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Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal

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Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*

*Lynn D. Wardle***

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I. INTRODUCTION

In promulgating the *Principles of the Law of Family Dissolution: Analysis and Recommendations* (hereinafter “*Family Dissolution Principles*” or “*Principles*”),¹ the American Law Institute (ALI) proposes an extensive set of new rules to apply in proceedings relating to family dissolution. Among the subjects covered by the ALI *Principles* are child custody (chapter 2), child support (chapter 3), property division (chapter 4), alimony (chapter 5), domestic partnership (chapter 6), and antenuptial and pre-cohabitation agreements (chapter 7). As the first proposal of any national legal institution for general reforms of family dissolution law since the Uniform Marriage and Divorce Act (“UMDA”), which was proposed more than thirty years ago,² the *Family Dissolution Principles* are both very timely and significant. The ALI is a prestigious law reform organization that has sponsored many successful law reform proposals during the past seventy-eight years.³ The *Principles* are the product of eleven years of labor by respected law professor Reporters,⁴ who were advised by three dozen very

1. All references to provisions of chapters 6 and 7 and the comments and the Reporter’s Notes thereto are to the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter PRINCIPLES (Tentative Draft No. 4)].

2. UNIF. MARRIAGE AND DIVORCE ACT (amended 1973), 9A U.L.A. 1 (1998). The UMDA, as it is known, was first approved by the National Conference of Commissioners on Uniform State Laws in 1970 and was amended in 1971 and 1973. While it has been a law teacher’s favorite, it has been less popular with state legislatures and was only adopted by eight states (with some deviations from the UMDA in most of them); all eight states acted to adopt the UMDA between 1972 and 1977. *Id.* (Table of Jurisdictions).

3. The ALI was founded in 1923 and has included many of America’s most influential judges, lawyers, and law professors among its members since its founding. The ALI has promulgated many highly influential “Restatements of the Law” in various fields of law (including Agency, Conflict of Laws, Contracts, Torts, and Trusts, to name but a few), helped in the drafting of the Uniform Commercial Code, and drafted several influential model codes, including the Model Penal Code and the Model Code of Evidence. *See The American Law Institute*, at <http://ali.org> (last visited Feb. 24, 2001).

4. The Chief Reporter was Ira Ellman, law professor at Arizona State University, lead author of a highly regarded family law casebook, and a prolific family law scholar. He was assisted by Katharine T. Bartlett, co-author of the same casebook, respected author of significant articles about custody and children, as well as the Dean of Duke University School of Law. Grace Ganz Blumberg of UCLA Law School and a respected authority on financial issues relating to marital dissolution was the third Reporter. Marygold S. Melli, a highly respected family law professor and prolific family law scholar from the University of Wisconsin also served for a time as a Reporter and was later a consultant. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, at v.

influential members of the legal profession, including a dozen highly respected state court judges,⁵ and attended by several dozen other knowledgeable and important lawyers, law professors, and judges.⁶ Thus, the *Family Dissolution Principles* has an impeccable pedigree, and because many influential jurists, law professors, and bar leaders helped to create it, it is certain to find a receptive audience in at least some lawmaking, legal, and academic circles. Clearly, the ALI *Family Dissolution Principles* must be taken very seriously as a significant law reform proposal that could have a major impact upon family law in America.

*A. The ALI Proposal to Expand the Categories of Relationships
Accorded "Family" Legal Status and Benefits*

While some of the principles incorporated in the *Family Dissolution Principles* are quite familiar to practitioners and scholars of family law, many of the proposals go far beyond existing law and recommend radical changes in family laws and policies. Perhaps the most revolutionary proposals would expand the types of relationships that receive privileged "family" status and benefits. Most of the chapters of the *Family Dissolution Principles* contain provisions that deconstruct, level, or redefine "family" relationships. For example, many of the sections of chapter 2 (custody), chapter 5 (compensatory payments), chapter 6 (domestic partners), and chapter 7 (agreements) contain provisions that either significantly redefine currently protected family relations or radically alter existing family law doctrines. Among the most disturbing of the proposed leveling reforms are those in chapter 6 (domestic partners), where the ALI proposes to significantly expand the types of relationships that may claim the full economic protections and privileges of marital status upon dissolution.

This article focuses on chapter 6 to demonstrate the family-deconstruction-and-relational-equalization theme of the ALI *Family Dissolution Principles* and to show that the ALI *Principles* radically redefine family by substantially expanding the categories of persons

5. Among the distinguished jurists who served as special advisers were Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court, Justice Joseph P. Warner of the Massachusetts Appeals Court, and Judge Judith Mitchell Billings of the Utah Court of Appeals. *Id.* at v–vi.

6. *See id.* at v–xii.

and relationships that are given legal preference as “family” relationships. Chapter 6 is predicated upon some erroneous assumptions about the characteristics of same-sex and heterosexual nonmarital cohabitation (as well as the nature and qualities of marriage in general) and about the sameness of the economic expectations and interdependence of nonmarital cohabitants and marital couples. By broadly defining domestic partners, liberally providing for how that status may be established, and proposing to extend identical (full marital) economic benefits to domestic partners upon dissolution, the ALI moves toward equalizing the legal status of all adult domestic relationships and the economic consequences of their dissolution.

Part I.B of this article provides a summary and overview of chapter 6 (domestic partners) of the *Family Dissolution Principles*. Part II notes some “good intentions” and laudable objectives of chapter 6, such as protecting couples who have lived in actual marriage-like relationships without the formal status of marriage and removing the economic incentive (for men, at least) to enter into nonmarital cohabitation relationships instead of marriages. Part III reveals how those good intentions have gone awry in the details of the particular provisions of chapter 6 and suggests how those provisions may seriously weaken and undermine the institution of marriage. Part IV shows that the major flaws of chapter 6 are not merely inadvertent or accidental; the ideological bias against marriage and marriage-based family relations is reflected in many chapters of the *Family Dissolution Principles*. Chapter 2 (custody), chapter 5 (compensatory payments), and chapter 7 (agreements) also contain provisions that significantly deconstruct and redefine family relations. Those chapters manifest significant hostility against the traditional family and against relationships established by kinship, marriage, and marital adoption. This article concludes by lamenting that the radicalism of the ALI *Family Dissolution Principles* represents a lost opportunity for an influential organization to provide responsible leadership by proposing reasonable, well-drafted reforms in the area of family dissolution law.

B. An Overview of Chapter 6

Chapter 6, entitled “Domestic Partners,” is one of the shorter chapters of the ALI *Family Dissolution Principles*, containing only six black letter sections and just sixty pages of text, commentary, and

notes. It was not part of the original ALI project on the *Principles of the Law of Family Dissolution* and was added as the project drew to completion.⁷ It defines “domestic partnership” as a new legal family status, provides rules for how the new relationship is established, and defines the legal benefits and obligations that result from the establishment and dissolution of that new relationship.

Section 6.01 defines the scope of the chapter, which is to govern the financial claims of any two unmarried persons “who for a significant period of time share a primary residence and a life together as a couple.”⁸ Chapter 6 applies only to financial claims arising at the termination of the relationship,⁹ is subject to proper written opt-out contracts,¹⁰ and may not be applied to “compromise the marital claims” of the lawful spouse of a domestic partner.¹¹

Section 6.02 defines the twin objectives of chapter 6: to provide for “fair distribution of the economic gains and losses incident to termination” of a domestic partnership relationship, and to protect society “from social welfare burdens that should be borne” by former domestic partners.¹² This is to be achieved by allocating property owned by either domestic partner in light of, *inter alia*, “equitable claims . . . [arising] in consequence of the relationship,”¹³ and allocating financial losses (including via alimony) “according to equitable principles.”¹⁴

Section 6.03 defines who are to be deemed “domestic partners” and how that new legal status is to be established. There are three levels of inclusion—three ways to establish domestic partnership. Two involve legal presumptions: one irrebuttable and one rebuttable. “In general, *domestic partners* are two persons of the same or opposite sex, not married to one another, who for a

7. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS, *Introduction*, at xiv (Proposed Final Draft, Part I, Feb. 14, 1997) [hereinafter PRINCIPLES (Proposed Final Draft, Part I)]; *id.* at 11–14.

8. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(1).

9. *Id.* Claims arising during the relationship and afterward for child support (and, of course, for custody and visitation) are not covered by chapter 6. *Id.* § 6.01(4).

10. *Id.* § 6.01(3). The general requirement that the agreement be in writing is contained in section 7.05(1). However, section 6.01(3) allows enforcement of contracts that are otherwise “enforceable under applicable law.” *Id.*

11. *Id.* § 6.01(5).

12. *Id.* § 6.02(1), (2).

13. *Id.* § 6.02(1)(a).

14. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02(1)(b).

significant period of time share a primary residence and a life together”¹⁵ Couples are irrebutably presumed to be domestic partners (“[p]ersons *are* domestic partners”) “when they have maintained a common household . . . with their common child” for a minimum continuous (but unspecified) period of time called the “cohabitation parenting period.”¹⁶ Couples are rebuttably presumed to be domestic partners if they are not related by blood or adoption and have maintained a common household for a minimum continuous (but unspecified) period of time called the “cohabitation period.”¹⁷ If neither presumption applies, a party may still establish domestic partnership by proving “that for a significant period of time the parties shared a primary residence and a life together as a couple.”¹⁸ This determination must be made in light of thirteen categorical considerations described in the section, including oral statements, commingled finances, economic dependency, specialized roles, changes in the parties’ lives, naming beneficiaries, distinctive relations, emotional and sexual intimacy, community reputation, commitment or attempted marriage ceremony, joint procreation, childrearing or adoption, and common household.¹⁹ The fact that one or both of the parties is (or are) married to another (or others), or that the parties could not otherwise legally be married to each other (for example, consanguinity or incest laws would prohibit their marriage or sexual union) is no bar to finding that he, she, or they are also domestic partners.²⁰

Section 6.04 defines domestic partnership property as property that would have been marital property had the parties been married to each other “during the *domestic-partnership period*.”²¹ However,

15. *Id.* § 6.03(1); *see also id.* § 6.01(1) (“Domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple, as determined by § 6.03.”).

16. *Id.* § 6.03(2) (first emphasis added). The amount of time in the *cohabitation parenting period* is undetermined in the *Principles* but is to be set in a “uniform rule of statewide application.” *Id.* However, in the comments, a two-year period is used to illustrate the point. *Id.* cmt. d; *see also* illus. 3, 7–8.

17. *Id.* § 6.03(3). The amount of time in the *cohabitation period* is undetermined in the *Principles* but is to be set in a “uniform rule of statewide application.” *Id.* However, in the comments, a period of three years is used to illustrate the point. *See id.* cmt. d & illus. 4–6.

18. *Id.* § 6.03(6).

19. *Id.* § 6.03(7)(a)–(m).

20. *Id.* § 6.03(7)(k) & cmt. d; *id.* § 6.01(5) & cmts. c–d.

21. *Id.* § 6.04(1). This period begins when the parties conceive a child or begin sharing a primary residence and lasts until they cease sharing a primary residence. *Id.* § 6.04(2).

recharacterizing separate property as domestic-partnership property is not allowed.²²

Section 6.05 provides that “[d]omestic-partnership property should be divided according to the principles set forth for the division of marital property”²³ In other words, domestic partners enjoy exactly the same property division claims and rights as married couples.

Likewise, section 6.06 provides that “a domestic partner is entitled to compensatory payments [alimony] on the same basis as a spouse.”²⁴ Again, with one minor exception, the economic benefit provided to domestic partners is identical to that given to married couples.²⁵

Overall, chapter 6 provides that persons who live together for a minimum period, or at least one of whom has experienced some change of life “fostered” or “wrought” by their cohabitation, and those who have expressly so contracted, comprise a domestic partnership. As such, they are entitled to the same economic benefits and incur the same economic obligations upon dissolution as attributed by law to married couples.

II. THE “GOOD INTENTIONS” OF CHAPTER 6

Since chapter 6 is an example of some apparently good intentions gone awry, it is appropriate to begin by noting the apparently good intentions or objectives. Five laudable goals or restrictions are particularly noteworthy.

First, one goal of chapter 6 is to provide financial protection for economically dependent or loss-suffering parties to long-lasting nonmarital cohabitation relationships that are truly marriage-like in quality and characteristics who made no express agreement about financial consequences.²⁶ The abundant case law regarding common law marriages, putative spouses, and some equitable remedies reveals that some parties enter into marriage-like relationships with

22. *Id.* § 6.04(3).

23. *Id.* § 6.05.

24. *Id.* § 6.06(1)(a).

25. The only (minor) exception is that care of a child for whom the partner is not a legal parent or parent by estoppel cannot provide the sole basis of a claim for compensatory payment. *Id.* § 6.06(2).

26. *See generally* PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01; *id.* § 6.02 cmt. a.

reasonable expectations that they really are (or are the same as) marriages, including expectation of financial protections associated with marriages.²⁷ Chapter 6 would provide significant economic protection for parties who have developed real, long-term, marriage-like relationships, but who have never been properly married. The goal of protecting the financial interests or financial equity of individuals who enter into such relationships is similar to the policy underlying common law marriage, putative spouse, and equitable doctrines (like unjust enrichment) and certainly is laudable.

Second, the drafters of chapter 6 clearly intend to give parties an incentive to marry by removing the economic opportunity to get “free milk” without marriage.²⁸ By removing an opportunity to circumvent financial responsibility for a partner in a marriage-like relationship, chapter 6 can be seen as pro-marriage.²⁹

Third, chapter 6 rejects the formal registration of domestic partnerships. It thus differs from the approach taken by the Vermont Legislature, which enacted a “Civil Union” registration scheme³⁰ pursuant to the Vermont Supreme Court mandate that the legislature extend equally the legal protections of marriage to same-sex couples.³¹ By contrast, domestic partnership under chapter 6 is merely a retrospective status, operative only after the relationship has ended.³² Since no formalization is required or expected at the outset, domestic partnership under chapter 6 does not resemble the creation of marriage. That avoids one potentially objectionable concern about

27. *See, e.g.*, *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986) (awarding social security benefits to woman as common law spouse of man with whom she lived in New York for twenty-one years as his wife); *Spearman v. Spearman*, 482 F.2d 1203 (5th Cir. 1973) (addressing situation of ceremonial marriage in good faith belief of validity by wife followed by seven years living as husband and wife); *Albina Engine & Mach. Works v. O’Leary*, 328 F.2d 877 (9th Cir. 1964) (discussing experience of cohabitation for twenty-three years, including eighteen after prior marriage dissolved, and three children); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (dealing with couple who lived as man and wife for fifteen years and had three children).

28. A Scandinavian neighbor told my wife and me of a close friend of hers who was cohabiting in her homeland with her boyfriend. She warned her friend several times that she was putting her boyfriend in the situation of asking himself, “Why pay for a cow when I am getting free milk?” After years of cohabitation, our neighbor’s friend was “dumped” by her boyfriend, who decided to marry a younger woman.

29. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 cmt. b.

30. VT. STAT. ANN. tit. 15, § 1201 (2001).

31. *Baker v. Virginia*, 744 A.2d 864 (Vt. 1999).

32. *See* PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03.

confusing or equating domestic partnership formation with marriage formation.

Fourth, chapter 6 extends only limited benefits to domestic partners. The benefits are limited in two ways. First, only parties to the domestic partnership incur economic benefits or burdens from the relationship. Chapter 6 does not extend rights or obligations to or from third persons or the state.³³ Likewise, the benefits available under chapter 6 are only available upon termination of the relationship during the lifetime of the parties.³⁴ They do not apply during the relationship, nor does chapter 6 deal with inheritance or succession. Limiting the scope of benefits that flow from the status of domestic partnership is prudent and appealing.³⁵

Fifth, chapter 6 also provides that domestic partner claims against a married domestic partner cannot be recognized if they “compromise the marital claims of a domestic partner’s spouse.”³⁶ The Reporters emphasize that the married spouse of the domestic partner takes priority over the unmarried domestic partner.³⁷

For these goals and provisions, the ALI deserves credit for its good intentions. However, the good intentions that underlie chapter 6 of the ALI *Family Dissolution Principles* have gone awry. They are offset and overwhelmed by flawed, sometimes radical provisions; these are discussed in the next section.

III. GOOD INTENTIONS GONE AWRY: THE DECONSTRUCTION AND REDEFINITION OF MARITAL STATUS

The problems with chapter 6 of the *Family Dissolution Principles* are twofold. First, chapter 6 goes far beyond the intentions and goals noted above. Those good intentions are rendered meaningless by some of the radical provisions that broadly define domestic partnership, set low standards for domestic partner determinations, and equate nonmarital cohabitation with marriage. The remedies

33. *Id.* § 6.01 cmt. a.

34. *Id.* §§ 6.01(1), 6.02(1).

35. However, the absence of any principled explanation justifying these limitations is troubling. *See infra* Part III.F.1.

36. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(5).

37. *Id.* § 6.01 cmt. c. Thus, both the spouse and a subsequent domestic partner may recover financial claims against a married man who has both a wife and a partner. “The result may be that the person involved in both relationships ends up with little or no property.” *Id.* at 7.

provided are stunningly excessive and inappropriate, simply imported wholesale from marriage law rather than tailored to the characteristics of domestic partnerships. Second, a number of problems arise relating to *how* chapter 6 would accomplish the “good intentions” and objectives noted in Part II. Many provisions are overbroad, loose, and ambiguous. Key sections of chapter 6 are poorly drafted, evading critical policy issues and inviting judicial legislation to fill in the large interstices in the vague provisions. Moreover, chapter 6 ignores and fails to build upon, reasonably develop, and expand existing legal doctrines.

The most significant flaws of chapter 6 of the ALI *Family Dissolution Principles* can be grouped into eight categories. They are described below.

A. The Provisions Defining “Domestic Partners” Are Overbroad

The definition of “domestic partners” is extremely broad and overinclusive, exceeding the reasonable expectations of marriage or marriage-like economic interdependence. Its breadth will invite litigation and encourage the assertion of domestic partnership claims in cases when there is no just basis for them. Two unmarried people are deemed to be domestic partners and subject to the provisions of chapter 6 if “for a significant period of time [they] share a primary residence and a life together as a couple.”³⁸ The requirement that they cohabit for “a significant time” and that they have lived “as a couple” are so subjective as to invite judges to simply resort to personal preferences in deciding the issue.

The definition of domestic partners in chapter 6 is so broad that it could include persons who did not intend to intermingle their economic lives or incur any financial support or property sharing obligations. Arguably, it could even include persons who actually and demonstrably intend not to intermingle their economic lives or incur any financial support or property sharing obligations. Any two people unmarried to each other who live together as a couple in a primary residence for a significant time and who do not explicitly and

38. *Id.* § 6.03 (1); *see also id.* § 6.01(1). During the discussions at the May 2000 plenary meeting of the ALI, at which chapter 6 was approved, there was some suggestion that language be added to limit this definition to those who were eligible to have the relationship recognized as a marriage. In general, suggestions of that nature were rejected by the Reporters, but it remains to be seen how the final definition will be crafted.

properly agree not to be domestic partners may nevertheless be found to be domestic partners.³⁹

Persons involved in relationships that are against public policy, including those that are prohibited by criminal law, would still apparently qualify for financial benefits as domestic partners if the parties are not married and live together as a couple for the requisite period of time. Presumably, this would include relationships of incest, concubinage, adultery, polygamy,⁴⁰ and arguably even sexual relationships involving parties who are not old enough to get married. Even if one of the parties is married to someone else, that person may be both a spouse and a domestic partner with an adulterous paramour, concubine, mistress, or with multiple lovers at the same time. The Reporters specifically provide that claims may be asserted even if “one or both of the domestic partners were married to someone else” unless that would “compromise the marital claims” of the legal spouse.⁴¹ Incestuous relations are explicitly included.⁴² Chapter 6 specifically extends domestic partnership status and benefits to same-sex couples.⁴³ Thus, in the name of economic morality, chapter 6 deliberately ignores many other moral concerns. In chapter 6, the only morality that matters is economic.

B. Domestic Partnership Is Too Easy to Establish Under Chapter 6

The broad definition of “domestic partners” in chapter 6 might be relatively harmless if it were offset by carefully drafted standards governing how domestic partnership is to be proven in court. Regrettably, however, chapter 6 is designed to make it extremely easy to establish “domestic partnership.”

39. *Id.* § 6.03(1) & cmt. b.

40. In the discussions at the ALI May 2000 annual meeting, one Reporter suggested that polygamy was not intended to be included. But it was not textually excluded at that time.

41. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(5).

42. The drafters of chapter 6 considered and explicitly rejected the exclusion from benefits of domestic partnership couples whose relationship would be incestuous and illegal, even criminal. Thus, even the phrase “[p]ersons not related by blood or adoption” appears in section 6.03(3). To narrow the class of persons who may benefit from a particular presumption, the Reporters emphasize: “Its inclusion in Paragraph (3) is not intended to exclude partners related by blood or adoption from the coverage of this Chapter.” *Id.* § 6.03 cmt. d, at 22.

43. *Id.* §§ 6.01(1), 6.03(1).

1. Domestic partnership is too easy to establish by presumption

Section 6.03 establishes strong presumptions that make it extremely easy to obtain the benefits of domestic partnership provided by chapter 6. The presumptions will be dispositive in most cases. If the couple are not related by blood or adoption, they “are presumed to be domestic partners when they have maintained a common household . . . for a continuous [amount of time] . . . called the *cohabitation period*.”⁴⁴ Regardless of their relationship (even including persons related by blood or adoption), if two people have maintained a common household with a common child for a set period of time, the presumption that they are domestic partners is irrebuttable.⁴⁵

The two presumptions of section 6.03 are drafted very broadly and are intended to apply in most cases. The Reporters note that “detailed inquiry into the lives of couples to determine whether they are domestic partners . . . will normally not be necessary, because most cases will be decided under one of the two rules [presumptions] set forth in Paragraphs (2) and (3).”⁴⁶ Thus, chapter 6 is extremely pro-domestic partnership. In an apparent effort not to exclude any possible just claimant, chapter 6 goes overboard in including as domestic partners many who would have no just claim or reasonable expectations of an economic partnership akin to marriage.

2. Chapter 6 makes it too easy to establish domestic partnership even without the benefit of the presumptions

In contrast to other chapters of the *Family Dissolution Principles*,⁴⁷ chapter 6 actually expands dramatically the discretion of the court to find domestic partnership and encourages judges to exercise that broad discretion in favor of finding couples to be domestic partners. If a person claiming to be a domestic partner does not qualify for the benefit of either the rebuttable or irrebuttable

44. *Id.* § 6.03(3).

45. *Id.* § 6.03(2).

46. *Id.* § 6.03 cmt. d.

47. That stands in stark contrast to the anti-discretion principle that generally characterizes the *Family Dissolution Principles*. J. Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923.

presumption, the party claiming to have been a domestic partner has only the ordinary civil case burden “of proving that for a significant period of time the parties shared a primary residence and a life together as a couple.”⁴⁸ In reaching a decision, the court must consider a laundry list of *thirteen factors* to determine whether the couple “shared life together as a couple” and thus qualify as domestic partners.⁴⁹ To give judges discretion to find in favor of domestic partnership limited only by a sweeping list of thirteen factors is to give them virtually unbridled discretion and a biased (pro-partnership) disposition.

Section 6.03(7), listing the thirteen specific factors and circumstances that the courts should consider in determining whether or not a relationship qualifies for domestic partner status, calls for extensive, close, factual scrutiny to make a determination. This contradicts the Reporters’ assertion that they have crafted section 6 to avoid individualized inquiries.⁵⁰ The discretion to find domestic partnership on the basis of thirteen factors—even when there is no presumption because of inadequate time of cohabitation or lack of a common child—seems to be tilted to encourage the court to find domestic partnership.

The overall approach of section 6.03 is to “ascertain whether the parties conducted themselves as spouses normally do in the course of family life.”⁵¹ The standard may sound benign, but the implementation is not. Despite the Reporters’ comments that persons who are merely sharing a dwelling and not sharing their lives are not covered,⁵² the distinction is extremely elusive. For example, college roommates ordinarily do not intend to enter into marriage-like “domestic partner” relationships with each other, but that may not be so apparent to a trier of fact. College roommates often spend a lot of time with each other and support each other emotionally (when report cards reveal disappointing grades, when job interviews do not lead to summer employment offers, when family members die, etc.). They often commingle expenses such as utility and phone bills, they frequently share food, and may even cook and eat

48. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(6).

49. *Id.* § 6.03(7).

50. *Id.* § 6.03 cmt. b.

51. *Id.* § 6.03 cmt. e, at 27.

52. *Id.* § 6.03 cmt. i, illus. 15–17.

together. They may visit each other's families during vacation periods, they may go on Spring Break together, share cars, computers, cooking utensils and clothes with each other, and sometimes "bail each other out" when credit card or rent payments are due. In fact, long-time college roommates could rather easily be found to be "domestic partners" under chapter 6. If a sexual relationship is added to the above facts, it is almost certain that under chapter 6 the college roommates would be found to be "domestic partners," which could raise serious public policy incongruity.⁵³

Ironically, the drafters of chapter 6 exclude from coverage and any economic protection the long-time, financially dependent mistress or paramour whose wealthy lover visits her regularly in the apartment he provides for her, but who does not normally reside with her.⁵⁴ Apparently she is to be excluded because the drafters curiously believe that a reasonable expectation of financial support cannot arise in the absence of cohabitation in a joint primary residence, even if one party is being entirely supported by, and living in a house provided by, the other. Apparently, sharing the primary residence is the drafters' exclusive litmus test for reasonable expectations of economic sharing.

C. Chapter 6 Provides Economic Recovery Solely as a Matter of Status—The New Legal Status of Domestic Partnership

Chapter 6 provides for economic rights for domestic partners solely as a matter of status, as an incident of the status of domestic partnership. It rejects contract and reasonable expectation as the controlling principles for extension of financial protection to nonmarital domestic partners, in favor of status. In this regard it goes *far beyond* existing palimony law. Chapter 6 "relies, as do the marriage laws, on a status classification" as the basis for the legal imposition of economic obligations and claims between nonmarital

53. If, on the same facts but in the absence of sexual relations, a domestic partnership were not found, that would raise the incongruous policy dilemma of "rewarding" parties who engage in behavior that is contrary to public policy (extramarital sexual relations) but not extending the same legal status and benefits to parties whose economic and nonsexual interpersonal relations are otherwise entirely identical.

54. "The purpose is to exclude casual and occasional relationships, as well as extramarital relationships conducted by married persons who continue to reside with a spouse." PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. c & illus. 1-2.

cohabitants.⁵⁵ Thus, it creates a new “domestic status”—a new family status in the law. It equates that new family status with marriage both generally, as an equivalent status, and specifically, as entitled to exactly the same fully equal marital rights to property sharing and to support (alimony) after the termination of the relationship. As the Reporters put it, “This approach reflects a judgment that it is usually just to apply, to both groups [married couples and non-married cohabitants who qualify as domestic partners], the property and support rules applicable to divorcing spouses”⁵⁶ In other words, chapter 6 is based on the policy assumption that cohabitation is the essence of marriage and nonmarital couples who cohabit should receive the same economic benefits upon dissolution as married couples.

The new “status” created by chapter 6 is a modern version of what was called in civil law “concubinage.” Concubinage gave (and in Louisiana today still gives) certain legal status and economic rights to unmarried partners, especially (but not exclusively) mistresses of married men.⁵⁷

Concubinage, in some form, has existed since early recorded history as far back as the Book of Genesis.⁵⁸ During the Roman Empire, concubinage was widely recognized, but only existed as an inferior or secondary status to marriage, and was afforded only certain types of legal recognition.⁵⁹ The Roman concubine was a *female cohabitor* who never acquired the social or legal status of her male partner nor did the children of such a union.

Concubinage was acceptable even for married men but was distinguished from casual love affairs because of its more permanent nature. It continued as a recognized institution in Rome until Emperor Constantine forbade it; subsequent Christian emperors condemned the practice and it fell into disuse.

Concubinage, in Louisiana law as in ancient times, has

55. *Id.* § 6.03 cmt. b, at 19.

56. *Id.*

57. In recent years, there has been significant debate over whether persons of the same sex can have a concubinage relationship. Most courts have rejected the proposition. *See* Succession of Bacot, 502 So. 2d 1118, 1130 (La. Ct. App. 1987); *Dial v. Dial*, 636 N.E.2d 361 (Ohio Ct. App. 1993); *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991); *but see In re Marriage of Weisbruch*, 710 N.E.2d 439 (Ill. App. Ct. 1999).

58. Gen. 35:22.

59. *Badillo v. Tio*, 6 La. Ann. 129 (La. 1851)

traditionally been viewed as a union between a man and a woman, living together as husband and wife but outside of marriage. Unlike marriage, it is not a civil contract and lacks the formalities required by our civil code.⁶⁰ It differs from putative marriage in that the parties have no reasonable belief that they are married.⁶¹

In chapter 6 the ALI resurrects concubinage in an expanded, more profitable form and calls it domestic partnership.

The problem with creating a new domestic status is that it could undermine the institution of marriage, which has been the exclusive domestic relationship of adults in Anglo-American law for centuries. Unmarried persons have been able to obtain economic justice upon various legal and equitable doctrines including express and implied contract, unjust enrichment, etc., but under those doctrines recovery is not dependent upon and does not connote any domestic status. Concerns about the impact of competing domestic status institutions are one important reason why the status of concubinage has not been generally accepted in common law states, and why it has been abolished in most states with civil law histories.⁶² The effect of creating an official, alternative, concubinage-like status of domestic partnership could be just as damaging to the institution of marriage as recognition of concubinage. This issue was not considered by the ALI, and chapter 6 should not be adopted in any state until that matter has been carefully examined and until it is clear that creating domestic partnership will not detrimentally impact the integrity of

60. See LA. CIV. CODE ANN. arts. 86 & 88 (1993).

61. See LA. CIV. CODE ANN. art. 117; *Bacot*, 502 So. 2d at 1127–28. See generally Kathryn Venturatos Lorio, *Concubinage and Its Alternatives: A Proposal For a More Perfect Union*, 26 LOY. L. REV. 1 (1980).

62. See generally Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000) (reviewing reasons for rejection of common law marriage and concubinage); Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAM. L. 271, 276–77 (1969) (presenting history and criticism of common law marriage); cf. *Skipworth v. Skipworth*, 360 So. 2d 975, 977 (Ala. 1978) (“[I]n modern society many individuals realize that common law marriages have inherent legal problems not found in ceremonial marriages.”); Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583 (1998) (reviewing history of rejection of heartbalm actions because of abuses); see also Harry D. Krause, Essay, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All*, 34 FAM. L.Q. 271, 298 (2000) (citing Mary Ann Glendon comparing nonmarital cohabitation to French concubinage). Perhaps the Reporters were implementing the advice of two feminists who have proposed that “concubinage” contracts be legalized to compensate women for their unmarried sexual relationships with men, and that the economic valuation of wives’ housework be increased by including sexual relations. See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 280–83 (1998).

the institution of marriage.

The use of status as the basis for recovery is dependent upon an assumption about the nature of cohabitation relationships that is seriously flawed and factually erroneous. Chapter 6 assumes that parties who cohabit outside of marriage in a shared primary residence wish to and in fact do “enjoy [the] substance” of marriage without the outward form.⁶³ In fact, many people enter into nonmarital cohabitation to avoid marriage, particularly to avoid the economic responsibilities and obligations of marriage.⁶⁴ And the assumption that cohabitation is equivalent to marriage, even when that is intended, is very dubious.⁶⁵

D. The Remedies Provided by Chapter 6 Are Excessive and Inappropriate

1. The economic benefits conferred by chapter 6 are unprecedented

The economic benefits conferred by chapter 6 are unprecedented, going far beyond those conferred upon nonmarital cohabitants under the most liberal existing palimony law. Section 6.04 extends to domestic partners full and equal marital property rights upon dissolution. All property acquired during domestic partnership that would be deemed marital property if the parties had been married is divided between the domestic partners, and the parties have the exact same post-relational claims to such property (called “domestic partnership property”) as they would have if they had fully and lawfully married.⁶⁶ Section 6.05 provides that upon termination of a domestic partnership the parties are entitled to the same division of property that they would have enjoyed if they had married. Section 6.06 provides that domestic partners are entitled to the same compensatory payments (alimony) that married couples may claim. The Reporters candidly admit that the provision for support goes further than any state statute and nearly all state court rulings have gone.⁶⁷ In fact, the remedies provided are excessive because the property interest provided to domestic partners is not

63. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 cmt. a, at 11.

64. The Reporters know this. *See id.* § 6.02 cmt. b.

65. *See infra* Parts III.D.2–3, III.G.

66. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.04 (1).

67. *Id.* § 6.06, Reporter’s Notes, at 59–60.

tailored to, and does not, provide fairness in relation to the kind of relationship or economic reliance and expectations associated with nonmarital cohabitation.

2. Chapter 6 does not tailor the remedy or protection extended to domestic partnerships to the characteristics of those relationships, but mechanically extends to domestic partners the same property rights that married couples have in marital property

The biggest single flaw of chapter 6 is that it fails to create rights and remedies that are customized for domestic partnership; it extends exactly the same economic property interests and compensatory rights to domestic partners as are provided to couples who are in the much more significant, committed, economically interdependent relationship of marriage. Marital property interests are based on the time-verified fact that most parties who marry make a long-term (presumably life-long) commitment to share their lives and their total family and personal interests, and they make significant adjustments in their economic life based on those interdependency commitments. However, it is far from clear that most nonmarital couples have similar expectations and make similar sacrifices in reliance on their expectations. Indeed, the existing social science evidence points in exactly the opposite direction, indicating that parties living in nonmarital cohabitation have very different expectations and characteristics than parties who are married.⁶⁸ In the face of the overwhelming evidence of such significant differences, chapter 6 irrationally extends full, equal marital property and compensatory payment rights to domestic partners.

In some jurisdictions, domestic partners (possibly called “de facto couples” or something else) already are given limited economic protections.⁶⁹ The drafters of chapter 6 might have followed those models and provided that domestic partners are entitled to one-half (or some other proportion) of the property rights enjoyed by a married person, or a certain interest per year over time (less than

68. See *infra* Parts III.D.2–3, III.G.

69. See, e.g., Reg Grayear & Jenni Millbank, *The Bride Wore Pink . . . to the Property (Relationships) Legislation Amendment Act of 1999: Relationships Law Reform in New South Wales*, 17 CAN. J. FAM. L. 227 (2000); see also Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 105 (2001) (“[O]pposite-sex cohabitation generally does not create joint rights to property acquired during the relationship.”).

enjoyed by married persons). But the ALI chose instead to grant full equivalent economic rights to domestic partners *inter se*.

Chapter 6 assumes that parties who cohabit generally, and all who would meet the definition or be found to be “domestic partners,” merely wish to “avoid the form of marriage even as they enjoy its substance.”⁷⁰ While empirical research indicates that young people today “strongly endorse cohabitation, perhaps in the mistaken belief that it will provide divorce insurance,”⁷¹ research shows that “[b]oth the general public and cohabitators themselves typically make a sharp distinction between marriage and [cohabitation].”⁷² They believe that “[c]ohabitation is not ‘just like marriage’ but . . . [a] lifestyle with a different set of social meanings, which generally serves different purposes. . . . [Cohabitators] flaunt their differences [from marriage].”⁷³ While the minority of cohabitators who have “definite plans to marry [such as cohabiting fiancés] act and behave in ways that are similar to married couples,” the rest (most) are “without plans to marry [and they] look very different from married couples—in their health habits, in the way they spend their money, in the attitudes toward divorce and marriage, leisure and money, and in their fertility patterns.”⁷⁴

Moreover, the financial expectations of parties who cohabit differ markedly from persons who marry. The Reporters baldly assumed that the economic expectations of cohabiting couples are the same as the expectations of married couples.⁷⁵ In fact, many people enter into

70. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 cmt. a.

71. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 183 (2000).

72. *Id.* at 37.

73. *Id.*

74. *Id.* Apparently in only a minority of cohabiting couples do both parties intend to marry; most cohabitations end in two years, and most do not result in marriage. Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, at 4 (Feb. 3, 2001) (In the 1980s, sixty percent of cohabitants married; in the 1990s, only thirty-five percent marry).

75. The Reporters assume that “as in marriage” nonmarital cohabitants “intend to deal fairly with each other.” PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. b, at 19. While that may be true, what is “deal[ing] fairly with each other” when parties are merely cohabiting is not necessarily the same as what is dealing fairly with each other when parties are married. The Reporters believe that “as in marriage, in the ordinary case [of domestic partnership] the law should provide remedies at the dissolution of a domestic relationship that will ensure an equitable allocation of accumulated property and of the financial losses arising from the termination of the relationship.” *Id.* Again, it may be true that an equitable allocation should be provided upon termination of both marriages and long-term cohabitations, but what is equitable is not necessarily the same. Economic equity upon breakup of the relationship

nonmarital cohabitation to avoid marriage and particularly seek to avoid the economic responsibilities and obligations of marriage. Fear of the economic consequences of failure of a marriage is a major reason for people cohabiting as domestic partners rather than entering marriage.⁷⁶ Thus, the extension in chapter 6 of exactly the same post-relationship property sharing rights and continuing support benefits to domestic partners as are provided to persons who have been married is indefensible and excessive. It appears to be more of a windfall—a reward for people who have entered into politically correct, preferred nonmarital relationships—than an accurate reflection of actual expectations or economic realities of those relationships.

3. Chapter 6 endorses and establishes false equivalence to marriage

Because the remedy provided upon dissolution is exactly the same, the standard and principles for granting recovery are exactly the same, and presumably the amount of recovery awarded will be exactly the same for domestic partners as for persons who have been married, the message of chapter 6 is that domestic partnership status is equivalent to marriage as an economic union. Nowhere in the *Family Dissolution Principles* do the Reporters provide any evidence to support that belief, and the common experience of history and contemporaries is the opposite.⁷⁷ Chapter 6 also sends uncritically a message that nonmarital cohabitation of almost any two persons (same-sex partners, incestuous partners, adulterous partners, and all other nonmarital cohabitants) is just as valuable to society, just as important to protect and encourage in law, as marriage. That is neither supported nor supportable. Chapter 6 clearly conveys a message of relationship equivalence that is not only demonstrably false, but is dangerously deceptive.

The provisions of chapter 6 that prescribe economic remedies

clearly depends upon more than the amount of time the parties have lived with each other; it depends also upon the nature and characteristics of the relationship, the understandings and reliances of the parties, the allocation of responsibilities during the relationship, the assets, work, income, saving and spending histories and patterns of the parties, etc. The Reporters, however, categorically equate marriage and nonmarital cohabitation for economic purposes upon dissolution. *Id.*

76. See Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 325.

77. See *infra* Part III.G.2.

assume several dubious propositions. First, they assume that the nature and characteristics of those “alternative relationships” are essentially “the same as” traditional marital relationships. Second, they assume that the benefits conferred upon society by those relationships are just as valuable or equivalent to the benefits conferred upon society by traditional marital relationships. Third, they assume that the cost to society of conferring equivalent legal protections is no greater than costs associated with the conferral of legal status, benefits, and protections upon traditional marital relations. Fourth, they assume that the kinds of benefits, protection, status, and privileges conferred upon the alternative relationships should be exactly the same for domestic partners as those conferred upon traditional marriages, rather than customized and tailored to the unique contours of the particular relationship. The net effect of these assumptions and of chapter 6 is the deconstruction of marriage by the myth of false equivalence.

By making domestic partnership a marriage-like “status” with equivalent financial rights *inter se*, the ALI creates a *competing domestic status* and sends a false message about functional equivalence of domestic partnership and marriage.⁷⁸ Thus, chapter 6 threatens the integrity and legal preference and protection for marriage by equating domestic partnership with marriage for purposes of property allocation and support claims upon dissolution.

*E. Chapter 6 Fails to Use or Improve Existing
Legal and Equitable Doctrines*

Chapter 6 largely overlooks and ignores existing legal and equitable doctrines that have long proven useful to remedy the problem of economic injustice resulting from the breakup of significant marriage-like long-term relationships. Such doctrines and remedies include the unjust enrichment doctrine, quantum meruit, the putative spouse doctrine, doctrines of implied contract and implied partnership, constructive trust principles, etc. Instead of proposing to carefully fine-tune and develop existing legal and equitable doctrines, chapter 6 proposes to create a radically new legal status that is virtually unprecedented in American family law. This seems rather like using a guillotine to get rid of a severe case of

78. *See supra* Part III.D.2–3; *infra* Part III.G.

dandruff; there is no need to lose one's head to solve the problem.

The Reporters acknowledge that existing doctrines are sufficient to provide recovery in many cases.⁷⁹ Of course, there are always cases in which courts do not interpret or juries do not apply existing equitable doctrines to everyone's satisfaction. However, that will happen even under the *Family Dissolution Principles*; our legal system, judges, and juries will still be imperfect. The Reporters failed to show why their rules will not be subject to just as much abuse as existing rules and doctrines, or improved versions of them.

The inadequacy of existing legal and equitable doctrines to provide an adequate remedy under new social conditions may well justify a thorough and careful examination of those existing doctrines and support for proposals to improve and update those principles and remedies. However, the ALI skipped that step entirely, electing instead to create a new family relationship status—domestic partnership. As fun and exciting as social engineering may be, the ALI must be faulted for rushing to propose a radical new domestic relationship rather than first exploring the possibility that improving existing doctrines might provide adequate or better protection against economic unfairness resulting from the breakup of nonmarital relationships.

1. Rejection of contract

The ALI's disregard for existing legal doctrines goes further. For example, chapter 6 rejects basing domestic partnership upon actual contract, agreement, or intent. The Reporters for chapter 6 explicitly declare: "This section thus does not require, as a predicate to finding the existence of a domestic partnership, that the parties had an implied or express agreement, or even that the facts meet the standard requirements of a quantum meruit claim."⁸⁰ This is ironic because the drafters of chapter 6 invoke contract principles to justify

79. For instance, they acknowledge that the unjust enrichment doctrine was successfully used to allow recovery as in *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03, Reporter's Notes, at 41. There the jury awarded a woman \$113,000 on her claim of unjust enrichment; she and the defendant had lived together for a dozen years, they had two children, and he had once executed a will that gave her ten percent of his property. The jury awarded her a little more than ten percent of his net worth at the end of the relationship under the equitable doctrine. *Watts*, 405 N.W.2d 303.

80. *Id.* § 6.03 cmt. b.

legalization of domestic partnership by operation of law.⁸¹ Yet they set the ordinary contract principle on its head. Contract principles protect individuals against being bound by obligations unless they affirmatively opt in by accepting those obligations. The ALI, however, proposes to bind individuals to a contract that they have not made, to obligations they have not chosen to assume, to commitments they have not agreed to assume, by the tactic of putting the burden of the individuals to act affirmatively to opt out or those obligations and commitments will be imposed by default.⁸²

How will a couple opt out of the default domestic partnership provisions of chapter 6? It appears that lawyers will be required to help them do so. The “opt out” must be by express agreement. Such agreements (as regulated by chapter 7 of the *Family Dissolution Principles*, for example) are quite technical and subject to very precise limitations, qualifications, and conditions. To provide reliable protection, the couple seeking to avoid domestic partnership by operation of law will need to obtain the services of an attorney—indeed, they will probably require the services of *two* attorneys.⁸³ Thus, most lower and middle income couples will not consider opting out to be a realistic option for them. And higher income couples who wish to opt out will have to pay dearly for the privilege, as legal services do not come cheaply.

The Reporters propose to implement a set of default rules—in effect, a contract imposed by law on parties who do not explicitly express their agreement to some different set of rules.⁸⁴ The default position (and shifting the burden to opt out) might be justified if it reflected social expectations, but that is not the case in this instance. Most people who enter nonmarital cohabitation deliberately choose *not* to assume the financial responsibilities of marriage that chapter 6 imposes on domestic partners.⁸⁵ Chapter 6 assumes exactly the

81. *See generally id.* § 6.03 cmt. b.

82. *Id.* The ALI scheme is reminiscent of the tactic of vendors who send advertisements offering one month’s free subscription (and in the fine print add that unless you affirmatively opt out thereafter, they will continue to send you the product every month at an exorbitant charge, which will continue until you affirmatively act to cancel the subscription); however, unlike the ALI, those merchants do not impose the obligation on the buyers to affirmatively opt out until after they have affirmatively indicated their choice to opt in (by returning the postcard that says “I subscribe”).

83. *Id.* § 7.05(3)(b).

84. *Id.* § 6.02 cmt. a.

85. *See supra* note 82 and accompanying text.

opposite. Thus, chapter 6 is ultimately anti-consent.

In one sense, chapter 6 proposes compulsory economic marriage. It proposes to force the economic obligations of marriage upon all persons who cohabit.⁸⁶ It will impose upon virtually all cohabitants (all who do not engage an attorney and execute a document that explicitly opts out) the full economic obligations and duties of marriage. It reflects the drafters' strong policy preference for linking economic obligations enforceable upon dissolution with cohabitation. Ironically, this pro-marriage policy proposal of chapter 6 overshoots the mark because consent, agreement, and contract are essential to marriage.⁸⁷

2. Rejection of reasonable expectation

Chapter 6 also rejects reasonable expectation as the basis for recovery as domestic partners. While it appears to assume (not unreasonably) that cohabitation in a primary residence for a significant period of time creates a reasonable expectation of some economic interdependence, on close inspection it turns out that an actual reasonable expectation to share in a marriage-like economic relationship is not required to recover marriage-like property interests and alimony rights, nor is lack of reasonable expectation to share economic benefits a sufficient protection against an unexpected claim under chapter 6. For example, one of the factors included in the black letter law of section 6.03 as evidence that the parties are domestic partners is participation in some "form of commitment ceremony or registration as a domestic partnership that, under applicable law, *does not give rise to the rights and obligations*" of domestic partnership.⁸⁸ Even if the parties investigated the law and determined that going through a private commitment ceremony or having their relationship blessed or solemnized in some religious fashion would *not* give rise to any financial obligations to each other (and based upon that understanding they proceeded) and even if the

86. *See generally* Press Release, Stephen Franks, New Zealand M.P., Government Moves to Marry Thousands Today (May 4, 2000) (on file with author).

87. For similar objections to a New Zealand bill, see Press Release, Stephen Franks, New Zealand M.P., Grim Year Ahead Likely for Many De Facto Couples (autodated) (on file with author); Stephen Franks, New Zealand M.P., What's the Fuss Over De Facto and Same Sex Property Law? (June 18, 2000) (unpublished manuscript, on file with author). While I confess that I like the incentive to marry, I dislike the tactic.

88. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(7)(j) (emphasis added).

law of the state where that relationship was created or where the parties resided explicitly provided that it did not give rise to economic rights and obligations, under chapter 6 the ceremony would be considered evidence of and could provide a basis for the imposition of the very economic responsibilities of domestic partners that the parties intended and reasonably expected to avoid.

The Reporters have categorically assumed that virtually all such cohabiting couples (except those who explicitly and properly opt out) wish to and in fact do “avoid the form of marriage even as they enjoy its [economic] substance.”⁸⁹ In fact, many people enter into domestic partnerships because they wish to avoid marriage and particularly to avoid the economic responsibilities and obligations of marriage.⁹⁰ Chapter 6 differs significantly from some other chapters of the *Principles* because it does not require evidence of the intent or reasonable expectations of the parties. By contrast, for example, one only becomes a “de facto parent” upon a finding of evidence of a reasonable expectation of the parental relationship (including permission of the biological parent).⁹¹

The failure to protect reasonable expectations of separate financial interests will surely harm some women because in some cultures, especially in some minority ethnic communities, women do most of the saving. For example, critics of a similar proposal in New Zealand wrote:

What about the woman who has carefully saved a nest egg from her useless boyfriend. She could see half of it go with him if she lets him stay for over three years because she was lonely.

. . . .

“This certainty of litigation will impose great costs on Maori solo mothers and the legal aid system,” said Donna Awatere Huata.

In Maori society it is practically always women who do the saving.

89. *Id.* § 6.02 cmt. a.

90. See Fineman, *supra* note 76, at 325; see also Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 91 (1990); Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 983–84 (1995).

91. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 2.03(1)(c).

This provides security for the children and herself when her partner abandons his responsibilities.

Yet when this flawed legislation becomes law, Maori women will be at great risk of losing half of their hard earned assets to the absconding male.⁹²

Since chapter 6 subordinates subjective expectations to strong presumptions and pro-partnership principles, similar results would occur under the ALI *Principles* as well.

Thus, chapter 6 goes far beyond *Marvin v. Marvin*,⁹³ the seminal California case famous for marking the extreme boundary of existing “palimony” rules. Ultimately, the claimant in the *Marvin* case (Michelle) was unable to recover on her claim because she failed to establish any facts which would provide any reasonable expectation of recovery under any legal or equitable principle or doctrine.⁹⁴ The Reporters for chapter 6, however, indicate that under chapter 6 a strong “presumption arises” that Michelle would recover as a domestic partner.⁹⁵ Chapter 6 thus exceeds even the extreme *Marvin* decision.

3. Rejection of “good faith belief” requirement of the putative spouse doctrine

Similarly, the rejection of the time-proven element of the putative spouse doctrine that requires a good faith belief in the validity of the marriage is very unwise. The Reporters explain that “[k]nowledge that a domestic partner is married to another does not alone bar claims under [Chapter 6].”⁹⁶ Under the putative spouse doctrine, the cohabitant who is living with someone who is married to another cannot collect as a putative spouse unless he or she had a

92. Press Release, Stephen Franks & Donna Awatere Huata, New Zealand M.P.s, Select Committee Scrutiny a Must (Feb 28, 2001) (on file with author).

93. 557 P.2d 106 (Cal. 1976).

94. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 556–57 (Cal. Ct. App. 1981). The court found that Michelle failed to establish as a matter of fact that Lee Marvin had made any express or implied agreement to divide his property with her or to be a financial partner with her or to provide post-cohabitation support for her. It further found that Michelle had been richly rewarded during cohabitation for her contributions to the relationship and concluded that Lee had not been enriched neither materially nor unjustly.

95. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. d, illus. 6.

96. *Id.* § 6.01 cmt. d, at 7.

good faith belief in the lawfulness of the purported marriage to the putative spouse.⁹⁷ The Reporters instead note: “By contrast, the basis for the accrual of rights between the parties under this Chapter is the character of their social relationship. Knowledge that one or both parties are married to another person is not conceptually inconsistent with the assertion of claims under this Chapter.”⁹⁸ (This apparently reflects Reporter Professor Ellman’s hostility to the notion of moral accountability having any role to play in marital dissolution law in America.)⁹⁹

The reason for the “good faith belief” requirement of the putative spouse doctrine is to protect the integrity of the monogamy rule that one person may have only one spouse at one time.¹⁰⁰ It protects that rule by refusing to extend financial protections to persons even who celebrate marriage if they have reason to believe that they or their spouse is still married to someone else. Thus, the ALI position refuses to protect the monogamy principle; indeed, it flatly declares that monogamy is wholly irrelevant to any recovery. It is merely “the character of their social relationship” that justifies their being able to assert a claim. On the other hand, it was precisely “the character of their social relationship”—bigamous, disfavored, and contrary to public policy supporting monogamous marriage—that was the principle underlying the good faith rule of the putative spouse doctrine.

F. Chapter 6 Is Drafted Ambiguously, Abstractly, and Incompletely

In addition to the errors relating to deconstruction and leveling of family relations, chapter 6 contains some significant practical and drafting errors. It leaves too many essential questions unanswered.

97. *Id.*; see also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 55 (2d ed., 1988) (“The good faith of the party who asserts a claim based on the marriage is required.”).

98. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, at 7–8; see also Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985).

99. See generally Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000); Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801 (1999); Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855 (1999).

100. See, e.g., Blakesley, *supra* note 98, at 18–19; see also *supra* note 40 and accompanying text (confusion over whether polygamists are covered under chapter 6).

1. Chapter 6 fails to provide specific information essential for equitable economic justice for cohabitants

As a matter of drafting, one of the weaknesses of chapter 6 is that it recommends adopting rules that depend upon a specific time variable to be fair, but then it refuses to recommend a specific time. For example, in section 6 a rebuttable presumption of domestic partnership arises if the parties “have maintained a common household . . . for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a uniform rule of statewide application.”¹⁰¹ The Reporters decline to suggest a specific time for the cohabitation period (perhaps for tactical political reasons). Likewise, an irrebuttable presumption of domestic partnership arises if a couple “have maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a uniform rule of statewide application.”¹⁰² Again, the drafters fail to define how long that period should be. The omission is not insignificant; in each case a legal presumption arises if, but only if, the parties have cohabited for the undefined time period. Whether or not it is wise, just, and fair to presume as a matter of law that a domestic partnership has been established (and interdependent financial obligations assumed) by cohabiting for a period of time depends upon *what* period of time. For example, if the parties have maintained a common household for twenty-one years, most people would think it fair to impose financial obligations similar to domestic partnership, but if they have only maintained a common household for twenty-one days the general sentiment might be very different. The problem with chapter 6 is that it does not identify what that period should be—whether it should be long, extremely long, short, or extremely short. That is ironic because the Reporters base their argument for legalization of domestic partnership on the notion that it is “just” and “fair” and “equitable.”¹⁰³ To claim that fairness

101. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(3).

102. *Id.* § 6.03(2).

103. *Id.* § 6.02 & cmt. b. The Reporters also note:

[O]ne court [has] observed that it is appropriate in these cases to presume “that the parties intend to deal fairly with each other.” This suggests that, as in marriage, in the ordinary case the law should provide remedies at the dissolution of a domestic relationship that will ensure an equitable allocation of accumulated property and of the financial losses arising from the termination of the relationship . . . [Chapter 6]

mandates the change of law they propose and then retreat from one of the most important factors that determine fairness—how long the parties have lived together—undermines the justifying principle. It also raises a concern that chapter 6 could be abused (or was intended) to impose *unfair* economic obligations in a strict liability way upon those who have shared a common household and life for only a very short period of time.¹⁰⁴

Likewise, chapter 6 wisely limits its application to the rights of the parties upon the termination of the relationship. Third parties cannot use the status to recover from a domestic partner. However, the Reporters provide no principled basis for limiting the application of their economic “fairness” principle in that way. For example, why should long-time domestic partners not be able to sue negligent drivers and employers for loss of consortium when short-time spouses can recover? Why should the economic rights upon death be different from the rights upon separation? While there are some good answers to such questions, the Reporters give none of them. By drawing lines without giving justifications for those limits, the Reporters appear arbitrary and invite quick erosion of the lines they have drawn. The failure to articulate any justification for not extending the right to recover to third parties suggests that the Reporters were not persuaded that there were any good reasons for the limitation, that they favor erosion of the line they have drawn, and that they have drawn the line solely for temporary, strategic reasons of political expediency. It looks like a Trojan horse.

2. Chapter 6 is too abstract and invites litigation

Chapter 6 makes some distinctions that may make sense in the abstract but are very difficult to apply in courtrooms and litigation. For instance, the authors emphasize that even though their definition of domestic partnership is extremely broad, it is not intended to include persons who merely live in “group living arrangements, such as dormitories or shared houses.”¹⁰⁵ The difference, the Reporters indicate, depends upon whether they are

shifts the burden of showing a contract to the party who wishes to avoid such fairness-based remedies

Id. § 6.03 cmt. b, at 19.

104. Likewise, section 6.03(6) suffers from this flaw.

105. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. I, at 34.

living in such arrangements “as an individual” rather than as a “couple.”¹⁰⁶ Conceptually that may be a coherent distinction, but at the level of trial and proof, it is an extremely ambiguous distinction. What about two individuals who live together in a house in an ongoing sexual relationship, but they have their own separate bedrooms? What if they share utility and food costs, but have separate cars and separate bank accounts? What about couples who share a bedroom, share sexual relations, are socially recognized as “a couple” but keep all of their living expenses separate? What if sex is not involved? The variations are innumerable and the litigation will be interminable.¹⁰⁷

Even in cases of relatively short cohabitation periods, subsections 6.03(6) and (7) leave the courthouse door open for parties to establish domestic partnership. They invite couples who break up before the minimum period of time to litigate anyway. And they make the invitation even more attractive by creating a laundry list of thirteen factors that can help them prove their claim of domestic partnership despite the short period of time they lived together.

Thus, chapter 6 invites litigation. In fact, it requires legal services twice. First, in order to avoid application of chapter 6, parties cohabiting or intending to cohabit will need to obtain legal services to draft an agreement that their relationship not be governed by chapter 6.¹⁰⁸ Because of the ambiguities of the chapter, it is virtually certain that only professionally prepared agreements will be sufficient; such vague drafting guarantees employment for two lawyers at the outset of the relationship. Second, because section 6.03 is so broad and so inviting, it encourages less wealthy or dissatisfied parties to file domestic partner claims upon the breakup of the relationship. Again, legal services (of two attorneys) are required. Whatever the result, the lawyers win, as do the courts who have more work for (more) judges. Only the parties (at least one of them) will lose.

Some provisions of chapter 6 are tautological. For example, whether unrelated persons are family (domestic partners) depends in part upon whether they “share a primary residence,”¹⁰⁹ with “family

106. *Id.*

107. *See supra* Part III.A.

108. *See supra* Part III.E.1.

109. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(1), (4).

members.” Whether the people they live with are “family members” may depend upon whether they are “domestic partners.”¹¹⁰

The noble experiment proposed by chapter 6 is not entirely dissimilar to Utah’s recent experience with common law marriage. The Utah Legislature enacted a statute approximately one decade ago creating common law marriage.¹¹¹ It was based, like chapter 6, on an economic fairness concern—it was enacted to eliminate welfare fraud.¹¹² Since then, however, common law marriage claims have plagued the courts, and none of them has arisen in the context targeted by the legislature—welfare fraud. There have been tremendous proof problems, interpretation issues, and judicial calls for reconsideration of the legislation.¹¹³ This is similar to the experience that led many other states (approximately forty) to abolish common law marriage. The problems that have led to the rejection of common law marriage are unavoidable under chapter 6 in claims for domestic partnership.

3. Chapter 6 creates very serious conflict of laws questions that have not been examined

Because of loose drafting, a very serious conflict of laws question is raised by section 6.03(7)(j), which explicitly authorizes the court to disregard otherwise applicable law. If the parties have participated in the commitment ceremony and registered as domestic partners in a state where that ceremony or registration “does not give rise to the rights and obligations established by this Chapter,”¹¹⁴ section 6.03(7)(j) provides that a court hearing a domestic partnership claim may rely on the fact of such ceremony or registration to impose the financial rights and obligations of domestic partnership anyway. The other state’s law may be completely disregarded. The Reporters provide no qualification, condition, or limit to this factor. Vested

110. *Id.* § 6.03(4).

111. UTAH CODE ANN. § 30-1-4.5 (2000) (enacted in 1987).

112. Because couples who were married and applied for welfare had to count all of the income of both of the parties, but persons who were cohabiting and applied for welfare apparently did not have to include the income of their nonmarital cohabitants, the legislature enacted common law marriage to prevent “welfare fraud.” See *In re Marriage of Gonzalez*, 1 P.3d 1074, 1078 (Utah 2000); *Kelley v. Kelley*, 9 P.3d 171, 182–84 (Utah Ct. App. 2000) (Jackson, J., dissenting).

113. *Kelley*, 9 P.3d at 182–84 (Jackson, J., dissenting).

114. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(7)(j).

rights and protections created by other law (the right to protection against economic obligations and the right to keep one's own property and earnings) are to be ignored categorically, even if that other state has the most significant relationship with the parties and the relationship. This is apparently true even if the forum state does not have any significant relationship at all with the parties or their co-residence, which could violate the Due Process and Full Faith and Credit clauses of the Constitution.¹¹⁵

The same problems arise with respect to section 6.03(7)(k), where the fact that parties have participated in "a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage"¹¹⁶ may be the basis for the imposition of the economic incidents of marriage under chapter 6. Again, this appears to be true even if the forum state has no significant interest in applying its law and even if the only state that has an interest in applying its law is the other state in which the couple resided exclusively and created their relationship.

The choice of law issues are not insubstantial in quantitative terms, either. As of January 1, 2001, seventy-seven percent of the same-sex couples who had registered "civil unions" under the new Vermont law allowing same-sex couples to acquire that new legal status were from outside of Vermont.¹¹⁷ Gay or lesbian couples from forty-seven states have registered civil unions in Vermont. The status recognition and choice of law issues that will attend efforts to force other states to recognize the domestic partnership status and give legal benefits to domestic partnerships under chapter 6, likewise, are not merely idle academic concerns.

G. It Is Contrary to the Best Interests of Society to Legalize Same-Sex Domestic Partnerships and to Legitimize and Promote Nonmarital Cohabitation as Chapter 6 Does

The good intentions or objectives noted in Part II are not the

115. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (concluding that Constitution is violated if jurisdiction whose law is applied has no significant contacts with the parties to transaction); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (finding that due process was violated when applied Texas law to parties and accident in Mexico, where there were no contacts with Texas).

116. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(7)(k).

117. E-mail from Bill Apao, Vt. Dep't of Health, forwarded to Lynn D. Wardle, the author of this article, by Wendy Herdlein (Feb. 14, 2001) (on file with author).

only goals of chapter 6, but ultimately seem to attract support for a much more radical ideological agenda—including legalization of same-sex domestic partnerships. Chapter 6 generally legalizes same-sex domestic partnerships, a step that has been repeatedly rejected by the voters of the American states. It also legitimizes and provides significant financial incentives to heterosexual couples to enter into nonmarital cohabitation, which can be clearly detrimental to the parties who cohabit, to their children, and to society.

1. Chapter 6 extends to same-sex couples a legal status (domestic partnership) that is fully equivalent to marriage in terms of the economic status, rights, and duties of the parties inter se upon breakup of the relationship

In some respects, chapter 6 seems designed primarily to extend to same-sex couples a legal status (domestic partnership) that is fully equivalent to marriage in terms of the economic status, rights, and duties of the parties *inter se* upon breakup of the relationship. The black letter provisions and the Reporters' comments explicitly and repeatedly emphasize that same-sex couples are included in chapter 6 domestic partnerships.¹¹⁸ While chapter 6 thwarts the expectations and understandings of most heterosexual nonmarital cohabitants (that cohabitation does *not* entail marriage-like economic commitment), it fulfills the frustrated yearnings of the gay and lesbian community for some marriage-like legal status for same-sex relationships.¹¹⁹

Only one state (Vermont) gives general domestic partnership status to same-sex couples, and one other (Hawaii) does so restrictively.¹²⁰ Yet the ALI has clearly designed chapter 6 to endorse

118. The Reporters cite with approval the Hawaii Supreme Court's ruling in *Baehr v. Lewin* (and *Baehr v. Mücke*) (later overturned by a constitutional amendment passed overwhelmingly by more than two-thirds of the citizens of Hawaii). They similarly cite with approval the Vermont Supreme Court's decision in *Baker v. State* and the legalization of same-sex civil unions there. The commentary and notes emphasize that same-sex couples are eligible for domestic partnership status and that moral (public policy) concerns relating to sexual behavior ought to be excluded from consideration in determining financial obligations and interests between nonmarital domestic partners. *See, e.g.*, PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(1); *id.* § 6.03(1) & cmts. b, d & illus. 7–9; *id.* Reporter's Notes, at 39, 46–49.

119. *See generally id.* § 6.03 Reporter's Notes, at 39, 46–49.

120. Vermont has created a scheme of "Civil Union" registrations allowing same-sex couples to obtain marital property and alimony benefits similar to those provided by chapter 6

and promote same-sex domestic partnership. That is out of step with the position taken by the people of every state that have had the chance to vote on the question of whether state laws should extend to same-sex couples the same or equivalent status enjoyed in law by married heterosexual couples.¹²¹ Same-sex domestic partnership is clearly a step toward same-sex marriage. Chapter 6 clearly proposes to take that initial step.

2. There are compelling public interest reasons not to legitimate heterosexual nonmarital cohabitation

The Reporters provide a rose-colored view of why people enter domestic partnership rather than getting married. Indeed they describe noble nonmarital cohabitation in glowing terms.¹²² However, empirical research has been done in the past twenty years on nonmarital cohabitation, and the picture that emerges of those relationships is not appealing. One of the most complete compilations of data on outcomes of nonmarital cohabitation in the United States, done by David Popenoe and Barbara Dafoe Whitehead, found that “virtually all research on the topic has determined that the chances of divorce ending a marriage preceded by cohabitation are significantly greater than for a marriage not preceded by cohabitation.”¹²³ Likewise, “[a]ccording to recent studies cohabitants tend not to be as committed as married couples in their dedication to the continuation of the relationship . . . , and they are more oriented toward their own personal autonomy.”¹²⁴ “Most cohabiting relationships are relatively short lived In

by pre-registration. Hawaii allows registration for limited benefits as “reciprocal beneficiaries.” When Hawaii’s domestic partner benefit law passed, state officials predicted that 20,000 people would sign up, but by the end of 1997, fewer than 300 had signed up. David Albertson, *Hawaii’s Domestic Partners Benefit Law Serves Few but Saves Precedent for Others*, EMPLOYEE BENEFIT NEWS, Apr. 1, 1998.

121. In Hawaii, Alaska, California, Nevada, and Nebraska, voters have resoundingly preserved the unique status, benefits, and protections of marriage for male-female couples.

122. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02; *id.* § 6.03 & cmt. a; *id.* Reporter’s Notes, at 36–39. Quotes from the Reporter’s Notes may be of interest to readers here.

123. DAVID POPENOE & BARBARA DAFOE WHITEHEAD, THE NATIONAL MARRIAGE PROJECT, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE 4 (1999), available at <http://www.smart-marriages.com/cohabit.html> (last visited June 12, 1999).

124. *Id.* at 5.

general, cohabiting relationships tend to be less satisfactory than marriage relationships.”¹²⁵

Annual rates of depression among cohabiting couples are more than three times what they are among married couples. And women in cohabiting relationships are more likely than married women to suffer physical and sexual abuse. Some research has shown that aggression is at least twice as common among cohabitators as it is among married partners.¹²⁶

Linda Waite’s review of the National Survey of Families and Households data revealed that when cohabiting couples argue they are more than three times as likely to resort to physical violence than are married couples, a finding supported by several other studies.¹²⁷ Studies also indicate that with cohabiting couples there are “far higher levels of child abuse than is found in intact families.”¹²⁸ Child sexual abuse is much higher for children whose biological parent or parents are only cohabiting rather than married.¹²⁹ “[T]hree quarters of children born to cohabiting parents will see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate.”¹³⁰ Likewise, “[w]hile the 1996 poverty rate for children living in married couple households was about 6%, it was 31% for children living in cohabiting households.”¹³¹ Another study notes that cohabiting men are four

125. *Id.* at 6. Popenoe and Whitehead note the 1980s data showing that about sixty percent of cohabitants married. *Id.* In the 1990s, however, that rate of cohabitant marriage fell to about thirty-five percent. Forste, *supra* note 74.

126. POPENOE & WHITEHEAD, *supra* note 123, at 7.

127. WAITE & GALLAGHER, *supra* note 71, at 155; *see also* POPENOE & WHITEHEAD, *supra* note 123, at 7 (“[A]ggression is at least twice as common among cohabitators as it is among married partners.”); Faith Abbott, *No Bomb, No Book*, 24 HUM. LIFE REV. 31, 43 (1998) (citing a 1993 British study by the Family Education Trust that used data on documented cases of child abuse and neglect between 1982 and 1988 and “found that—compared with a stable nuclear family—the incidence of abuse was thirty-three times higher when the mother was living with a boyfriend not related to the child. And even when the live-in boyfriend was the biological father of the children, the chances of abuse were still twenty times more likely.”); Dean M. Busby, *Violence in the Family*, in 1 FAMILY RESEARCH, A 60-YEAR REVIEW, 1930–1990 335, 361 (Steven J. Bahr ed., 1991) (“Yllo and Straus (1981) . . . found that cohabiting couples had higher rates of violence than married couples. Severe violence was almost five times as likely in cohabitating relationships [than in marriages].”).

128. POPENOE & WHITEHEAD, *supra* note 123, at 8.

129. WAITE & GALLAGHER, *supra* note 71, at 159.

130. POPENOE & WHITEHEAD, *supra* note 123, at 7.

131. *Id.* at 8.

times more likely than husbands to cheat on their partners, and cohabiting women are eight times more likely than wives to be unfaithful to their partners.¹³² A recent study of the relationship of marital status and individual happiness reported that a strong positive relationship between marital status and personal happiness exists in sixteen of the seventeen nations examined.¹³³ The report found that being married increased happiness equally for men and for women in the nations examined, and marriage was more than three times more closely associated with happiness than was nonmarital cohabitation. In light of evidence like this, it is simply irrational for the ALI to recommend in chapter 6 that states should legitimate nonmarital cohabitation and give it the strong endorsement of providing post-termination economic consequences equivalent to those provided to married parties.

H. Chapter 6 Would Significantly Weaken the Institution of Marriage

Legalizing domestic partnership as proposed by chapter 6 could significantly weaken marriage. The overwhelming majority of young people today yearn to get married,¹³⁴ yet they are also frightened of marriage because they have personally experienced or witnessed repeatedly in the lives of their loved ones and friends the personal trauma of marital failure and divorce. These vulnerable young people may be drawn to the dangerous alternative of nonmarital domestic partnership if it is legalized.

Despite the Reporters' assurances that chapter 6 will not encourage young people to enter into nonmarital cohabitation,¹³⁵ there are good reasons to believe that if chapter 6 were adopted more couples would choose nonmarital cohabitation instead of marriage. For example, nonmarital cohabitation increased dramatically after the famous *Marvin v. Marvin* case and similar "palimony" cases in courts in other states in the 1970s and early 1980s. Between 1970 (just six years before *Marvin*) and 1999 (just

132. *The Marriage Movement: A Statement of Principles*, at <http://www.marriagemovement.org> (June 29, 2000).

133. Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARR. & FAM. 527 (1998).

134. Waite and Gallagher report that "[n]inety-four percent of college freshmen in one 1997 survey said they personally hoped to get married. Just 3 percent didn't hope to marry." WAITE & GALLAGHER, *supra* note 71, at 183.

135. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 cmt. b.

twenty-three years after *Marvin*) the number of unmarried heterosexual couples living together rose more than 800 percent.¹³⁶ During the same time period, the rate of marriage fell dramatically.¹³⁷ While cause and effect relations between legal changes and social changes are hard to pin down exactly, at least it can be reasonably said that there might be some causal connection.

Scandinavian countries have had heterosexual domestic partnership for nearly a half century and have recognized same-sex domestic partnership for about a dozen years. The experience of those countries also suggests that legalizing domestic partnership will weaken marriage. First, it appears that the legalization of domestic partnership only occurs after the institution of marriage has already been significantly weakened and devalued in society. Thus, the fact that the ALI is proposing legalization of domestic partnership is a significant indication that the institution of marriage in the United States is already in distress in terms of loss of social position and vitality. Second, after domestic partnership is legalized, it appears that the institution of marriage rarely recovers its position in society. The demographer William Goode suggests that after marriage is weakened in a society it is nearly impossible to revitalize it without some traumatic and dramatic external pressure such as military conquest, economic collapse, or natural disaster of widespread proportions.¹³⁸ It is very difficult to put the genie back in the bottle. So before starting down the road to domestic partnership, we had better be very sure that it leads in a direction we want to go—for history suggests that it is a one-way street.

136. Statistical Abstract of the United States 2000 (U.S. DePart of Commerce, Economics, and Statistics Admin., U.S. Census Bureau) at 55, Table No. 60 [hereinafter Statistical Abstract 2000] (from 1,589 in 1980 to 4,486 in 1999); *id.* at 52, Table No. 57 (41.1% of women 15–44 in 1995 had cohabitated); *id.* at 51, Table No. 53 (24.1% of population in 1980 never married; 29.0% in 1999); Statistical Abstract of the United States 1995 (U.S. DePart of Commerce, Economics, and Statistics Admin., U.S. Census Bureau) at 55, Table No. 60 (523,000 cohabitants in 1970).

137. Statistical Abstract 2000 at 51, Table No. 53 (from 65.5% in 1980 to 59.5% in 1999); Statistical Abstract of the United States 1977 (U.S. DePart of Commerce, Economics, and Statistics Admin., U.S. Census Bureau) at 38, Table No. 48 (married population 71.7% in 1970, 69.6% in 1976).

138. WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 318, 335–36 (1993).

IV. THE DECONSTRUCTION OF FAMILY RELATIONSHIPS IS A
PERSISTENT THEME OF THE ALI *PRINCIPLES*

Chapter 6 is not the only chapter of the *Family Dissolution Principles* containing provisions that are hostile to marriage and marriage-based families. That ideological bias tilts most of the chapters of the *Principles*. For example, the *Principles* purport to consider comprehensively the subject of “family dissolution,”¹³⁹ but the ALI totally refused to consider grounds for dissolution—that topic was not even on the table.¹⁴⁰ Since there is a well-recognized, growing national movement to reform unilateral no-fault divorces,¹⁴¹ the omission is neither inadvertent nor nonpolitical. The Reporters apparently were so committed to unilateral no-fault divorce that they would not risk allowing that subject to come up for discussion.¹⁴²

The provisions of chapter 2 of the *Principles*, dealing with the allocation of custodial and decision-making responsibilities for children, deconstruct legal parenthood just like chapter 6 deconstructs marriage by increasing the categories of persons who can claim that privileged status and position. Chapter 2 extends significant parental status, standing, rights, privileges, and protections to adults who are not biological, adoptive, or marital parents (the traditional categories of legal parents). Section 2.03 extends parental rights to “parents by estoppel,” and “de facto parents,” as well as “legal parents.” The chapter 2 provisions also give standing not only to those three groups of people, but allow intervention by other interested persons who may not come within

139. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS, 1–16 (Tentative Draft No. 3 Part I, Mar. 20, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, Part I)].

140. This harmonizes with the philosophy of chapter 6, which effectively allows the unilateral creation of the domestic partnership status whenever either cohabiting party wants to create it. Established unilateral no-fault divorce principles, which the Reporters protected against reform, provide for the termination of the marital status relationship any time either party wants to end it.

141. See Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783 (1999).

142. This should come as no surprise for anyone who has read the law review writings of Ira Mark Ellman, the lead Reporter for the *Family Dissolution Principles*, who is an emphatic defender of unilateral no-fault divorce. See Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J.L. POL'Y & FAM. 216 (1997); see also *supra* note 99.

any of those categories.¹⁴³ Child custody and visitation disputes will have the potential to become community free-for-alls. (This is taking the “it takes a village to raise a child” metaphor to a ludicrous extreme.) Other sections of chapter 2 provide that sexual orientation (which the comments suggest includes ongoing homosexual behavior) of the contestants may not even be considered in resolving custody issues.¹⁴⁴ The comments categorically (and erroneously) proclaim, with eyes closed to numerous studies to the contrary, that there is no evidence that homosexuality of a parent harms or jeopardizes children raised by such parents.¹⁴⁵ Infidelity by one contestant may not be considered in the custody proceeding unless the faithful parent carries the expensive burden of establishing (usually by hiring a child psychiatrist or psychologist) that the infidelity has been harmful to the child (rather than the unfaithful parent bearing the burden of showing no harm from the infidelity).¹⁴⁶

One of the major effects of the substantially expanded notion of parenthood under chapter 2 of the *Principles* are that the lesbian partner of a biological mother will be able to assert parental rights and continue to interfere in the parent-child relationship of the biological mother and child. Moreover, chapter 2 provides a basis for manipulation to continue such relationships—the nonmarital cohabitant being able to make a very credible threat to a biological parent that “if you don’t stay with me, I will sue for and get custody of your child, and you’ll be left without a partner and without a child.”¹⁴⁷ Those kinds of claims, which can be very threatening and

143. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 2.04.

144. PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 139, § 2.14(1)(d).

145. *See, e.g.*, ROBERT K. LERNER & ALTHEA K. NAGAI, MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING (2001); Judith Stacey & Timothy Biblars, *How Does Sexual Orientation of Parents Matter*, 66 AM. SOC. REV. 159 (2001); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

146. PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 139, § 2.14(1)(e).

147. A few years ago I was consulted by a lawyer who was handling precisely that kind of case. A young woman who had a child in a relationship with a man that went sour moved in with an older woman who was a lesbian and who was financially well off. The young mother and her child were supported for a relatively short period of time by the older lesbian. Then the mother decided that she did not want to continue that relationship and moved out. She allowed continued contact between her former partner and her child for a short period of time but then determined that it was not in the best interests of her child to allow further contact by the lesbian ex-partner. The lesbian ex-partner filed suit to obtain parental relations (visitation).

disruptive to the child and to the mother-child relationship, will surely proliferate (as will litigation to enforce them) if chapter 2 is adopted.

Chapter 5 of the *Family Dissolution Principles* effects a substantial revision of the basic principles of post-divorce alimony or spousal support, which the ALI relabels “compensatory payments.” The proposed provisions embody a radical change of alimony principles, based in large part on the gender-discriminatory principle that the spouse who earns the most generally should have a post-divorce duty to share income with the other spouse even if the other spouse is self-supporting.¹⁴⁸ Economic loss is the governing consideration, but causal connection between marriage and loss is not required.¹⁴⁹ Equalization of post-divorce income solely for the sake of gender-income equalization is as unjust as it is popular with radical feminists.¹⁵⁰ In determining compensatory payments, the grounds or reasons for the failure and breakup of the marriage generally are irrelevant; “fault” is not a valid consideration with regard to compensatory payments (except behavior, such as spouse abuse or child abuse, generally—and erroneously—attributed predominantly to males).¹⁵¹

The provisions of chapter 7 on antenuptial contracts would reverse the trend of the past four decades of generally respecting party autonomy to structure the financial dimensions of spousal (and imitative) relationships. Chapter 7 is generally hostile to enforcement of premarital (and pre-nonmarital) agreements. For instance, chapter 7 requires agreement thirty days prior to marriage, and even if all of the strict requirements are met, the burden of proof is on the party seeking to enforce the contract to establish that it was not invalid.¹⁵²

She won a temporary order of visitation.

148. There is conceptual harmony between the unilateralism of chapter 6 and of chapter 5. Chapter 6 effectively provides for the creation of the economic relationship of domestic partnership any time either cohabiting party wants to create it. Chapter 5 effectively continues the economic relationship (spousal support) after the dissolution of a marital relationship as long as the economic “losing” party wants it.

149. See generally PRINCIPLES (Proposed Final Draft, Part I), *supra* note 7, § 5.02(1) & (2) & cmts. a, e; *id.* Reporter’s Notes, at 265, 269–71.

150. *Id.* See, e.g., Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475 n. 40 (1999); Ellman, *supra* note 99; Michelle Murphy, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313 (2000).

151. PRINCIPLES (Proposed Final Draft, Part I), *supra* note 7, § 5.02(2) & cmt. c.

152. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 7.05.

Other provisions also provide that if a child is born after the party signed the antenuptial contract or if the relationship lasts a certain number of years before breakup, the court has the discretion to decline to enforce the antenuptial contract on vague and subjective “substantial injustice” grounds.¹⁵³

The deconstruction of marriage is promoted in chapter 7. For example, section 7.12 forbids enforcement of “covenant marriage” agreements and other reinforced marriage commitments.¹⁵⁴ Likewise, Professor Ellman’s views against any principles of moral responsibility in dissolution law are manifest in this chapter.¹⁵⁵ Provisions in agreements that require consideration of marital misconduct in awarding property or alimony are unenforceable.¹⁵⁶ Thus, the attempt to deconstruct marriage and families is pervasive throughout the *ALI Principles*.

Apart from ideologically driven flaws in the *Principles* there are a number of gaps in the coverage of the project. For example, the *Family Dissolution Principles* fail to discuss, much less recommend, any procedural reforms for dissolution proceedings that might ameliorate some of the trauma associated with such proceedings and the breakup of families. Mediation, other forms of alternative dispute resolution, waiting periods, counseling, and other practical methods of providing protection against damaging, hasty, ill-considered action, and against hostile and abusive tactics are not generally considered or proposed in the *Family Dissolution Principles*. The absence of provisions dealing with jurisdiction for dissolution (divorce) and related proceedings is a serious disappointment. Jurisdictional issues relating to divorce proceedings have not been seriously considered in fifty years,¹⁵⁷ yet much has changed in other branches of the law of jurisdiction (including due process principles) during that time. Likewise, as Ralph Whitten points out in his paper,¹⁵⁸ there are significant issues relating to conflicts of laws raised

153. *Id.* § 7.07.

154. “A term in an agreement is not enforceable if it (1) limits . . . the grounds for divorce . . .” *Id.* § 7.12. Likewise, penalties for filing for dissolution are unenforceable. *Id.* § 7.12(3).

155. *See supra* notes 99 & 142.

156. *PRINCIPLES* (Tentative Draft No. 4), *supra* note 1, § 7.12(2).

157. *See, e.g.*, *May v. Anderson*, 345 U.S. 528 (1953); *Williams v. North Carolina* (II), 325 U.S. 226 (1945); *Williams v. North Carolina* (I), 317 U.S. 287 (1942).

158. Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 *BYU L. Rev.* 1235.

by the *Principles*, and family law would have been well served by a systematic consideration of the choice of law and judgment recognition dimensions of dissolution, custody, support, and marital property division decrees. Regrettably, those topics were simply ignored in the ALI *Family Dissolution Principles*.

V. CONCLUSION

The major flaw in the *Family Dissolution Principles* in general, and chapter 6 in particular, is that it deconstructs family relations and tries to “level” marriage, parenting, and “alternative” relationships by greatly expanding the kinds of relationships that are given the same preferred, privileged legal status and benefits as “family” relations. Some aspects of that theme pervade nearly all of the chapters of the *Family Dissolution Principles*, but it is in chapter 6 that this theme is expressed most clearly and perhaps most dangerously. There, a new concubinage status called “domestic partnership” is created and defined overbroadly, ridiculously easy establishment of the new status is provided for, and based upon that status the same economic rights and obligations accorded married persons are extended to nonmarital cohabitants upon dissolution. Due to ambiguous yet strategic drafting, a host of practical problems can be expected if chapter 6 becomes law. A few of the provisions reflect good intentions, if not good ideas, but they are so intellectualized and so ambiguous that they are practically incapable of nonarbitrary application. Rather than settling the law, chapter 6 and significant other parts of the *Family Dissolution Principles* are likely to unsettle the law and generate increased litigation.

The potentially profound social effects of conferring legal equivalence upon alternative relationships has not been wisely considered by the ALI *Principles*. Chapter 6 relies on what the ALI Reporters perceive to be recent social changes to justify a significant revision of the basic institution of marriage and family life.¹⁵⁹ It is far from clear, however, that the drafters have not mistaken a mere temporary lifestyle fad for a significant social change, confusing a flashy but transitory generational blip in a few demographic cohorts for real lasting social change. Nothing could be more common; every generation sees its time as a time of pivotal social change and

159. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 cmt. a.

perceives its fads as constituting great political progress and social reformation. But after a few brief decades, after a few natural calamities, a few wars, a few years of economic troubles, the fads fade and the vaunted new lifestyles wilt and largely disappear. In the meantime, however, large numbers of the affected generation will suffer from the tragic (and unnecessary) deprivation and impoverishment of their family life wrought by social engineers whose devaluation of marriage and marriage-based families facilitated and encouraged couples and families to discard the only solid foundation for secure family relations in order to pursue shabby counterfeit “functional equivalents” like domestic partnership.

The ALI *Principles* achieve plausible coherence only by dismissing the powerful bonds of marriage and parenthood as subjective, artificial social constructs. It is based firmly on the principle of moral relativism that equates homosexual partners and nonmarital cohabitation with marriage, that deems a lesbian’s friendship with the child of another woman as the equivalent of maternal love, that equates a roommate’s desire for influence over a child or children with parental responsibility. It insists that marital love between husband and wife is no different from any intimate relationship that results from cohabitation by consenting adults. Thus, significant portions of the *Family Dissolution Principles* are mere ideology masquerading as policy—liberal dogma passed off as legal principle. Chapter 6 virtually ignores the entire body of social science research about the characteristics of nonmarital cohabitation as well as the profound lessons about those human relationships taught by history, tradition, and human experience that might inform a responsible law reform initiative. Rather, it reflects a terribly impoverished view of marriage and marriage-based family life that borders on cynicism and despair.

The *Family Dissolution Principles* in general, and chapter 6 in particular, represent a squandered opportunity for the ALI. The time is ripe for dissolution law reform. There have been no comprehensive proposals for reform of dissolution law in America since the UMDA was proposed in 1970. The UMDA was a pre-no-fault divorce reform and its major contribution to family law was to endorse and show how to implement no-fault divorce. Since the UMDA was proposed, a no-fault divorce revolution has swept the country, and the states have had a quarter-century of experience with no-fault divorce. A generation has grown up since the no-fault divorce

revolution and the UMDA. The world has changed much since then, and much more is known today about divorce consequences (for children and adults) and processes than was known then. The dreams of sexual liberation and freedom from family commitments that seemed so attractive to the free-spirit generation of the 1960s and 1970s seem much less glamorous to the current generation who were the children of or grew up in the era of no-fault divorce. A number of unexpected and undesirable consequences of the no-fault divorce reforms of the 1970s have been identified, and the public dissatisfaction with the regime of unilateral no-fault divorce and with adversary custody and visitation litigation is growing. Thus, the time is right for a comprehensive review of and proposal for reform of dissolution law in the United States, but the ALI has fumbled the opportunity by seeking to radically deconstruct the family and equalize alternative relations. So the opportunity to responsibly guide the reform of family dissolution law in America remains, and some other organizations and individuals may now step forward, profiting from the mistakes of the ALI, to offer more practical, prudent, reasonable, responsible, and well-tailored law reform proposals.