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FOR IRA ELLMAN: One More Reason "Why Making Family Law Is Hard"

David L. Chambers†

Kate Bartlett and Ira worked together as reporters on the ALI project. I was merely one of nearly thirty advisors to the reporters. The advisors had no responsibility for drafting, no responsibility for coming up with original proposals. Our sole job was to come once a year to a meeting in Philadelphia and take potshots at the drafts that Ira, Kate, and Grace Blumberg sent to us. At the meetings, the reporters would sit on a platform and listen to our comments as we moved section by section through a draft. Ira became a master of reportership. He would nod as we attacked him. He would smile. You know his grin. He would take lots of notes. He would answer questions without being unduly defensive.

One might guess that this process of listening over and over to conflicting comments and then returning with new drafts for a later meeting would lead Ira and his co-reporters to an insipid end product, recommendations that were the lowest common denominators among the dissonant views Ira heard. But Ira, Kate and Grace wisely rejected most of our comments and took strong positions of their own. Ira proved himself a precise and careful drafter, with fine judgment. He's also a mensch.

In his talk this afternoon, Ira amply demonstrated why making family law is hard. It is hard both when policymakers seek to devise rules to affect the behavior of family members in the future and when they seek to devise rules to achieve just resolutions of relationships that have already ended.

I'd like to talk for a few minutes about one other reason why making family law is hard, a reason that I am hardly novel in identifying but one that makes Ira's achievement even more impressive. Making family law is hard because it deals with matters about which so many people feel so intently, feelings that often cause not fully sensible behavior in the legislative process. Most Americans approach family law issues as if we were experts. We have all been members of families. We have all watched other families to whom we are related or who live near us. Most of us, without much reflection, form views about what makes a good family, views about behaviors to encourage and reward and about other behaviors to deter and to punish.

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As we form our views, many of us are affected by our religious beliefs, for most religions have a lot to say about marriage and about the appropriate behavior of spouses and parents. Thus, in the United States in the nineteenth century, the most contentious policy debates involving family law rules were carried on in religious terms. Consider, for example, the struggles to widen the availability of legal divorce, to obtain for married women rights with regard to the ownership and control of separate property, and to suppress Mormon polygamy. In the twentieth century, religion has been no less important in the fights over no-fault divorce, abortion, and, at this moment, the recognition of same-sex couple relationships.

In the ALI discussions, the advisors almost never, perhaps never, referred to their religious beliefs as a reason for or against some suggested rule, but over and over again, the twentieth century's secular form of the religious debates was present in the room. The issue was gender and the achieving of just rules in a world in which women are still expected to perform, and do in fact perform, a much more central role than men in the caretaking of children, and in which men more frequently than women develop financial capital and earning capacity over the course of their adulthood. Thus, though every proposal in the *Principles* is framed in sex neutral terms, the potential application of these rules to women as a group and to men as a group was always visible in discussions. That was true as to every one of the six substantive chapters in the *Principles*—the chapters regarding custody of children, child support, division of property, compensatory spousal payments (once known as alimony), domestic partners, and agreements. For example, when the advisory committee discussed issues of child custody, one of the members of the committee routinely examined the proposals through the lens of divorcing men, whom he saw as systematically mistreated and undervalued in child custody matters. Some others on the committee found this advisor annoying, but that was in part because they looked almost solely through the lens of women's experience. Though all of us were ostensibly committed to developing rules that served the interests of children, we were all, I suspect, affected by our views about the equities for the adults. We talked one language (children's needs) but were consciously or unconsciously affected by the needs of adults. Similarly, the discussions regarding the four financial chapters—property division, alimony, child support, and the financial position of domestic partners—were affected by the gendered roles of men and women, by the likelihood that it would be women who would be caring for children after divorce and thus needing child support, and the likelihood that women would have less earning capacity in the future and thus needing capital and, in some cases, compensatory payments.

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Even the discussion of agreements regarding property were affected by perceptions about the bargaining position in which women find themselves.

That Ira, working with Kate and Grace, has in the end developed a coherent set of recommendations that seem sensible for children and fair to both women and men (by my own notions of fairness), that he persuaded the testy and opinionated (and largely male) membership of the American Law Institute to go along with him, is a splendid achievement. Here's to Ira.

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