

# VICTIMS, BREEDERS, JOY, AND MATH: FIRST THOUGHTS ON COMPENSATORY SPOUSAL PAYMENTS UNDER THE PRINCIPLES

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## I. INTRODUCTION

Marriage is a risky proposition. A promise may be broken, a trust betrayed, a safe haven lost. For homemakers, the risks are even greater, for a failed marriage may mean not only psychic loss, but severe economic loss as well. Such is the penalty for limiting one's market participation in order to shoulder the bulk of family responsibilities. Most often, this penalty is imposed on women, since homemakers are typically female. As marriage endures, a homemaker's risk increases, for even as her economic vulnerability grows, culture and law combine to create incentives for her husband to shed her.<sup>1</sup> While this storyline certainly does not describe all married women, it is common enough to have sparked concern among numerous feminist commentators.<sup>2</sup>

Now comes the American Law Institute with its *Principles of the Law of Family Dissolution*.<sup>3</sup> The *Principles* frankly describe the disparate economic positioning of many divorcing men and women with a candor that forces a much-needed realism into reform discourse. Generally avoiding questions of the moral legitimacy of gender roles, the *Principles* focus instead on the practical realities of homemaking.<sup>4</sup> The costs of homemaking, as the *Principles* note, are most apparent in the case of a traditional wife in a long-term marriage who foregoes market investment and consequently "is likely to be left at divorce with undeveloped earning potential."<sup>5</sup> Although these "Betty Crockers"<sup>6</sup> may be

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1. Lloyd Cohen, *Marriage, Divorce, and Quasi-Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 273-78 (1987); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 40-44 (1989).

2. See, e.g., Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Joan Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383 (1994).

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

4. See generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* (2001).

5. ALI PRINCIPLES 1997, *supra* note 3, § 5.05 cmt. c.

partially able to recoup their market losses, "the process, neither easy nor assured, grows more difficult with the passage of time."<sup>7</sup> Less immediately apparent, but no less real, are the homemaking costs experienced by wives "in the more usual modern arrangement in which both spouses are employed outside the home."<sup>8</sup> Even in this two-working-parent family, a woman typically serves as the primary caretaker of children, a role that often leads her to "choose work that will fit around . . . family responsibilities, a complication and impediment to occupational advancement not faced by most men."<sup>9</sup> As the *Principles* observe, the caretaking role "typically results in a residual loss in earning capacity that continues after the children no longer require close parental supervision."<sup>10</sup> In these observations, the *Principles* formally acknowledge what even brief reflection should disclose: people who spend time doing the cooking, the cleaning, the washing, the shopping, and the reading of bedtime stories to small persons have less time to invest in a career. Recognition of this reality and its market implications is critical to achieving fairness at divorce.

Current divorce statutes typically authorize courts to divide marital property and award alimony under a broad discretionary standard that suggests relevant factors, but ultimately defers to an individual judge's sense of fair play.<sup>11</sup> Not the least of the dangers inherent in such a system is the possibility that an egalitarian-minded, well-intentioned judge will unrealistically assume spouses are equally opportuned at divorce. Such a judge may equally divide minimal marital property, and award little or no alimony. Each spouse then, theoretically at least, will enjoy a clean break and a fresh start, though on a decidedly different economic footing. The shield that once protected the married homemaker from her market opportunity costs is thus abruptly removed, and she is left alone to bear those costs,<sup>12</sup> even as her husband is left alone to enjoy any gains resulting from his fuller market participation. If the law incorrectly assumes such husbands and wives are equally positioned at divorce, it effectively penalizes the wife whose human capital has deteriorated during marriage and rewards the husband whose human capital has increased. Such a scenario goes far in explaining the persistently troubling statistics on the disparate financial impact of divorce on men and women,<sup>13</sup> and its possibility haunts every homemaker who negotiates a divorce settlement.<sup>14</sup>

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6. See Cynthia Lee Starnes, *Reflections on Betty Crocker, Soccer Mom and Divorce: A Message from Detergent Manufacturers*, 1997 WIS. L. REV. 285.

7. *Id.*

8. *Id.*

9. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, *WOMEN IN THE AMERICAN ECONOMY* 7 (1986).

10. ALI PRINCIPLES 1997, *supra* note 3, § 5.06 cmt. a.

11. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 288 (1987) (authorizing a court to "equitably apportion" property); see also *id.* § 308(a)-(b), 9A U.L.A. 446 (providing that a court "may" award maintenance "in amounts and for periods of time the court deems just").

12. ALI PRINCIPLES 1997, *supra* note 3, § 5.06 cmt. a.

13. In 1985, Lenore Weitzman reported that women and children's standard of living dropped by 73% the first year after divorce, while men's standard of living rose by 42%. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985). While Weitzman's figures were controversial, most critics attacked the extent of the reported disparity, rather than its existence. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 19-25* (1991) (citing a study

The ALI's answer to this scenario is a detailed set of presumptive alimony rules designed to ensure a more equitable allocation of loss. Even as we applaud the *Principles'* frank realism and bold effort to restructure the law of alimony, however, we critics must begin the process of questioning them. Especially deserving of first blush scrutiny is the *Principles'* choice of a victimization model rather than one based on equal partnership, its breeder/non-breeder dichotomy, its remarriage penalty, and its quantification methodology. Such scrutiny hopefully will guide reform rather than deter it, and so ultimately facilitate the *Principles'* laudable goal of a more equitable sharing of the economic risks of marriage.

## II. REDESIGNING ALIMONY

Chapter 5 of the *Principles* offers an ambitious new scheme for alimony, which is recast as compensatory spousal payments. The overarching goal of this chapter is to replace the need-based, discretionary standard of current law with a set of more carefully tailored presumptive rules designed to allocate loss "according to equitable principles that are consistent and predictable in application."<sup>15</sup> This new regime is detailed in two major topics. Generally, Topic 2 applies to "longer" marriages while Topic 3 applies to "shorter" ones.<sup>16</sup>

Topic 2 identifies three types of loss for which compensation is presumptively appropriate: (1) a loss of marital living standard in a marriage of "sufficient duration";<sup>17</sup> (2) an earning capacity loss incurred by a primary caretaker of children;<sup>18</sup> and (3) an earning capacity loss incurred by a spouse caring for a "sick, elderly, or disabled third party in fulfillment of a moral obligation."<sup>19</sup> These Topic 2 awards generally measure loss by calculating the spouses' income disparity and multiplying that figure by a "durational factor" based on the length of the marriage or the caretaking period.<sup>20</sup> Each Topic 2 section invites states to adopt a "rule of statewide application" to establish both the triggering parameters of the presumption of entitlement<sup>21</sup> and the quantification mechanism for a resulting award.<sup>22</sup>

Unlike their Topic 2 counterparts, Topic 3 awards will likely be available only to a small group of qualifying spouses. Topic 3 authorizes compensation for: (1) a spouse who divorces before receiving a "fair return" on an investment

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showing a 30% temporary decline in women's living standards and a 10 to 15% rise in men's living standards). Recently, Weitzman acknowledged that the numbers were actually closer to 27% and 10%, respectively. See Katherine Webster, *Post-Divorce Wealth Gap Was Wrong, Agrees Author*, SEATTLE TIMES, May 19, 1996, at A3.

14. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952-54 (1979).

15. ALI PRINCIPLES 1997, *supra* note 3, § 5.02(1).

16. *Id.* § 5.02 cmt. a.

17. *Id.* § 5.05.

18. *Id.* § 5.06.

19. *Id.* § 5.12.

20. *Id.* §§ 5.05(2)-(3), 5.06(2), (4), 5.12(2).

21. This triggering factor is the length of the marriage in section 5.05 and the length of the caretaking period in sections 5.06 and 5.12. ALI PRINCIPLES 1997, *supra* note 3, §§ 5.05-06, 5.12.

22. *Id.* §§ 5.05(2)-(3), 5.06(2), 5.06(4), 5.12(2).

in the other spouse's earning capacity<sup>23</sup> and (2) a spouse who is disparately able to recover her premarital living standard after a short marriage.<sup>24</sup> These sections appear designed to protect two paradigmatic claimants: (1) the spouse who supported a mate through professional school and who divorces before the degree or license generates significant property,<sup>25</sup> and (2) the spouse who relocates to further the other spouse's career, while compromising her own.<sup>26</sup> Given their restitutionary basis, Topic 3 awards are nonmodifiable.<sup>27</sup>

### III. RECASTING BEGGARS AS VICTIMS

The *Principles* charge much of the inadequacy of current law to its failure to identify a conceptual basis for alimony.<sup>28</sup> Current alimony statutes typically empower a judge to award alimony upon a claimant's demonstration of need,<sup>29</sup> though they offer no explanation for the implicit tenet that one party is obliged to redress the other's need.<sup>30</sup> While alms giving may be morally ennobling, it is not generally legally compelled. The law's failure to provide a reasoned basis for alimony combines with the broad discretionary powers of trial courts to create a system in which alimony is hugely and capriciously unpredictable.

The *Principles'* solution to this problem is to conceptualize alimony as compensation for loss. So viewed, alimony's purpose is the "equitable reallocation of the losses arising from the marital failure,"<sup>31</sup> a characterization that "transforms the claimant's petition from a plea for help to a claim of entitlement."<sup>32</sup> According to its drafters, however, this new model does less to change the need-based scheme of current law than to explain it.<sup>33</sup> The "intuition that the former spouse has an obligation to meet need," they reason, "arises from the perception that the need results from the unfair allocation of the financial losses arising from the marital failure."<sup>34</sup> The *Principles'* solution is thus to recast the beggar of current law as a victim.

While there is little doubt that current law suffers from the absence of a rational basis for alimony, the *Principles'* answer to this problem may not be the

23. *Id.* § 5.15.

24. *Id.* § 5.16.

25. *Id.* § 5.15 cmt. a.

26. *Id.* § 5.16 cmt. b, illus. 2.

27. ALI PRINCIPLES 1997, *supra* note 3, §§ 5.15(5), 5.16(5).

28. *Id.* § 5.02 cmt. d.

29. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 308(b), 9A U.L.A. 446 (1998). (authorizing a court to award maintenance after considering factors including the claimant's financial resources, age, physical and emotional condition and the "time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment").

30. *See* Ellman, *supra* note 1.

31. ALI PRINCIPLES 1997, *supra* note 3, § 5.02 cmt. a.

32. *Id.* The extent to which this award is actually an entitlement, is cast into question, however, by later provisions authorizing termination of a spousal award. *See infra* notes 61-74 and accompanying text.

33. ALI PRINCIPLES 1997, *supra* note 3, § 5.02 cmt. a. Given the inconsistencies in existing law, however, the *Principles'* claim may demonstrate more modesty than accuracy, as the consistency and predictability they champion would themselves work a dramatic change in existing law.

34. *Id.*

best one. Since the vast majority of alimony claimants are women,<sup>35</sup> the *Principles'* victimization model makes a statement about a woman's value in marriage, and it is a disparaging one. A wife's right to income sharing depends, not on her status as a stakeholder in marriage, but, rather, on her claim that her loss is severe enough to require her husband, the true stakeholder in the relationship, to take responsibility for her. Like the "progressive" rehabilitative alimony statutes of no-fault divorce laws, the underlying theme is that a damaged woman requires compensation and, perhaps, rehabilitation so that she may "rise from vice to become a sound, productive citizen."<sup>36</sup> The supporting and disturbing model is that of breakdown and repair, failure and success, turpitude and redemption.

The *Principles'* decision to cast alimony claimants as victims might be less objectionable if it were more necessary. It is not. A sounder model for income sharing could be based on a view of spouses as equal partners. As equal partners, spouses presumptively make many mutual commitments, involving emotional, spiritual, and sexual issues, as well as the financial commitment to share family income.<sup>37</sup> Under a partnership model, a spouse with disparately low earnings is neither a beggar nor a victim, but rather, an equal stakeholder and contributor in marriage entitled at divorce to share any gains the marriage produced.<sup>38</sup> Numerous commentators<sup>39</sup> have urged such a model, loosely drawn from contract or partnership principles.

As an example of the essential differences between the *Principles'* victimization model and a model based on equal partnership, take the case of the traditional marriage between a homemaker, whose market earnings have been minimized by long term caretaking responsibilities, and a breadwinner, whose earnings have been maximized by more concerted market participation. Under the *Principles* this homemaker's right to alimony would depend on her status as a victim of marriage, i.e., on her lost opportunities, including her "lost opportunity to have had children with someone with whom she would enjoy an endur-

35. The evidence is that alimony has never been awarded to more than a small proportion of divorcing women. In 1990, the Bureau of the Census reported that only 16.8% of the 19.3 million ever-divorced and currently separated women (as of 1987) were entitled to receive alimony under the divorce decree. BUREAU OF CENSUS, U.S. DEP'T COMMERCE, CURRENT POPULATION REPORTS - CHILD SUPPORT AND ALIMONY 11 (1990).

36. See Starnes, *supra* note 2, at 98.

37. See Williams, *supra* note 2, at 404, (stating that "[a]t divorce, the family wage is abruptly re-defined as the personal property of the husband.>").

38. The *Principles'* general rejection of an expectation model may be due in part to their rejection of the contract model that would support it. Observing that "contract principles allow an expectation award only against a party in breach," the drafters conclude that a contract model conflicts with the principle of no-fault divorce law. ALI PRINCIPLES 1997, *supra* note 3, § 5.05 cmt. b. This is not necessarily true. Actually, contract itself adopts a no-fault approach to remedies in its refusal to award punitive damages. Fundamentally, contract law recognizes the right of a party to end the contractual relationship and imposes no penalty on the party who chooses to do so, often for reasons of self-interest, including efficiency. While the contracting party is not compelled to continue the contractual relationship (i.e., specific performance of the contract is not ordinarily ordered) she must compensate her contract partner for her nonperformance. In the context of marriage, nonperformance or breach of the economic compact of marriage could be defined as a refusal to share the family wage. The remedy for such a "breach" would be based on some degree of income sharing.

39. See, e.g., Singer, *supra* note 2; Starnes, *supra* note 2; Williams, *supra* note 2.

ing relationship."<sup>40</sup> The focus is on injury, and the determinative issue is the extent to which the homemaker has been damaged. Under a partnership model, this same homemaker's right to alimony would depend on her status as an equal stakeholder and contributor to marriage.<sup>41</sup> The focus is on gain, i.e., the family wage, and the determinative issue is the extent to which the homemaker's status as an equal partner entitles her to share that wage.

While it is important to acknowledge the market costs many women incur during marriage as they prioritize family responsibilities, it is equally important that these women not be cast as losers. By choosing a model that characterizes alimony claimants as victims rather than equal partners, the *Principles* send an unnecessary and disdainful message to married women whose homemaking role compromises their ability to earn market wages.

#### IV. THE BREEDER<sup>42</sup>/NON-BREEDER MODEL

In what is surely a well intentioned, if misguided, effort to ensure that homemakers are fairly compensated for their lost opportunities, the *Principles* establish a two-tier alimony scheme that distinguishes breeding women from non-breeding ones. Good intentions will not rescue this scheme from its offensive concept nor from its problematic application.

Section 5.06 authorizes compensatory spousal payments for the spouse with an "earning capacity loss arising from his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse."<sup>43</sup> Under this section, a "presumption of entitlement arises" if: (1) marital children lived with the claimant for a minimum period specified in a "rule of statewide application"; and (2) the claimant's earning capacity is "substantially less" than that of the other spouse.<sup>44</sup> This presumption does not arise, however, if a court determines that the claimant did not provide "substantially more than half" of the total care both spouses together provided for the children.<sup>45</sup> An award under section 5.06 may be combined with a section 5.05 award (based on marital duration and income disparity),<sup>46</sup> though the total award may not exceed the maximum authorized by section 5.05.<sup>47</sup> Thus, the effect of section

40. ALI PRINCIPLES 1997, *supra* note 3, § 5.06 cmt. e.

41. In many cases, this contribution will include performance of a disproportionate share of the parties' joint parenting responsibilities.

42. See *In re Marriage of Branter*, 136 Cal. Rptr. 635, 637 (Cal. Ct. App. 1977) ("A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime . . .").

43. ALI PRINCIPLES 1997, *supra* note 3, § 5.06; see also *id.* § 5.12 (discussing third parties in general and creating a similar accelerated right to income-sharing for a spouse who has cared for third parties).

44. *Id.* § 5.06(2).

45. *Id.* § 5.06(3).

46. *Id.* § 5.06(5).

47. *Id.* Topic 3 awards are unavailable to the spouse whose "aggregate entitlement under Topic 2 is *substantial*." ALI PRINCIPLES 1997, *supra* note 3, § 5.03(4)(b) (emphasis added). One may wonder, of course, what constitutes a *substantial* award.

5.06 is to authorize accelerated compensation for the primary caretaker of minor children.<sup>48</sup>

Since the vast majority of primary caretakers are women,<sup>49</sup> section 5.06 makes a statement about women and it is a disturbingly regressive one. A woman's right vis-à-vis her husband depends on whether she has borne him a child.<sup>50</sup> In effect, the *Principles'* breeder/non-breeder model conditions a woman's status as a stakeholder in marriage on her ability to establish an attachment to a child. Under this scheme, women take on rights through their children rather than through their individual adult contribution to the marital partnership. Women who cannot establish an attachment to a child take on a lesser status than those who can. The legal system, evidently, has less interest in furthering or protecting a woman's stake in marriage to the extent it is separate from a child-bearing function.<sup>51</sup> This message devalues all women.

The section 5.06 decision to disfavor non-breeding women seems curiously inconsistent with the *Principles'* general refusal to engage in a post hoc appraisal of the value of marital roles. "Divorcing individuals," the drafters observe, "are likely to believe that the allocation of resources and responsibilities during their marriage was unfair."<sup>52</sup> It is only when the marriage ends and disparate earning potential revealed that the parties argue, possibly for the first time, an unfair distribution of labor during the marriage. The *Principles* wisely reject such contentions,<sup>53</sup> reasoning that any spousal complaint about marital roles is undermined by the reality of unilateral divorce which "makes it impossible for either spouse to impose an inequitable arrangement on the other."<sup>54</sup>

Yet in section 5.06, the *Principles* evidence a willingness to engage in the very post hoc evaluation of marital roles they disdain. "The spouse who sacrifices career prospects to care for the couple's children, in reliance upon the other spouse's income, has a claim for that reliance loss" the drafters reason, but "the spouse who sacrifices career prospects to pursue a passion for golf, in reliance upon the other spouse's income, does not."<sup>55</sup> Evidently, the *Principles* are willing to set aside their objections to post hoc evaluations of the spouses' roles when necessary to discount the claims of non-breeding women. Yet, according to the *Principles'* own reasoning, if the parties found the distribution of labor in the childless marriage inequitable, they could have ended it. Moreover, the *Principles'* report card will sometimes mistake the self-indulgent spouse for the selfless

48. *Id.* § 5.06. Section 5.12 creates a similar right to income-sharing for a spouse who has cared for certain third parties, a situation that presumably will be much less common than that giving rise to a claim under 5.06. *Id.* § 5.12.

49. See Silbaugh, *supra* note 2, at 8-14; David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?* 42 FAM. REL. 323, 326 (1993).

50. The seriously offended might suggest that the next step is to assert that the *most* valuable women are those who have borne a *male* child.

51. One might argue that such a view relegates childless marriages to the second class status largely reserved for same-sex relationships. For this thought, I owe my colleague Mae Kuykendall.

52. ALI PRINCIPLES 1997, *supra* note 3, § 5.02 cmt. c.

53. *Id.* § 5.06 cmt. d (stating that "[m]arital stories have countless variations, but the measure of recovery cannot be made to turn on an inquiry into their details").

54. *Id.* § 5.02 cmt. c.

55. *Id.* § 5.03 cmt. b.

one, for even as it weeds out the golfing wife, it weeds out the hard-working humanitarian wife who devoted long hours to the homeless, the parentless, and the AIDS-stricken, perhaps with the encouragement of her spouse. Neither the parties nor the *Principles* wisely engage in post hoc value judgments of the parties' "[m]arital stories [with their] countless variations."<sup>56</sup>

In addition to the conceptual concerns it raises, section 5.06 raises serious practical concerns. Section 5.06 allows a spouse to avoid a presumption of entitlement by showing that the claimant did not perform a disproportionate share of parenting responsibilities.<sup>57</sup> One can imagine the temptation, especially in high stakes or other contentious cases, to litigate questions such as: Did Mom perform 60% or only 40% of the caretaking? Does one hour of coaching Little League equal one hour of reading bedtime stories, of cooking family meals, of washing children's clothes, of helping with the homework, of vacuuming the living room? These questions are unanswerable and inappropriate.

All these concerns might be minimized if section 5.06 were really necessary to achieve equity for a homemaker. It is not. Section 5.05 *already* compensates a spouse, including a primary caretaker, for a disparate loss of the marital living standard. Any disparity in earning capacity caused by caretaking will thus already provide a basis for recovery under section 5.05. If the progression of income sharing under section 5.05 is too slow to achieve equity for primary caretakers, then it should be accelerated for all claimants. Mothering is clearly a valuable social function, and the *Principles'* effort to force recognition of the costs of caretaking is an important contribution to reform efforts. Nevertheless, states should decline to adopt section 5.06,<sup>58</sup> if not for the offensive message it sends, then surely for the practical struggles it invites.

#### V. GENDERED OPPORTUNITIES FOR JOY: THE REMARRIAGE PENALTY

In a day when a woman was viewed as a man's chattel, logic required that a husband's duty to support his wife terminate when she became the property of another man. In a day when, at least in proper rhetoric, a woman is viewed as a man's equal, a rule terminating spousal payments upon a wife's remarriage is more difficult to justify. Nevertheless, despite their repeated incantations of entitlement,<sup>59</sup> the *Principles* adopt a rule that spousal payments terminate auto-

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56. *Id.* § 5.06 cmt. d.

57. *Id.* § 5.06(3).

58. Similar objections apply to section 5.12, which states should also decline to adopt. See ALI PRINCIPLES 1997, *supra* note 3, § 5.12.

59. See *id.* at 280 (titled Topic 2's caption "*Entitlements Based on the Parties' Disparate Financial Capacity*") (emphasis added); *id.* § 5.05(1) (stating "a person married to someone of significantly greater wealth or earning capacity is *entitled* at dissolution to compensation") (emphasis added); *id.* § 5.05(2) (stating "presumption of *entitlement* arises in marriages of specified duration and spousal income disparity") (emphasis added); *id.* § 5.06(1) (stating "a spouse should be *entitled* at dissolution to compensation for the earning capacity loss arising from his or her disproportionate share during marriage of the care . . . of children") (emphasis added); *id.* § 5.06(2) (stating "presumption of *entitlement* arises") (emphasis added).



matically upon a recipient's remarriage.<sup>60</sup> Under this rule, termination does not depend upon an inquiry into the financial impact of the remarriage, but on the fact of marriage itself.<sup>61</sup>

The rationale? First, it is always done.<sup>62</sup> Second, it is cheap.<sup>63</sup> Third, remarriage ends the obligor's responsibility.<sup>64</sup>

The fact that something is always done is a dubious rationale for continuing an inequitable practice. And cheap is not always better. It is unlikely that an alimony recipient would much appreciate the litigation costs the law has saved her by automatically terminating her alimony.

The real question is thus whether the *Principles'* third rationale supports automatic termination. Why exactly does an obligor's responsibility for a claimant's loss end upon her remarriage? The most obvious answer reeks of a woman as chattel philosophy: the wife now belongs to a new man who has taken responsibility for her. When she is passed on to another male provider, her former provider may wash his hands of her. Such reasoning smacks of a Cinderella complex,<sup>65</sup> implicit in the drafters' observation that "[f]or the divorced woman the surest path to financial recovery is remarriage."<sup>66</sup>

As the drafters' explanation for the remarriage penalty continues, it worsens. "Personal intimacy and exclusivity," they explain, "contribut[e] importantly to the law's willingness to find obligations that survive dissolution. . . . To require support of the second marriage by the first spouse would cast doubt on the second marriage's authenticity."<sup>67</sup> The reference to "personal intimacy and exclusivity" as part of the idealized model for marriage suggests that the rationale for automatic termination lies somewhere in the emotional and sexual nature of the spouses' relationship, a disturbing implication suggesting that a husband's obligation to make payments to a former wife depends upon her continuing, if theoretical, emotional and sexual availability to him. Once she enters a new marriage and therefore a new idealized model of intimacy, she becomes

60. ALI PRINCIPLES 1997, *supra* note 3, § 5.08. This automatic termination rule applies to payments under sections 5.05 and 5.06, but does not apply to the restitutionary-based payments under Topic 3. *Id.* §§ 5.15(5), 5.16(5).

61. An exception is provided for special cases in which termination would work "a substantial injustice because of facts not present in most cases." *Id.* § 5.08(2). As comment d explains, "[r]are cases may present unusual facts that make application of the automatic termination rule seriously unjust." *Id.* § 5.08(2) cmt. d. Illustration 4 gives as an example of such an unusual fact pattern, dissolution of a thirty year marriage, a wife who three years later marries a man who is already married to someone else and who dies one month after the remarriage. *Id.* § 5.08(2) cmt. d, illus. 4. Obviously, this is not an exception the drafters foresee as available in an ordinary case.

62. *Id.* § 5.08 cmt. a (stating that automatic termination "is consistent with the rule applied to traditional alimony awards in every state").

63. ALI PRINCIPLES 1997, *supra* note 3, § 5.08 cmt. c (stating that automatic termination "eliminates the cost of modifying the original decree").

64. *Id.* § 5.08 cmt. a.

65. See COLETTE DOWLING, *THE CINDERELLA COMPLEX* 31 (1981).

66. ALI PRINCIPLES 1997, *supra* note 3, § 5.07 cmt. c, reporter's note at 348. By terminating payments on remarriage, the drafters achieve the additional goal of cutting the ties between the parties, a result they deem "generally good for both the individuals and the legal system, which may otherwise remain involved in their domestic affairs." *Id.* § 5.07 cmt. a.

67. *Id.* § 5.08 cmt. a.

for the first time legally unavailable to him emotionally and sexually, and, presumably for this reason, his duty to make payments to her ends.

Equally disturbing is the drafters' sudden reference to psychic loss to justify their automatic termination rule. Such non-financial psychic loss includes "the failed expectation of having a close and caring lifetime companion."<sup>68</sup> The drafters explain that the sections on compensatory spousal payments limit compensation to financial loss because of the "impracticality of measuring the non-financial losses."<sup>69</sup> Upon remarriage, however, "the inference naturally arises that the obligee derives great rewards overall from the new relationship."<sup>70</sup> Thus, psychic losses are recovered and the entitlement to compensation disappears. But what of continuing financial losses? This abrupt, selective shift from a model of alimony as compensation for financial loss to a model based on psychic loss makes for a dubious, if convenient, rationale for terminating alimony.

The practical implications of the automatic termination rule are serious indeed. Since 75% of divorcing women ultimately remarry,<sup>71</sup> the remarriage penalty has a sweeping and sometimes disastrous impact. Consider, for example, a law professor's worst-case hypothetical on remarriage. After thirty years as a traditional homemaker and three children, Betty Crocker's high-income husband, Adam, divorces her, leaving her heartbroken and vulnerable. Six months after her divorce, Betty is swept away by the attentions of Clark, an unemployed writer, whom she soon marries. Clark, however, is not the guy he appeared to be and his philandering leads Betty to divorce him soon after the wedding. The consequence of Betty's brief, ill-fated relationship with Clark is that Betty, after thirty years of marriage and three children, loses her entitlement to payments from Adam. The rationale? She should not have married Clark. No one seems able to explain, however, why any wife, including the long term homemaker, should not enjoy the opportunity to begin life afresh that her husband enjoys at the end of their marriage.

Ultimately, the question goes to the nature of compensatory spousal payments. Are they based on a husband's duty to support a wife, with all the overtones of chattel and sexual fidelity historically implicit in that duty? Or are they rather based on a wife's entitlement as an equal partner in marriage? If spousal payments are truly an entitlement as the *Principles* claim, they should not terminate automatically upon remarriage.

## VI. THE MATHEMATICS OF LOSS

To achieve their objective of consistency and predictability in compensatory spousal payments, the *Principles* invite states to adopt "a rule of statewide application," which generally measures a claimant's loss by calculating the spouses' income disparity and multiplying that figure by a "durational factor" based on the length of the marriage or caretaking period.<sup>72</sup> The *Principles* thus

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68. *Id.*

69. *Id.*

70. *Id.*

71. ALI PRINCIPLES 1997, *supra* note 3, § 5.07 cmt. c, reporter's note at 349 (citing ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 29-30 (1981)).

72. *Id.* §§ 5.05(2)-(3), 5.06(2), 5.06(4), 5.12(2).

provide only a framework for reform, the specifics of which are left to subsequent state action. In their extensive discussion of the basic alimony regime set out in section 5.05, the *Principles* make at least two suggestions states should decline to follow.

First, states should decline the *Principles'* invitation to establish a probationary marital period during which no presumption of entitlement arises. The basic scheme of section 5.05(1) is to condition spousal payments on a marriage "of sufficient duration" that equity requires compensation.<sup>73</sup> The underlying principle is that a claimant must have been "married to a person of greater wealth or earning capacity *long enough* that the reduced standard of living otherwise experienced by the claimant after dissolution 'is equitably treated as the spouse's joint responsibility.'" <sup>74</sup> While the principle of increasing interdependence over time is not objectionable, the proposition that this principle begins to operate, not at the beginning of marriage, but only after a designated probationary period *is* objectionable. This scheme suggests that commitment and reliance are appropriate only if the marriage endures. Evidently, the marital vows do not themselves create a compensable expectation or reliance that justifies post-divorce income sharing. In its early years, marriage takes on a probationary aspect that more closely resembles cohabitation than marriage. This scheme devalues the initial marital commitment.

Moreover, it is not clear on what principled basis a state could define the "sufficient duration" necessary to trigger marital rights. While the *Principles* themselves do not define the designated threshold period, they do suggest, by way of illustration, that such a term might be set at five years.<sup>75</sup> But, why is five years better than three? Better than seven?

No matter how "sufficient duration" is defined, the definition may create a distorting incentive for the higher wage-earner to terminate the relationship prior to that threshold period. The *Principles'* five-year threshold, for example, would give a higher wage earner an incentive to terminate the marriage at 4.9 years in order to avoid a presumption of compensatory spousal payments, a result the drafters surely could not intend. On balance, states would be well advised to reject the *Principles'* suggestion of a probationary marital period.

Second, states should reject the income sharing progression suggested in the drafters' illustrations. Setting the "durational factor" under section 5.05 is a "key policy" decision that will determine the percentage of income sharing based on the length of the marriage.<sup>76</sup> By way of illustration, the drafters suggest a durational factor equal to the number of years of marriage multiplied by .01. As applied, this factor would produce a compensatory spousal payment of 5% of any disparity in earnings after 5 years of marriage, 10% after 10 years and 20% after 20 years, with a maximum payment of 40% of the disparity in earnings

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73. *Id.* § 5.05(1).

74. *Id.* § 5.05 cmt. a.

75. *Id.* § 5.05 cmt. a, illus. 1.

76. *Id.* § 5.05 cmt. g.

after 40 years of marriage.<sup>77</sup> Application of this durational factor suggests some disturbing results. Consider the case of the long term homemaker of twenty years whose husband's expected monthly income is \$5,000 but whose own expected income is only \$1,000. Under the illustration's durational factor of .01, such a homemaker would receive \$800 per month (20% of \$4,000), giving her an expected income of \$1,800, and leaving her spouse with monthly income of \$4,200. Such a result perpetuates, with increased certainty, the disparate impact of divorce.

A more equitable durational factor might be drawn from the Uniform Probate Code. The drafters of the Probate Code base a spouse's elective share of an augmented estate on the length of the marriage. Interestingly, they describe this sliding scale percentage as "the first step in the overall plan of implementing a partnership or marital sharing theory of marriage, with a support theory back-up."<sup>78</sup> Using the Probate Code as a model would produce a compensatory spousal payment of 15% of any income disparity after 5 years, 30% of any disparity after 10 years, and 50% of any disparity after 15 years.<sup>79</sup> Whether or not states like the Probate Code formula, they should reject the harsh formula provided in the drafters' illustrations.

VII. CONCLUSION

The *Principles* take a powerful step in both their candid recognition of the disparate positioning of many husbands and wives at divorce, and their determination to inject certainty and equity into an alimony regime that has long been haphazard and inequitable. Their answer to the problems of current law,

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77. As the drafters note, this maximum award level may well be reached before 40 years if a section 5.05 award is combined with one under section 5.06, as where a claimant has been the primary caretaker of children. ALI PRINCIPLES 1997, *supra* note 3, § 5.06 cmt. e.

78. UNIF. PROBATE CODE § 2-202, 8 U.L.A. 103 (1998).

79. *Id.* § 2-202, 8 U.L.A. 102, which establishes the following scale:

If the decedent and the spouse were married to each other:	The elective-share Percentage is:
Less than 1 yr. ....	Supplemental Amount Only
1 yr. but less than 2 yr. ....	3% of augmented estate
2 yr. but less than 3 yr. ....	6% of augmented estate
3 yr. but less than 4 yr. ....	9% of augmented estate
4 yr. but less than 5 yr. ....	12% of augmented estate
5 yr. but less than 6 yr. ....	15% of augmented estate
6 yr. but less than 7 yr. ....	18% of augmented estate
7 yr. but less than 8 yr. ....	21% of augmented estate
8 yr. but less than 9 yr. ....	24% of augmented estate
9 yr. but less than 10 yr. ....	27% of augmented estate
10 yr. but less than 11 yr. ....	30% of augmented estate
11 yr. but less than 12 yr. ....	34% of augmented estate
12 yr. but less than 13 yr. ....	38% of augmented estate
13 yr. but less than 14 yr. ....	42% of augmented estate
14 yr. but less than 15 yr. ....	46% of augmented estate
15 yr. or more .....	50% of augmented estate

however, should be carefully scrutinized. At the core of their alimony model is a troublesome characterization of women as victims, a casting the drafters adopt in preference to the more egalitarian model offered by partnership. Specifically, states should decline sections 5.06 and 5.12, which raise troublesome conceptual and practical concerns, and reject the remarriage penalty. The basic income-sharing model of section 5.05 should be enthusiastically embraced, even as states begin the deliberative and cautious discourse necessary to identify "rules of statewide application" that will make the law of alimony not merely more predictable, but more equitable.

