MONEY AS EMOTION IN THE DISTRIBUTION OF WEALTH AT DIVORCE

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Money as Emotion in the Distribution of Wealth at Divorce

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The ALI's Principles take an incoherent body of law governing the treatment of nonfinancial contributions to wealth accumulated during marriage, a body of law with many unresolved tensions, and treat it as might be expected. To the ALI's credit, the Principles' treatment of nonfinancial matters, although it too is incoherent, is more thoughtful than the underlying law it seeks to organize and describe. Nonetheless, this chapter examines one deeply flawed choice animating the Principles, the attempt to separate financial and nonfinancial matters.\(^1\)

The Principles attempt to separate emotional and personal aspects of a marriage from financial ones in numerous places.\(^2\) The drafters' approach is to acknowledge and settle financial issues between the parties, but to leave nonfinancial disputes without legal remedy. The drafters aim to avoid dealing with the more emotional issues surrounding marital dissolution by removing nonfinancial matters from consideration.\(^3\) This approach is problematic for several reasons. First, most marriages include countless negotiations and bargains weighing financial matters against nonfinancial matters. Remedies that fail to capture those bargains are likely to be unfair. Second, this approach fails to appreciate how emotional the financial issues can become within marriages and at the time of marital dissolution. Finances are not distinct from emotions in relationships, but are an avenue through which spouses express emotions. Finally, even if it were well advised, the drafters' attempt to sever nonfinancial matters from divorce proceedings is futile. Despite the drafters' strong commitment to ignoring nonfinancial matters, the Principles largely sporadically back into accounting for them in various financial formulas.\(^4\) Although we may wish that legal remedies at divorce could unfold without the thorniest nonfinancial matters coming into the litigation, those matters are essential to the broken bargain and impossible to remove from consideration. The drafters do a disservice to divorce litigation by attempting to bury issues that will inevitably resurface in different forms. In a few places, the drafters seem to acknowledge that financial and nonfinancial aspects of marriage cannot be separated. We must decide whether to view this as an inconsistency, or instead, as an inevitability.

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\(^1\) Although the drafters' resolution of the financial/nonfinancial divide is not satisfactory, the drafters deserve genuine respect for the skill, wisdom, and intelligence with which they have approached this problem.

\(^2\) See, e.g., Principles §§ 5.02 cmt. b, at 790 (discussing spousal support) and 7.08 (governing prenuptial agreements).

\(^3\) Principles § 5.02 cmt. b, at 790.

\(^4\) See, e.g., Pancreas § 5.07 (compensating for a spouse's loss in earning capacity as a result of caring for a dependent child or relative).
This chapter does not argue that the drafters failed to consider the complexities of the problem. Instead, it argues that they have dealt with one of the thorniest issues in family law by choosing simply to take it off the table. This choice does not necessarily lack courage. But I believe it represents wishful thinking. This chapter argues that it is impossible to separate money from emotion, as the Principles strive to do. While this chapter does not offer a better solution, the choice the drafters make bears understanding and analysis.

This chapter maps out the Principles’ treatment of nonfinancial matters in property division, alimony awards, and premarital agreements in Section I. It examines first the consequences and next the rationale for the ALI’s exclusion of nonfinancial matters in Section II. In Section III, the chapter examines one provision of the Principles which governs financial misconduct. It uses this example to illustrate the impossibility of excluding nonfinancial matters from consideration, as nonfinancial matters become masked as financial ones.

I. How the Principles Manage Nonfinancial Matters

It is first necessary to illustrate the drafters’ approach to the separation of financial and nonfinancial matters. While the Principles draw the line between nonfinancial and financial matters in many provisions, a few examples will suffice here.

A. Compensatory Spousal Payments

The clearest and most significant example of line-drawing between financial and nonfinancial matters comes in Section 5.02, which explains Compensatory Spousal Payments. The very purpose of compensatory payments or alimony is to “allocate financial losses that arise at the dissolution of a marriage.” Imagine the sentence without the term “financial.” Some people would assume it was limited to financial losses, while others would imagine an open-ended inquiry into the conditions of the marriage. However, the drafters’ choice to include the term “financial” makes it clear that they know that these losses are only one slice of the losses associated with the end of a marriage. The term is inserted to clarify the limited scope of the remedy, that is, the cognizable losses for which a court can account.

The Principles devote comment b in Section 5.02 to explaining the exclusion of nonfinancial losses. That comment acknowledges the reality of nonfinancial gains and losses as it chooses to ignore them: “[d]ivorce also imposes emotional losses and emotional gains, but these Principles do not recognize these as an element of awards.” The decision to recognize only financial losses rests on the notion that financial issues and emotional issues are separate: “[t]he pains and joys that individuals find from divorce are not commensurable with its financial costs.”

The notes to comment b refer readers to an influential law review article written by the Principles’ chief reporter, Professor Ira Ellman, on the same subject. Here, as elsewhere in the Principles, there is every sign that the drafters know that financial issues

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5 Principles § 5.02.
6 Principles § 5.02(1).
7 Id.
8 Principles § 5.02 cmt. b, at 790.
and emotional issues are entirely intertwined in reality, but incommensurable for legal purposes.

B. Marital Agreements

While compensatory spousal payments are the best example of the drafters' commitment to this separation, there are others. Consider the treatment of marital agreements in Chapter 7 of the Principles.11 In keeping with state law, the Principles allow for the enforcement of agreements governing finances, while rejecting enforcement of agreements that govern what are in essence the nonfinancial elements.12 Section 7.08 bars enforcement of agreements that would provide for a financial penalty if divorce follows marital misconduct — agreements that would institute for the couple the fault-regarding distribution systems still alive in some states.13 The Principles also reject enforcement of agreements that hinge financial payments on particular conduct within marriage, such as fidelity, or some other nonfinancial benefit.14

C. Fault-Blind Divorce and Division of Assets

The sideling of nonfinancial matters is also expressed in the drafters' decision not to account for contributions to a marriage in dividing assets,15 and not to consider fault either as a ground for divorce or in financial settlements.16

II. Evaluating the Separation of the Financial from the Nonfinancial

Once the drafters concede that separating the nonfinancial elements is not the same thing as denying that they exist, several questions arise. First, is it a large or a small matter to address and remedy only financial issues? Is the separation justified and if so, how? Can there be justice with the two separated? Should we assess the justice question abstractly, or gauge it more practically by the litigants' satisfaction? Does the satisfaction of other actors in the system, primarily divorce attorneys and judges, take precedence over the litigants' satisfaction? This Part considers each of these questions.

A. Is the Exclusion of Nonfinancial Matters a Large or Small Matter?

The relationship between financial and nonfinancial matters is not simply an attribute of marriage. It is perhaps the defining attribute of marriage.17 Marriage is the constant exchange of financial and nonfinancial things, monetary and nonmonetary ones. Some of

11 Principles § 7.
12 Principles § 7.08(2) (making unenforceable agreements to limit or enlarge grounds for divorce or agreements requiring a court to evaluate marital misconduct in awarding alimony or dividing marital property).
13 Principles § 7.08 cmt. b, at 1005.
14 Id.
15 Principles § 4.09 cmt. b, at 734. This is an area where most states have at least formally considered nonfinancial contributions.
16 Principles § 4.09 cmt. c, at 734.
17 For further discussion, see Katharine B. Silbaugh, Turning Labor into Love: Housework and the Law, 91 NW. U. L. Rev. 1 (1996) (hereinafter Silbaugh, Turning Labor Into Love); Katharine B. Silbaugh, Marriage Contracts and the Family Economy, 93 Nw. U. L. Rev. 65 (1998) (hereinafter Silbaugh, Marriage Contracts); Katharine B. Silbaugh, Commodification and Women's Household Labor, 9 Yale J. L. & Feminism 81 (1997); Katharine B. Silbaugh, Gender
Money as Emotion in the Distribution of Wealth at Divorce

...nonmonetary ones are well understood to be "economic," such as household labor that provides material benefits. Some nonmonetary exchanges are not as often characterized as financial, including the exchange of counseling, support, love, sex, companionship, loyalty, compliments, or entertainment. These exchanges can result from overt bargaining as well as simple reciprocity. The exchanges are a defining attribute of family relationships.

Often, money in marriage is exchanged for a nonmonetary benefit, as when a wage is brought home and shared in exchange for homemaking. Family law has come to recognize and account for this exchange, as evidenced by the homemaker provisions in equitable distribution statutes.\(^1\) But that exchange is not the only instance where there is a relationship between money and marital conduct. They are more deeply inseparable than that near-labor contract would suggest. Even the giving of money is the giving of nonmonetary benefits: people given money within marriage may experience it as care for them and for the relationship. People who give money may do so as an expression of love, making the giving of money in effect the giving of love. The withholding of money can imply the inverse. Money is fully imbued with the emotions of the marriage. When a marriage later falls apart, it is no wonder that feelings of betrayal and loss include financial betrayal and resentment. The financial unwinding of a marriage is not distinct from the emotional accounting rejected by the Principles. It is one very significant element of it. The best that can be said, then, is that the drafters selectively reject nonfinancial matters, since financial ones are so laden with nonfinancial attributes as to be easily classified as emotional and nonfinancial in nature.

From the drafters' comments, it appears that they appreciate the countless ways in which marriage can be thus characterized as an exchange. Has comment b to Section 5.02 correctly characterized these other gains and losses when it calls them the "emotional losses and gains?\(^{19}\) I have argued that financial losses are emotional losses. Money, both during and after marriage, is emotional and intimate. People work to provide money to their families, and consider that act an expression of commitment and love. Couples fight about money more than they fight about anything else in marriage.\(^{20}\) Divorcing couples themselves judge the financial outcome of a divorce in light of marital conduct, no matter how many times their lawyers tell them fault does not matter.

Policy makers might have particular concerns about paying attention to financial but not nonfinancial matters. The nonfinancial versus financial aspects of marriage are significantly gendered.\(^{21}\)

There is another concern. The parties may continue to exchange some nonfinancial benefits after dissolution, although this exchange will not appear as such under the Principles. While the Principles acknowledge homemakers and primary caretakers who give up earning capacity to care for dependents, their analysis is limited to loss of earning capacity, not the ongoing flow of benefits from unpaid labor. Consider ongoing child care by a custodial parent after a divorce. Child support pays for expenditures that will need to be made on a child’s behalf, but not for the actual labor of raising the child. If such labor impairs a

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\(^1\) See, e.g., UMFA § 307.  
\(^19\) Principles § 5.02 cmt. b, at 790.  
\(^21\) See generally Silbaugh, Turning Labor Into Love, supra note 17; Silbaugh, Marriage Contracts, supra note 17.
parent's earning capacity, that may be addressed through compensatory payments. But there is a continued flow of labor to the benefit of the noncustodial parent, who still has continued responsibility for the child's welfare. It is possible to pretend to offset that labor against the noncustodial parent's sense of loss from not living with his or her child, which the Principles allude to. But the grounds for assuming an equal exchange of financial and nonfinancial benefits during the marriage, if there ever were any, no longer exists postdivorce. The only assurance given by the Principles that the exchange of financial and nonfinancial benefits is equal during marriage is that if it were not, one spouse would exit. Because exit has already happened after divorce, the ongoing postdivorce flow of nonfinancial benefits needs a better account than the Principles give.

B. Is the Exclusion of Nonfinancial Matters Justified?

The drafters justify the exclusion of nonfinancial matters from compensatory spousal payments in comment b to Section 5.02 as follows:

The reasons for this exclusion are pragmatic as well as principled. The pains and joys that individuals find from divorce are not commensurable with its financial costs, so that there is no method for determining the extent to which compensation for a financial loss should be reduced or enlarged to reflect nonfinancial gains or losses. Any effort to consider the emotional consequences of divorce would also require evaluation of the parties' marital conduct. A spouse may experience relief or even joy from having terminated an oppressive marriage, but we presumably would not wish to reduce that spouse's financial claims by assigning monetary value to these emotional gains. So also if joy came from the freedom to pursue an intimate relationship with a third person that had begun during the marriage, unless we distinguish the cases on grounds of fault.... To include consideration of emotional losses and gains would require a more general examination of marital misconduct, which this section rejects.

To summarize this rationale: first, nonfinancial losses are not commensurable with financial losses; that is to say, there is no common metric between them. That is what is meant by "there is no method for determining the extent to which compensation for a financial loss should be reduced or enlarged to reflect nonfinancial gains or losses." Second, counting nonfinancial gains and losses would be inconsistent with a core tenet of the Principles, the elimination of the fault determination. That is what is meant by "To include consideration of emotional losses and gains would require a more general examination of marital misconduct, which this section rejects."

These two justifications appear in other provisions where the Principles limit nonfinancial losses. For example, in arguing against the enforcement of marriage agreements pertaining to nonfinancial matters, the Principles say that courts would find themselves "policing the details of intimate relationships," a task that the drafters believe is inconsistent with the elimination of fault-based divorce.

This subpart considers these two rationales, incommensurability and the no-fault philosophy, in reverse order. It then concludes with one of the drafters' mitigating assumptions:

22 Principles § 502(3)(a).
24 Principles § 5.02, comment c, at 791.
26 Id.
28 Principles § 5.02 cmt. b, at 790.
23 Principles § 5.02 comment b, at 791.
25 Principles § 5.02 cmt. b, at 790.
29 Principles § 7.08 cmt. a, at 1004.
that the give and take of financial and nonfinancial matters within marriage evens out in the end, because otherwise couples would divorce.\textsuperscript{30}

1. The Fault Inquiry
While this chapter does not advocate the reintroduction of fault per se, the Principles' use of the no-fault concept to justify the exclusion of nonfinancial matters is nonetheless troubling. A glaring circularity marks the rationale offered by the Principles. The drafters give two reasons for excluding fault:

\begin{quote}
[T]he position taken by the Principles on this question follows from both the goal of improving the consistency and predictability of dissolution law, and the core tenet that the dissolution law provides compensation for only the financial losses arising from the dissolution of marriage.\textsuperscript{31}
\end{quote}

The Principles have failed completely on one of the two explanations offered for ignoring nonfinancial matters: that consideration would too closely resemble an evaluation of fault. At the same time, the drafters reject consideration of fault because it resembles compensating for nonfinancial matters. These justifications are completely circular: considering fault looks too much like considering nonfinancial matters, while considering nonfinancial matters looks too much like considering fault. If the similarity to fault fails as an independent reason to sideline nonfinancial matters, only consistency and predictability are offered to justify eliminating fault, and incommensurability to justify ignoring nonfinancial losses and gains.

Consider, then, the impact of the position on fault taken by the Principles. The distaste for fault extends well beyond eliminating fault grounds for divorce. It includes rejecting any inquiry that reminds us of a fault inquiry. Thus the Principles disallow marital agreements governing marital conduct because the inquiry could be similar to a fault inquiry.\textsuperscript{32}

The equation of the two bases glosses over significant differences between adjudicating fault where the parties have asked a court to, as is the case with a marital agreement governing fault, and adjudicating fault where one or both parties resist it. To the drafters the elimination of fault grounds for divorce is adequate to justify the elimination of any adjudication that could resemble fault-based determinations.

A driving motivation for marginalizing nonfinancial matters is an unwillingness to investigate the details of intimate relationships. The fault debate will continue to be had elsewhere. But to understand the way in which avoiding fault inquiries motivates and bleeds into all sorts of other decisions within the Principles, it is crucial to unmask the precise objection here: is it squeamishness about investigating these details? Is it concerns about privacy and, if so, whose privacy: lawyers, judges (disrespect for the court system), or litigants, children, and other family members? Is the objection about indeterminacy? Or does the objection stem from a belief that conduct that appears "wrong" outwardly might not be so wrong, such as adultery that happens after the marriage is ruined in fact, if not formally. Surely, the reason for avoiding inquiries into nonfinancial matters should influence the reach of this policy. For example, if a couple's privacy is the driving concern, then explicit marital agreements inviting a court to adjudicate fault should be permissible.

\textsuperscript{30} Principles § 4.69, comment b.

\textsuperscript{31} Principles § 1, Topic 2, Part I, at 43.

\textsuperscript{32} Principles § 7.08 cmt. b, at 1005.
The Principles have not clearly articulated which concern motivates the aversion to examining marital conduct. I would presume the aversion is motivated by indeterminacy, or a real lack of social consensus about marital conduct. Certainly, that lack of social consensus complicates the task the drafters set out to accomplish. But if that is the reason it is not possible to consider marital conduct, then the Principles suffer from a significant limitation, since issues about appropriate marital conduct are decided by default when ignored. It is true that allowing each individual judge to resolve disputes according to the judge's version of marital expectations is a nightmare. However, it is not obvious that the ALI is a less arbitrary decisionmaker when it comes to matters of social values.

Thus, in an attempt to eliminate one problematic inquiry, the Principles arguably have eliminated the good with the bad. Although few favor the reinstitution of fault-based divorce, if the only way to eliminate fault is to ignore the nonfinancial aspects of marriage, the price is just too high.

The Principles have thus overreacted to the fault issue, with consequences. It is not clear that the law must stamp out all remaining vestiges of an investigation of marital conduct in order to eliminate fault divorce grounds. The Principles take a cramped view of fault; just as the Principles refer to nonfinancial losses as "emotional" losses, melancholy other nonfinancial aspects of marriage, the Principles refer to questions of fault as questions of "morality," "virtue," and "sin," missing other attributes of fault.

Attempting to eliminate everything that resembles fault makes it difficult to manage some of the more important distributive issues at divorce. This chapter argues below that even the Principles are not prepared to go as far as their stated ideal. The best example occurs in Section 4.10, dealing with property distribution, which establishes an exception to the equal division rule in the case of financial misconduct. First, however, this chapter considers the other justification for avoiding the evaluation of nonfinancial matters: incommensurability.

2. The Incommensurability Problem
The use of incommensurability to justify ignoring nonfinancial matters is equally unsatisfying. On its face, the argument is almost nonsensical, as the law routinely provides remedies for losses that are in some way incommensurable with financial metrics: pain and suffering, emotional distress, reputational loss, and loss of consortium are just a few examples. All but the most mechanical economists acknowledge that measuring those types of losses in dollar terms is an artificial process. But the law accommodates this fiction because it is better than the alternative, which is not recognizing the losses at all. To shore up the argument made in the Principles, the drafters must supplement the incommensurability idea. Incommensurability between finances and other relationship issues must be different than the incommensurability between finances and physical pain or emotional distress in tort, for example.

One possible way to distinguish incommensurabilities occasioned by divorce is by labeling them "not worth it," in the sense that the size of the loss is smaller than the pain of the litigation. The drafters may simply be arguing in this case that using a financial metric for nonfinancial matters does not beat the alternative. The Principles hint at this when they suggest that nonfinancial matters during marriage can be presumed to have

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33 Principles § 5.02, 5.09, 790.
34 Principles § 1, Topic 2, pt. III(a).
35 Principles § 4.10.
36 Principles §§ 5.02, 5.09, 790; 4.09, 736.
been offered in an equal exchange, since an unequal bargain would have led to divorce before.\textsuperscript{37} This argument seems weak in part because, as the \textit{Principles} acknowledge, there are many barriers to divorce: religious commitments, sunk costs, and children, for example, that make it probable that people will stay in a bad bargain. More particularly, courts only examine the questions the \textit{Principles} raise after a marital split has actually ensued, making it almost certain that the bargain was in fact a bad one in that particular marriage. If the spouses have any regard for marriage or any psychological attachment to the marriage’s success, the bargain likely has been bad for a significant amount of time.

The \textit{Principles} elsewhere suggest that the return is not worth the effort of finding a metric. In its justification for rejecting premarital agreements that insert fault-based divorce by consent, the \textit{Principles} suggest that fault inquiries may not be a good use of judicial time.\textsuperscript{38} Also, in the explanation for adopting a presumption of equal property division, the \textit{Principles} emphasize how burdensome and intrusive such an inquiry would be.\textsuperscript{39} Thus, the drafters may not be resting their argument on the presumed equality of exchange, meaning the outcome’s presumed justice, so much as on an aversion to examining nonfinancial matters in the legal process. Evaluating nonfinancial matters in marriages is an ugly process for litigants, judges, and lawyers, and perhaps this explains the aversion, regardless of the justice of the matter.\textsuperscript{40}

Thus aversion and intrusion may be one thing the \textit{Principles} seem to mean by incommensurability, rather than that it is not possible to find a financial metric. But there is another possibility. The drafters may be advancing a distinct point, that is impossible to agree on what was a loss and what was a gain in marriage. This position holds that evaluating marriages is a hopelessly relativistic, values-based process. The difference between calculating losses in divorce and pain and suffering in tort law is that there are deep differences of perspective on how valuable various nonfinancial elements of a marriage are. In tort, it is the artificiality of money as a proxy for the loss that is the concern. No one doubts, however, the existence or severity of pain. But with divorce, the contested terrain concerns the very pluralism of family life in the United States, the pluralism of meanings about family. Maybe the challenge of finding a common metric is greater here because it implicates all the contests at the heart of the “family values” debates. Maybe the drafters despair, as so many do, of coming to any conclusion on those matters. Hence, the \textit{Principles} try to show wisdom by concluding that settling nonfinancial matters is impractical.

However, an equally plausible understanding of the same dilemma is that the \textit{Principles} advocate putting our heads in the sand. Deciding not to confront these cultural contests does not eliminate them. A formula that takes the worst contests out of the legal system may make the legal process less contentious. Yet, one of the main benefits of a civil legal system is providing a proper forum for resolving the knottiest conflicts in society. It seems possible that the \textit{Principles} will provide predictability by avoiding the nonfinancial issues, but a coin toss also provides predictability. The real question is whether it fairly resolves the dispute between litigants. By taking the enormous and deep conflicts over nonfinancial

\textsuperscript{37} \textit{Principles} § 502 comment c. Section 4.1.0, Comment b.

\textsuperscript{38} \textit{Principles} §§ 7.06 comment b, at 1005 ("Such a state law may reflect institutional judgments about the allocation of judicial time").

\textsuperscript{39} \textit{Principles} § 4.09, cmt. b, at 763 ("Even though the presumption of an equal division will sometimes be incorrect, case-by-case measurement offers no promise of greater accuracy. Moreover, the measurement attempt itself would require a retrospective examination of the parties' marital life that would often be burdensome and intrusive, as well as futile in its purpose.").

\textsuperscript{40} \textit{id.}
matters within marriage, perhaps the most significant matters in a divorce, out of the legal system, the Principles do not eliminate those conflicts. Instead the Principles leave us asking where else those inevitable conflicts will express themselves.

There are circumstances when even the rationalist Principles admit that nonfinancial matters require redress, as in the cases where one spouse has been a primary caretaker of children in a marriage. In these instances, the Principles seem to walk a tightrope. The drafters acknowledge marital conduct but insist that there is a special financialness to this particular problem. There does have to be compensation, and the dispute does relate to nonfinancial roles and behaviors during marriage, if the term “nonfinancial” can be used at all. The Principles solve the problem by arguing that the compensatory payments in that case are justified by loss of financial earning power. But illogically, the payments are tied to both spouses’ incomes. If the payments were to be justified on the basis offered by the Principles – loss of the care giver’s earning capacity – the payments should be tied to the difference between the care giver spouse’s earning capacity before care giving and her earning capacity after care giving. Instead, the Principles pay attention to the breadwinner’s earnings as well. In other words, although the Principles assert that they are just managing a financial loss to the earning capacity of the care giver, it looks like they are responding to a nonfinancial matter – the role commitments made within that type of marriage. The property illustration that follows makes this point even more clearly: the drafters can argue that they are only managing financial losses that arise from divorce, but they cannot help but do more than that if the Principles are to retain any claim to fairness.

3. The Assumption That Nonfinancial Matters Do Not Outlive the Marriage

Finally, the Principles utilize a device that the drafters believe will make this tension acceptable: an assumption that the financial and nonfinancial aspects of marriage resulted in an equal balance of benefits and burdens during the marriage. If that were not the case, couples would get divorced. That theoretical equality serves as a justification for not examining exchanges during the marriage. At the same time, the Principles forthrightly acknowledge the inadequacy of that theory to describe actual marriages, as explained in comment c to Section 5.02:

Divorcing individuals are likely to believe that the allocation of resources and responsibilities during their marriage was unfair. It would seem certain that some are correct. But the divorce law cannot provide general relief for unfair conduct in marriage. . . . The no-fault divorce law of most states gives spouses the legal power to terminate the marriage unilaterally. In principle, this power makes it impossible for either spouse to impose an inequitable arrangement on the other, at least in the long term. In practice, this may not be true. Parties may be bound together by nonlegal ties that keep persons in unhappy relationships. There is little the law can do to alter that.

This position is obviously very cold consolation: there are injustices of a nonfinancial nature, they are to be acknowledged, but the law cannot address them. As a practical

41 Principles § 5.03(2)(b).
42 Principles § 5.05.
43 Principles §§ 4.10 cmt. b, at 753 (“The legal remedy available to a spouse who finds a marriage unacceptably burdensome or inequitable is exit.”); 4.09, cmt. c, at 736 (“In considering the reasonableness of the presumption of equality, some comfort may perhaps be taken in the observation that under a legal regime of no-fault divorce in which either spouse can unilaterally terminate the marriage, individuals who believe their relationship is seriously one-sided can terminate it.”).
45 Principles § 5.02 cmt. c, at 791.
matter, the Principles ultimately do not manage to not address nonfinancial matters very effectively, as this chapter demonstrates, despite the fact that the drafters are highly motivated to ignore them. \footnote{See Part III infra.}

In short, the Principles formally address only postdissolution losses, while responding to the occasional postdissolution consequence of roles during the marriage, as with the compensatory spousal payments for primary care givers. Nonfinancial matters are a real and crucial aspect of the exchange during marriage, but are also assumed to be equally distributed when money is factored in, and unmeasurable, and therefore unremediable postdivorce.

Consider Section 4.10, comment b:

The equitable importance of differences in the spouses' financial contributions or consumption could not be evaluated in isolation from the marriage as a whole, because the financial and non-financial threads of marriage cannot ordinarily be unraveled. A retrospective assessment of the marriage for the purpose of determining a fair allocation of property would require examining the emotional and personal benefits and burdens that the marriage provided each spouse, as well as the financial burdens and benefits. Individuals may derive great benefit, overall, from a marriage that is a net financial loss. But such an inquiry into the entire marriage is not and should not be part of the process by which marital property is allocated. The law employs a general rule of equal division because an individualized assessment of each marital relationship is not normally possible. . . . The legal remedy available to a spouse who finds a marriage unacceptably burdensome or inequitable is exit. \footnote{Principles § 4.10 cmt. b, at 752–53 (emphasis added).}

As an aside, it is worth noting something counterculture about this remedy. Policymakers generally bemoan the apparent commitment problems of adults today, expressed through the ease with which people leave marriage to meet their personal needs. The drafters, on the other hand, use the easy availability of divorce to justify legal unwillingness to delve into the complexity of marriage. It is as if the Principles endorse divorce for those who are unhappy, a position that may be correct, but is certainly controversial.

More to the point, it is unclear whether all nonfinancial goods are consumed during the marriage. Are there no lingering effects or lingering exchanges? Children live on and are provided countless benefits, financial and nonfinancial, that inure to the benefit of both parents. Marital decisions about where to reside can linger postdivorce, emotional opportunities with third parties passed up during marriage can have postdivorce effect, and betrayal lives on, as anyone who has known someone after a bitter divorce knows. That is to say that the exclusion of nonfinancial matters is artificial even postdivorce. Given that the nonfinancial and financial were entwined and continue to be entwined, a sense of a just financial settlement that ignores nonfinancials is hard to achieve. This leads to the question of whether the ALI's solution is just, to which this chapter now turns.

C. Is the Exclusion of Nonfinancial Contributions Just?

Suppose two children are each given ten dollars in quarters. They are told that they can pool their money and spend it, making any kind of deal with each other they would like, or they can each spend their ten dollars separately. But they are also told that at the end
of the day, all that is left in either pile will be divided equally between them. The children have been given a set of rules that are clear, rules that have predictability as a virtue. But this rule does not embody any particularly deep values, and it creates odd incentives for each child to spend instead of save. While this may not be a great analogy for marriage, parts of it may shed light on our family law system, particularly with respect to rewarding consumption over savings. What the illustration asks is whether, when crafting a rule that is easy to administer but avoids the intractable questions around values and values conflict, it is possible to call such a rule just or successful by any important measure.

The Principles raise other particular concerns about justice and injustice. The Principles replicate a convention in the law of making some things inappropriate material for legal exchange—love, care of one's children, emotional support, and sex, for example. To the extent, however, that such things actually are exchanged in some form, failing to enforce the deal simply weakens the bargaining hand of the individual who offers the item for exchange. A real advantage-taker who brings nothing financial to the table, but nothing nonfinancial either, may benefit from the Principles' willingness to give him or her half the money anyway on the assumption that he or she must have brought something more to the deal than feeding the other spouse's masochism. At the same time, someone who brings plenty of nonfinancial contributions to the table would barely know she had offered anything to the deal under this scheme, and may find little refuge in the Principles' justification that she was always free to get a divorce.

III. Is This the Only Choice? The Problem of Financial Misconduct

Are the Principles just accommodating reality or practicality? As this chapter has already argued, nonfinancial matters are routinely dealt with in law. In addition, simply taking the really hard questions out of the equation does not make them go away. Finally, it is important to consider whether excluding the nonfinancial in fact accommodates reality. If so, why do states cling to the use of fault or other evaluations of various kinds of conduct within marriage, both beneficial, like savings, and harmful, like desertion?

These are difficult questions. The most generous view of the Principles' choice is to ask: could anything have been done differently? Perhaps exclusion is a lousy choice, but better than all the other ones. There is plenty of support for this idea. Recall that the drafters justify the separation of these elements in large part with arguments from practicality. Those arguments include the impracticality of finding good measurements for nonfinancial losses, the incommensurability claim. They also include the impracticality of expecting predictable or accurate independent evaluation of marital conduct or the no-fault argument. There is much that is persuasive about this perspective.

But the belief that the choice to exclude nonfinancial contributions is practical or inevitable is itself questionable. So, too, is the related claim that accounting for the full range of marital conduct, gains, and losses is idealized and impractical. The law repeatedly returns to accounting for some kinds of marital conduct of a nonfinancial nature, and the Principles are no exception. Even with a strong commitment to avoiding this evaluation, the Principles have been unable to stick to its mission. If the Principles, apparently strongly committed at the abstract level to the elimination of these factors, are unable

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48 For further discussion see generally Silbaugh, Marriage Contracts, supra note 17.
49 Principles § 4.10 cmt. b, at 753.
execute that principle, perhaps it cannot be done. Money is not as transparent as the drafters thought. Instead, it is laden with the same emotional content as anything else that happens within a marriage.

As a primary example, consider some rules with regard to the distribution of property, though there are other examples. In particular, consider Section 4.10, Financial Misconduct as Grounds for Unequal Division of Marital Property. What this section does is create an exception to the rule that divides property fifty-fifty without regard for marital conduct. That exception allows for offsets when one spouse engages in what is called "financial" misconduct. Specifically, if one spouse makes a gift of marital property to a third party, such as a paramour or a parent or sibling, or spends or loses money through "intentional" misconduct and does so within a time period before the dissolution marked by a rule of statewide application (a year, two years, for example), that gift is counted back into the assets available for fifty-fifty divide. The same rule applies to financial losses, even from negligence, that occur after service of a dissolution petition.

This section may appear to be different because the misconduct is financial. But that is not so clear. First, the Principles elsewhere ignore explicitly financial conduct that occurred during marriage. The drafters must take this position if they are to exclude the consideration of nonfinancial matters: once the law asks who spent too much, or saved or earned too much during the marriage itself, it immediately finds itself considering the many items of exchange—services, well-being, support, and so forth—that are at the center of the storm for those seeking to avoid nonfinancial matters. Comment b to Section 4.10 admits as much:

The general rule that the allocation of property at divorce is not based upon a retrospective accounting of the parties' relative expenditures arises from the same basic analysis that explains why unequal earnings do not rebut the rule that marital property is divided equally at divorce. The equal-division principle is not grounded upon a factual assumption that the parties made equal financial contributions to the marriage, or equal financial demands upon it. It is therefore not rebutted by a contrary factual showing. . . . [T]he financial facts could not alone govern the assessment of whether an equal division is fair. The equitable importance of differences in the spouses' financial contributions or consumption could not be evaluated in isolation from the marriage as a whole, because the financial and non-financial threads of marriage cannot ordinarily be unraveled. A retrospective assessment of the marriage for the purpose of determining a fair allocation of property would require examining the emotional and personal benefits and burdens that the marriage provided each spouse, as well as the financial burdens and benefits. Individuals may derive great benefit, overall, from a marriage that is a net financial loss. But such an inquiry into the entire marriage is not and should not be part of the process by which marital property is allocated. . . . The legal remedy available to a spouse who finds a marriage unacceptably burdensome or inequitable is exit.

50 Perhaps the most obvious of a rule that considers marital conduct is the Principles' compensation for losses in earning capacity only for those who cared for dependents of various kinds—an inquiry into positive marital conduct, albeit one with some objective criteria. Principles § 5.0(2)(b+c). Another example is the termination of these payments upon remarriage of the recipient, which is a behavioral rather than a financial judgment. Principles § 5.0b.
51 Principles § 4.10.
52 Principles §§ 4.10(1) and 4.10(2).
53 Principles § 4.10(3).
54 See, e.g., Principles § 4.10, comm. c.
55 Principles § 4.10, comm. b, at 752-53 (internal citation omitted).
The drafters argue for ignoring the financial conduct during marriage, then, because they realize that financial and nonfinancial conduct are inseparable. But the types of financial misconduct anticipated in the exception crafted in Section 4.10 absolutely typify the ways in which financial and nonfinancial matters are completely and inextricably intertwined. There is no principled way to contain the insight of Section 4.10. The comments to Section 4.10 admit this strikingly with the illustrations chosen.56

The most obvious example is Illustration 11.57 In this illustration, a husband is found guilty of forcible rape and sentenced to prison. His wife does not have to share in the expense of his legal defense in the divorce that follows because the expenditure resulted from intentional misconduct on his part. It turns out that this is true even if that conduct took place before the window of time when financial misconduct matters; even if, for example, she stands by him while he claims his innocence, and seeks the divorce later when he admits to her his guilt.58 Paragraph 5 of Section 4.10 says that these provisions can go back before the fixed period set forth in the rule of statewide application, “if facts set forth in written findings of the trial court establish that their application to the earlier incidents is necessary to avoid a substantial injustice.”59

Other classic examples, offered up in the illustrations, are of gambling expenditures and of money spent on adulterous relationships.60 These expenditures, too, can be back-dated under Paragraph 5 to before the rule of statewide application, to avoid a substantial injustice.

Whether a spouse is a convicted rapist, or just a profligate spender on particularly insulting causes like affairs or gambling, there is room in the Principles to account for his or her conduct. The drafters maintain that the exception is cabined by the financial nature of this misconduct—these are cases where, in their view, the conduct is just about the money. But how is it possible to know that the spending was wrong—that it was “financial misconduct”? Comment e suggests that prevailing case law will apply to conventional financial misconduct, such as concealing assets, as well as to “a wider group of fact patterns that also include gambling losses and funds spent on an adulterous relationship . . .”61 In other words, an existing body of law outlines conventional nonfinancial misconduct or fault.

The explanatory comment notes that these rules reflect prevailing law in most states.62 The Principles are arguably just bowing to reality here; this is prevailing law in most states because courts are simply unable to ignore this kind of misconduct, and the Principles will not seem like a credible alternative to current law if they fail to accommodate this reality.

Why is this the prevailing law in most jurisdictions? It is inevitable that some forms of conduct and misconduct will play a role in financial settlements at divorce. This is because everyone knows—the drafters, the judges, lawyers, people getting divorced, people who are married—that financial misconduct is wrapped up in facts about the relationship: the adultery, the consumption, the gambling, or as Illustration 11 posited, even the rape.63 This is not to say that fault evaluations are good, just that they are inevitable. It is impossible to think or talk about dissolution without considering these issues in every case. The law

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56 See Principles § 4.10 Illus. 1–4, at 753–4.
57 Principles § 4.10 cmt. e, at 759.
58 Principles § 4.10, illus. 8–9, at 757–58.
59 Id.
60 Principles § 4.10 Illus. 11, at 759.
61 Principles § 4.10(c) Illus. 11, at 759.
can choose to ignore them, but if it does so, participants in the process are likely to feel as though the system is not just or realistic.

What are the implications of this analysis of Section 4.10? The narrowest point that can be made here is that Section 4.10 is an exception to the no-fault principle, causing the Principles to fall short of their commitment to no-fault in this single provision.\textsuperscript{64} But this provision illustrates more than this; indeed, it nicely captures many of the impossibilities and practicalities of family law.

First, nonfinancial conduct and financial conduct are intertwined. Before a divorce, as a couple is drifting apart, the wife might begin to invest in a hobby that is an assertion of independence from the marriage. Perhaps that hobby would be cycling, which increasingly occupies her free time. She buys a $6,000 bicycle one year before the marriage ends. It is expensive, but for a cycling enthusiast it may not be outrageous. This expenditure is probably not misconduct under the provision, even though the cycling may be wrapped up in her emotional exit from the marriage. However, if she spends that money buying jewelry for her paramour, then that purchase is considered misconduct under the provision. So what is the outrage—spending valuable cash outside the marital unit, or spending it in adultery? It seems obvious that it is the latter: adultery is bad enough, but spending money on it puts salt in the wound. This is the kind of insult to injury that an ordinary judge will recognize and feel the need to remedy.

Money is not distant and cold, but instead is integrally wrapped up in the personal aspects of marriage. This is illustrated most clearly when there is spending on adultery, and the drafters provide a remedy for that situation. But despite the drafters' decision to provide no remedy when one spouse is a saver and one a spender, the saver feels personally betrayed by the spender, often emotionally betrayed. I have analyzed before the odd legal doctrines governing marriage contracts that consider financial matters distant enough from marriage to be an appropriate subject of contract without damaging the core of marriage, while other nonfinancial conduct is so central to marriage that it cannot be reduced to contract. I responded that money is not naturally unemotional, but the legal rules that distance it from emotions themselves commodify money.\textsuperscript{65} The drafters' characterization by making financial matters seem tame enough for courts, by comparison to nonfinancial ones. The drafters pretend money is colder or less fraught with emotion or more rational than it is; that would seem to be the only way to justify treating nonfinancial matters differently. But when it comes to compensating a spouse when his or her ex spent money on a lover, it is a thin reed of respectability to claim that the reason that the spouse needs to be compensated is that his or her bank account has been reduced.

If the drafters have in fact been unable to hold nonfinancial matters at bay, it is important to ask whether that was inevitable. Think of the implications: the drafters, the ALI, and maybe the whole Family Law bar, have been prepared to concede that after all these years of experience with fault, there is no good way to take marital conduct into account. The drafters profess, in comment c to Section 5.02: "the divorce law cannot provide general relief for unfair conduct in marriage."\textsuperscript{66} Yet on the other hand, there may be no way to avoid taking account of marital conduct. That may be the real tension, or incoherence, of family law— the impossibility, but the necessity, of looking into the marriage.

\textsuperscript{64} Principles § 4.10.

\textsuperscript{65} Silbaugh, Marriage Contracts, supra note 17, at 124.

\textsuperscript{66} Principles § 5.02 cmt. c, at 791.
IV. Conclusion

Of course, the drafters are aware of the ways in which the financial and nonfinancial are entwined. The Principles finesse the problem: it is precisely because they cannot be disentangled that we cannot try to.

Then what is the Principles' real relationship to the financial versus the nonfinancial aspects of marriage? The Principles express conflicting attitudes. At times, the Principles appear to resolve the tension by proclaiming that the law can only or should only deal with financial issues. But at other times, the Principles explain the treatment of financial issues in terms of other, nonfinancial considerations, as in the case of compensatory payments for care giver spouses or offsets for financial misconduct. Maybe this is the best we can do: it is pragmatic. It may also be predictable. However, it is not coherent, despite the fact that coherence was a prominent goal of the drafters. Legislators in particular should consider whether the value of predictability is high enough to overcome results that will not be satisfying to litigants in real cases.

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