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The ALI Principles of the Law of Family Dissolution: Addressing Inequality Through Functional Regulation

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INTRODUCTION

As part of the commemoration of the American Law Institute's Centennial, this Essay reflects on the ALI *Principles of the Law of Family Dissolution* ("Principles"), a project completed in 2000.[1] Upon approval, President Charles Alan Wright expressed an expectation that the Principles "will be extremely influential in American law and a product of which this Institute can be very proud."[2] In the last two decades, with only a small number of exceptions, state lawmakers have not enacted, and courts have not expressly adopted, the Principles' recommendations.[3] Accordingly, some scholars have dismissed the Principles as a failed project.[4] In this Essay, we offer a different perspective, viewing the Principles not as a command to lawmakers and judges but instead as an important authority that, operating in dialogue with courts, legislatures, advocates, and scholars, has shaped and advanced a progressive agenda in family law.[5]

Our account reflects the roots of the project. Because family law at the time was "less settled"—indeed, "in flux"[6]—it was a prime candidate for the greater "flexibility" afforded by a

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± Anne Urowsky Professor of Law, Yale Law School. We owe a special debt to Kate Bartlett, Grace Blumberg, and Ira Ellman for speaking with us about their work on the Principles and for reacting to an earlier draft of this Essay. For helpful comments, we also thank Susan Appleton, Cynthia Grant Bowman, Bob Gordon, and Courtney Joslin, as well as participants in the Third Annual Nonmarriage Roundtable at Washington University School of Law and in a Boston University School of Law Faculty Workshop. For excellent research assistance, we thank Grace Choi, Sam Davis, Madison Harris-Parks, and Brittany Swift. We are grateful to Sara Oswald at the Biddle Law Library at the University of Pennsylvania Carey School of Law for her archival work.

[1] *See American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) (hereinafter "Principles"). The Principles were adopted on May 16, 2000, at the ALI annual meeting in Washington, D.C. In addition to Wright's leadership, ALI Director Geoffrey Hazard initiated and led the Principles project until 1999, when Lance Leibman became Director. *Id.* at xv.

[2] Tuesday Morning Session – May 16, 2000, A.L.I. Proc. 106, 144 (2000).

[3] *See* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008); Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 301 (2001) ("Chapter Two holds the distinction of being the only portion to have been adopted by a state legislature."). For a critique of the analysis done by Clisham and Wilson, see Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29 (2014).

[4] *See*, *e.g.*, Clisham & Wilson, *supra* note 3, at 576 ("[T]he *Principles* have not had the influence the ALI hoped for with legislators or courts—the two groups at which they are principally directed."); David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, 27 HARV. J.L. & PUB. POL'Y 917, 960 (2004) ("The *Principles* are a failed effort at family law reform and may not even enjoy the support of most of the members of the ALI.").

[5] *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 324 (2020). *Cf.* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 829-30 (2004) (explaining how legal scholars influence family law in direct and indirect ways).

[6] *See Principles*, *supra* note 1, at xv ("Director's Foreword" by Lance Liebman).

"Principles" project than a "Restatement."[7] When first introducing the family dissolution project to the ALI membership, President Wright observed that the Principles "did not purport to be a Restatement" but instead "purports to state what the Institute believes are the principles that enlightened jurisdictions should follow," for example, by adopting legislation.[8] As esteemed ALI Council member Bennett Boskey later explained the virtues of principles projects: "by concentrating on the cutting edge of the law the Institute can contribute recommendations for sound and useful development in what is often a fast-paced arena."[9] Consistent with this aim, Katharine Bartlett, a reporter on the family dissolution Principles, explained the drafters' effort "to find 'best practices' without necessarily being constrained by existing law."[10] In this Essay, we show how the Principles' drafters, themselves influential scholars who had been developing their own approaches to legal regulation of the family, intervened in cutting-edge issues in ways that staked out and elaborated a progressive family law agenda that would continue to gain traction in the decades after the Principles' publication.

For the drafters, a progressive agenda must insist that family law reflect the ways that individuals form and live out relationships, rather than marshal the power of law to impose a narrow vision of the family and leave unprotected those who fail to conform. The need to meet families where they are yielded a legal framework that vindicates critical equality commitments and adopts a functional, rather than formal, approach to legal regulation. A functional approach accommodates the family relationships that individuals form, values the work of care that individuals contribute to their families, and recognizes that relationships give rise to rights and responsibilities. We link the Principles' preoccupation with *family inequality* to its *functional* approach to recognition and regulation. Relations *within families*—particularly gender-differentiated roles in different-sex couples—as well as distinctions *between families*—particularly marital-status distinctions that also implicated sexual orientation discrimination—concerned the ALI's drafters.[11] Rather than distinguish family relations based on gender, sexual orientation, or marital status, the drafters articulated generally applicable principles that sought to mitigate inequalities by reflecting, and accommodating, families' lived experiences. Drawing on archival materials, interviews, and other relevant primary and secondary sources, this Essay demonstrates how concerns with inequality shaped the Principles' functional approach to both adult and parent-child relationships.

With respect to adult relationships, we attend to questions of gender equality within marital and nonmarital families. The reporters recognized the decline of rigid gender roles in family law and in society. However, in light of the persistent gendered realities of family life, they worried about the

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[7] *See* Bennett Boskey, *The American Law Institute: A Glimpse at Its Future*, 12 GREEN BAG 2d 255, 261 (Spr. 2009).

[8] Tuesday Afternoon Session – May 16, 1995, 72 A.L.I. Proc. 45, 73 (1995). As explained elsewhere in this volume, the ALI has since "formalized" this distinction, explaining "Principles are primarily addressed to legislatures, administrative agencies, or private actors," but "may be addressed to courts when an area is so new that there is little established law." They may also "suggest best practices for these institutions." AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE 4, 13 (2015) (revised style manual). *See* Kenneth S. Abraham and G. Edward White, *The Work of the American Law Institute in Historical Context*, this volume.

[9] Boskey, *supra* note 6, at 261.

[10] *See, e.g.,* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the Law of Family Dissolution,* 10 VA. J. SOC. POL'Y & L. 5, 6 (2002) (noting that "Principles" strive to find "best practices" rather than "restate" the prevailing law and also recognizing role of empirical and normative questions in crafting custody rules).

[11] On these two dimensions of equality, see LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 5-7, 117-219 (2006). On the relationship between equality principles and the functional turn in family law, see Susan Frelich Appleton, *Gender and Parentage: Family Law's Equality Project for Our Empirical Age, in* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 237-56 (Linda C. McClain & Daniel Cere, ed. 2013); NeJaime, *supra* note 5, at 334-40.

harms that purportedly neutral legal rules inflicted on women. This equality-inflected approach led the drafters to be skeptical of contract models that were premised on equal bargaining power of spouses or nonmarital partners and ignored that relationships themselves gave rise to duties. Accordingly, the drafters sought to reward non-monetary investments in family relationships and to provide financially for spouses and partners (disproportionately, women) who sacrificed economic opportunities in the interest of the family unit. This perspective is reflected in the Principles' approach to alimony ("compensatory spousal payments") and property distribution for divorcing couples, as well as in its application of that approach to unmarried "domestic partners."

The treatment of unmarried couples also reflected the drafters' concerns with inequality based on marital status and sexual orientation. When the project began, no state permitted same-sex couples to marry and, although various municipalities had domestic partnerships laws, no state did. By the time the Reporters finished, the federal government and many states had "defense of marriage laws" limiting marriage to one man and one woman and even, in some instances, prohibiting alternative formal statuses. Vermont had enacted a civil union regime for same-sex couples, and California had adopted, and begun to expand, a domestic partnership law. Against that backdrop, the Principles proposed to treat as "domestic partners" two persons—whatever their gender—who shared life as a couple, and to bring them under the protective umbrella of marriage law for purposes of property distribution and alimony. In the ALI's perspective, same-sex couples whose relationships "closely resemble marriages *in function*"[12] should not be forced to live outside of family dissolution rules.

Similar equality concerns animated the Principles' approach to parenthood. The drafters sought to protect parent-child relationships formed outside of marital families, which necessarily included families formed by same-sex couples. Unlike the paradigmatic different-sex couple, same-sex couples with children necessarily include a nongenetic parent. Accordingly, commitments to equality based on marital status and sexual orientation, as well as concerns with children's welfare, led the drafters to elaborate an increasingly capacious functional approach to parental recognition. The law, on this view, should follow actual parent-child relationships. To implement this approach, the Principles adopted two pathbreaking concepts—de facto parent and parent by estoppel.

Even as we identify the Principles' role in tackling critical issues that have preoccupied family law in the years since, we also recognize the limits of the ALI's approach. The Principles addressed inequality only partially and stopped short of fully elaborating a functional approach to family recognition. Of course, as a project with law reform ambitions, the drafters were constrained by political and practical considerations that led them to accept key dimensions of the "traditional" family. Indeed, they explicitly disavowed any intention to encourage nonmarriage over marriage and, to the contrary, predicted that the Principles would reduce the "incentive to avoid marriage" to escape responsibilities to a partner.[13] Yet, combatants in the culture wars urged opposition to the Principles for weakening or "de-privileging" marriage by assimilating nonmarital relationships to the model of marriage.[14] Similarly, the functional approach to parental recognition did not reach its logical conclusion of parity between biological and nonbiological parent-child relationships. Yet, critics assailed the functional categories that included LGBTQ parents and other nonbiological parents for "fragmenting parenthood" by eliminating biology as its basis.[15]

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[12] Principles, *supra* note 1, at 915 (emphasis added).

[13] *Id.* at 916.

[14] *See, e.g.,* Institute for American Values et al., *The Marriage Movement: A Statement of Principles* 22 (2000); Institute for American Values et al., *The Future of Family Law* 5, 16-18 (2005).

[15] *See, e.g., The Future of Family Law*, *supra* note 14, at 16, 37.

Nonetheless, in identifying and advancing a functional approach to family recognition in part as a means to address persistent inequality in both law and society, the ALI supplied an emergent family law agenda with credibility. Since the time the Principles were promulgated, the functional approach, in important respects, has grown dramatically, justified in part on equality grounds. The law of parental recognition has embraced functional criteria as part of a broader agenda to protect children's relationships with their primary caregivers and to vindicate commitments to equality based on gender, sexual orientation, and marital status. While the ALI's status-based approach to nonmarital adult relationships remains less dominant than the contract model it criticized, its position nonetheless serves as a vital reference point and model in ongoing debates over legal remedies for unmarried partners. Given declining marriage rates and rising rates of nonmarital cohabitation, the need for such legal remedies arguably persists even though marriage for same-sex couples eliminated a significant source of inequality evident to the Principles' drafters.[16] In other areas, such as premarital and marital agreements, the Principles' insistence on tempering freedom of contract given the particular context of intimate bargaining and how family relationships change over time has influenced significant law reform projects.[17]

To be clear, we are not making a claim about the Principles' influence on each of the areas it tackled. We do not, and cannot in an essay of this length, address each major section of the Principles. Rather, we focus on a few key doctrinal areas to show the purchase of the Principles' conceptual framework. The question is not whether courts and legislatures adopted the Principles' proposals, but instead whether the ALI—in keeping with the aims of a "principles" project—identified and elaborated concepts that have become central to critical debates in family law and that, to varying degrees, have influenced the direction of the law.[18]

I. ADULT RELATIONSHIPS

An image from the tech world, path determination, seems apt to describe the impact that the selection of Ira Ellman as (initially) Reporter and then Chief Reporter and Grace Blumberg as co-reporter had on the chapters of the Principles on which they collaborated relating to adult-adult relationships.[19] Blumberg and Ellman shared a skepticism about contract as an adequate model for adult relationships because it failed to recognize that relationships themselves could give rise to duties. Instead, they favored a status-based approach in which law would acknowledge and address the realities of family life, including inequalities between men and women (as spouse and cohabitants), marital and nonmarital families, and different-sex and same-sex couples.

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[16] On the growing prevalence of and reasons for nonmarital cohabitation in the U.S., see Deirdre Bloome and Sharon Ang, *Marriage and Union Formation in the United States: Recent Trends Across Racial Groups and Economic Backgrounds*, 57 DEMOGRAPHY 1753 (Sept. 10, 2020); Nikki Graft, *Key Findings on Marriage and Cohabitation in the U.S.*, Pew Research Center (Nov. 6, 2019), https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/

[17] *See, e.g.,* Barbara A. Atwood and Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements,* 46 FAM. L. Q. 313, 314-15, 329-30 (2012) (noting the Principles' "sharp criticism" of the Uniform Premarital Agreements Act and contrasting approach as among factors making "timing seem right" for promulgating the new Uniform Premarital and Marital Agreements Act).

[18] *See* NeJaime, *supra* note 5, at 324 (situating the ALI Principles in family law's functional turn).

[19] In his "Director's Foreword" to the *Principles*, Lance Liebman observed that "finding the right Reporters proved difficult," but that after "valiant early contributions" by several professors, "the team of Ira Ellman, Chief Reporter, and Kate Bartlett and Grace Blumberg, Reporters took over and led the work to its happy conclusion." Principles, *supra* note 2, at xv.

The Principles' functional approach not only included both marital and nonmarital relationships but also justified assimilating some unmarried couples to the law of marriage. This ambitious and controversial approach emerged over time.[20] At the 1995 ALI annual meeting, Ellman stated that a "project on Family Dissolution . . . largely means divorce," although there was a "contemplated" chapter on "the dissolution of nonmarital relationships" and chapters on custody and child support would address both marital and nonmarital children. In that sense, the project was "on the dissolution of both formal and informal families." However, Ellman introduced draft chapters on property (Chapter 4) and compensatory payments (Chapter 5) as "really exclusively divorce topics."[21] The final version of the Principles, however, made most of Chapters 4 and 5 applicable to some nonmarital couples on the rationale that relationships that met the criteria of "domestic partners" (Chapter 6) "closely resemble marriages in function, and their termination therefore poses the same social and legal issues as does the dissolution of a marriage." Similarly, Chapter 7 (a late addition to the *Principles*) specified rules for how both spouses *and domestic partners* could make agreements to alter or confirm the "legal rights and obligations" they would otherwise have to each other under the Principles or "other law governing marital dissolution."[22]

In what follows, we focus on the drafters' approach to spousal support and domestic partners, showing how concerns with inequality based on gender, marital status, and sexual orientation shaped a functional approach to intimate relationships. The Principles' approach to spousal support aimed to address the economic inequality arising in marriage due to the persistence of the gendered pattern of a wife's investment in homemaking and caretaking and a husband's investment in market labor. The Principles reflected and extended Ellman's scholarly approach, seeking to compensate spouses for economic losses arising from sharing behavior in marriage.[23] The Principles' status-based approach to unmarried cohabitants aimed to address gendered patterns of care and work in nonmarital families. The Principles adapted Blumberg's influential proposal to "assimilate cohabitants to married persons" for purposes of property division and spousal support.[24]

A. Spousal Support

1. Ellman's Call to Focus on (Gendered) "Economic and Social Realities"

In an influential 1989 article, *The Theory of Alimony*, Ellman contended that neither contract nor partnership concepts provided an adequate model for marriage—or theory for alimony awards. Ellman noted the stark disconnect between modern alimony law's formal gender neutrality and the "economic and social realities that usually make the wife economically dependent rather than the husband." Those "realities" included the greater "domestic burden" that wives bore from shouldering primary responsibility for "domestic needs"—particularly childcare—even as the majority of wives worked outside the home. Contract would not remedy a wife's loss from such marital investment if the marriage ended in divorce.[25]

Ellman's article painted a vividly gendered picture of why marriage—without an "enforceable long-term contract"—is a "risky investment." The "traditional wife" invests in a marriage early by having and raising children and providing her husband "with the supportive domestic environment

[20] For examples of critiques, see RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF FAMILY DISSOLUTION (Robin Fretwell Wilson, ed. 2006).

[21] Tuesday Afternoon Session – May 16, 1995, 72 A.L.I. Proc. 45, 66 (1995).

[22] Principles, *supra* note 1, at 915, 945-46.

[23] Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 3 (1989).

[24] Grace Ganz Blumberg, *Cohabitation without Marriage: A Different Perspective*, 28 UCLA REV. 1125, 1166 (1981).

[25] Ellman, *The Theory of Alimony*, *supra* note 23, at 4 & n.2, 13, 40.

that furthered his market success," with the expectation of later "sharing in the fruits of her husband's eventual market success." A wife may give her husband "'the best years of her life"' without a return on her investment, while the husband exits the marriage able to take "much of the gain realized" (such as increased earning capacity) into a new marriage. While such "marital 'specialization"' "makes sense for most couples" *if* "they view their marriage as a "sharing enterprise," a "disproportionate loss" is suffered by the spouse who specialized in domestic labor if the commitment to share breaks down.[26]

Ellman did not argue that family law should discourage gendered role specialization and sharing behavior or steer people toward more egalitarian marriages. Rather, given how spouses actually conduct their lives, alimony law should reward, rather than punish, sharing behavior and sacrifices. Ellman proposed to reconceptualize alimony as one spouse's obligation to compensate the other for "residual" loss (i.e., surviving the marriage) in the latter's earning capacity arising from engaging in domestic labor during marriage. He proposed several principles for redefining alimony as "compensable marital investment."[27]

2. Chapter 5: Status (and the Passage of Time) Give Rise to Duties

Chapter 5 incorporates Ellman's critique of contract and partnership models and his proposed theoretical framing around compensation for financial losses. Its objective is "to allocate financial losses that arise at the dissolution of a marriage according to equitable principles that are consistent and predictable in application." This shift from spousal need to compensation for losses "arising from the marriage and its failure" transforms a spouse's petition "from a plea for help to a claim of entitlement."[28]

The commentary emphasizes status and the duration of a relationship as giving rise to duties that survive a marriage's end: "as marriages lengthen, continuing obligations between former spouses depend less on explicit agreement and promise than on their relationship itself, molded by them jointly, with consequences for them and their children." How spouses conduct their joint lives grounds such duties. Section 5.03 specifies different awards based on several categories of compensable loss, approximating "the fact patterns that typically support alimony claims in existing law." One category mirrors Ellman's article in focusing on earning-capacity loss incurred during marriage and continuing after dissolution due to "one spouse's disproportionate share, during marriage, of the care of the marital children . . . ." Chapter 5 goes further, recognizing loss arising from other forms of caretaking when one or both spouses have a moral obligation to engage in it.[29]

Chapter 5 also went beyond *The Theory of Alimony* by recognizing compensable loss in a marriage of "significant duration" without inquiring into sharing behavior. Section 5.03(2)(a) deems a "compensable loss" the "loss of living standard experienced at dissolution by the spouse who has less wealth or earning capacity." Time itself is a proxy for changes—and their impact—in a marital relationship. Thus, equitable principles require accounting for "losses that arise from the changes in life opportunities and expectations caused by the adjustments individuals ordinarily make over the course of a long marital relationship."[30]

The significance of the passage of time in entwining lives and engendering obligations is also evident in Chapter 4 (on dividing property). Section 4.12 provides that, in sufficiently long-term

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[26] *Id.* at 42-44, 48.

[27] *Id.* at 49, 53-73. Ellman argued that any loss in an "egalitarian marriage" would fall on both spouses, but they might still be in unequal positions after divorce since husbands usually have greater earnings than wives. *Id.* at 45-46.

[28] Principles, *supra* note 1, at 787, 790.

[29] *Id.* at 793, 798 (§ 5.03(2)(b)), 801.

[30] *Id.* at 787, 798 (§§ 5.02(2)(a), (3)(b)).

marriages, a portion of each spouse's separate property should be (gradually) recharacterized at dissolution as marital property, with the percentage increasing with the length of the marriage. In support, the reporters appealed to how spouses think about their property as a marriage lengthens and drew a parallel to Chapter 5's increase in the amount of compensatory payments based on a marriage's length.[31]

In defending the controversial recharacterization provision at an ALI meeting, Ellman appealed to the interplay of ownership and equity, arguing that equity becomes more important in a long marriage: "people should not leave a marriage of 25 or 30 years' standing with significant differences in financial status." Dean Herma Hill Kay supported the provision as a "brilliant stroke" that "corresponds" to the expectations of "most people" in long marriages who "feel that the sharp distinctions that the law imposes on separate and community property really are not very meaningful in their lives."[32]

3. Gender Dynamics and Feminist Criticisms of Chapter 5

Chapter 5's illustrations—intended to represent typical cases—reveal the gender dynamics not evident from the gender-neutral language of its principles. The reasoning behind using feminine pronouns ("she"/"her") for the "long-time homemaker" was that "in understanding the nature of the obligation that arises in the long-term marriage, it is useful to think first about the traditional homemaker wife, as perhaps the clearest case." However, although the historical pattern of a wife's financial dependence on a husband is the most "persuasive application" of compensation for loss, it also applies when husbands are "financially dependent upon their wives." Further, because the Principles make persons who qualify as "domestic partners" under Chapter 6 subject to most of Chapters 4 and 5 (absent an express opt-out), Chapter 5's principles would apply to same-sex partners who were not (then) able to marry. Presumably, Chapter 5's status-based reasoning—that obligations arise as "the parties' lives become entwined"—would equally apply to long-term cohabitation (whatever the partners' gender): "As a marriage lengthens, the parties assume roles and functions with respect to one another. In sharing a life together, they mold one another."[33]

Even as the Principles sought to address gender inequality, it did not go as far as some feminist critics of alimony law urged. At one annual meeting, family law scholar Carol Bruch moved (unsuccessfully) to resubmit—rather than approve—Chapter 5 "in light of [the] large body of thoughtful scholarship" attempting to "right the wrongs of unequal living standards after divorce." The project, Bruch charged, had "basically ignored" the work of "all of the people who have been writing over the last 10 years to say what horrible injustices have occurred to women under our spousal support laws."[34] Bruch argued that, as a "Principles," rather than a "Restatement," the draft should be an "an improvement" of the current law, not "an apology" or "rationale" for it.[35] Another concern was that Chapter 5 failed to address the residual and permanent income and earning capacity loss,

[31] *Id.* at 769 (§ 4.12).

[32] Wednesday Morning Session, May 17, 1995, 72 A.L.I. Proc. 91, 130, 140 (1995). By a vote of 95 to 101, a motion to recommit Section 4.18 (what became Section 4.12) to the Reporters for reconsideration failed. *Id.* at 142.

[33] Principles, *supra* note 1, at 809, 811.

[34] Wednesday morning Session, May 15, 1996, 73 A.L.I. Proc. 109, 110, 117 (1996) (mentioning Professors Krauskopf, Brinig, Czapanskiy, and herself). Bruch drew on her experience as "a housewife of seven years" to criticize the "demeaning" tone of parts of the draft toward "women who have devoted their efforts to a joint enterprise" and to insist on the aptness of an equal partnership model. *Id.* at 121 (1995).

[35] *Id.* at 110.

even following a "relatively short term marriage," experienced by a caretaking spouse who becomes (after divorce) the custodial spouse.[36]

B. Unmarried Cohabitants

1. Blumberg's Argument for a Status-Based Approach to Cohabitation

In a generative 1981 article, *Cohabitation without Marriage: A Different Perspective*, Blumberg noted the American "romance with freedom of contract" despite its obvious limits as applied to intimate relationships. She contended that "publicly created status is a much more sustainable vehicle for handling support and property claims of unmarried and married cohabitants than is contract theory." Contract theory produced "unjust results" given cohabitants' unequal bargaining power. Further, this dynamic was gendered: inequality in economic power between men and women produced unequal bargaining power in marriage and cohabitation since "self-interest would lead the man to give up as little [wealth] as possible." Cohabitants often followed marriage-like gendered patterns: "pervasive sexual segregation in the labor force, gender-based pay differentials, higher female unemployment rates, and a tradition of male primacy" usually led couples to invest in "the male." Challenging a view of nonmarital cohabitation as "experimentation" freeing women "from their traditional roles," Blumberg contended that sociological studies and case law revealed that "the woman wanted to marry and was economically powerless," while the man was "domineering and economically powerful;" the cohabitation relationship itself was "long and traditional in terms of sex stereotyped role assumption."[37]

All these factors demonstrated the inadequacy of a contract model focused on the "intent of the parties" with respect to their nonmarital cohabitation. Cohabiting women engaged in "marriage-like" traditional roles, yet lacked the remedies available to wives through doctrines like equitable distribution and rehabilitative alimony. Blumberg proposed a "simple solution": "assimilate cohabitants to married persons for purposes of maintenance, property division, and elective share statutes." Instead of *Marvin v. Marvin*'s model of looking to express or implied contract or to equitable remedies, directly imposing "divorce remedies" would be fairer than "pretending concern for cohabitants' 'intent,'" given that most cohabitants do not make express agreements.[38]

Blumberg's status model, treating "a cohabitation of two or more years' duration or a cohabitation of any duration in which there is a child born to the parties . . . as though it were a lawful marriage," foreshadowed the approach of Chapter 6. Blumberg countered arguments that treating cohabitants "as though they were married" was unfair with sociological studies showing that cohabitants think that "there is no difference between marriage and cohabitation" and that "they will be and ought to be treated as though they were married persons"—although post-separation, men, particularly, tended to reevaluate "marriage-like cohabitation" as "non-marriage-like."[39]

2. Chapter 6's Status-based Model and Inclusion of Same-sex Couples

By the late 1990s, when Blumberg and Ellman drafted Chapter 6, they could look to status-based models in the U.S.—most prominently Washington State's application of its community-

[36] For discussion, see Tuesday Afternoon Session – May 14, 1996, 73 A.L.I. Proc. 53, 67-80. As another example of this gap, Chapter 5 did not require "income equalization at the dissolution of long marriages." *See* Principles, *supra* note 1, at 825-831 (noting "considerable feminist literature" urging post-divorce income sharing, while arguing Chapter 5's "less ambitious principle" would still yield "larger awards than those currently granted in many alimony cases").

[37] Blumberg, *Cohabitation without Marriage, supra* note 24, at 1133, 1163, 1168.

[38] *Id.* at 1166, 1168.

[39] *Id.*

property laws to stable, marriage-like relationships.[40] Also by this time, recognition of the needs of same-sex couples expanded the earlier focus on the gendered dynamics of "heterosexual cohabitation."[41] For Blumberg and Ellman, any chapter on nonmarital cohabitants must include same-sex couples.[42] (At UCLA, Blumberg was involved in efforts to extend family benefits to employees' same-sex partners.[43]) Chapter 6 observes: "there are domestic partners who are not allowed to marry each other under state law because they are of the same sex, although they are otherwise eligible to marry and would marry one another if the law allowed them to do so."[44] Thus, while the basis for Chapter 6 was contract's inadequacy for intimate adult relationships, one justification for it was same-sex couples' exclusion from marriage.[45]

Aptly, Chapter 6's Illustrations featured same-sex and different-sex couples. Representative of social realities and of fact patterns common in case law, many illustrations featuring different-sex couples included gendered role specialization.[46] Some examples featuring same-sex partners included economic disparity and role specialization, while others featured more egalitarian arrangements.[47]

3. Assimilating Cohabitation to Marriage: A "unitary system"

When the Principles project commenced, it was not evident that it would take the status-based approach to nonmarital cohabitation championed by Blumberg in 1981. The "Background Paper" for the January 25-26, 1990 meeting, convened to "inform and shape the American Law Institute project to draft Principles of Law Governing Family Dissolution," lists "the dissolution of informal intimate relationships" as among the major issues.[48] Further, it notes a shift in public attitudes about such relationships "to tolerance, if not approval," and "increased openness and public tolerance of same gender intimate relationships," reflected in "a body of legislation and developing case law."[49] But the "very preliminary draft" shared with participants states that, while the parts on child support and child custody "shall apply to children of both formal and informal relationships," the parts on property division and spousal support "shall apply only to divorce, i.e., the dissolution of a formal marriage."[50]

Through the mid-1990s, this distinction between formal marriage and cohabitation continued. In November 1993, when Ellman shared partial drafts of three chapters—Division of Property, Alimony (renamed "Compensatory Payments"), and Child Support—he stressed the "inherent

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[40] *See* Ira Mark Ellman, *Contract Thinking was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1366 (2001) (explaining that the Washington Supreme Court and, subsequently, the ALI *Principles* chose the approach rejected by *Marvin,* "assimilating unmarried cohabitants into the legal regime of marriage"). In Washington, a community property state, if nonmarital partners are in a "committed intimate relationship" (established through a multi-factor test), there is a rebuttable presumption that any property they acquire during cohabitation is common property, subject to equitable distribution at the end of the relationship. *See* Olver v. Fowler, 168 P.3d 348 (Wash. 2007).

[41] Principles, *supra* note 1, at 933, 1128.

[42] Interview with Grace Blumberg, March 11, 2011 ("Blumberg Interview").

[43] Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1287 (2001).

[44] Principles, *supra* note 1, at 914.

[45] Blumberg Interview, *supra* note 42.

[46] *Id.*; Interview with Ira Ellman, April 7, 2021. *See* Principles, *supra* note 1, at 921-22 (Illustrations 3 through 6).

[47] *See* Principles, *supra* note 1, at 923-25 (Illustrations 7 & 11).

[48] Memo from Marygold S. Melli to Participants in Conference eon the Law and Public Policy of Family Dissolution, Jan. 4, 1990 (attaching Background Paper: Conference on the Law and Public Policy of Family Dissolution).

[49] *Id.* at 2. To be fair, after noting that courts "generally enforce" contracts between cohabitants and flagging questions about such contracts, the Background Paper raises the status question: "Should cohabitation give rise to economic rights or obligations founded otherwise than in contract?" Id. at 16.

[50] "Principles of the Law Governing Family Dissolution" ("Very Preliminary Draft"), attached to Background Paper.

interdependence" of these chapters.[51] He reported that no work had been done on two additional planned chapters, Dissolution of Nonmarital Cohabiting Relationships and Premarital and Separation Agreements, and did not discuss extending the Principles' approach to property and alimony to nonmarital relationships.[52] By 1994, it was not clear the reporters would reach nonmarital cohabitation, as Ellman observed that "at one time" such a chapter "was contemplated."[53]

In October 1998, however, Ellman shared with the Council a preliminary draft of a chapter called "Domestic Unions," addressing "long-term, marriage like, nonmarital relationships."[54] Authored by Blumberg and Ellman, the chapter laid out the basic approach taken in the final version of Chapter 6. Finding the proper terminology proved challenging: most of the advisors did not care for the initial draft's use of "de facto spouses" and "de facto marriage"[55]—terms that made vividly clear the reporters' functional approach. They favored "domestic partners," but Blumberg and Ellman worried about its "inappropriate connotation of a business relationship."[56] By 1999, Chapter 6 was renamed "Domestic Partners."[57]

At the May 2000 annual meeting, when the ALI membership first saw drafts of Chapters 6 and 7, President Wright and Blumberg presented nonmarital cohabitation as "not part of our original agenda." As Blumberg explained Chapter 6's origins, "some of our Advisers, particularly the judges, thought that [nonmarital cohabitation] needed rethinking and reformulation [and] that some of their most troubling cases involve the dissolution of nonmarital families and that existing law was often unsatisfactory." Ellman stressed the limits of contract in identifying the "difficult problem" posed by Chapters 6 and 7: "how to acknowledge the importance of contract without forgetting that the contract rubric can never provide a complete description of family relations."[58]

In presenting Chapter 6, Blumberg observed the fast-changing landscape at home and abroad concerning nonmarital cohabitation. She recollected Wright urging, "early in the history of this project," to look at "foreign law as well as to American law," and commented that the reporters "took this advice most to heart . . . with nonmarital cohabitation."[59] As Blumberg documented in her 1981 article,[60] other countries took a functional approach under which, as she explained to the ALI, they "look to the social behavior of the parties [and] to objective facts rather than to subjective intentions." Blumberg contrasted the "American contractual treatment" with this functional approach, which generally asked, "does this nonmarital family look like a marital family?," and if it did, applied "some or all of the family law" concerning dissolution to a "nonmarital family."[61]

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[51] Memorandum from Reporter Ira Ellman to the Council, "An Overview of Existing Law and the Project's Current Status," November 11, 1993.

[52] *Id.* at 1.

[53] Memorandum from Reporter Ira Mark Ellman to Council, Nov. 11, 1994, at 1. Ellman also indicates it is "no longer feasible" to draft a chapter on Agreements, "given the time available to complete the project." *Id.* at 23-24.

[54] Chapter 6, Domestic Unions, attached to Memo from Chief Reporter Ira Mark Ellman to Council of the American Law Institute, on submission for October Council Meeting, Sept. 27, 1998.

[55] Memo from Chief Reporter Ira Mark Ellman to Council of the American Law Institute, on submission for October Council Meeting, Sept. 27, 1998.

[56] *Id.*

[57] Memo on Chapter 6 from Grace Blumberg to Advisers and Members Consultative group, Sept. 24, 1999.

[58] Monday Morning Session – May 15, 2000, 77 A.L.I. Proc. 3, 29-30 (2000).

[59] *Id.*

[60] *See* Blumberg, *supra* note 24, at 1170-78.

[61] Monday Morning Session, *supra* note 61, at 32.

By focusing on the lived reality of families, the reporters developed a functional approach that led them to craft "a unitary system," under which "the same rules apply to all sorts of couples."[62] Thus, the "foundation" for Chapter 6 was "the equitable concerns" expressed in Chapters 4 and 5, which "define and rationalize the claims that one spouse has upon another at the termination of a marriage" unless they explicitly agree—pursuant to Chapter 7—not to be "subject to these equitable rules." Since Chapter 6 sought to reach "marriage-like cohabitation," the reporters attempted to draft "rules that would distinguish relationships that are marriage-like from those that are not."[63] The duration of a relationship for a "significant period" would trigger a presumption that the couple were domestic partners, rebuttable by evidence that the parties "did not share life together as a couple."[64] The Principles propose a shorter period if the couple maintains a "common household" with "their common child." If a couple does not meet the state-determined time threshold, Section 6.03(6) allows one party—using a multi-factor test—to try to establish that they shared a primary residence and a life together as a couple for a "significant" period of time.[65]

If the Principles were adopted, the default would shift from a rule that unmarried cohabitants have no economic obligations to each other arising from their shared life—absent an agreement to engage in such sharing—to a rule that they did, absent an express agreement otherwise. Blumberg noted the influence of Canada and Australia and, domestically, the inspiration of Washington's case law.[66]

4. Competing Assessments of the Functional Approach: Weakening Marriage or Fostering Equality and Diversity?

At the 2001 annual meeting, hints of the ongoing culture wars over marriage seeped into the debate over domestic partners. Some members objected that Chapter 6 gave legitimacy to same-sex relationships; conservative family law scholar Lynn Wardle asserted: "what you are proposing is same-sex domestic partnership, which overwhelmingly is, I think, a bad idea." Others commented that because issues of marriage and nonmarriage implicated "religious beliefs" and "state power," "caution" counseled the ALI waiting until "society itself has a clearer version of what kinds of more permanent relationships are entered into." One suggestion was to add a proviso of nonendorsement of "these kinds of relationships." Supporters countered that the issue was not whether nonmarital relationships were "good, bad, [or] moral," but the "reality" that such relationships exist and that lawyers, judges, and others needed "rational guidance" about how to address them when they end.[67]

Blumberg's response was pro-marriage but also attentive to the "social fact" of "informal unions."[68] She reminded critics that the commentary took a position preferring marriage as "more orderly" and "regular," while attempting to deal with the increasing rate of cohabitation. The Reporters were not "endorsing" nonmarital relationships. To the contrary: "All three of us are happily married, and . . . I don't know about my Co-Reporters, but I have never cohabited (*laughter*) and I would urge my daughter not to also." Because marriage is "an umbrella of benefits flowing from third parties, the state, and between the parties," Blumberg continued, "I would tell my daughter to marry, because she is much better protected by the institution of marriage." Chapter 6, she clarified, simply aims to "deal with the dissolution" of nonmarital relationships, reflecting the concerns of the judges

[62] Monday Afternoon Session – May 15, 2000, 77 A.L.I. Proc. 47, 93 (2000).
[63] Monday Morning Session, *supra* note 61, at 31.
[64] Principles, *supra* note 1, at 916-17.
[65] *Id.*
[66] Monday Morning Session, *supra* note 61, at 31-32.
[67] *Id.* at 36, 43-45.
[68] Monday afternoon session, *supra* note 62, at 51.

who expressed the need for rules to address the "nonmarital families" coming before them. In a comment signaling support for greater equality among families, Blumberg explained that the reporters did not add stronger language favoring marriage because, in an environment in which same-sex couples have "no right to marry," but have access to an "equivalent institution" (like the civil union in Vermont), "we would certainly not want to take a position against that equivalent institution."[69]

On one view, the ALI's scheme of bringing domestic partnership under the umbrella of marriage law—with respect to economic consequences at dissolution—may appear moderate. Rather than creating a range of relationship statuses from which individuals could choose, the Principles solidified the primacy of marriage by expressing a preference for marriage while extending divorce rules to nonmarital cohabitation. The drafters also distinguished the debate over same-sex marriage in Hawaii and Vermont from the "quite modest" focus of the remedies in Chapter 6, which did not address "the relationship between the couple as a unit and third parties and the state."[70]

Chapter 6's insistence on a status rather than contract paradigm, however, could also appear progressive, given the legal and political landscape of the late 1990s. Under *Marvin*, a contract-based remedy would not entitle a cohabitant, when a relationship dissolved, to divorce remedies; *Marvin* rejected assimilating nonmarital dissolution to marital dissolution. Both Blumberg and Ellman had criticized *Marvin;*[71] Blumberg reiterated that criticism when presenting Chapter 6 at the 2000 ALI meeting: applying "the rubric of contract rather than family law, to the rights and obligations of nonmarital cohabitants" for the last 25 years had "provoked considerable dissatisfaction."[72] The Principles' proposal to use a status-based approach pressed a new direction for family law—one focused on the reality of intimate relationships.

Given the legal and political climate with respect to same-sex marriage, the Principles' choice to treat different-sex and same-sex cohabiting couples the same with respect to their entitlement to marriage-like remedies recognized and accommodated LGBTQ family formation. As importantly, the Principles assumed a functional equivalence not only between same-sex and different-sex cohabitants, but also between same-sex cohabitants and different-sex spouses. This point was not lost on the ALI's supporters or its critics.

Of the various chapters addressing adult relationships, Chapter 6 received by far the most attention in commentary published in the immediate wake of approval of the Principles.[73] In convening a symposium on the Principles at Brigham Young University, Lynn Wardle charged the drafters with going "far beyond existing law" in recommending "official recognition of homosexual and extramarital concubine-like domestic partnerships, on an economic par with marriage."[74] Other participants predicted that the Principles would threaten and erode the institution of marriage[75] and undermine the traditional, gender-differentiated, heterosexual family.[76]

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[69] Monday Morning Session, *supra* note 61, at 44, 46.

[70] *Id.* at 37 (Ellman).

[71] Blumberg, *supra* note 24; Ellman, *supra* note 39.

[72] Monday Morning Session, *supra* note 61, at 31.

[73] *See, e.g.,* Lynn Wardle, *Introduction to the Symposium on the American Law Institute's Principles of the Law of Family Dissolution,* 2001:3 BYU L. REV. i (2001) (observing that "the bulk of the presentations at the BYU Symposium" focused on Chapters 2 and 6).

[74] *Id.* at ii.

[75] William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 B.Y.U. L. REV. 961 (2001).

[76] F. Carolyn Graglia, *A Nonfeminist's Perspective on Mothers and Homemakers Under Chapter 2 of the ALI's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 993 (2001). A few contributors offered qualified praise for Chapter 6. *See*

A very different view emerged from a competing symposium in the *Duke Journal of Gender Law and Policy*. Dean Herma Hill Kay (an Adviser to the *Principles* project) commended the drafters for endeavoring to "complete the divorce law reforms begun in the 1960s," including addressing "unresolved" gender issues that remained "embedded in the law and practice of family dissolution."[77] While Wardle contended that the Principles went far *beyond* existing law, Kay noted that several commentators to the Duke symposium faulted the Principles for being too much like a "Restatement" in *adhering* to current law concerning property division, instead of taking the opportunity to correct state law, for example, through treating human capital as property.[78] Some commentators stressed the negative gendered effects of the drafters' choices, such as not taking account of non-financial losses,[79] while others emphasized positive effects, such as compensating working mothers for loss due to caretaking for children.[80]

In contrast to the concerns raised in the BYU symposium, the Duke commentators praised the Principles for opening up "a range of possibilities" for "gay and lesbian couples in particular."[81] While some faulted it for "retaining the status of marriage as normatively superior to domestic partnerships," they also recognized that, if widely adopted, the Principles could promote equality among families by nudging the law toward "recognizing a wider range of relationships."[82]

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More than twenty years after Blumberg's observations about "dissatisfaction" over the limits of contract for addressing inter se economic obligations between cohabitants, that "dissatisfaction" is unabated.[83] Critics highlight that cohabitants seldom recover for engaging in the very sharing behavior that Blumberg and Ellman identified, and they point to the harms inflicted particularly on women in different-sex relationships, who invest in the household and childcare.[84]

Meanwhile, a primary constituency for the ALI's approach to nonmarital cohabitation—same-sex couples—has gained access to a status-based framework—marriage. Blumberg predicted in 2001 that same-sex couples' quest for marriage could "shed useful light on the social and welfare functions of the family, whether marital or nonmarital."[85] But as a practical matter, marriage equality has meant that the dominant force in reform for nonmarital relationships is no longer as engaged or as powerful.

Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 B.Y.U. L. REV. 1023 (2001); Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 B.Y.U. L. REV. 1135 (2001).

[77] Herma Hill Kay, *Foreword,* 8 DUKE J. GENDER L. & POLICY ii, ii-iii (2001).

[78] *Id.* at iv (citing Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?,* 8 DUKE J. GENDER L. & POL'Y 124 (2001); Allan M. Parkman, *The ALI Principles and Marital Quality,* 8 DUKE J. GENDER L. & POL'Y 162 (2001); Penelope Eileen Bryan, *Vacant Promises? The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L. & POL'Y 177 (2001)).

[79] Katharine B. Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 203 (2001).

[80] Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal Is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL'Y 151 (2001).

[81] Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families,* 8 DUKE J. GENDER L. & POL'Y 87 (2001).

[82] Martha M. Ertman, *The ALI Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107 (2001).

[83] *See, e.g.,* Albertina Antognini, *Nonmarital Coverture*, 99 B.U.L.R. 2139 (2019); Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. (2021).

[84] Antognini, *Nonmarital Coverture*, *supra* note 81.

[85] Blumberg, *supra* note 43, at 1309-1310.

Nonetheless, a fierce debate continues over how family law should address unmarried couples. The ALI's position may not be the dominant approach, but it remains an influential alternative that many strongly support. Disagreements that aired upon publication of the Principles continue. Scholars, judges, lawmakers, and lawyers disagree over whether cohabitation and marriage *are* functional equivalents warranting the same economic rules at dissolution. And they diverge over whether a status-based approach disregards or respects autonomy and choice.[86] An illustrative example is the Uniform Law Commission's recently approved Uniform Cohabitants' Economic Remedies Act (UCERA). The leaders of that project have adhered to a contract-based approach, even rejecting the ALI's view as "radical." Their critics have pressed for status-based provisions, appealing to the Principles as a superior model.[87] Even when not adopted, the ALI's position shapes the terms of debate.

II. PARENT-CHILD RELATIONSHIPS

The law had long protected parent-child relations within marriage and treated nonmarital children as "illegitimate."[88] In the 1960s and 1970s, courts and legislatures repudiated this discriminatory regime.[89] Even though law would no longer routinely treat unmarried fathers as legal strangers to their children,[90] distinctions remained between marital and nonmarital parents. When a married woman gave birth, her husband was treated as the legal father even if he was not the biological father.[91] But when an unmarried woman gave birth, the father's parentage was premised on a biological connection. What, then, should happen to children raised by an unmarried mother and a man who was not the biological father?

The Principles' drafters viewed marital status-based inequality as a problem in its own right. But the marital-status distinction implicated another emergent equality concern—sexual orientation.[92] Excluded from marriage, same-sex couples raising children were necessarily doing so outside of marriage. Tackling sexual orientation inequality meant tackling the role of biology in parenthood. While the paradigmatic unmarried different-sex couple was raising their own biological child, the paradigmatic same-sex couple included a nonbiological parent.[93] Accordingly, premising nonmarital parental recognition on biological connection was especially harmful to LGBTQ parents. Absent a second-parent adoption, which only a handful of jurisdictions authorized at the time, only the biological parent would be treated as a legal parent. The nonbiological parent lacked standing to seek custody upon dissolution.[94]

Given these concerns with inequality, the question of parental recognition—and therefore who has standing to seek custody—became an important feature of the ALI's work on custody. In

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[86] See, e.g., Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1322-33 (2019) (summarizing some of the literature). *Compare* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) (raising autonomy arguments against status-based remedies for nonmarital partners), *with* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 972–73 (2019) (challenging autonomy arguments against status-based remedies and arguing that conventional approach fails to further "choice" in family forms).

[87] *See infra* Conclusion.

[88] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *434-47.

[89] *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

[90] *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016).

[91] *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2272 (2017).

[92] Interview with Katharine Bartlett, Jan. 19, 2021 ("Bartlett Interview").

[93] *See* NeJaime, *supra* note 91, at 2297.

[94] *See* Douglas NeJaime, *The Story of* Brooke S.B. v. Elizabeth A.C.C.*: Parental Recognition in the Age of LGBT Equality*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 245 (Melissa Murray et al. eds., 2019).

what follows, we show how the Principles' definition of "parent" evolved over time in ways that grew to include nonmarital, nonbiological parents and to treat them more like legal parents. We then show how the ALI's approach staked out important ground in an emergent debate in family law and ultimately shaped developments in parentage law at the state level.

A. Towards Functional Parenthood

As the influential work of Joseph Goldstein, Anna Freud, and Albert Solnit had taught in the 1970s, from a child's perspective, a parent-child relationship does not depend on a biological or legal connection.[95] Instead, the child's relationship to her "psychological parent" grew out of the day-to-day interactions between parent and child.[96] This experiential understanding of parenthood came to animate a *functional approach*—reflecting the realities of family life, rather than turning on formal markers like marriage or biology.

Such an approach was not prominent in the early stages of the ALI project. At the initial 1990 conference, original reporter Marygold Melli drew attention to "informal families" and "same gender intimate relationships," but said nothing about nonbiological parents in nonmarital families.[97] When the drafters eventually addressed "the role of the psychological parent" in an early draft on custody, they focused on stepparents.[98] The 1992 preliminary draft, which provided that a "stepparent . . . may be awarded parental authority and physical custody,"[99] continued to view parent-child relations within the paradigm of the heterosexual marital family.

The addition of reporter Katharine Bartlett in 1995 changed the direction—and ambition—of the ALI's treatment of parent-child relationships. Bartlett had written on questions of parenthood in ways that challenged law's traditional assumptions. She defended nonmarital families, questioned the role of biological connection, and suggested that a child may have more than two parents.[100]

Bartlett's commitment to a functional approach first emerged in her treatment of custodial responsibility, the subject of Chapter 2. The preliminary draft that Bartlett shared in 1995—which represented "a new start" on the custody chapter[101]—emphasized past caretaking as the basis on which to allocate custodial responsibility between parents whose relationship dissolved.[102] Future custodial arrangements should reflect the realities of the family's pre-dissolution life, aspiring to "continuity and stability in the child's primary parent-child attachment or attachments."[103] But a rule that applied to "parents" required the ALI to answer the question: *Who is a parent?*

1. De Facto Parent

The ALI began from the premise that "parent" meant legal parent. The draft defined the "parent-child relationship" to cover "relationships between child and parent as defined under

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[95] *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

[96] *See id.*

[97] Conference on the Law and Public Policy of Family Dissolution, Background Paper 2-3 (Jan. 4, 1990); Memo to Participants in Conference on the Law and Public Policy of Family Dissolution, from Marygold S. Melli (Jan. 4, 1990).

[98] Preliminary Draft No. 1, §7.26 (p. 11) (1992).

[99] Preliminary Draft No. 3, §7.26 (p. 8) (1992).

[100] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-83 (1984).

[101] Memo to Advisers, Members' Consultative Group, from Kate Bartlett and Ira Ellman 1 (May 8, 1995).

[102] Preliminary Draft No. 5 at 10-11 (1995). *See also* Memo to Advisers, Members Consultative Group, from Kate Bartlett 1 (May 8, 1995). Bartlett's approach here was influenced by Elizabeth Scott's foundational article. *See* Elizabeth S. Scott, *Pluralism, Paternal Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

[103] Preliminary Draft No. 5, § 2.02(2)(b) (p. 29) (1995).

applicable state law"—at a time when state law definitions largely defined parent in ways that excluded unmarried nonbiological parents. Nonetheless, Bartlett sought to "recognize[] the parenting interests of adults who are not biological or adoptive parents but who have functioned as the child's parents in certain circumstances." Even as the draft defined the "parent-child relationship" to include "functionally-defined parent-child relationships," it treated them formally as "non-parents."[104] The "interests of [these] non-parents," Bartlett affirmed, "ordinarily are subordinate to those of the parents."[105]

The functional perspective on parenthood, and its blurring of the parent/non-parent distinction, eventually unsettled the drafters' initial assumption that state law would control the definition of "parent." By 1997, Bartlett had adopted the term "functional parent" alongside "legal parent," and was extending custodial rights to both.[106] Whereas the 1996 draft had used the heading, "Allocations of Residential Responsibility to Persons Other than Parents," the 1997 draft used the heading, "Allocations of Residential Responsibility to Persons Other than *Legal* Parents."[107]

By early 1998, when ALI members first received a tentative draft on "the allocation of responsibility for children,"[108] the term "de facto parent" had replaced "functional parent." The draft explained that "a *parent* is either a legal parent or a de facto parent."[109] Ultimately, in the final version of the Principles, a de facto parent was defined as "an individual . . . who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation . . . regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."[110]

The inclusion of de facto parent provisions exemplified the functional approach's capacity to mitigate inequality. Nonbiological parents in same-sex couples could qualify as de facto parents. (While the 1995 draft's two illustrations of functional parents involved only a different-sex couple,[111] the 1996 draft featured a same-sex couple who had raised a child from birth.[112]) Nonetheless, the Principles relegated de facto parents to a lesser status entitled to fewer rights than legal parents.[113]

Treating nonbiological parents in same-sex couples as less than full parents was problematic. The 1990s had witnessed groundbreaking work on parental recognition for LGBTQ parents. Bartlett herself was influenced by Nancy Polikoff's work,[114] particularly a 1990 article making the case for functional parenthood to protect lesbian parents and their children.[115] The Principles had more work to do to vindicate same-sex couples' families. Ultimately, many more parents would be captured by a new, and increasingly expansive, functional category—parent by estoppel.

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[104] *Id.* at 21, 41-42, 47).

[105] Memo to Advisers, Members Consultative Group, from Kate Bartlett 1 (May 8, 1995).

[106] Memo to Advisers and Members' Consultative Group, Principles of the Law of Family Dissolution, from Reporter Katharine T. Bartlett xi (June 2, 1997); Preliminary Draft No. 7, § 2.03(a), (b) (1997).

[107] Preliminary Draft No. 4, §§ 2.03, 2.21 (1997) (emphasis added). *See also* Council Draft No. 7, § 2.21 (1997).

[108] Memo to Members of The American Law Institute, from Reporter Katharine T. Bartlett xxvi (Feb. 16, 1998).

[109] Tentative Draft No. 3, § 2.03 (p. 37) (1998). *See also* Preliminary Draft No. 8, § 2.03 (p. 14) (1998).

[110] Principles, *supra* note 1, § 2.03 Definitions.

[111] Preliminary Draft No. 5, § 2.03 (p. 48) (1995).

[112] Preliminary Draft No. 6, § 2.21, Illustration (p. 354) (1996).

[113] *See, e.g.,* Preliminary Draft No. 7, § 2.21 (pp. 392-93) (1997); Memo to Members and Advisers, Family Dissolution Project, from Reporter Katharine T. Bartlett 1 (Sept. 17, 1999) ("The rights of de facto parents were inferior in certain respects to those of legal parents.").

[114] Bartlett Interview, *supra* note 92.

[115] *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO L.J. 459 (1990).

2. Parent by Estoppel

In 1998, Bartlett recognized the temptation to devote more attention to the category of "parent," even as the drafters were reluctant "to break any new ground."[116] Seemingly in response to feedback from the ALI membership, Bartlett noted that since the child support chapter (Chapter 3) drew on estoppel principles by preventing individuals from denying support obligations based on their prior conduct, "it may seem unbalanced or even inconsistent not to recognize a comparable principle in Chapter 2."[117] The preliminary draft circulated in 1998 altered the definition of "legal parent" to include an individual "upon whom a child obligation has [been] imposed under Chapter 3."[118] Bartlett framed the concept as both a logical analogue to the child support chapter and a natural outgrowth of the custody chapter's "functional emphasis."[119]

By the 1998 Council draft a few months later, this new category stood on its own. The notion of "parent" had coalesced around three separate categories: legal parent, parent by estoppel, and de facto parent.[120] The parent by estoppel category included not only a man with a child support obligation but also "a man who acted as the child's father for a significant period of time . . . under the reasonable good faith belief that he was the child's biological father."[121]

The parent by estoppel approach reached nonbiological parents in nonmarital families and treated them like legal parents. But it remained tethered to the heterosexual family. After all, a nonbiological parent in a same-sex couple could not have a reasonable, good-faith belief that she was the child's biological parent. Given this shortcoming, Bartlett's work on parent by estoppel was unfinished. Indeed, she noted in the 1998 Council draft that she had "reserved [a] section for parent status created by agreement."[122]

By 1999, Bartlett presented the Council with an additional parent by estoppel path, covering individuals who functioned as parents under an agreement with the legal parent.[123] Unlike the other parent by estoppel pathways, Bartlett framed this new pathway in expressly gender-neutral terms—"holding *himself or herself* out as the child's parent"[124]—thus offering a path to parental standing to

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[116] Memo to Advisers and Judges and Members Consultative Groups, from Reporter Katharine T. Bartlett 9 (June 9, 1998).

[117] *Id.* While we do not analyze Chapter 3 (authored by Blumberg and Ellman), we note that it reflected the reporters concerns with the unequal economic conditions facing children and their custodial parents (primarily, mothers) after divorce. The Principles' approach to child support departed from the prevailing American method, which produced insufficient support for children whose residential parent earned substantially less than the nonresidential parent. To mitigate this problem, the Principles elaborated a child-support formula that accounted for not only the absolute but also the relative income of parents, explaining that "the residential parent's interest is not to bear disproportionately the financial costs of childrearing" and "not being disadvantaged, compared to the child's other parent, by the financial opportunity costs of residential responsibility." Principles, *supra* note 1, § 3.04.

[118] Preliminary Draft No. 8, § 2.03 (p. 14) (1998).

[119] Memo to Members and Advisers, Family Dissolution Project, from Reporter Katharine T. Bartlett 1 (Sept. 17, 1999).

[120] Council Draft No. 5, § 2.03 (1998).

[121] Memo to Members of the Council, The American Law Institute, from Reporter Katharine T. Bartlett xvi (Sept. 25, 1998); Council Draft No. 5, § 2.03 (pp. 123-24) (1998). In the final version, the "significant period" become "at least two years." § 2.03 Definitions.

[122] Council Draft No. 5, § 2.03 (p. 124) (1998).

[123] Council Draft No. 6 § 2.03 (1999). *See also* Memo to Members and Advisers, Family Dissolution Project, from Reporter Katharine T. Bartlett 1 (Sept. 17, 1999).

[124] Memo to Members and Advisers, *supra* note 119, at 1-2 (emphasis added).

nonbiological mothers in same-sex couples. Indeed, the Principles instructed that determinations "should not turn upon whether the parties are of the same sex or different sexes."[125]

> In the final Principles, a "parent by estoppel" included an individual who
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> > lived with the child since the child's birth . . . or . . . lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.[126]

This new pathway offered a way for both parents in a same-sex couple to stand in legal parity, given that "[t]he rights and privileges of a legal parent and a parent by estoppel are the same, and superior in some respects to those of a de facto parent."[127]

Ultimately, the 2000 draft presented to the ALI membership included the three categories of parent—legal parent, parent by estoppel, and de facto parent[128]—with parent by estoppel in its new, more expansive form. Bartlett explained that, during the drafting process, she and her colleagues confronted "questions about allocating responsibility for children who are the product of nontraditional family arrangements, including those arising from nontraditional reproductive methods, de facto parenting arrangements, and custodial agreements." While earlier drafts had "referred most questions concerning these matters to existing state law," the drafters ultimately decided "to address some of these earlier unattended issues"—doing so in ways that were "in keeping with the Chapter's emphasis on the functional components of parenting."[129] Progressives cheered the ALI's functional parent provisions,[130] specifically pointing to how they vindicated LGBTQ families.[131] But conservatives objected.[132] "[W]ith validation of same-sex domestic partnerships and of homosexual parenting," one critic charged, the ALI had become a leader in "the feminist march to complete androgyny."[133]

3. Assigning Custodial Responsibility

Once it was clear who had standing to seek custody, the decisionmaker would need instructions on how to adjudicate disputes. This, of course, was originally envisioned as the primary work of Chapter 2, before Bartlett pursued the very definition of "parent." To operationalize the best

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125 Principles, *supra* note 1, § 2.03(b) Definitions.

126 *Id.*, § 2.03 Definitions.

127 Memo to Council of the American Law Institute, from Reporter Katharine T. Bartlett 1 (Nov. 12, 1999).

128 Principles, *supra* note 1, § 2.03 Definitions.

129 Memo to Members of The American Law Institute, from Reporter Katharine T. Bartlett xxxvi-xxxviii (Feb. 25, 2000).

130 *See, e.g.,* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1103 ("The boldness of chapter 2's custody provisions lies chiefly in the provisions' expansion of the concept of parenthood and the accompanying erosion of the privileged status traditionally reserved for biological and adoptive parents.").

131 *See, e.g.,* Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57, 90 (2000) (noting that the "ALI Principles . . . rejected linking parental rights inevitably and exclusively to biology" and thereby "rises to the challenge posed by [planned lesbian and gay] families").

132 *See, e.g.,* David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1186 (objecting to the de facto parent category, arguing that "what children really need are . . . one or preferably two natural or adoptive parents").

133 *See, e.g.,* F. Carolyn Graglia, *A Nonfeminist's Perspectives of Mothers and Homemakers Under Chapter 2 of the ALI Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 993, 1012.

interest of the child standard, which had long been criticized as indeterminate, the Principles adopted a more concrete approach.[134] Articulated in the very first draft that Bartlett circulated, the "past allocation of care" standard made it to the final version. Reflecting the child-centered concerns centered by a functional approach, the standard uses the facts of past caretaking as the basis for future custodial arrangements.[135]

The "past allocation of care" standard also sought to vindicate gender equality. Some men criticized the drafters' approach for failing to recognize the rights of fathers.[136] Instead of adopting a joint custody framework, with its purportedly gender-neutral approach to parenting, the drafters adopted a functional standard that, while formally gender-neutral, recognized the disproportionate caretaking work done by women in different-sex couples.[137] Moreover, by adopting a clear rule rather than an abstract standard, their approach would reduce the need for women to bargain away financial rights in exchange for custodial rights.[138]

Under the Principles' approach, not all parents enjoyed equal access to custody. Courts were instructed to depart from the "past allocation of care" in disputes involving de facto parents. A court "should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel," and a de facto parent may be denied parenting time altogether "if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical."[139]

Ultimately, the treatment of de facto parents exhibited both the promise and constraints of a functional approach at the start of the 21st century. As Bartlett explained, "greater recognition of individuals who are not legal parents but who have lived with the child and functioned in a parental role" was "consistent with the emphasis on past caretaking patterns."[140] Yet, even as the Principles' approach to custodial responsibility used past caretaking as the relevant measure, it minimized this factor when assigning custody to de facto parents.[141]

B. The Rise of Functional Parenthood

The Principles' account of parenthood, which developed in conversation with courts and scholars, contributed to evolving understandings of parentage—one that is reflected in legislative enactments, judicial decisions, and scholarly arguments. Situating the ALI's approach in family law developments illuminates how the ALI pushed a functional agenda that sought to mitigate troubling inequalities in existing family law. At the same time, appreciating the ALI's relatively early intervention

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134 Preliminary Draft No. 5, Introductory Discussion at 4-5 (1995).

135 Principles, *supra* note 1, § 2.02(e) ("the continuity of existing parent-child attachments after the break-up of a family unit is a factor critical to the child's well-being").

136 Bartlett Interview, *supra* note 92.

137 *Id.*

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

139 Principles, *supra* note 1, § 2.18.

140 Memo to Members of the Council, The American Law Institute, from Reporter Katharine T. Bartlett 1-2 (Sept. 24, 1997).

141 *See, e.g.,* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 782 (1999) (observing that "the Principles are a step forward for nonlegal parents," but, "this step, as are perhaps most steps in the law, is a small step"); Sarah H. Ramsay, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POLY' 285, 301 (2001) ("On balance the Principles are a positive, incremental step toward recognizing families that do not fit the nuclear family model.").

in family law's functional turn helps make sense of some of the ways in which law has departed from the ALI's approach even as it has pursued the ALI's functional aims.

Of course, the most straightforward form of influence would be adoption. There are some examples of this, including in the parentage context. Nearing the end of the ALI drafting process, the Massachusetts Supreme Judicial Court adopted the ALI's approach to recognize de facto parents—doing so in a dispute involving a same-sex couple.[142] The court drew on the ALI's reasoning to support a child-centered approach that maintains children's relationships with de facto parents.[143]

Other states, though, did not expressly adopt the ALI's approach to parentage. Nonetheless, the Principles served as authority to support functional parenthood, even when the standards articulated by the court broke from the specifics of the ALI. For example, in a pathbreaking decision adopting a de facto parent doctrine in 2000, the Rhode Island Supreme Court noted that "our position here is in harmony with the principles recently adopted by the American Law Institute," which "has recognized that individuals who have been significantly involved in caring for and supporting children and for whom they have acted as parents may obtain legal recognition of their parental rights to visitation and custody."[144] Beyond supporting general acceptance of functional parent doctrines, courts turned to the ALI for more specific guidance.[145] For instance, after a landmark 2005 decision in which the Washington Supreme Court looked to the ALI as it adopted de facto parentage,[146] a lower court in the state relied heavily on the ALI's fact-sensitive explanations in extending de facto parent status to a foster parent.[147]

Of course, some courts have resisted the functional turn.[148] In such cases, the ALI has appeared as authority in dissents advocating functional doctrines.[149] In some jurisdictions, those dissenting positions have eventually become the governing rule. Consider developments in Maryland. When the Maryland high court rejected de facto parentage in 2008 in a case involving an unmarried same-sex couple, the dissent quoted the ALI's parent by estoppel provisions to support its view that the court should "hold that a *de facto* parent stands in legal parity with a legal parent."[150] In reversing that decision in 2016 in another case involving a same-sex couple, the Maryland high court looked to a range of family law authorities. It observed in case law from other states a "modern common law trend of recognizing the status of *de facto* parents," noted that "family law scholarship and the academic

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[142] *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

[143] *See* Youmans, 711 N.E.2d at 172-73.

[144] Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000). *See also* Stitham v. Henderson, 768 A.2d 598, 605-06 (Me. 2001).

[145] *See, e.g.,* Young v. King, 208 A.3d 762, 766 (Me. 2019) (drawing on the Principles in concluding that a de facto parent's failure to adopt the child is relevant to but not dispositive of the legal parent's acceptance of the de facto parent's parental role).

[146] *See In re* Parentage of L.B., 122 P.3d 161, 176 n.24 (Wash. 2005). *See also* Rideout v. Riendeau, 761 A.2d 291, 302 (Me. 2000). *See also* K.E.M. v. P.C.S., 38 A.3d 798, 807 n.6 (Pa. 2012) (drawing on the Principles in endorsing a paternity by estoppel doctrine that includes a required showing of the child's best interests).

[147] *See In re* Custody of A.F.J., 260 P.3d 889, 895-96 (Wash. App. 2011).

[148] Yet, the recent trend looks quite different than the pessimistic assessment that ALI critic Robin Wilson provided in 2010. *See* Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1111 (2010) ("While courts have looked to the Principles for guidance on this topic more than any other, they have rejected the ALI's approach twice as often as they have accepted it.").

[149] *See, e.g.,* Moreau v. Sylvester, 95 A.3d 416, 438 n.22 (Vt. 2014) (Robinson, J., dissenting) ("The American Law Institute has likewise recognizing that parental rights can arise from intentions and conduct, rather than biology or legal ties."); Chaterjee v. Chaterjee, 253 P.3D 915, 934 (N.M. App. 2011) (Vigil, J. dissenting) (drawing support from the ALI's protection of a "child's relationship with an adult who has functioned as a parent"). *See also* Killingbeck v. Killingbeck, 711 N.W.2d 759, 774 (Mich. App. 2005) (Cooper, P.J., concurring in part and dissenting in part).

[150] *See* Janice M. v. Margaret K., 948 A.2d 73, 101 & n.5 (Md. 2008) (Raker, J., dissenting).

literature have also endorsed the notion that a functional relationship . . . can be used to define parenthood," and explained that the ALI "recommended expanding the definition of parenthood to include *de facto* parent as one of the parties with standing to bring an action for the determination of custody." Ultimately, the court concluded that "[t]he weight of authority outside Maryland reinforces our decision to overturn [our earlier decision] and recognize *de facto* parenthood."[151]

The ALI's direct influence may have been compromised by its choice of terminology—itself a sign of the time at which the Principles were drafted. As Bartlett crafted the functional parent concepts, the leading authority on de facto parent status was the Wisconsin Supreme Court's 1995 decision in *In re H.S.H.-K.*[152] Chief Justice Shirley Abramson, who wrote that opinion, was an Adviser to the Principles and in conversation with Bartlett about these issues.[153] In *H.S.H.-K.*, which featured a same-sex couple, the court ruled that the nonbiological mother could be treated as a de facto parent and thus seek visitation. This was a landmark decision for LGBTQ rights and functional parenthood. Nonetheless, the de facto parent was not a legal parent under Wisconsin law and was not entitled to the rights (and responsibilities) of legal parents.

Accordingly, when Bartlett was developing the ALI's account of functional parenthood, de facto parent status was not understood as the equivalent of legal parenthood. When the Massachusetts Supreme Judicial Court adopted de facto parenthood a few years later, it relied directly on the ALI in articulating a status entitled only to standing to seek visitation.[154] Chief Justice Marshall, who served on the ALI Council and was also in conversation with Bartlett, joined that opinion.[155]

In this sense, the dialogue between courts and the ALI produced a particular view of de facto parenthood—one that protected nonbiological parents in same-sex couples but offered less than full parenthood. Over time, this de facto parent doctrine would come to appear insufficient and discriminatory.

Today, most jurisdictions that recognize a comprehensive form of functional parenthood do so through a de facto parent doctrine. Further, the doctrine in many of these jurisdictions emerged in part from disputes involving same-sex couples. De facto parentage, on this modern view, yields parental rights and responsibilities.[156] Most recently, states, including those following the 2017 Uniform Parentage Act, have codified de facto parentage, making clear that it is merely another path to *legal* parentage.[157]

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[151] *See* Conover v. Conover, 146 A.3d 433, 439 n.6, 449, 451 (Md. 2016).

[152] *See id.* at 447.

[153] *See* In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995); Bartlett Interview, *supra* note 92.

[154] *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

[155] *See id.* at 886; Bartlett Interview, *supra* note 92. In an earlier opinion, Marshall endorsed de facto parentage, specifically adopting the term "proposed by the Reporters on the ALI Principles of the Law of Family Dissolution." Youmans v. Ramos, 711 N.E.2d 165, 167 n.3 (Mass. 1999).

[156] *See, e.g., In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005). Unlike the ALI's de facto parent category, which could include "individuals who have not necessarily held themselves out as parents," Memo to Members of the American Law Institute, *supra* note 129, at xxxviii, modern de facto parentage generally requires that the individual formed a parent-child relationship, and in some states looks to whether the individual held the child out as her child.. De facto parentage, on this approach, is parentage, while the ALI's version looks more like a non-parental status common in third-party visitation statutes. *See* N.D. CENT. CODE § 14-09.4 (2020); UNIF. NONPARENT CUSTODY & VISITATION ACT (UNIF. LAW COMM'N 2018).

[157] *See* CONN. PUB. ACT. 21-15, § 38 (2021); VT. STAT. ANN. tit. 15C, §§ 501 - 502 (2020); WASH. REV. CODE § 26.26A.440 (2020); UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017). Even the ALI's ongoing restatement project on Children and the Law views de facto parent status in a more robust way than the earlier Principles. Am. Law Inst., Restatement of the Law, Children and the Law, Tentative Draft No. 2, § 1.82 (p. 63) (March 20, 2019). The draft

From this perspective, we can see how it would be inadequate simply to examine state adoption of the ALI's recommendations as a measure of their influence.[158] Functional parenthood has different names and meanings in different places. Indeed, counting jurisdictions that have de facto parent doctrines may reveal less about the influence of the ALI's de facto parent provisions and more about the parent by estoppel provisions, which treated functional parents as equivalent to legal parents. In this sense, parent by estoppel in the Principles is more analogous to what many courts and legislatures today call de facto parent.[159] Indeed, the Washington Supreme Court noted the similarity between the comprehensive de facto parent doctrine it adopted in 2005 and the ALI's parent by estoppel category.[160]

Parent by estoppel covered an individual who, pursuant to a co-parenting agreement with the legal parent, *held out* the child as their child. Such language sounded in registers familiar to presumptions of parentage long part of state family law regimes. The Uniform Parentage Act of 1973, adopted by nearly twenty states, provided that "[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly *holds out* the child as his natural child."[161] This presumption aimed to capture unmarried *biological* fathers who had assumed a parental role in the child's life. But by the turn of the century, a biological limitation on the "holding out" presumption was contested. By 2002, the California Supreme Court ruled that the lack of a biological connection did not necessarily rebut the presumption.[162] A man, or woman, who was not the biological parent could attain parentage based simply on the conduct of "holding out."[163]

At the time of the ALI drafters' work, it was unclear whether the "holding out" presumption would meaningfully move in a nonbiological direction. Perhaps trading on this existing concept might have only confused the ALI's proposals with those of the Uniform Law Commission. More importantly, the drafters' very approach to functional parenthood seemed to preclude resort to the "holding out" presumption to capture functional parenthood. The drafters were clear that state law defined who was a legal parent, and state law included presumptions of parentage.[164] It would have made little sense to then offer a non-legal category that tracked the "holding out" presumption that existed in many states. Accordingly, the functional parent status that would approximate legal parental status fell under a term, estoppel, that sounded in equity, rather than law.

Restatement explains that its "definition of a de facto parent reflects the spirit of the Principles . . . but differs in [important] respects." *Id.* § 1.82 (p. 67). Unlike the Principles," under the Restatement, "a court may award a de facto parent primary custodial responsibility if it is in the child's best interests." Even as the Restatement characterizes de facto parents as "third parties," it treats them like legal parents—"similar to the [2017] Uniform Parentage Act's . . . definition." *Id.* § 1.82 (pp. 63, 65).

[158] *See* Clisham & Wilson, *supra* note 3, at 576 ("While we cannot say definitively that the *Principles* have not had some legislative influence somewhere, if legislatures are borrowing from the *Principles*, they are certainly not tipping their hands.").

[159] Memo to Members of The American Law Institute, *supra* note 129, at xxxviii ("The rights and privileges of a parent by estoppel are the same as those of a legal parent.").

[160] *See In re* Parentage of L.B., 122 P.3d 161, 176 n.24 (Wash. 2005).

[161] Unif. Parentage Act § 4(a)(4) (Unif. Law Comm'n 1973) (emphasis added).

[162] *In re* Nicholas H., 46 P.3d 932, 936 (Cal. 2002).

[163] *See, e.g., In re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

[164] § 2.03(a) Definitions ("Individuals defined as parents under state law ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents. In some states, an individual may be a parent also by virtue of an unrebutted legal presumption, such as the presumption that a husband is the father of his wife's child.").

Ultimately, parent by estoppel as a term gained little traction.[165] Had the drafters called it "holding out" parentage, perhaps the continuity between the Principles and subsequent developments would be more clearly appreciated. Adoption of the nonbiological, gender-neutral "holding out" presumption has accelerated in recent years. State courts have increasingly applied existing "holding out" presumptions to reach nonbiological mothers and fathers in nonmarital families.[166] Some states, following the 2017 UPA, have expressly enacted a nonbiological, gender-neutral holding out presumption.[167]

The Principles have mattered to the development of the law, even as they represent a particular moment in time—one in which a functional family law project that extended equality to nonmarital and LGBTQ parents could venture only so far. Massachusetts provides a useful illustration of how the Principles advanced an equality-driven functional agenda and yet ultimately proved insufficient. Early on, Massachusetts adopted the ALI's approach to de facto parenthood, with some modification. At the time, this constituted a landmark development for functional parenthood and LGBTQ equality. Yet, this approach to de facto parenthood has been criticized for failing to provide parental rights and responsibilities to an individual, including a nonbiological parent in a same-sex couple, who has functioned as the child's parent.[168]

What appeared progressive and child-protective at the time of the ALI eventually seemed inadequate. In a landmark 2013 parentage decision, the Massachusetts Supreme Judicial Court cited the inferior treatment of de facto parents, under both Massachusetts law and the ALI, as a basis for finding that de facto parent adjudication was not a sufficient remedy for a nonbiological co-parent in a same-sex couple. Instead, the court concluded, the nonbiological mother could establish parentage under the state's "holding out" presumption, which the court for the first time interpreted to authorize nonbiological parentage.[169] Without saying so, the court shifted from the weaker de facto parent concept of the ALI to the more robust parent by estoppel concept—though the development occurred under the rubric of presumed parentage.

One could read the court's decision as rejecting the ALI's approach: de facto parent status failed to provide sufficient protection to functional parents. But one could also read it as vindicating the ALI's approach: a more comprehensive functional parent doctrine, operationalized through the concept of "holding out," was necessary. Either reading shows the complicated ways in which the Principles have shaped the development of family law in inclusive and functional directions.[170]

CONCLUSION

The Principles intervened in important and evolving family law debates and pushed forward agendas for reform with respect to both adult-adult and parent-child relationships. But the Principles' impact has been uneven. Reflecting two decades later, we can see that the degree to which the ALI influenced, or even predicted, the direction of the law has varied across these two domains.

The law's treatment of parent-child relationships has moved in a decidedly functional direction. Since the time of the ALI's work, courts in many states have recognized nonmarital,

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165 The concept retains purchase under New York law.

166 *See* Chatterjee v. King, 280 P.3d 283 (N.M. 2012).

167 *See*, *e.g.*, R.I. GEN. LAWS § 15-8.1-401 (2020); VT. STAT. ANN. tit. 15C, § 401 (2020); WASH. REV. CODE § 26.26A.115 (2020); UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).

168 *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 499–501 (2014).

169 *See* Partanen v. Gallagher, 59 N.E.3d 1133, 1141 n.17 (Mass. 2016).

170 As Bartlett observed in 2014, "the Principles captured trends that had already begun when the Principles were drafted, and have continued since then." Bartlett, *supra* note 3, at 34.

nonbiological, nonadoptive parents under equitable and common law theories or based on statutory presumptions.[171] More recently, states have codified de facto parentage and a nonbiological "holding out" presumption.[172] The 2017 Uniform Parentage Act (UPA), promulgated by the Uniform Law Commission (ULC), represents a comprehensive framework for implementing a functional approach to parental recognition. As the drafters made clear, this functional approach not only reflects the realities of family life but also vindicates important equality interests.[173]

In contrast, functional regulation of adult relationships has encountered more powerful resistance. On the one hand, the move in some states toward alimony guidelines can be interpreted as aligned with the *Principles*' rejection of contract models in favor of status: equitable principles support compensating for losses arising from the changes that marriage and its end bring.[174] Similar to the ALI, some state guidelines use a formula that increases both the amount and duration of alimony based on the duration of a marriage.[175] On the other hand, alimony reform is at least as likely to have been driven by other powerful forces, including lobbying efforts by payors and growing hostility to "permanent" alimony.[176]

Contract-based frameworks for unmarried cohabitants continue to dominate, and ascriptive recognition has lagged.[177] The ULC's approach in UCERA is a striking example. The drafting committee recognized that, nearly a half century after *Marvin,* there is "no predictable result when cohabitants dissolve their relationship or one cohabitant dies," that courts are reluctant to award relief, and, particularly, may fail to recognize "domestic services" performed by one partner as a basis for recovery.[178] And yet, the UCERA Committee essentially codified *Marvin;* after initially including a bracketed status-based provision on "presumptive equitable partnership"[179] it declined to include a status-based remedy, describing as "perhaps radical" the ALI's approach of extending "marital remedies" of alimony and equitable distribution of property to cohabitants.[180] By contrast, the ALI approach provided a model for scholars and advocates who urged the Committee to include a "status-based option" in light of public policy concerns, including (echoing Blumberg) wealth-based power

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171 *See* NeJaime, *supra* note 5, at 328-34; NeJaime, *supra* note 91, at 2370-72.

172 *See supra* notes 157, 167.

173 *See* UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017) (prefatory note).

174 *See, e.g.,* Memorandum in Support of A06728 (New York) (referring, in section on "Justification" for proposed alimony bill, to the ALI *Principles*' recognition of "economic losses that spouses suffer at the end of marriage" and its suggestion to share those losses "through a formula for determining post-marital spousal support that takes into account the income of the parties and the length of the marriage"). While the memo supporting the legislation that eventually passed in 2015 does not repeat this reference to the *Principles*, the legislation includes various formula for determining the amount and duration of spousal support. *See* N.Y. DOM. REL. § 236 (2022). The legislation, however, also includes an income cap on how much of a payor's income will be subject to the alimony guidelines.

175 *See, e.g.,* MASS. GEN. L. CH. 208 (2022).

176 *See, e.g.,* Kris Frieswick, *'Til Death Do Us Pay*, BOSTON MAG., Jun. 22, 2009; SB 1796 (Fla.) (enrolled legislation awaiting governor's signature that eliminates reference to "permanent" in alimony guidelines).

177 A few states have developed opt-in formal statuses for adult-adult relationships, such as Colorado's Designated Beneficiary Agreement. COLO. REV. STAT. ANN. § 15-22.106.1. More recently, municipalities have begun to enact domestic partnership ordinances open to more than two partners. *See, e.g.,* CAMBRIDGE MUNICIPAL CODE, CHAP. 2.119020D (enacted in March 2021).

178 *See* Uniform Law Commission, Uniform Cohabitants' Economic Remedies Act 3-4 (draft for approval, July 9-15, 2021) ("Prefatory Note"). All cited materials about UCERA may be found at the ULC's website: https://www.uniformlaws.org/.

179 *See* Economic Rights of Unmarried Cohabitants Act 12-14 (Nov. 13, 2019 draft) (including in brackets Art. 4. Presumptive Equitable Partnership) (noting Province of Alberta, Adult Interdependent Relationships Act (2002) as influence).

180 *See* Uniform Law Commission, Uniform Cohabitants' Economic Remedies Act 32 (draft for approval, July 9-15, 2021) ("Prefatory Note").

differentials between the parties and the problem with inferring "intent" given the varied reasons cohabitants do not marry.[181]

The theoretical, normative, and practical arguments that animate the functional approach apply in important ways to both the adult-adult and parent-child settings, and yet legal regulation has diverged to a significant extent. Today, scholars point to the parent-child context to justify functional reforms in the adult-adult setting, and those who resist a functional framework point to the regulation of adult relationships as a model for parental recognition.[182] Conflict over not only whether but how regulation in these two contexts should converge carries forward a debate that was forged in significant part by the Principles and the critiques it attracted, and today's participants continue to look to the Principles as a touchstone.[183]

While the values that the drafters of the Principles identified—equality, autonomy, fairness, predictability, and certainty—remain critical to debates over a functional approach,[184] today's debate is informed by nuanced empirical and ethnographic research. Indeed, scholars arguing about legal regulation of families draw on research addressing some of the key empirical questions that Bartlett identified as important but unanswered at the time the Principles emerged.[185] An animating reason for assimilating "domestic partners" to spouses was an empirical premise about the functional equivalence in how people conducted and understood these relationships. Two decades later, debate continues about the relationship between marriage and cohabitation (or, more broadly, "nonmarriage"). Some research on why low- and moderate-income women separate marriage and parenthood and the high "bar" to believing marriage with a current partner is desirable suggests conscious avoidance of marriage's economic sharing rules.[186] Family law scholars differ in interpreting this work, with some questioning whether the decision not to marry "is always or primarily fueled by a rejection of the marital property rules," rather than, for example, concern over relationship quality and the conviction that marriage requires attaining a threshold level of economic stability and financial security that one or both members of the couple currently lack.[187] This perception that marriage is out of reach calls into question the extent to which law and policy should continue to prioritize marriage. The literature on different types of cohabiting relationships surfaces problems with imposing sharing rules on cohabiting couples, yet also suggests the need for doctrinal innovations to address nonmarital families.[188] While race and class did not feature prominently in the Principles' analysis of cohabitation, more recent work highlights the role of racial and economic inequality in the decline of marriage

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[181] *See* Memo from Cathy Sakimura, National Center for Lesbian Rights & Professor Courtney Joslin, UC Davis, to ULC Economic Rights of Unmarried Cohabitants Act Committee, Dec. 3, 2019; Proposed alternative text of Article 4 based on the ALI's Principles of the Law of Family Dissolution (draft of Article 4); see also Memo from Patricia A. Cain, Professor of Law, Santa Clara University to ULC Economic Rights of Unmarried Cohabitants Act Committee, Dec. 4. 2019 (urging that "recognition based on status" is "the most important aspect of your project").

[182] *Compare* Joslin, *supra* note 86, (arguing that "capacious parentage rules that recognize, value, and respect chosen family relationships . . . should [also] apply to the horizontal adult-adult relationships"), *with* Carbone & Cahn, *supra* note 86, at 108 (2016) (after examining tensions between the law of nonmarital parentage and the law of nonmarital coupling, arguing for convergence in the direction of the approach of coupling).

[183] *See, e.g.,* Joslin, *supra* note 86, at 984; Carbone & Cahn, *supra* note 86, at 66.

[184] *See, e.g.,* Joslin, *supra* note 86, at 916-17, 977 (arguing for a functional approach to the regulation of nonmarital families based on principles of "relational autonomy," equality, and fairness).

[185] *See* Bartlett, *supra* note 10, at 51-52.

[186] *See, e.g.,* KATHRYN EDIN AND MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2007); KATHRYN EDIN AND TIMOTHY NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY (2013).

[187] *See* Joslin, *supra* note 86, at 972-73 (2019). On these reasons, see, e.g., Kathryn Edin and Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE OF CHILDREN 117 (Fall 2005).

[188] *Compare* Carbone & Cahn, *supra* note 86, at 96, *with* Joslin, *supra* note 86, at 967.

among some groups.[189] This marriage gap and the emergence of marriage as a marker of privilege and an engine of inequality complicate the assimilation of marriage and cohabitation,[190] yet also bolster the case for a regulatory system that reaches dependency relationships outside of marriage.[191]

In this sense, today's debate differs importantly from the debate at the time of the Principles. Proponents of the Principles' functional approach sought to meet families where they were, accommodating the realities of family life and tackling the inequalities at stake. While some critics shared these goals, some opponents sought not to accommodate variation across families but instead to channel family life into traditional structures and vindicate conventional roles.[192] On this view, some inequalities—between marital and nonmarital families, women and men, and different-sex and same-sex couples—were not only justified but desirable. The drafters clearly repudiated this motivation to impose rigid rules on families and channel family life into traditional structures.[193] On this point, their position now enjoys widespread support in the academy and in law reform work. Today, both proponents and opponents of a functional approach aspire to legal rules that reflect the realities of family life and address inequalities within and among families.[194] For most participants in these debates, the question is no longer *whether* but *how* to accommodate family diversity and address inequalities within and among families. The values and goals that animated the Principles' drafters are now widely shared, even if they lead scholars and policymakers to different conclusions.

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[189] *See* Bloome & Ang, *supra* note 16.

[190] *See, e.g.,* Claire Cain Miller, *How Did Marriage Become a Mark of Privilege?,* N.Y. TIMES (Sept. 25, 2017); Pew, *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CENTER (Nov. 18, 2010), https://www.pewresearch.org/social-trends/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/; JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

[191] *See, e.g.,* Joslin, *supra* note 86, at 946.

[192] *See* Graglia, *supra* note 76, at 993; Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1232.

[193] *See* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 846 (1998) ("the principles offer determinacy in decisionmaking without presupposing, or attempting to promote, a standard family scenario").

[194] *Compare* Carbone & Cahn, *supra* note 86, at 120-21, *with* Joslin, *supra* note 86, at 986-87.