

BRIGITTE M. BODENHEIMER MEMORIAL LECTURE ON THE FAMILY

Inventing Family Law

*Ira Mark Ellman**

TABLE OF CONTENTS

INTRODUCTION.....	856
I. THE PROBLEM OF DISCRETION IN FAMILY LAW.....	857
II. INVENTING FAMILY LAW	871
A. <i>Status Rules and Contract Rules</i>	872
B. <i>Custody</i>	876
C. <i>Alimony</i>	878
D. <i>Property Allocation and Child Support</i>	884
CONCLUSION	885

* Professor of Law and Faculty Fellow, Center for the Study of Law, Science and Technology, College of Law, Arizona State University, Tempe, Arizona, 85287-7906, Ira@asu.edu. I would like to express thanks to Robert Post, Jeffrie Murphy, Franklin Zimring, and Grace Blumberg for their comments on an earlier draft. The Seventeenth Anniversary Brigitte M. Bodenheimer Memorial Lecture on the family was given at the University of California, Davis, School of Law on November 12, 1998.

INTRODUCTION

I think it is particularly fitting that the observations I offer today are part of a lecture series honoring the memory of Brigitte Bodenheimer. While I never knew Professor Bodenheimer personally, her work on the Uniform Child Custody Jurisdiction Act ("UCCJA") had an important impact on my own thinking when I first entered the field of family law. A major theme of her custody jurisdiction work was the importance of protecting children from well motivated courts that were so willing to revisit custody decisions made by prior tribunals that they made all custody determinations vulnerable to constant relitigation. Professor Bodenheimer saw that the solution lay in rules of jurisdiction that unambiguously denied courts the opportunity for such second guessing. She saw that determinate rules of jurisdiction were better for children in the long run, even if denying courts the chance to revise one another's determinations would occasionally have the effect of leaving a bad decision in place. For many years I have been teaching my family law students about the importance of Brigitte Bodenheimer's insights, and why she was exactly right in her views. What I want to do today is explain why I believe the lesson she taught us in the field of custody jurisdiction has larger implications, that overbroad discretion is indeed a problem throughout family law, a problem which can be solved generally just as Professor Bodenheimer sought to solve it in child custody jurisdiction.

First, let me briefly review what I suspect is for most of you familiar background. Nearly everywhere, both child custody and alimony are within the realm of trial court discretion. Much has been written about how the dominant custody standard, "best-interests-of-the-child," effectively leaves each trial judge free to make the important value choices that necessarily underlie a custody determination.¹ As for alimony, the 1973 Uniform Marriage and Divorce Act exemplifies the dominant approach, directing the court to set a maintenance order it believes "just."² Two decades ago

¹ See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, for a classic work on judicial functions in child custody cases. A more recent piece that takes a different view and notes the literature since Mnookin is Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991).

² UNIF. MARRIAGE AND DIVORCE ACT § 308(b), 9A U.L.A. 446 (1998). For a more

child support was the same, but the push of federal regulations transformed it, and now child support guidelines decide nearly all cases, leaving very little for judges and lawyers to do other than marshaling the correct income and expense figures for insertion into the charts or, as in California, the computer programs.

Marital property presents a more diverse picture. In the handful of equal division states, like California, allocation is governed by a very mechanical rule. While there can be protracted disputes about the characterization of property, they are typically decided by fact-finding rather than by appeals to trial judge discretion. On the other hand, many of the common law equitable distribution states reject even a presumption of equal division, and instead insist on a discretionary allocation of property by a trial court supposedly informed by a statutory list of factors thought relevant to its assessment of equity. The ten or twelve hotchpot states go even further: rejecting any property rule distinction between divisible marital property and nondivisible separate property. Instead, they rely on the trial court to weigh the source of the property as another factor to consider in making an equitable allocation of it. So for many of the common law states, the equitable division reforms replaced a clear common law rule (allocate all property at divorce to the spouse in whose name it was titled) to a rule of discretionary allocation. Given the relative dominance of the common law system in the national picture, it thus seems that in most of the country today, only child support is decided by a system that relies predominantly on rules rather than discretion. And the child support rules exist only because they were pushed on the states by Washington lawmakers concerned primarily with their potential value in reducing the federal contribution to welfare payments.

I. THE PROBLEM OF DISCRETION IN FAMILY LAW

How did we end up with such a discretionary system? Historically, after all, we have at times had clear rules. An obvious example is the old common law marital property system. Gender stereotypes also once provided a ready source of clear rules. When I first moved to Arizona in 1978, it then had only recently repealed this statute:

thorough discussion of the discretionary nature of this traditional standard, see Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father.³

So clear rules can be had. The problem, of course, is that the traditional rules relied upon by the common law reflect values we no longer share. Their replacements need to reflect modern values we do share. But what are those values? And can we fashion a rule that faithfully implements them? There, of course, is the problem. And one appealing solution to this problem — as with any problem — is avoidance: put it in someone else's inbox. That is essentially the approach most often taken the last few decades, by those charged with designing family law rules — legislatures and state high courts alike. So the trial court's inbox has become very full. On this point child support is an instructive example. There is a very broad public consensus about the importance of collecting child support from absent parents. It is widely believed that the ability to collect child support is facilitated by guidelines that set presumptive support levels. The particular amount set in the guidelines are of course subject to debate, and the states have produced varying results. But the wide agreement on the value of having guidelines, and of avoiding a case-by-case reexamination of the proper relationship between parental income and the size of the child support obligation, ensures support for guidelines despite this inevitable disagreement over any particular implementation. Indeed, that support has been much greater than might have been expected when the guideline enterprise was begun. Trial court judges who initially reacted protectively to what was sometimes perceived as an assault on their discretion came eventually to appreciate the virtues of inbox control.

Child support thus provides an example — like that of Professor Bodenheimer's UCCJA — of the willingness to sacrifice the decision maker's discretion to craft customized justice in each individual case, in order to achieve a larger benefit over the full run of cases. Nearly twenty years ago P.S. Atiyah observed that there is a

³ ARIZ. REV. STAT. § 14-846(B) (repealed 1974); *see also* Porter v. Porter, 518 P.2d 1017, 1019 n.1 (Ariz. Ct. App. 1974) (noting that section 14-846 was repealed effective January 1, 1974).

tension between what he called the law's hortatory function — a decision's impact on the future behavior of other persons, nonparties — and the desire to do justice in the individual case.⁴ He noted that if judicial decisions were never made public, courts would focus exclusively on doing justice between the two particular litigants before them, because there would be no occasion to consider the decision's impact on others — the hortatory function. An example of that phenomenon can be seen today when courts of appeal render decisions that remain unpublished, a practice that is particularly common in California.

According to Atiyah, the law's concern with the hortatory function has declined because of modern man's unwillingness "to accept the authority of a principle whose application seems unjust in a particular case, merely because there might be some beneficial long-term consequences which he is unable to identify or even perceive."⁵ A decision that communicates a principle of decision not only informs (and potentially influences) future actors, it also informs, and thus constrains, future decision makers. Eliminating the hortatory function (as by not publishing the decision, or relying on a very elastic principle) avoids this constraint. So one explanation for the prevalence of discretionary rules in family law could be a more general trend found throughout the law. Perhaps modern family law reforms took place during an era in which the law generally moved away from rule-based decision making and toward customized but ad hoc decision making. It must also be observed, however, that the trend was very warmly welcomed in family law. For example, the Connecticut Supreme Court, among the courts most consistently and most self-consciously committed to avoiding rules in family law, has applauded its legislature for "acting wisely in leaving the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines."⁶ Perhaps the court believes that families are all so very different from one another that in any event a decision in one case can never be relevant to the next one.

⁴ See P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1249-50 (1980).

⁵ *Id.* at 1270.

⁶ *Seymour v. Seymour*, 433 A.2d 1005, 1007 (Conn. 1980). For other discussions on discretion by the Connecticut Supreme Court, see, for example, *Sunbury v. Sunbury*, 553 A.2d 612, 614 (Conn. 1989), and *Beede v. Beede*, 440 A.2d 283, 285 (Conn. 1982).

Now, I have been comparing the use of rules with reliance upon trial court discretion, without stopping to examine very closely what there is about discretion that might be cause for concern. After all, people are often encouraged to exercise discretion, so there must be something good about it. Indeed, there is a long literature on the nature of discretion that I have mostly ignored. Let me dip into it now, very lightly, just enough to allow us to examine its importance in family law.

One thread of the literature distinguishes rules — mechanical things that a clerk could apply — from standards — statements of general principle that impose meaningful constraints on the decision maker, but which nonetheless require judgment in their application.⁷ Although he uses a different terminology, I find Robert Post's discussion of these distinctions most helpful in clarifying the different ways we can formulate statements of law.⁸ And so I want to begin with an example borrowed from Post — three different rules we might give a police officer directing traffic at an intersection:⁹

- (1) Traffic should be regulated as the officer sees fit — an example of a *rule of discretion*.
- (2) Traffic should be regulated so as to avoid congestion — an example of a *rule of judgment*.
- (3) Traffic should be regulated so that it alternates between two minutes' movement in a north-south direction and three minutes' movement in an east-west direction — an example of a *mechanical rule*.

The law certainly contains some mechanical rules, such as the requirement that one be eighteen to vote, or present in the jurisdiction for 180 days before filing a divorce petition. But in most areas of law that are of interest, pure mechanical rules are atypical.

⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977).

⁸ See Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 495-506 (1994) [hereinafter Post, *Reconceptualizing Vagueness*] (discussing "discretion," "judgement," and "vagueness doctrine"). Post explains that exercising discretion in the interpretation of legal rules rests on a judgement that reflects the standards of a particular social group or institution. *See id.*

⁹ These examples, and the other thoughts of Robert Post that I borrow here, can be found in Robert Post, *Justice for Scalia*, THE NEW YORK REV. OF BOOKS, June 11, 1998, at 57 [hereinafter Post, *Justice for Scalia*] and Post, *Reconceptualizing Vagueness*, *supra* note 8, at 92-93.

Child support guidelines come closest, although the trial judge can depart from the guidelines with a reasoned explanation properly grounded upon the statutory standard for such departures.¹⁰ But for our purposes more interesting is the difference between a rule of judgment and a rule of discretion.

Post explains that difference this way: “[W]hereas discretion authorizes the exercise of subjective preferences, judgment demands the application of norms that derive from shared experiences.”¹¹ So Traffic Rule 1, for example, allows the officer to favor cars traveling north and south, simply because it is the officer’s preference, but Traffic Rule 2 does not. Rule 2 instead establishes a norm — reduce congestion — that has meaning from the community’s shared experience, and requires a judgment as to how to best implement that norm under local conditions. The particular traffic pattern that results from the application of Rule 2 may vary with the officer, and so Rule 2 is different than the mechanical Rule 3. In retrospect one might determine that some judgments made under Rule 2 were better than others, because some were more successful than others in reducing congestion. So even though reasonably informed and competent officers may make different good faith judgments under Rule 2, the fact that their judgments are amenable to such later evaluation, according to standards that would be uncontested, tells us that they are judgments and not mere preferences. This contrasts with the result we would have under Rule 1, which allows no such evaluation. Under Rule 1 we can no more compare one officer’s preference for northbound traffic with another’s preference for eastbound, than we could evaluate their preferences for different flavors of ice cream.

This last point is especially important in thinking about the

¹⁰ Whether this really offers a window of judgment within an otherwise mechanical rule depends upon the nature of the statutory standard: does it contemplate only a finding of fact that places the case outside the normal mainstream, or does it require the court to apply a norm to the facts? A rule that allows the judge to depart from the guideline amount to take account of the child’s special needs or gifts requires the court’s exercise of judgment: what kinds of needs appropriately trigger this provision? In contrast, a rule permitting a departure to take account, for example, of the child’s own financial resources would not require judgment if the rule specified a particular result once the court established the financial facts. Overall it seems that the child support guidelines come fairly close to a mechanical rule, for it seems that the statutory standards for departure from the support guidelines effectively exclude the exercise of judgment in all but a handful of relatively unusual fact-patterns.

¹¹ Post, *Justice for Scalia*, *supra* note 9, at 57.

common law system, the genius of which is supposed to lie in its gradual, incremental building of legal principle. Judges of course make policy under the common law, but they do so within the framework of rules, not in the exercise of unguided discretion, applying or interpreting principles derived from prior cases to render decisions under new facts. One might describe judges performing this role as exercising a kind of discretion, but this kind of “rule-building discretion,” to use Carl Schneider’s term, is really an exercise of judgment within the typology I am employing.¹² The judge’s construction of prior precedent is explained by reference to norms — typically norms that underlie the precedent, and which are necessarily part of the reasoned explanation offered for the current construction. A later court that rejects this construction of the rule will explain that it was wrong either because it is not in fact consistent with the governing norms underlying it, or because, over time, the governing norms have changed.

Of course the relevant norms necessarily reflect, as Post notes, the standards of some social group, and are thus “socially and historically specific.”¹³ This is why they may change over time. But the important point here is that at the time of decision the relevant community can “supply a common ground or criteria” by which the decision is made, or against the decision, once made, may be evaluated. Without such criteria, there can be no rule-building, and one does not have judgment but rather discretion — or, to borrow a descriptive term of Carl Schneider’s, “rule-failure discretion.”¹⁴ So this is an important difference between our Traffic Rule 1 and 2: there can be no accretion of useful precedent over time from decisions made under a governing principle that asks the decision maker to decide as he sees fit.

We can have rule-failure discretion even though the purported rule does not leave the decision maker entirely free to do anything she chooses. Traffic Rule 1 — direct as you see fit — remains an example of rule-failure discretion even if we add the gloss that the Traffic Officer cannot charge drivers a dollar each to cross the intersection, and cannot limit north-south traffic to Mondays, and east-west to Tuesdays, in order to save her from the time and attention required to oversee more frequent changes in direction.¹⁵ It is

¹² Schneider, *supra* note 1, at 2244.

¹³ See Post, *Justice for Scalia*, *supra* note 9, at 57.

¹⁴ See Schneider, *supra* note 1, at 2244.

¹⁵ This is essentially the same observation as made by Dworkin, *supra* note 7, at 33.

enough that Traffic Rule 1 permits an officer to favor the north-south traffic because he believes people traveling that corridor pay more taxes, or are headed for more socially useful destinations, than those traveling east-west. Reliance on such personal preferences is foreclosed to officers operating under Rule 2. The key difference, in other words, between Rule 1 and Rule 2 is that Rule 1 lets the officer choose the policy he wants to implement in his direction of traffic, while Rule 2 does not. Rule 2 instead chooses a policy — reduce congestion — and then relies upon the officer's judgment to implement it. (Rule 3 chooses both the policy and a mechanical implementation strategy). It is this difference which makes precedent useless under Rule 1, because prior decisions under that rule will reflect no more than prior policy choices of prior officers, choices which Rule 1 leaves later officers free to reject.

Nor does a rule of discretion become a rule of judgment simply because we have great confidence in the decision maker who will operate under it. So if we entrust a child to King Solomon, and tell him to render whatever custody decision he believes best, we still have a rule of discretion, even if we believe it better to rely on Solomon's discretion than on any rule of judgment which we might devise.¹⁶ Our confidence in Solomon's discretion does not allow us to avoid the penalties of a discretionary rule: the decision costs inherent in a system that relies more on close fact-finding and less on general principle, and the elimination of any role for precedent in deciding cases. We may be willing to incur those costs to give Solomon the power to choose policies, and to change his choice from time to time; perhaps we would have a different view with other judges. My point here is simply to recognize that this is what we are doing if we adopt a rule of discretion.

Let us then examine some familiar rules of family law more carefully, to ask whether they call for judgment or establish rule-failure discretion. Do they invite each decision maker to indulge her own policy preferences? Can their application yield meaningful precedent over time?

Robert Mnookin's classic critique of the best interests standard, now twenty years old, has become conventional wisdom.¹⁷ The law

¹⁶ For more on "wise man" or "khadi" discretion, see Schneider, *supra* note 1, at 2242-43.

¹⁷ See Mnookin, *supra* note 1, at 226.

today is not much different than when he wrote. The typical statute directs that custody decisions be made according to the child's best interests. As Tentative Draft Number 3 of the American Law Institute ("ALI") project observes, this standard

tells courts to do what is best for a child, as if what is best could be determined and was within their power to achieve. In fact, what is best for children depends upon values and norms upon which reasonable people differ. . . .¹⁸

Of course, there are cases and there are cases. Opinions don't differ if the choice between parents is a choice between love and cruelty, cleanliness and filth, respect and exploitation. But those stark choices don't often come up. How important is it to instill religious belief in a child? Should the child have a strong cultural affinity, and to which culture? What is the relative importance of individuality, creativity, civility, reliability, sensitivity, intellectual achievement, loyalty, and "fitting in"? And then there is the added problem, well-known to every parent, of the gap between deciding on the traits one wants to instill in a child, and succeeding in doing so. Parents who share the same values may differ on the best strategy for achieving them. I don't know, myself, that experts are all that helpful in resolving such disagreements over strategy. But it doesn't matter. If we were in a fantasy world in which everyone knew for certain just how to mold a child, the difficulty of the best interest standard would be worse, not better, for our relative incompetence in predicting how varying parental styles affect children conceals the standard's more fundamental problem.

Do a thought experiment. Imagine that psychologists really could tell us, precisely, just how differently a child would come out under one custody arrangement as compared to another. Would we then be happy with a best interest standard that asked the judge to pick from among the child's possible alternative futures? The answer to that question is found in the enormous discomfort most people have with suggestions (probably fanciful) that advancing science might allow parents, aided by genetic engineers, to "design" their child's traits. I doubt the judicial engineer would be more welcome than the parental one. So I suspect that our in-

¹⁸ American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 2-3 (Tentative Draft No. 3, Part I, 1998).

competence in predicting how a custody decision will affect a child's future saves us from confronting the real problem with the best interest standard: while it sounds like a principle of decision, similar to "reduce congestion," it really isn't, because it leaves the core value choices up to the decision maker in each case. The discomfort we would have in entrusting core parental value choices to the varying preferences of diverse trial judges is in practice ameliorated by our intuition that the judge is even less likely than the parents to be effective in achieving them. As I once said in another context, the law may be stupid, but at least it won't work.

Of course, appellate courts could construe the typical statutory best interest standard so as to make the essential value choices, in ways that bind the trial court. But generally, they do not. Apart from some hot button issues like race or gender, which of course the trial courts are generally told to ignore, appellate courts reviewing custody decisions most often confirm the trial court's broad discretion. This is hardly surprising. When courts make an express value choice in a published opinion, they often find themselves under heavy fire. Old-timers in the family law business will remember the storm that met the Iowa Supreme Court's opinion in the classic case of *Painter v. Bannister*,¹⁹ which held it better for Mark to have the stolid but reliable guidance of his conventional midwestern grandparents, than the creative but offbeat energy of his widower-father, a rebellious journalist. "We are here setting the course for Mark's future," the court self-consciously began, and went on to explain that the grandparents would provide Mark "a stable, dependable, conventional, middle-class, middlewest background" while the father would allow Mark "more freedom of conduct and thought with an opportunity to develop his individual talents" in an environment that was more "exciting" but also "romantic, impractical, and unstable."²⁰ In choosing the grandparents the court explained, straightforwardly, that it believed "security and stability in the home are more important than intellectual stimulation."²¹ I'm sure some would agree, probably more now than in 1966 when the case was decided, but I doubt even now we could pass a custody statute which made that choice. Anyway, a cynic might ask, why push it? It's better and safer to bury the value

¹⁹ 140 N.W.2d 152 (Iowa 1966).

²⁰ *Id.* at 153-54.

²¹ *Id.* at 156.

choices in the trial court's discretion, where they remain sufficiently obscured to defy challenge.

The pervasive tradition of discretion in family law makes this easy to do. Before I began work on the ALI project, I wrote about how standardless the traditional rule on alimony, now called maintenance, is.²² The core conventional rule allows the court to grant an award to a spouse in "need." "Need" is of course just the very standard that the child support reforms abandoned when they adopted guidelines, and with good reason. It is not susceptible to useful definition in this context. One could define it objectively by reference to subsistence standards, but of course we do not mean to limit alimony claims to those who would otherwise starve. So if the court thinks the claimant deserves support — because she would otherwise fall too far from the marital living standard, or below some other standard that seems appropriate, or because she otherwise loses too much from the marriage's dissolution, or because she is entitled to some transitional assistance in light of the parties relative situations going into and coming out of the marriage — we say she is in need. So "need" became a term of art that is a conclusion rather than a measure. The traditional statute contained no guidance as to when the conclusion was warranted,²³ and less than no guidance on how to fix the size of an alimony award once the court established need. Enough to equalize their living standards, or something less? If less, then, how much less?

The typical statute's failure to grapple with these issues has not escaped judicial attention. A 1990 California case, *Smith v. Smith*,²⁴

²² See Ellman, *Theory of Alimony*, *supra* note 2, at 1.

²³ Today most states pick out some particular situations that do not fit comfortably within a need rubric, and add special provisions to their alimony statute dealing with them. The support-during-school cases are typical: how can the spouse who supported the entire family while the other spouse attended school now claim to be in need? She can't, unless the term serves simply as a container into which we place any alimony claim found valid under some rationale, often unarticulated. Eventually realizing this, states now often have a special alimony provision for such cases. *E.g.*, ARIZ. REV. STAT. § 25-319(A)(3) (1991); N.C. GEN. STAT. § 50-20(b), (c)(7) (1996); *see also*, *Watt v. Watt*, 214 Cal. App. 3d 340, 262 Cal. Rptr. 783 (Ct. App. 1989) (describing California's statutes). Other states have reached the same result by judicial decision. *E.g.*, *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982). But the larger problem remains. How large an award should the traditional alimony claimant — the long-term, financially-dependent spouse — receive? The typical statute doesn't tell us. It doesn't tell us anything, really, about the two fundamental policy questions put by any alimony claim: what circumstances support a claim by one spouse to share the other's income even after their marriage has been dissolved?

²⁴ 225 Cal. App. 3d 469, 274 Cal. Rptr. 911 (Ct. App. 1990); *see also* *Simpson v. Simpson*, 4 Cal. Rptr. 2d 583, 587 (Ct. App. 1992).

observes that the legislature has never defined the “purpose of spousal support” and that the “bench and bar have . . . been unable to determine what the Legislature intended” by “marital standard of living.”²⁵ But what seems worse is that the appellate courts have not generally seen fit to fill this gap. So as *Smith* also said, “the ultimate decision rests within the court’s ‘broad discretion.’”²⁶ And they mean *broad* discretion: “A trial court’s exercise of discretion will not be disturbed on appeal unless . . . the court has ‘exceeded the bounds of reason’ or it can ‘fairly be said’ that no judge would reasonably make the same order under the same circumstances.”²⁷ So if any other judge would agree with the trial court, its decision must be affirmed, unless one is prepared to say that both judges have lost their reason. Of course, another pair of judges might have decided the same case very differently — and this rule would sustain them too.

It is important to keep our focus on what is happening here. These cases are not coming out differently because the judges go different ways on close questions of contested fact, or because they take different approaches toward achieving a common policy goal. They often come out differently because different trial judges have different policy preferences on when and in what amounts spousal support should be awarded.

No one should think that California has a special problem in this matter. To the contrary, the general pattern has been for appellate courts to conclude not only that their statute offers no guidance, but that the appellate courts should not fill the gap because guidance is impossible. Nor should one think that the problem is peculiarly American. Indeed, the charming honesty of an appellate judge in British Columbia provides my favorite example. In rejecting a husband’s 1982 appeal of a spousal maintenance award, he said:

We were urged to state rules of law and I decline to do so It was said that if we would state propositions of law it would be eas-

²⁵ See 225 Cal. App. 3d at 489, 274 Cal. Rptr. at 922. For a more sympathetic description of California legislative efforts in this matter, see *In re Marriage of Smith & Ostler*, 223 Cal. App. 3d 33, 43-52, 272 Cal. Rptr. 560, 566-71 (Ct. App. 1990). There appears to be no relation between the Smiths in this case and those involved in the case quoted in the text.

²⁶ 225 Cal. App. 3d at 479-80, 274 Cal. Rptr. at 916.

²⁷ *Id.* at 480, 274 Cal. Rptr. at 916, cited with apparent approval in *In re Marriage of Weinstein*, 4 Cal. App. 4th 555, 564, 5 Cal. Rptr. 2d 558, 562 (Ct. App. 1991), and *In re Marriage of Olson*, 14 Cal. App. 4th 1, 4 n.1, 17 Cal. Rptr. 2d 480, 482 n.1 (Ct. App. 1993).

ier for counsel to settle cases. I do not think that it would be useful to accede to that request We were urged to endorse the statement taken from [another case]. I have read the case, I have no argument with what was done. Whether the statements . . . have application in other cases, I am not prepared to say.²⁸

Although it may seem difficult for a Californian accustomed to a strict regime of equal division to believe, in many states much the same approach prevails for the allocation of property under equitable distribution.²⁹ As an Indiana appellate judge observed, the trial court's range of choice in equitable distribution "is virtually limitless and [appellate] review little more than pretense."³⁰ It is true, of course, that many equitable distribution statutes contain lists of factors that the court is supposed to consider in deciding how to allocate the property. But these comprehensive lists, con-

²⁸ *Berry v. Murray* 30 R.F.L. 2d 310, 311 (B.C. App. 1982). See also the official annotation to *Duncan v. Duncan* 40 R.F.L. 3d 358, 358 (Alta. Q.B. 1992), a 1992 appellate case from Alberta: "*Duncan* . . . is yet another case where the judge tries to set out rules . . . in a support case to be made but does not . . . establish any rules of general application in the area." The British experience seems little different. In a 1991 study, John Eekelaar found that 76% of a sample of registrars, who decide contested alimony claims, said they had no "overall view as to how the net incomes of the former spouses should stand in relation to each other after the divorce," a result Eekelaar found unsurprising given that the governing law provided the registrars with no model. JOHN EEKELAAR, REGULATING DIVORCE 61-62 (1991).

²⁹ Property allocations are not quite so discretionary as alimony awards. Even in the equitable distribution states that do not presume an equal division, there is at least an assumption that both spouses are ordinarily entitled to *some* share of property in the marital pot. The court's application of the factors goes to the proportions, not usually the entitlement, and there is reason to think that courts usually shy away from extreme inequality in the proportions. It is interesting to contemplate, as a brief aside, how lawyers respond to the greater predictability of property allocations, as compared to alimony awards. So long as the law reliably awards both spouses some share of property that's in the marital pot, lawyers have an incentive to recast potential alimony claims on the other spouse's post-divorce earnings into property claims. The more reliable is the property remedy, compared to alimony, the greater is the incentive. And in fact it seems that this incentive has indeed influenced lawyering strategy over the past fifteen or twenty years, after the common law states all established some version of equitable distribution. The most obvious example is the campaign, largely failed, to treat degrees or professional licenses as marital property when earned during the marriage: Project out a lawyer's future earnings at divorce, calculate a present value for them, attribute some portion of them to the degree earned during marriage, and Presto! — the post-divorce earnings are transformed into a measure of the degree's value, and thus divisible property at divorce. What attorney worth her salt would seek alimony, and thus leave her client's share of those future earnings up to whim of the judge, if she could instead establish a property claim to half of them? Lawyers will of course gravitate to the arenas with the clearest rules that favor their clients. Although the matter is more complex, much the same phenomena can be seen in the law governing professional goodwill. See IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 343-64 (3d ed. 1998).

³⁰ *Baker v. Baker*, 488 N.E.2d 361, 366 (Ind. Ct. App. 1986) (Young, J., concurring).

taining every possible consideration anyone might think relevant, do not much matter.³¹ As the Michigan Supreme Court said in 1992:

The trial court is given broad discretion . . . and there can be no strict mathematical formulations Indeed, there will be many cases where some, or even most, of the factors will be irrelevant It is hoped that [a requirement of specific trial court findings] will result in greater consistency

. . . [but] the division of property is not governed by any set rules.³²

Indeed, if there are no set rules, it is difficult to see what value specific findings might have. What of the relative weight of the factors, which can point in opposite directions? The typical statute is silent because, as the Connecticut Supreme Court has explained, “[w]hile the trial court must consider the delineated statutory criteria, no single criterion is preferred over the others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case.”³³ That is, the law can change from case to case, along with the facts.

When intermediate appellate courts in Hawaii, frustrated by such indeterminacy, developed a set of equitable distribution guidelines, they were slapped down by the Hawaii Supreme Court, which in 1992 held that such guidelines improperly deprived trial judges of the discretion they should have in allocating property.³⁴ It is perhaps astonishing that such a rule could be adopted with regard to property, generally regarded as one of the last bastions of fixed rules of law. As a Canadian commentator protested, “What person will enter a business or professional partnership or joint venture if

³¹ Should financial contribution to the property's acquisition count in its allocation? Contribution to other facets of the marital relation? How does the court evaluate, for example, the quality of the homemaking contributions provided by the wife whose husband's market labors earned most of the assets? Should the property allocation compensate for disparities in the parties' earning capacities by allocating more to the spouse whose earnings prospects are less favorable? Does such a claim for an enhanced property share depend upon the length of the marriage? Does the right to share in the fruits of the other spouse's labor depend upon the length of the marriage? All the considerations are typically included within the list of permissible factors.

³² *Sparks v. Sparks*, 485 N.W.2d 893, 901 (Mich. 1992).

³³ *Carpenter v. Carpenter*, 453 A.2d 1151, 1154 (Conn. 1982) (citing *Valante v. Valante*, 429 A.2d 964, 966 (Conn. 1980)).

³⁴ *Gussin v. Gussin*, 836 P.2d 484, 492 (Haw. 1992).

the only liquidation rule is that a court will have a discretion to make any order it thinks fit in regard to all the money and property?"³⁵

In 1984, Mary Ann Glendon said that the movement to equitable distribution is better described as a movement to "discretionary distribution, since what consistently distinguishes [it] from [its] predecessors is not that [it is] more equitable, but that [it is] more unpredictable."³⁶ Her observation still seems true in states like Michigan, Hawaii, and Indiana. In such states the last fifteen years have seen little useful accretion of rule-building precedent.³⁷

So I think we can conclude that alimony, custody, and even property allocation are effectively governed in most states by family law's version of Rule 1: decide as you see fit.³⁸ The legislatures and appellate courts leave basic policy choices up to the trial judge deciding each case. Most people think there is something unfair

³⁵ Ian F.G. Baxter, *Family Law Reform in Ontario*, 25 U. TORONTO L.J. 236, 261 (1975).

³⁶ Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1556 (1984).

³⁷ It may be that a careful survey of the law of all states might reveal some movement, over this time period, away from such discretion and toward a rule of equal division. Certainly that trend can be seen in some states. Common law states that have adopted at least a presumption of equal division include Alaska, see *Brown v. Brown*, 914 P.2d 206, 209 (Alaska 1996), Oregon, see *In re Marriage of Stice*, 779 P.2d 1020, 1025-26 (Or. 1989), and Florida, see *Rezner v. Rezner*, 553 So. 2d 334, 335-36 (Fla. Dist. Ct. App. 1989). The English law contains no such presumption. The Scottish law does, but one scholar has concluded that it is more common for the presumption to be rebutted than followed. See ECKELAAR, *supra* note 28, at 78-79.

³⁸ There is room for some quibble here. States that divide property under a rule presuming equal division do not fit this description, and if the community property states are included in the count there is perhaps room to argue that "most" states do not have an entirely discretionary approach to property allocation. More fundamentally, one can argue that the best interests standard is not quite a "decide as you see fit" standard because it can be violated. A court might violate it by a judgment awarding custody according to an assessment of the parents' relative equity without regard to the child's interest (as would a judgment that offered, as a reason for allocating primary custody to the spouse who irreversibly gave up career opportunities to care for the child during the marriage, that this spouse's career sacrifice created an *entitlement* to primary custody). But while the best interests standard thus seems more confining than "decide as you see fit," it is sufficiently flexible that a judge in fact motivated by such equitable concerns can easily explain the decision in best interest terminology (the child is best off with the parent with whom the child is most familiar, etc., see ELLMAN ET AL., *supra* note 29, at 664-65), and in that sense the best interests standard does not *effectively* impose a policy choice on the decision maker, even though in *form* it would seem to exclude such concern with parental interests. Nonetheless, in principle, extreme cases are possible in which the decision maker's policy choice would be excluded (for example, relying on such equitable concerns to favor the parent guilty of serious child abuse). A more precise typography might therefore include a fourth category, a Rule 1a perhaps, that includes rules that adopt a very vague policy choice — vague enough that for the vast majority of cases there is no effective policy imposed on the decision maker, even though some possibilities that could arise in some cases are effectively excluded. (I thank my colleague Jeffrie Murphy for bringing this point to my attention.)

about having the governing legal principles change from judge to judge and from case to case. I suspect that such a system can endure only because this feature is obscured by the pretense that the law is contained in generally worded statutes under which the trial court's discretion is exercised. Proponents of the discretionary system urge the importance of providing customized justice in each case, but the problem with such a system, as we noted in the ALI work, is that judges "apply different rules as often as they face different facts." The desire to customize every result to a case's particular facts leads to an unjustified disparity in the treatment of like cases.

The resulting absence of controlling precedent probably makes litigation more likely.³⁹ Informal reports from trial judges suggest, for example, that disputes over alimony are far more likely to come to litigation than are disputes over child support.⁴⁰ Moreover, decisions in individual cases are more costly, requiring more time and effort, when they turn on close fact-finding rather than on general principle. For example, if we are committed to listening to the evidence both parents might offer about their particular child's financial need, and the reasons each might offer for why the other should pay for more of it, we will spend far more time per case fixing the level of child support than if we apply a simple rule that takes a particular percentage of parental income for child support. This cost is of course imposed not only on the judicial system itself, but also on the litigants. These costs can thus create a barrier discouraging claims for child support, or for more child support than the obligor will agree to provide. That is why federal rule makers believed that a system of child support guidelines that avoided these costs would encourage enforcement of child support obligations.

II. INVENTING FAMILY LAW

So I hope I have shown that rules of largely limitless discretion are common in family law, and that their prevalence is not a good thing. Nor are they appropriate as principles in a classic ALI for-

³⁹ See John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 L. & SOC'Y REV. 135, 161 n.24 (1986) (stating that alimony and child-support settlements are supported by high predictability of judicial decisions).

⁴⁰ The author is on a committee established to consider spousal maintenance guidelines for Maricopa County (Phoenix) Arizona, created by the Presiding Judge of the Domestic Relations Court partially in response to this perception.

mat. The other Reporters and I did not believe we could fulfill our commitment to prepare the ALI's *Principles of the Law of Family Dissolution* with a single global blackletter rule, "do what's right." More was expected of us.⁴¹ Given the law's experience, we had no illusions about the difficulty of the task. Indeed, it would be rather surprising if we really got it right. Our more modest hope is that we might nudge the law in a more fruitful direction.

A. *Status Rules and Contract Rules*

In the time remaining to me, then, I want to give you a glimpse into how we went about this task of rule creation. But before I begin that description I need to highlight another criterion for characterizing legal rules, one that describes a basic choice we had to make in our drafting: the choice between status rules and contract rules.

One might say a status rule allocates rights and obligations with respect to others on the basis of their relative status. For example, parents have certain rights and obligations with respect to their children that flow from parental status, however that status came about. A contract rule, by contrast, traces obligations to their voluntary assumption, recognizing complementary rights in other persons who are the beneficiaries of these assumed obligations.⁴² The distinction I want to draw is between a rule that imposes its own values on parties who stand in some status relation to one another, and a rule that looks to derive the appropriate principle of decision from an inquiry into understandings between the parties themselves.

Consider, for example, two possible rules for the division of property acquired during a long-term intimate relationship. We

⁴¹ We felt, in other words, much as did the Vermont Supreme Court in an admirable if unsuccessful effort to define their law of alimony more clearly, when they observed that "total trial court discretion . . . is ultimately inconsistent with the rule of law [I]t is our responsibility to set appropriate standards and ensure consistent decision making" *Klein v. Klein*, 555 A.2d 382, 386 (Vt. 1988). Or, as Atiyah puts it, when rules of discretion prevail the judicial process becomes "a sort of arbitration process . . . in which law and principle are largely discarded Procedural laws and principles might . . . remain, but substantive ones would largely disappear." Atiyah, *supra* note 4, at 1250.

⁴² The line, of course, can be blurred. One can argue, for example, that a law specifying the obligations and rights of husbands and wives toward one another is a contract rule insofar as the parties voluntarily enter into the relationship, even if the law attaches particular consequences to all persons classified as spouses, without inquiring into the understanding that might exist within any particular couple. But that does not affect my main point.

could say it ought to be divided according to the understanding of the parties as we can best discern that understanding, whether from a formal agreement or from their conduct. This contract rule is essentially the rule that most states apply today to the division of property between unmarried cohabitants at the termination of their relationship. Or we can say that the property acquired during the relationship is divided equally at its termination. This is essentially the rule that California and a few other states apply to property acquired during a marriage.

A variety of rationales might be offered for this California rule, including the rationale that an equal division is most likely to reflect what the parties themselves expected. But the rule itself does not depend upon any showing of such an expectation or belief in the particular parties before the court. Indeed, evidence of their contrary belief is irrelevant. A clear showing that both spouses were surprised to learn of the community property rule would not avoid its application to their case.⁴³ And some status rules, such as the obligation to support one's child, cannot even be avoided by a formal agreement — except, of course, an adoption agreement that transfers the parental status to someone else. Status rules, in other words, impose values on the parties, while contract rules attempt to discern a rule of decision from the parties' own values.⁴⁴

I raise this distinction between contract and status rules because it seems particularly relevant to the challenge facing the family law rule maker. Contract rules can be seen as an alternative to discretion in solving the problem of formulating rules that work with a great diversity of families. Discretion relies on the decision maker to customize the outcome to each family's particular circumstances, while contract rules direct the decision maker to customize the result by reference to the particular values and understandings of the couple before him. Put this way, contract rules seem far preferable. It is surely better if the varying values that govern decisions in family law disputes mirror the varying values of the couples

⁴³ Indeed, California would apply its equal division rule, for example, to a couple who marry and live most of their lives in a traditional common law jurisdiction that allocates property according to who earned it, if they happen to move to California a year before their divorce. See CAL. FAM. CODE §§ 63, 125, 2550 (West 1994).

⁴⁴ Of course, the law might rely upon its own values in deciding upon the proper domain of contract — there may be some matters or some contracts that will be excluded because of overriding social policies. I am describing a rule as a contract rule when it leaves an importantly broad range of value choices to the parties, even if the law still forecloses *some* possible choices.

themselves, rather than of the judges deciding their cases. Contract rules thus promise the reformer the possibility of customizing the law to a diversity of family forms without resort to the limitless discretion that I have here criticized. By contrast, a solution to the problem of limitless discretion that relies on status rules seems stultifying and rigid, associated with the bad old days of gender bias and Victorian hypocrisy.⁴⁵ And so there is an important portion of current family law scholarship that favors what I have called contract rules.⁴⁶

Yet there are some important difficulties with contract rules. People don't generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it. So courts are asked to infer a contract from the parties' conduct. The experience with *Marvin*, California's great experiment in recognizing contract cohabitation, has often disappointed its supporters. The *Marvin* experience teaches that contract claims most often fail, as indeed they probably should if the usual requirements for an enforceable contract are applied.⁴⁷ Thus, for a contract approach to succeed, it must embrace a broad view about what constitutes an agreement, inferring understandings very freely from the parties' conduct. But as I have elsewhere observed at greater length, it is a dangerous business to extrapolate, from people's conduct during a relationship, an agreement about how they want their affairs settled when it ends.⁴⁸ Most fundamentally, knowing the parties' commitments to one another during their relationship may tell us nothing about which commitments both spouses understood would survive its dissolution. It is arguably likely that even couples with very clear understandings about their conduct during marriage never had any common un-

⁴⁵ For some interesting thoughts along these lines, see MILTON REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* 41-42 (1993), which also observed that contract can be viewed as a means of accommodating family diversity.

⁴⁶ One of the earliest in this thread is Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982). A more recent contract-oriented piece is Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994), which I take issue with in the article *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*. See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 749-762 [hereinafter Ellman & Lohr, *Marriage as Contract*] (criticizing empirical claims and theories of Brinig and Crafton).

⁴⁷ For a recent California example, see *Friedman v. Friedman*, 20 Cal. App. 4th 876, 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

⁴⁸ My basic arguments are laid out in Ellman, *Theory of Alimony*, *supra* note 2, at 13-33. There are further points in Ellman & Lohr, *Marriage as Contract*, *supra* note 46, at 719.

derstanding about the consequences of dissolution, for the prospect of dissolution might not arise in their consciousness until a point in their relationship when they could reach common understandings about precious little. There is also the troublesome problem that to deduce obligations from their inferred commitments during the marriage might require an inquiry into why the marriage ended, because the cause of its dissolution might be thought relevant to remedies based on the inferred understanding, or its breach. In this way contract rules may effectively lead to a revival of fault divorce.⁴⁹

This brings us squarely back to the problem of discretion. For given the difficulty of discerning a spousal agreement on principles that should govern their marital dissolution, the likely effect of a rule that requires such discernment is a judicial decision packaged in contract terms but actually driven by the court's own unarticulated ideas of fairness — its own understanding of the commitments that husbands and wives should have to one another and to their children.⁵⁰ Requiring courts to conceal the values they apply to decide cases of course repeats rather than cures the difficulties of nearly limitless discretion.

Finally, consider that we may not always want a court to apply the parties' apparent marital values to their dissolution even when we can discern them. What if the pattern of marital conduct involved the regular exploitation of one spouse by the other, in which the victim apparently acquiesced over many years? Would a contract rule require decisions by the divorce court consistent with the exploitation pattern? So it seems that in the end an expansive version of contract will not allow the rule maker to avoid rules that impose externally derived values on the divorcing parties — rules triggered, for example, by their status as husband and wife.

Therefore, as we faced the task of drafting principles to govern family dissolution, we began with two thoughts in mind: (1) there is no avoiding the law's choice of values; and (2) the values should be contained in the rules, not obscured in discretion, or in illusory

⁴⁹ Nothing I have just said suggests that the conduct of the parties during marriage is necessarily irrelevant to remedies available at divorce. It is rather that any relevance does not emerge from an agreement between the parties themselves, which is likely either absent or unknowable. Its relevance, if it has some, will derive from the sense of justice or fairness that the decision maker brings to his examination of that conduct.

⁵⁰ For an example of such a packaging, see my discussion of the New Jersey Supreme Court decision *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979), in Ellman, *Theory of Alimony*, *supra* note 2, at 21-23.

inquiries into parties' own choices during their marriage. As I look back on what we have done, I think we also concluded that for each of the four main divisions of dissolution law — custody, child support, property allocation, and alimony — we could identify some particular facts about the relationship, facts amenable to relatively easy establishment through objective evidence, that could form the basis of a presumptively correct result. That result would reflect the value choices that we had made. The result was only presumptively correct because of the possibility, in any particular case, that additional facts could justify a different result. We have no mechanical rules that could sensibly occupy the entire field. But we can still avoid the problems of limitless discretion by combining the presumptive result with a requirement that a trial judge, who believes a departure is necessary, must explain that departure in written findings.

B. Custody

Professor Katharine Bartlett, who drafted our chapter on custody, was your speaker last year, but I will still take a moment now to summarize briefly the core principles of that chapter because they exemplify some of the points I have just made. Custody is surely the most difficult of the four core subjects for which to generate a sensible nondiscretionary rule, and it therefore remains the one in which we leave the greatest range of choice to the trial court. It also skirts closest to what some might characterize as a “contract” rule approach, although I think that characterization would be wrong.

Section 2.09 of the *Principles* effectively establishes a presumption allocating custody “so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.” At first blush this might sound like a primary caretaker presumption, but that is not quite right, because the section also operates as a presumption in favor of an equal allocation of custodial time if the parents had allocated caretaking responsibilities equally when the family was intact. The presumption is of course rebuttable, and the section provides a list of particular fact patterns that do rebut it. These include, for example, the need to accommodate the firm and reasonable preferences of a child above a specified age, and the need to keep sib-

lings together where doing so is necessary for their welfare. A relatively mechanical portion of the section overrides the general principle and guarantees a minimum percentage of custodial time to every responsible parent, including those whose share of direct caretaking was less than this minimum percent. Finally, a general provision allows the court to avoid all the section's presumptions if it finds that the presumed allocation would be "manifestly harmful to the child." The judge who departs from the section's presumptions needs to explain how that departure fits within one of the rebuttal grounds recognized by it. There are some further details I will skip over here that provide for some common factual variations that do not fit comfortably within the general rule as I have summarized it.

While hardly a mechanical rule, one can see that this section provides a much more predictable rubric for deciding custody cases than does the typical best interest standard. One starts any custody inquiry with a presumptively correct result, which is alone an important advance over the best interests test, which does not even provide any tiebreaker rule. (The best interests rule does not allocate the burden of proof; neither party is identified as the "defendant" who wins when there is no preponderance of evidence favoring either side).

One might imagine that the rationale for the ALI's rule is contractual: that we look at the parents' agreement on how to allocate their parental responsibilities during their relationship, and apply it after its dissolution. But that is not our rationale, and I doubt that such a justification for the rule could withstand careful scrutiny. The parental agreement, if there was one, was after all devised to apply to an intact family, in which even the parent providing a relatively small share of the direct caretaking functions would have daily contact with his children. The situation after divorce is so different that it would stretch things considerably to claim that this arrangement during marriage is evidence of the parties' agreement that one of them see his child just a few times a month if they were to divorce.

The ALI rule is instead explained as a judgment that in the usual case the historical allocation of caretaking responsibilities "correlates well with . . . the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities" and therefore provides a standard that advances the child's interests. The rule is also predictable in application and more easily

adjudicated than is the best interest standard itself.⁵¹ It is a judgment that in the overall run of cases the less determinate best interest rule is no more likely to advance the child's interests, while imposing all the additional costs that any discretionary rule imposes on both the parties and the courts. I believe that many trial judges will find the ALI formulation entirely unremarkable, for it merely states what they already do, and in that sense is no great departure. But it would be a mistake, I think, to minimize the importance of transforming an unarticulated principle that silently guides many judges into a rule of law that is binding on all. That transformation restores Atiyah's hortatory function to the law of custody: there is now a rule that guides the outcome not only of the litigated cases, but also of the majority which are settled by agreement — in the "shadow of the law" — to use Bob Mnookin's well-known phrase.⁵²

C. *Alimony*

Let me now move on to alimony, the other area of family law that is universally discretionary, and is treated in a chapter in our project for which I served as draftsman. I previously observed that need, the most common criterion for an alimony award under existing law, simply does not work as a central explanatory concept for alimony, and under current law is invoked by courts largely as a conclusion rather than as an explanation. Yet some explanation is required, as there is also a widespread intuition that marriage alone does not create an obligation of one spouse to provide the other with post-marital financial support, the way that parentage alone creates the child support obligation.

The search to identify the additional facts required to justify an alimony award has been confused by alimony's multifaceted role: there are several different kinds of claims recognized under the alimony rubric, and facts critical to some are irrelevant to others. When a marriage dissolves after just a few years, there may be claims for having sacrificed one's own economic advancement in order to support one's spouse's, on the now failed assumption of a

⁵¹ See American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 113 (Tentative Draft No. 3, Part I, 1998).

⁵² Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968 (1979).

shared financial fate. In the long-term marriage, there may be a claim arising from having relied for much of one's life on sharing in the income of a spouse to whom one is no longer married, and a possibly distinct claim for the earnings sacrifice incurred from having left the market to care for children. The typical statute lumps these all together as "factors," along with all other facts that might possibly bear on whether to grant alimony, and then asks the trial court to consider them all and come up with a number, in the exercise of its discretion. To fold this process into alimony's original formulation, this long list of factors is often cast as items that bear on whether the petitioning spouse is in "need."

The ALI draft concludes that the route to an alimony rule did not lie in refining the need standard, but in abandoning it. A unifying concept must be sought elsewhere. The *ALI Principles* therefore refocus the alimony inquiry from *need* to *loss*. The question was then to identify those losses that should be compensable at divorce by a claim against the other spouse. The result is not entirely revolutionary. A spouse found in need under existing law is usually a spouse on whom the marital dissolution imposes a loss that seems unfairly disproportionate. That is, the sense that one spouse has an obligation to meet the other's post-dissolution needs arises from the recognition that the need results at least in part from an unfair distribution of the financial losses arising from the marital failure. Alimony thus becomes a remedy for unfair loss allocation, rather than for relief of need, and the *ALI Principles* therefore — replace the term "alimony" with a new term — "compensatory payments."⁵³

There are different kinds of possible losses, and a useful statute must identify each compensable loss by criteria that permit a reasonably certain assessment of whether it is present. In some cases only some losses will be present; in some cases none; and in some cases there are multiple losses. The chapter recognizes five different kinds of compensable losses, two of importance primarily in shorter marriages, and three in marriages of intermediate or longer duration.⁵⁴ The change from *need* to *loss* transforms alimony

⁵³ The spouse who incurs a disproportionate financial loss from the dissolution will often seem in need, but even in those cases the degree of need will vary. That is why no single standard of need appropriately decides all alimony cases.

⁵⁴ See American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, § 5.03 (Proposed Final Draft, Part I, 1997). Section 5.03 of the *Principles* sets out the five losses in summary form, with cross references to the sections that flesh out the details. See *id.* The two key losses are the loss of the marital living standard at the dissolution of a marriage of

from a plea for help to a claim for an entitlement, allowing — indeed, requiring — more certain rules of adjudication.

I will briefly describe one example of these rules. Section 5.05 creates an award based entirely on the duration of the marriage and the disparity in earning capacity of the spouses at the marriage's termination. A presumption in favor of an award arises once the marriage exceeds a duration threshold, such as five years, and the income disparity exceeds a specified percentage, such as twenty-five percent. I use five years and twenty-five percent as examples: The ALI does not itself choose those or any other numbers, but instead requires the adopting jurisdiction to pick numbers in a statewide rule of uniform application — a rule, in other words, that is explicitly set out and binding on every judge. The same approach is applied to the calculations of the amount of the award. The jurisdiction must adopt a rule that sets the amount according to a formula that makes the award proportional to the marital duration and the parties' relative incomes. So we end up with a system quite similar to that used for the child support guidelines. Another section, 5.06, which applies to the spouse who served as the primary caretaker of the couple's children, follows the same pattern, except that it employs the duration of the period during which the claimant was the primary caretaker, rather than the duration of the marriage. The two claims are aggregated for the common case in which the marital duration, and the duration

significant duration, incurred by the spouse who has less wealth or earning capacity, and the loss in earning capacity incurred during marriage, and continuing after divorce, arising from a spouse's disproportionate share during marriage of the responsibility to care for the couple's children. *See id.* The chapter does not recognize these two losses on an all or nothing basis, but in proportion to the length of the marriage or child care period. The loss of the marital living standard, for example, is fully recognized only in relatively lengthy marriages. Note also that the chapter does not call for full compensation for the loss even then, but rather equal *sharing* of the loss by uninjured party. The *Principles* find no basis for shifting an entire loss from one party to the other within the context of a no-fault system in which neither party is identified as morally responsible for the marital dissolution that occasioned the loss. The third recognized loss is modeled on the loss for the care of the marital children, but applies to the earning capacity loss incurred on account of the spouse's care of "a sick, elderly or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly." *Id.* The two remaining recognized losses do not depend upon duration for their full recognition, and thus can have importance in shorter marriages. They are "[t]he loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity," and "[a]n unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after the dissolution of a short marriage." *Id.* There are of course many complications in the identification and measurement of these losses which are addressed in the *Principles* — to which the interested reader is referred.

of the primary caretaker period, both exceed the eligibility threshold.

The overall effect is to close the post-divorce income gap between spouses in proportion to the marital duration and the caretaking duration, until the award hits a ceiling, equal to half of the claimant's loss of the marital living standard, at which point the parties share the loss equally. The usual result for the most compelling cases — the longest marriages — is to equalize the parties' post-divorce incomes. The claimant who was a primary caretaker of marital children will reach the ceiling after fewer years of marriage than the claimant from a childless marriage, because she will aggregate awards under both sections. Like child support, the award is ordinarily for periodic payments, but the court can also satisfy a compensatory payment award with a lump sum of equivalent value, if that is more practical for the parties. The duration of the periodic payments is set under a presumption that makes it proportional to the duration of the marriage and to the child care period, but the duration becomes indefinite — open-ended — once the marital duration and the age of the obligee exceed specified levels.⁵⁵

A claimant's entitlement to an award under these provisions governs unless the trial judge finds that there are facts in the case that differ from the facts found in the usual run of cases in some important way, not contemplated by the presumption, that makes

⁵⁵ See American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, § 5.06, *illus.* 5-6, at 373-74 (Proposed Final Draft, Part I, 1997). Here is a specific example taken from the published ALI draft. It is a marriage dissolved after 18 years, during 15 of which the wife has been the primary caretaker of the couple's children, who are 15 and 11 at the time of divorce. *See id.* He is a plumber earning \$5000 monthly; she attended a junior college, has worked occasionally as a teacher's aide in a nursery school, and at the time of divorce can find regular work paying \$750 monthly. *See id.* Under the particular implementation of the *ALI Principles* that the draft assumes in setting out this example, the applicable guideline would recognize both an award based on marital duration and one based on the child care period. *See id.* Combined, they yield an award to the wife of \$1700 monthly for seven and a half years, with the award based upon the marital duration alone continuing for an additional year and a half at a monthly amount of \$765. *See id.* The rule requires this result unless the trial judge makes a finding on the record that the case presents facts that are both unusual and which justify the conclusion that the presumptive award would work a substantial injustice — a formulation employed generally throughout this chapter as the standard for rebutting the chapter's presumptions. *See id.* Child support is, of course, calculated separately and would be added to these amounts; the child support award is based on the incomes the spouses will have after the compensatory payments are made. *See id.* This example assumes a relatively restrained implementation of the ALI recommendations. Other implementations also consistent with the recommendations could yield a higher award, or one of longer duration.

departure from the presumption necessary to avoid a substantial injustice. This requirement makes meaningful appellate review possible. The question on appeal is whether the case really does present facts that are unusual in a marriage of the specified duration and income disparity, and which render an otherwise appropriate award substantially unjust. One would hope that over time appellate courts would develop caselaw on the substantial injustice exceptions that provides real guidance on its meaning in that jurisdiction. So while some would describe the trial courts as exercising discretion in their application of this exception, it would be, to borrow Carl Schneider's phrase, rule-building rather than rule-failure discretion.

The size of the awards allowed under the ALI's system are not necessarily revolutionary. They are more generous than the alimony awards that many courts would now order, but they are also similar to what some courts have done under similar cases. The importance of the ALI reform lies not in the numbers themselves but rather in their reliability and predictability. For while many courts would reach a similar result under current law, others from the same jurisdiction will not, and many potential claimants will therefore settle for less rather than take the risk that they would lose if they pursued more in litigation. The important difference, in other words, is between the presumption of entitlement created under the *ALI Principles*, and the appeal to the trial judge's discretion, and goodwill that the claimant must make under current law.

The presumption of entitlement does not arise from contract or agreement, but from the duration of the marriage. When people share their lives over a sufficiently long period of time, obligations arise from their relationship. This is not a new principle. Legal obligations arise from human relationships all the time. Indeed, the modern law of employers and employees, or of landlords and tenants, departs from reliance on contract and toward the impositions of duties by law in the absence of, and sometimes even in contradiction to, explicit contractual terms on the question.⁵⁶

⁵⁶ In employment, for example, Section 5 of the Occupational Safety and Health Act (§ 654) imposes a general duty on all employers to furnish a workplace free from hazards likely to cause death or serious physical harm. Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (Supp. II 1997). One well-known decision found an implied agreement to continue employment, except for good cause, of a long-term employee, in precisely the kind of stretch of ordinary contract rules that is familiar to students of *Marvin* — and better explained as the imposition of a duty derived from the court's sense of fairness rather than any agreement of the parties. See *Pugh v. See's Candy, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr.

These legal duties arise from the law's overriding sense of fairness rather than from any agreement between them.

A long marriage is an obvious example of this familiar rule. As a marriage lengthens the spouses ordinarily assume roles and functions with respect to one another. Each molds the other, and the molds gradually harden. Life choices are made that cannot be undone, or undone easily. Because the impact each spouse has on the other develops gradually over time, so does the presumptive obligation, which may therefore be measured by the marital duration. The obligation cannot end suddenly at divorce, just as it does not begin suddenly at marriage. Having concluded that this is generally true, the *Principles* do not require its demonstration by each claimant in each case. It instead adopts a general rule, while leaving to the developing case law the development of specific exceptions under the "substantial injustice" standard.

The listener who has been thinking ahead may wonder how this rationale could be limited to formal marriage, for it would seem to apply to any marriage-like long-term relationship of emotional intimacy. The Reporters reached the same conclusion in the Project's chapter on cohabiting couples, which has not yet been published, or approved by the Institute, but which — at least for now — incorporates cohabiting couples into most of the rules for compensatory payments and the allocation of property, once the couple cross certain thresholds in their relationship, such as sharing a primary residence for a specified minimum duration and having a child together. No contract between the parties need be shown for the remedy to arise. Our courage in taking this position, in preference to the contract rubric, was fortified with Canadian, Australian, and New Zealand authorities, as well as with a scattering of American cases, mostly from Washington state. We of course do not bar contract claims in the unusual cases in which they actually can be shown, but we would expect under such a system that contract would play much the same role that it plays with respect to claims between divorcing spouses: mainly as a defense against claims that

917 (Ct. App. 1981). In most states landlords are required to provide their tenants a warranty of habitability. It is usually called an "implied" warranty, which suggests that the law is merely recognizing a term the parties themselves intended. But this is sleight of hand, for the duty is really one imposed by law which in most states cannot be waived even by an express term in the parties' contract. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 526 (4th ed. 1998). The triumph of such status rules over pure contract rationales in such areas is a familiar observation, one that others have also made in their assessment of the role of contract in family relations. See, e.g., REGAN, *supra* note 45, at 91-92.

would otherwise arise. The burden of establishing a valid contract, in other words, is on the party seeking to avoid a remedy at the conclusion of a long-term intimate relationship, rather than on the one seeking to establish it. I contemplate that the final chapter in the Project — a chapter on premarital agreements — will contain some substantive limitations on the scope of agreements, as well as some heightened procedural requirements, but that work has not yet really begun.

D. Property Allocation and Child Support

I will conclude my summary of the ALI's work with just a few words each on property allocation and child support. The Institute's treatment of marital property will seem familiar to Californians. I have observed how so many common law states have struggled over the meaning of equitable distribution. "Equitable" is just a four syllable word for "fair." And as is known to any group of schoolchildren dividing a bag of candy, the default meaning of fair is "equal." Anyone proposing an unequal division must offer a persuasive argument for that result. The Institute found very few, and the draft therefore provides for an almost irrebuttable presumption of equal division.

In child support we faced very different issues, because the federal government had already required the states to adopt a system of guidelines that essentially eliminated the kind of limitless discretion I have criticized. For child support, then, we had the luxury of going beyond the question of how one might formulate a clear rule of entitlement, to asking instead whether the rules now in place were reasonably calculated to achieve their policy purposes. In the small amount of time I could devote here to the topic, I cannot do justice to the brilliant analysis of existing child support guidelines provided by the Reporter for that chapter, Professor Grace Blumberg. So I will not try. Let me instead merely pique your interest by telling you that this work irrefutably demonstrates that for nearly all states, including California, the often complex guidelines are in fact inconsistent with any reasonable set of policy preferences, and are certainly inconsistent with the unrealistically ambitious policy objectives that the statutes establishing the guidelines often embrace. The chapter makes an enormous contribution, I believe, in clarifying policy thinking in this area and in offering a methodology for constructing support guidelines that constitutes a

tremendous advance over the methods now prevalent. Professor Blumberg's work reminds us that when rules are clear and value choices apparent, productive debate over them becomes possible.

CONCLUSION

Let me conclude by admitting a doubt about our entire enterprise. There was a time, when I was younger and even less sensible than I am now, when I thought family law might be important for the impact it had on how people conducted their marriages. Devise the right rules of family law and perhaps people will treat one another better, have happier marriages, or be better parents. I have long since moved away from such views. The plausible range of choices available to the family law policy maker simply does not include results extreme enough to have such an impact on intimate behavior, which is driven largely by other forces that inevitably swamp the relatively meager incentives the law can create from the contingent results of a future divorce often beyond the actors' current contemplation. But as I have moved toward that view, it appears that some state legislatures have been drawn in the opposite direction. There has been much talk, and even some action, toward resuscitating fault divorce, as if one could thereby improve the durability of existing marriages.⁵⁷ I favor happy, durable marriages as much as anyone, and have been blessed with the enormous good fortune of participating in one, but I have no idea how one could legislate them for those less lucky than I. Nothing we have done in the American Law Institute pretends that kind of result. Our goals were more modest, although plenty ambitious enough for us. We wanted to make the dissolution of a marriage

⁵⁷ This movement has come following more than a decade of declining divorce rates. For my critique of it, see Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J.L. POL'Y & FAM. 216 (1997) and Ira Mark Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341 (1998). Not only have divorce rates been declining, but other statistical measures of family life have also been moving for some time in a positive direction. See Tamar Lewin, *Birth Rates for Teen-Agers Declined Sharply in the 90's*, N.Y. TIMES, May 1, 1998, at A21 (reporting on recent release from the National Center for Health Statistics). There has been a decade-long decline in birth rates among teenage girls (married and unmarried), and the rate among black teenagers is now the lowest ever recorded. See *id.* The birth rate for all unmarried women has been declining, with particularly sharp drops among unmarried black women — whose birth rate has now reached its lowest point in 40 years — lower than in the 1950s and 1960s. See Steven A. Holmes, *Birth Rate Falls to 40-Year Low Among Unwed Black Women*, N.Y. TIMES, July 1, 1998, at A1 (reporting figures compiled by the National Center for Health Statistics). The rate peaked in 1989. See *id.*

less difficult in process and more fair in result to all the parties involved — children and spouses — than it sometimes is today. If we have made a small contribution toward that goal, I will be well satisfied.