitigate this risk. Of course, simply observing this risk does not explain the basis for its reallocation. One explanation provided by the authors is that reallocating differential risk may reduce the probability of an economically superior spouse exploiting the economically inferior spouse within marriage.[37] The theory is that, to the extent that marital law provides for greater financial equality between spouses following dissolution of marriage, spouses will likely possess more equal bargaining power in the marriage and have equalized economic incentives for the success or failure of the marriage.[38]

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31. *See id.* § 5.05 cmt. c.

32. *Id.*

33. *See* Sugarman, *supra* note 6, and accompanying text.

34. ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. c.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 158 (1989)(explaining that economic inequalities between spouses often lead to inequalities in power).

However, there is another, more central, explanation embodied in the *Principles* for reallocation of the marital living standard loss. The *Principles* imply that the independent spouse has contributed to, or has accepted responsibility for, the vulnerability the dependent spouse faces at divorce.

b) The Principle of Gradually Merging Responsibility

The core explanation given in the *Principles* for compensation for loss of the marital standard of living (after long marriages) is that the way the marital relationship operates justifies recognition of financial obligations that survive for a period of time following divorce.

> The obligation recognized by this section . . . does not arise from the marriage ceremony alone, but takes longer to develop. As a marriage lengthens the parties assume roles and functions with respect to one another. When adults share enough of their life together they may mold one another as surely as parents affect their child. Eventually the molds harden. The nature and speed of the process must vary with the couple, but at its limits seems nearly inevitable. Few would urge a different analysis in the usual marriage of 35 years. The obligation. . . thus assumes no blameworthiness for the marital failure, just as the obligation to support one's child assumes no blameworthiness for the child's conception. It is enough to recognize that the parties' situation at the end of their marriage is the consequence of both their acts to conclude that it is their joint responsibility.[39]

The Reporters identify this theory as "the principle of gradually merging responsibility."[40] The theory is very broad-based and includes several important dimensions for examination. In fact, the theory appears to be a conglomeration of various theories of marriage.[41] The focus here will be on three facets of the "merger" principle. First, the theory posits that joint conduct has created the financial situation spouses find themselves in at divorce. Although the *Principles* suggest that contribution is too problematic to be maintained as a justification,[42] their "joint causation" thesis can be characterized as an expansive joint contribution rationale; together, spouses contribute to both the gains and losses in a marriage and so should share them jointly at divorce.[43] Second, the authors seem to accept, in some situations, a recognition of responsibility for a spouse's financial situation even if no causal connection between conduct in the marriage and the parties' relative financial positions at divorce can be established. Finally, when combined with the theory of joint contribution—which is reflected

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39. *See* ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. c.

40. *See id.*

41. This may well be an effective way to develop a coherent theory. The challenge of developing a single cohesive theory has proved most difficult because our intuitions so often change depending on the fact pattern of marital conduct that is being considered. As soon as there is a theory that explains why the result in a particular fact pattern given seems appropriate, the suggestion of a variant of facts often makes the previous explanation seem inadequate. So, the search for a unifying theory has raged on with little resolution.

42. *See* ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. b.

43. This also corresponds closely with a marital (rather than business) partnership theory as suggested by Milton Regan. *See* Regan, *supra* note 2, at 2371-73. The Reporters acknowledge the parallels of the merger principles to both Regan's partnership theory as well as Stephen Sugarman's theory of merger over time. *See* Sugarman, *supra* note 6, at 149.

in the rationale justifying an equal property distribution at divorce—the *Principles* plainly espouse a particular model of marriage. Rather than depicting marriage as a largely individualistic endeavor, the relationship is portrayed as one defined by norms of interdependence, altruism, and sharing.

i) Joint Conduct, Joint Outcomes

For many, long-term relationships evoke an intuition that the relationship generates an obligation for at least rough equality in the parties' situations when the relationship ends. A crucial part of the explanation for this perception stems from common conceptions about how spouses behave in a long marriage. In important respects, many people perceive that individual conduct before marriage is dramatically transformed once marriage occurs and progresses. The decisionmaking process changes within marriage: it is no longer a simple question of whether a contemplated choice will be good (or bad) for the individual, but instead whether a decision will result in a benefit (or harm) for the two of them together. In marriage, spouses typically engage in a myriad of exchanges—economical and psychological—sharing labor (in and out of the market) and leisure. This collaborative conduct reflects the view that the resources each family member has access to are available to serve the needs of the entire family regardless of each member's individual contribution to the resource.

The *Principles* seem to have this image of marital conduct in mind in formulating the conclusion that "[i]t is enough to recognize that the parties' situation at the end of their marriage is the consequence of both their acts to conclude that it is their joint responsibility."[44] From this perspective, the principle of joint contribution to the financial outcome each spouse faces at divorce is almost indistinguishable from the Reporters' rationale for equal sharing of property at divorce. Recall that the equal property division the Reporters advocate is based on the premise that "both spouses contributed significantly to the entire relationship, whether or not they contributed [directly] to accumulation of property during it."[45] The core concept is the same for compensatory spousal payments following a long marriage—sharing in marriage leads to sharing its consequences at divorce.

Many or perhaps most people would likely agree that spouses engage in joint conduct of the kind assumed in the *Principles*. However, if cooperative behavior is a major factual premise underlying wealth reallocation upon divorce, then a logical reaction is that the factual assumption should be rebuttable by evidence that the parties in a particular marriage did not conform to this model of behavior. In this way, the "joint causation" rationale behind compensatory spousal payments shares the same difficulties the current contribution rationale labors under.[46]

Although the Reporters assert that they are rejecting the notion of contribution as the basis for compensatory spousal payments,[47] it appears that their rejection is not of the contribution principle itself, but rather is of the more nar-

44. ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. c.

45. *Id.* § 4.15 cmt. c.

46. *Id.* §§ 4.15 cmt. c, 5.05 cmt. b.

47. *Id.*

row conception of contribution evident in modern marital law. The authors explain that the modern contribution principle is flawed as a factual basis for greater wealth reallocation at divorce because it often focuses on each spouse's financial contribution to the acquisition of economic resources during marriage.[48] This approach is problematic because, while in many cases it may be true that both spouses make financial contributions, such contributions are rarely equal and can be difficult to prove. In fact, it is frequently the case that one spouse makes little or no direct economic contribution to marital wealth.

Additionally, the trend in practice suggests that claims for property distribution are rarely defeated by a showing of unequal financial contribution.[49] Accordingly, the Reporters conclude that in the context of property division, "[i]t makes far more sense to ground an equal division presumption on the spouse's contribution to the entire marital relationship, not just to the accumulation of financial assets."[50] Furthermore, because of the difficulty of measurement (which would require a retrospective accounting of spousal conduct over the length of the marriage), the Reporters conclude that it is sensible to make an irrebuttable presumption of equal contribution to the relationship. However, in the context of compensatory spousal payments, the problem of a potential factual rebuttal is addressed only hazily and ultimately is left to vagaries of judicial discretion.

The presumption of entitlement under Section 5.05 suggests that the factual premise of joint conduct causing joint outcomes is assumed, requiring no specific showing that, in fact, such conduct occurred during marriage. If this factual assumption is tested against a fairly common fact pattern, it appears comfortably accurate. Imagine a married couple with no children who decide that the wife should become a full-time homemaker. The wife, having been employed in the early years of marriage as an insurance claims representative, leaves her employment and works only in the home, without compensation, for 15 years. If she re-enters the paid labor market at divorce, assume she might make roughly $30,000 annually whereas her engineer husband, having increased his earnings over the course of the marriage, might make roughly $85,000 a year.

Here, the *Principles*' theory of joint causation for each spouse's economic circumstance at divorce appears to be accurate. The wife's earning capacity loss was in fact caused by a joint decision that the wife abandon her insurance career and forgo development of the earning capacity that career would bring. Focusing on the husband's situation at divorce, however, it is less clear that joint acts caused his economic circumstance—arguably, he would he have been an engineer making $85,000 annually regardless of the marriage. But assume now that he worked long hours to advance his career with her taking up the slack in their personal lives, and that she directly supported his career by moving to several geographic locations for his career advancement and also entertained his clients and co-workers extensively. With these additional facts, his situation at divorce easily fits the joint causation model. Compensation for the wife's loss of the marital standard of living under these facts is particularly appealing. Like the earlier discussed examples of the primary caretaker spouse—and the supporting

48. *Id.*

49. *See id.* § 5.05 cmt. b.

50. ALI PRINCIPLES 1997, *supra* note 5, § 4.15 cmt. c.

spouse who contributed to the other spouse's education—the economic exchanges between the parties are evident.

However, as the facts depart from one spouse making clear and direct contributions to the other's economic success, it becomes more difficult to support a theory of joint causation. Another fairly common factual scenario that contradicts the joint contribution premise can easily be imagined. Assuming the initial facts described are the same, consider a variation on the factual scenario: instead of the wife becoming a homemaker during the parties' marriage, she remains in her position as an insurance representative. The parties did not move to advance the husband's career and the wife did not entertain clients and co-workers extensively. At divorce, after modest promotions, the wife earns $45,000 in the insurance field, and the husband earns $85,000 from engineering. This fact pattern arguably does not conform to the joint causation model. It might reasonably be suggested that the spouses would be in exactly the same disparate financial circumstances whether they were married or not.

ii) Constructing the Possible Meanings of "Merger over Time"

What should the result be if joint causation does not unambiguously justify reallocation of income? The *Principles* do not provide any guidance on this point. Two alternative interpretations of "the principle of gradually merging responsibility" can be constructed. Both support the view that the nature of marriage itself justifies an entitlement to income sharing for a period of time after divorce, notwithstanding the lack of evidence of joint conduct causing the spouses' relative financial outcomes.

The Reporters prominently depict marriage as a relationship of mutual contribution that profoundly shapes each individual spouse's identity: "[w]hen adults share enough of their life together they may mold one another as surely as parents affect their child. Eventually the molds harden. . . . [A]t its limits [the process] seems nearly inevitable."[51] This description suggests that the conclusion in the last factual scenario, that the wife (insurance representative) and husband (engineer) would be in the same positions regardless of marriage, cannot be supported. We simply cannot know whether the husband would be in the same situation without his wife's participation in his life, just as we cannot know who she might have been absent their marriage. Rather than engaging in a guessing game of "what ifs", it makes sense to rely on a common understanding about the way the marital relationship functions. Thus, it is fair to characterize his situation as well as hers, as flowing from their marriage—assuming that in most marriages a significant part of spousal behavior reflects reciprocal sharing and interdependence, and that each spouse's identity is powerfully shaped as a result. Spouses are who they are at the end of marriage at least in important part because of their having lived united lives within the marriage. Proving otherwise may well be impossible. The *Principles* broad presumption of entitlement seemingly advocates that this depiction of the nature of marriage be accepted as "the usual case."

This understanding may be what the Reporters meant by the principle of merger as the basis for income sharing after long unions, a concept they describe

51. *Id.*

as similar to scholar Stephen Sugarman's theory of merger over time.[52] His theory is that the longer spouses are married, the more their human capital is intertwined: "[a]fter a while, one can less and less distinguish between what was brought into the marriage and what was produced by it."[53]

However, even when faced with a lack of causal connection between marital conduct and divorce outcomes, an inclination for entitlement to income sharing following divorce may go well beyond recognition of the difficulties of factual proof of causation. At some level, regardless of whether a particular marriage in fact causes spousal economic circumstances at divorce or not, many intuit that that there ought to be joint responsibility for economic losses triggered by divorce. Another interpretation of "gradually merging responsibility," distinct from the first, flows from this possibility. Perhaps what happens in marriage is that spouses over time integrate many aspects of themselves into a cohesive "marital unit." This occurs where each spouse brings his or her individual strengths and weaknesses together and merges them to such an extent that each can be held responsible for whatever situation the other faces at divorce. Certainly, this kind of merger of economic and non-economic strengths and weaknesses occurs within many intact marriages. For example, married couples regularly pool their incomes, for good or bad, such that an economically-inferior spouse regularly shares the income of a higher-earning spouse.[54] The *Principles* provide that responsibility for this kind of marital merger should survive for a period of time following divorce.

One rationale for recognizing responsibility for spousal outcomes, arguably not caused by marital conduct, might be that spouses have impliedly consented to accept such responsibility as demonstrated by their "merger behavior" during marriage. This explanation is perhaps an elaborate extension of familiar liberal social contract theory: voluntary "acceptance" of responsibility is evidenced by a relationship of long-term sharing and interdependence. Both parties freely merged their lives and thus implicitly agreed to ongoing financial obligations during the period of time it will take to untangle the merger.[55]

However, the Reporters' theory of merger and responsibility may be read to encompass principles considered more radical than this: post-divorce obligation should be recognized even if the parties cannot really be deemed to have consented to it. In addition to Stephen Sugarman's theory of marital merger, the Reporters rely on principles from family law scholar Milton Regan's theoretical

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52. *Id.* § 5.05 cmt. c, reporter's note at 304.

53. Sugarman, *supra* note 6, at 159-60.

54. Deborah Rhode and Martha Minow explain this point:

> In an ongoing marriage, the entire family shares in the salary advantages . . . and benefits that disproportionately accompany male jobs. A wife is thus somewhat shielded from the full force of her disadvantages in a wage economy; she contributes her lower wages and uncompensated domestic labor to enhance the family's well-being without having to sustain herself and her children on that inadequate economic base.

See Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*: *Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 193 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (footnote omitted).

55. For a cogent description of social contract theory, and particularly its connection to feminist theory, see Regan, *supra* note 2, at 2344-49 (discussing in detail NANCY J. HIRSCHMANN, RETHINKING OBLIGATION: FEMINIST METHODS FOR POLITICAL THEORY (1992)).

work concerning marriage.[56] Recognizing marriage as a complex and special relationship that includes a host of economic sacrifices and plans as well as an "ethic of care" that goes beyond financial concerns, Regan explicitly argues for recognition of a community between ex-spouses that survives divorce for some time:

> The interdependence and vulnerability that marriage often creates can give rise to responsibility that is not adequately conceptualized as voluntarily assumed. Those in the realm of the family sometimes recognize, as well as consent to, obligation. Sharing one's life with another can create a special duty of care to ensure that one's partner is not seriously disadvantaged by the end of a relationship that so profoundly shapes a person's sense of identity and meaning. In this sense, the prior marriage itself can be a source of obligation, regardless of the discrete exchanges that occurred within it.[57]

In many instances, the obligation does not flow from consent, but exists because the special nature of marriage demands it. The Reporters' explanations of the principle of gradually merging responsibility reflect crucial aspects of this thesis. Perhaps the authors meant to incorporate these principles by referring to the "roles and functions" parties assume with one another, and by making the analogy that the spousal relationship of interdependence which significantly molds each spouse parallels the influence and corresponding obligation parents have to their children.[58] Furthermore, the Reporters' comments do not require proof of economic sacrifice or other marital "causation" for spousal income disparity: "[i]t is the income disparity itself, and not the reason for the disparity, that over time gradually enlarges her financial stake in the marriage. . ."[59]

iii) Advocating a Community Model of Marriage

As the foregoing discussion highlights at several points, the *Principles*' cumulative basis for post-divorce financial obligations vividly portrays a model of marriage defined by pervasive commitment, interdependence, and sharing that rejects a strict cost-benefit accounting. This model subscribes to values often associated with community ideology, emphasizing the importance of connections among humans as a defining component of human identity.[60] The model deemphasizes the principles of individual autonomy prevalent in the American tradition of individualism.[61] These two opposing models are admittedly stylized, as the complexities of human behavior cannot adequately be captured by two extreme depictions such as these. However, this framework can prove use-

56. ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. c.

57. Regan, *supra* note 2, at 2349.

58. ALI PRINCIPLES 1997, *supra* note 5, § 5.05 cmt. c.

59. *Id.*

60. When I refer to "community" norms in this piece I mean to refer quite simply to the notion I describe here—that interdependence and connections in human relationships is an important part of human identity that deserves emphasis, although certainly not emphasis that excludes other values.

61. *See generally* Elizabeth Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687 (providing an informative description of the basic components of liberal theory, communitarian theory and the liberal-communitarian debate).

ful in illuminating prevalent tensions in our thinking about marriage.[62] The competing views of atomistic individualism, defined by freedom from others, and community, defined by interdependence and connection to others, have been thoughtfully explored in the context of marriage elsewhere.[63] I raise the issue here simply to highlight that the *Principles* have now taken a strong position in this debate, recommending the policy choice that sharing principles and community norms be the prime values in the law of marriage and its dissolution.

Like many in the legal community and beyond who advocate a conception of marriage that is more inclusive of community values,[64] I believe this emphasis is the right one and has much to recommend it. This issue deserves fuller treatment than can be offered here, but it is worth highlighting two core rationales that recommend marital law's commitment to community norms. Perhaps the most convincing reason for embracing community norms in marriage is because many couples themselves have chosen the principles of interdependence and sharing as crucial components of their aspirations for, and behavior in, marriage.[65] One study suggests, for example, that most couples entering marriage see the relationship as an open-ended commitment to a shared life that will endure.[66] Most people would probably agree that marital behavior typically includes conduct described by the Reporters as the basis for compensatory spousal payments—a relationship reflecting mutual sharing and a host of exchanges and accommodations in which spouses forge essential constituents of their identities.

In addition to reflecting commonly held views of and behavior in marriage, the model of marriage chosen by law may have some influence in how members of society conceptualize the meaning of marriage. Regan's observation is apt: "Enforcing obligations that endure beyond marriage helps constitute this relationship as a special community, signaling that it involves a special commitment to the welfare of another."[67]

It may be that an assumption that the law can shape human behavior is unrealistic given the complexities and varying sources that animate individual conduct. Nonetheless, as Katharine Bartlett suggests:

> Marriage in this society is still an important ideal. Marriage rates remain high and most unmarried adults want, or expect, to marry. . . . The appeal of marriage makes it an important resource for transmitting and reinforcing the values of commitment and responsibility thought to be important to families and children.[68]

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62. *See, e.g.*, Milton C. Regan, Jr., *Boundaries of Care*: *Constructing Community After Divorce*, 31 HOUS. L. REV. 425, 430 (1994).

63. *See generally* Regan, *supra* note 62; Scott, *supra* note 61.

64. *See* Regan, *supra* note 62.

65. *See generally* BELLAH et al., *supra* note 1.

66. *See* Lynn Baker & Robert Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 444 (1993).

67. Regan, *supra* note 62, at 440.

68. Katharine T. Bartlett, *Saving the Family From the Reformers*, 31 U.C. DAVIS L. REV. 809, 815-16 (1998).

However gentle the nudge might be, "direction . . . is still important, even on a small scale, and incremental changes may produce cumulative effects."[69]

iv) Risk of Rejection of the Community Model of Marriage

Unfortunately, the Reporters do not make the case for why a community orientation is the one that should be embraced, nor do they clarify the degree of commitment to this model embodied in the *Principles*. In ignoring the need for clarity and persuasion to convince decisionmakers to accept this view, the Reporters may well underestimate the powerful influence that individualism has in shaping our conceptions about relationship—even in the community paradigm of marriage. This omission seriously decreases the likelihood that the reforms advocated in the *Principles* will ever be adopted.

Important aspects of modern divorce outcomes already reveal a strong individualistic orientation and, thus, a community framework is at a severe disadvantage. For instance, focusing on entitlement to post-divorce income sharing (an issue for which the *Principles* advocate dramatic and inevitably controversial changes) the law's current treatment of such claims demonstrates widespread reluctance to redistribute "the man's income."[70] As I have suggested at length elsewhere, this tendency is evidenced quite clearly in enhanced earning capacity cases.[71] In situations where one spouse (the husband) earns a professional degree with the support of the other spouse (the wife), courts regularly conclude that income and enhancements to income are individually, rather than collectively, earned and are owned by the spouse who has nominal title to the degree. This conclusion is manifest in the typical results in these kinds of cases, where, despite frequent assertions to the contrary and facts that demonstrate pervasive sharing and contribution by both parties, wives are left with no successful claim to reallocation of wealth based on their participation in the acquisition of the wealth enhancement or in the marriage more generally.[72]

The lessons of the modern law's resistance to meaningful recognition of women's entitlement to post-divorce income sharing suggest that to be successful on this front, any reform effort must minimize opportunities for denying a claim to such entitlement. However, the *Principles* do not accomplish this objective. Although the core theories behind the *Principles'* wealth reallocation schemes concerning property and income distribution embrace community norms in marriage, the structure of the rules themselves provides plentiful opportunities for decisionmakers to infuse their judgments with the tenets of individualism. Ultimately, the effect is that the door has been opened to deny claims of entitlement to income sharing and, accordingly, the law's commitment to community ideology is at risk of rejection on a case by case basis, even if the *Principles* and their underlying theory are accepted.

On one hand, Section 5.05(1) recommends a presumptive entitlement to compensatory spousal payments in long-term marriages. The nature and op-

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69. Regan, *supra*, note 62, at 449.

70. *See* Williams, *supra* note 4, at 2234.

71. *See generally* Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. Rev. 59 (2001).

72. *See id.* at 103-07.

eration of the marital relationship itself, whether it is based on an assumption of joint contribution or on the perhaps distinct concept of "merger over time," is the central basis for entitlement. No specific evidence of the way a particular marriage in fact operated is needed—its function is presumed. On the other hand, under Section 5.05(4), the presumption of entitlement is rebuttable by facts, set forth in written findings, that establish that the presumption's application in a particular case "would yield a substantial injustice."[73] Only one illustration is provided in the Principles to illuminate when a departure from the entitlement presumption might be warranted. The example given is that of a couple who are married for twelve years, easily satisfying the minimum duration (six years) required by a hypothetical state statute to trigger the presumption, and, who have at least a 25 percent disparity in their incomes at divorce.[74] However, the couple lived separate and apart after only two years of marriage and, in the intervening years, did not pool income or expenses.[75] The authors do not offer an explanation as to why this example justifies deviation from the presumption. It can only be assumed that the conduct within this hypothetical couple's marriage is not perceived to conform to the joint contribution or merger premises.

The example given is extreme because the hypothetical couple really did not share their lives except for the first two years of marriage. Presumably, this factual scenario is rare. Nonetheless, the illustration demonstrates that under the *Principles*, the joint contribution and merger norms attributed to a typical marriage are open to factual dispute. No guidance is given on how to resolve the much more difficult situation I described earlier, where the engineer husband and the insurance representative wife would arguably have been in the same disparate economic circumstances regardless of the marriage. Taking the rebuttable presumption to its logical extension with these facts, a court might justify deviation from the presumption based on the conclusion that "joint acts" during marriage did not cause the parties' financial circumstances at divorce—life did.

Such a reading reasonably flows from the generalized theory offered by the Reporters, particularly because the notion of joint causation is the clearest aspect of the authors' articulation of the principle of gradually merging responsibility. This is probably not the result that the Reporters intended. It appears that the Reporters anticipate that, in the usual case, the presumption will not be overcome because the factual premises underlying the compensatory scheme will be present in the vast majority of cases. Section 5.05 comment a explains: "significant marital duration and income disparity are ordinarily adequate of themselves to justify the award."[76] Since the presumption is raised only once the thresholds of marital duration and income disparity have been met, it is not clear what facts justify deviation from the presumption. The Reporters' prediction that the presumptions will serve to make the law governing compensatory payments "consistent and predictable in application" may prove to be inaccu-

73. ALI PRINCIPLES 1997, *supra* note 5, § 5.05(4).

74. *Id.* § 5.05 cmt. e, illus. 2.

75. *Id.*

76. *Id.* § 5.05 cmt. a.

rate.[77] In the rules' current formulation, entitlement to income sharing based on long-term marriages is made vulnerable to the potential vagaries of judicial discretion on a case-by-case basis.

At a minimum, the *Principles* urgently need a wider array of specific illustrations that provide courts with a greater understanding of the theory behind income sharing following divorce and, most importantly, of the circumstances that justify deviation from the law's commitment to the primacy of community in marriage. Moreover, a detailed exposition of the theory and the sharing principles that shape the proposed law would also provide the necessary clarity for understanding the rules and convincing decisionmakers to adopt them. Finally, as they have done with property division, the *Principles* could make the presumption of entitlement subject to only a very few specifically defined exceptions, thus largely foreclosing the possibility of discretionary and variable policy judgments by individual judges. In these ways, the promise of the positive and much needed reforms offered by the *Principles* may come closer to realization.

77. *Id.*