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# Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment

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# ERODING THE MYTH OF DISCRETIONARY JUSTICE IN FAMILY LAW: THE CHILD SUPPORT EXPERIMENT

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*Reliance on judicial discretion to resolve disputes is one of the most fundamental characteristics of the American legal system. Nowhere have judges exercised more unfettered discretion than in family law. Judicial discretion in this area, however, is not without its critics. In this Article Professor Jane Murphy recommends limiting the use of judicial discretion in family law matters. Professor Murphy argues that the lack of predictability which flows from discretionary decisions undermines our confidence in the equity of decisions and encourages protracted litigation.*

*Professor Murphy reviews the developing consensus that fixed rules are necessary to guide judges' discretion in divorce dispute resolution. Examining the application of fixed rules to one particular area of family law—child support obligations—Professor Murphy demonstrates that the use of fixed rules has successfully provided judges and parties with a means of developing more equitable, predictable child support decisions. Professor Murphy concludes that fixed rules similarly will prove useful in other areas of family law that presently are governed by judicial discretion.*

Reliance on judicial discretion to resolve disputes in Anglo-American courts has been described as "the most significant twentieth-century change in the fundamentals of the legal system."[1] The principal justification for the expanded use of judicial discretion is the need for creativity and flexibility to tailor decisions to the particular circumstances of each case and, accordingly, to achieve the maximum amount of justice in each case. Nowhere is this ideal of individualized justice used to justify broad, unfettered judicial discretion more than in family law. Until recently, the prevailing wisdom of legal scholars and social scientists has been that

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1. KENNETH DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 20 (1969).

the unique circumstances of each family require broad discretionary standards in domestic litigation. When a trial judge decides how a family will reorganize itself after a divorce, the judge exercises more discretion than in almost any other decision he makes. Where the children should live, how they will be supported, and how the property will be divided are all decisions the law commits largely to the discretion of the trial judge.

Broad discretion in family law decisionmaking is detrimental to the judicial system and to the parties seeking to resolve disputes. Vesting judges with such discretion does not enhance their ability to make just decisions; instead, it jeopardizes fundamental rights of parents and children. Vague, indeterminate standards also tend to support the perception of both men and women that judicial decisions in this area are arbitrary or discriminate against them on the basis of their sex. Further, the lack of predictability that flows from broad, undefined standards discourages divorcing parents from settling their disputes on equitable terms. As a result, the resources of both the judiciary and the litigants are wasted at a time when both are critically scarce. Finally, by adhering to such standards in the courtroom, those who seek to improve access to domestic dispute resolution may view mediation and other forms of alternate dispute resolution as the only alternative to the delays and acrimony of litigation. Such "reforms" may prove unjust and inappropriate for large categories of divorcing families.

This Article begins by briefly examining the role of discretion in the history of family law decisionmaking. Part II of the Article then explores the emerging consensus that courts and legislators must develop fixed rules to guide judges' discretion in divorce dispute resolution.[2] Finally, the Article examines the impact of the widespread adoption of a single fixed rule—the child support formula—on this approach to family law decisionmaking. Specifically, the Article discusses the effect of nondiscretionary formulae on the process and the results of the litigation of child support. Has the move from a discretionary standard, allegedly tied to the needs of the particular child, to a fixed rule for child support provided the benefits to the parties and the system assumed by fixed-rule advocates? Are the results more predictable and therefore less likely to be litigated? Does the fixed rule's guarantee of a minimum level of child support make women less likely to settle for inappropriately low amounts of child support notwithstanding custody threats by men? Are the re-

2. The analysis of current laws and proposals for reform in this Article focuses largely on family law in the divorce context. Many of the arguments the Article offers in favor of fixed rules, however, also apply to never-married parties involved in family disputes over such issues as paternity, child support, custody, and visitation.

sults in child support cases sounder—are custodial parents getting more reasonable amounts of support for their children calculated without regard for the biases of the decisionmaker? Is the child support model for decisionmaking adaptable to other areas of family law?

Establishing fixed rules in the divorce decision that will protect the rights and interests of all members of the family after divorce presents an enormous challenge to legislators, the judiciary, and family law advocates. Available data on the national experiment with child support formulae reveals the benefits that both litigants and the legal system experience when fixed rules replace discretionary standards. This success obligates legislators and judges to develop fixed rules for other areas of family law. In this way, we can move toward our goal of providing courts that will allow individuals to resolve their domestic disputes in an affordable and just manner.

## I. THE ROLE OF DISCRETION IN FAMILY LAW DECISIONMAKING

The problem of finding the proper balance between fixed rules and discretion challenges all legal systems.[3] Throughout the history of Anglo-American law, discretion has played an increasingly important role.[4] Despite the modern trend toward categorical decisionmaking in some areas,[5] scholars throughout the last century have believed that decisionmaking models respecting individual differences are central to the integrity of any legal system.[6] Decisions requiring complex judgments about past or future human behavior have been viewed as particularly inappropriate for formulae or rules.[7]

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3. The classic debate between legalists advocating justice through fixed rules and empiricists, who argue in favor of justice through discretion, goes back as far as the political philosophies of Plato and Aristotle. *See* ARISTOTLE, POLITICS, Book II, § 8, Books III, IV (Stephen Everson ed., 1988); PLATO, STATESMAN 293-300 (Raymond Klibansky & Elizabeth Anscombe eds., & A.E. Taylor trans., 1961). Although Aristotle spoke of a "government of laws and not of men" and Plato believed that the wise and fair man presents greater promise for producing just decisions, both philosophies recognized the need for some mix of law and discretion. JEROME FRANK, IF MEN WERE ANGELS 190-211 (1982).

4. DAVIS, *supra* note 1, at 20.

5. This trend is revealed in fixed rules that have been developed for decisions on issues ranging from sentencing of criminal defendants to eligibility for public benefits. *See generally* John J. Capowski, *The Appropriateness and Design of Categorical Decision-Making Systems*, 48 ALB. L. REV. 951, 951, 968-80 (1983) (identifying this trend and developing a framework for evaluating rules).

6. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908) (warning that a "scientific" rule-oriented approach to the law may be regarded as arbitrary and not worthy of public confidence). For a more complete discussion of the basic legal principles that produce a moral legal system, see LON FULLER, THE MORALITY OF LAW 33-94 (1969).

7. For example, many scholars believe that fixed rules have limited utility when attempting to make fair and accurate determinations about past behavior in criminal cases. *See, e.g.*,

Discretion in domestic law has its origins in the concept of the equity court. Equity courts were established to replace a system of justice that applied rigid rules in the courts of law with a system that permitted some measure of discretion. Rigidity, it was believed, was the mark of a primitive legal order.[8] Citizens believed that the law courts could no longer dispense justice.[9] Inflexible application of rules forced the parties to go to the king for relief. The king appointed chancellors to provide the individualized justice that rigid courts of law could not; the chancellors' authority gradually developed into the equitable Court of Chancery.[10]

The use of discretion continued to grow in most areas of Anglo-American law. Given the complex issues of human behavior underlying child placement and other family law issues, it is not surprising that reliance on the exercise of judicial discretion became particularly prevalent in family law. Increasingly, it replaced the development of meaningful standards and rules in state regulation of the family. In contrasting family and property law, for example, Mary Ann Glendon has noted:

> In our legal system, property law traditionally has been and even now continues to be characterized by a high degree of strict law, due to what are generally thought to be special needs in that field for stability, predictability, and security of titles. Family law, on the other hand, is characterized by more discretion than any other field of private law. This fact is typically explained by a perceived need to tailor legal resolutions to the unique circumstances of each individual and family. However, when the fields of property and family law intersect, as they frequently do, especially when a family is dissolved by divorce or death, difficult questions arise concerning the proper accommodation of the interests served by rules establishing "bright lines" and those furthered by individualizing discretion.[11]

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Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV 1329, 1375-76 (1971) (footnote omitted).

8. HENRY S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 68-69 (6th ed. 1876).

9. *See, e.g.*, DAVIS, *supra* note 1, at 19; *see also* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 29-31 (1877) (reviewing the British roots of the American courts of equity).

10. In time, however, the Chancery Court developed its own rules to guide the exercise of discretion. DAVIS, *supra* note 1, at 19. Thus, the recognition that rules should be developed to avoid arbitrariness and inequity always has tempered the ideal of individualized justice through the exercise of discretion.

11. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167-68 (1986) (footnote omitted); *see also* Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039, 1052 (1985) (discussing the vagueness of family law standards).

To understand and evaluate the persistent hold that discretion has had on family law jurisprudence, it is useful to place discretionary decisionmaking in context with other trends in the field. As many commentators have noted, chronicling the development of family law in this country in terms of a coherent and conscious development of values or objectives in family life is difficult.[12] Some generalizations or trends are discernible, however, which might account for the significant reliance on judicial discretion in so many areas of family law.

Family law, as it developed in post-revolutionary America, was distinctly local in nature.[13] Opposition to national jurisdiction over the family characterized nineteenth-century domestic relations law.[14] Although the long-standing denial of federal jurisdiction over domestic relations continues today, some uniformity developed as a result of the adoption of complementary or uniform state statutes.[15] For example, while not many states have adopted the Uniform Marriage and Divorce Act[16] as a whole, the Act has been credited with the adoption of more or less uniform legislation permitting no-fault grounds for divorce throughout the country.[17]

To the extent that states have adopted similar domestic relations statutes, however, they have resulted in consistency or uniformity only in those areas they have chosen to regulate through fixed rules—marriage formation and dissolution grounds.[18] As states have lifted many restrictions on marriage and moved to no-fault divorce, these "rules" have amounted to a broad consensus favoring minimal state regulation in this

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12. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 2 (1989); PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 6 (1990); Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 4 AM. B. FOUND. RES. J. 799, 820 (1985).

13. *See, e.g.*, Grossberg, *supra* note 12, at 820 (describing nineteenth-century American laws prescribing who could marry as a "morass of marriage regulations, some universal, others contradictory, and a few purely idiosyncratic").

14. *See, e.g.*, *Ex parte* Burrus, 136 U.S. 586, 593-99 (1890) (overturning a writ of habeas corpus in a child custody dispute on ground that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States").

15. Beginning in the early twentieth century, the Conference of Commissioners on Uniform State Laws turned its attention to domestic relations law. *See History of Efforts to Secure a Uniform Law on Marriage and Divorce*, 6 CONG. DIG. 183, 186 (1927).

16. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987).

17. *See, e.g.*, GLENDON, *supra* note 12, at 39 n.11; Homer H. Clark, Jr., *The Role of Court and Legislature in the Growth of Family Law*, 22 U.C. DAVIS L. REV. 699, 701 (1989).

18. GLENDON, *supra* note 12, at 48-49, 188-90.

area. Professor Glendon[19] has commented on this dramatic reduction in state intervention in all aspects of the formation and dissolution of marriage, which has occurred over the last thirty years. The almost total removal of legal impediments to marriage and divorce has removed the state from this sphere of family decisionmaking. At the same time, however, the state, with increased pressure from the federal government in some cases,[20] has intensified its regulation of the economic and child-related consequences of divorce.[21] The statutes in this area, although relatively consistent in language from state to state, contain vague, undefined standards. An examination of these standards and the negative consequences that flow from them demonstrates the need to rethink approaches to decisionmaking in areas states have chosen to regulate.

### *A. Child Custody and Support*

In the area of child custody, a broad "best interest of the child" standard has replaced prior law utilizing fixed rules in favor of the father and, later, for a relatively short period, the mother.[22] Because of the vagueness of statutory and common-law definitions of this standard,[23] the custody decision, as a practical matter, rests in the near absolute dis-

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19. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63-69 (1987); GLENDON, *supra* note 12, at 293-94.

20. For a discussion of federal legislation resulting in states' adoption of child support formulae, see *infra* notes 95-104 and accompanying text.

21. GLENDON, *supra* note 12, at 197-99, 227-33.

22. For a summary of the role of presumptions in child custody determinations, see Ramsey L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 337-43 (1982) (evaluating benefits of the maternal preference in custody decisions for young children); *see also* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 233-37 (reviewing the historical antecedents of the "best interest" standard); Nancy D. Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-36 (1982) (discussing the history of child custody determinations, beginning with an irrebuttable presumption in favor of fathers, shifting to a paternal presumption unless he was found to be unfit, and finally moving to the brief history of the maternal preference).

23. The Uniform Marriage and Divorce Act, which provides the best summary of prevailing standards, provides as follows:

> § 402. [Best Interest of Child]
>
> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents,

cretion of the trial judge, whose decision is seldom upset on appeal.[24] A scholar advocating the broadest possible standard offers the typical justification for such a broad standard:

> [The court] should avoid all arbitrary rules because they improperly limit the decisionmaker's discretion. Each person involved in a custody dispute—the child, the biological parent or parents, and the substitute parent or parents—is a complex individual whose emotional, intellectual, and physical needs and capabilities are unique. . . . A court must be free to consider *all* of these factors and to evaluate their effects on the individual child's welfare. If custody is awarded *because* a claimant is a biological or a psychological parent, these other important factors will not be considered and the court will have insufficient discretion to be as responsive as possible to the unique needs of each child involved in a custody battle.[25]

In the area of child support, judges also have relied on broad discretionary standards to decide how much a noncustodial parent must pay. Although post-divorce poverty of children has made child support an area of increased federal and local regulation,[26] until very recently "the court's discretion regarding the amount of child support usually reign[ed] supreme."[27] Traditionally, most states' statutes simply have instructed the court that a parent has an obligation to support his or her child.[28] Case law has interpreted these statutory provisions to require courts, when setting the amount of support, to consider the needs of the

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his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

24. RICHARD NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 9-10 (1984); Klaff, *supra* note 22, at 357; Schneider, *supra* note 11, at 1052.

25. John W. Ester, *Maryland Custody Law—Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225, 250 (1982). The courts echo this analysis of the best interest standard. *See* Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 419-21, 381 A.2d 1154, 1164 (1977) (noting that "the intricacies of the many human relationships that are interwoven into each custody dispute defy [such] simplification. . . . [There must be] room for adjustments in individual situations.").

26. *See* discussion of current developments in child support legislation *infra* notes 95-104 (federal), 105-14 (state) and accompanying text.

27. HENRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVES 10 (1981).

28. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2451 (Supp. 1990); DEL. CODE ANN. tit. 13, § 501 (1981); MD. FAM. LAW CODE ANN. § 5-203 (1984).

child and the noncustodial spouse's ability to pay.[29] Some states have expanded the criteria to a series of relevant factors in order to guide the courts' otherwise unbridled discretion.[30]

### *B. Alimony and Property Distribution*

The prevailing standards for allocating family assets at divorce are also characterized by broad discretion.[31] With regard to both property division and alimony, most states provide a list of factors that *may* be considered by courts in divorce proceedings.[32] The principles guiding

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29. *See, e.g.*, Beck v. Jaeger, 124 Ariz. 316, 317, 604 P.2d 18, 19 (1979); Unkle v. Unkle, 305 Md. App. 587, 597, 505 A.2d 849, 854 (1986); Carol S. Bruch, *Developing Normative Standards for Child-Support Payments: A Critique of Current Practice, in* THE PARENTAL CHILD-SUPPORT OBLIGATION: RESEARCH, PRACTICE AND SOCIAL POLICY 119, 119-20 (Judith Cassetty ed. 1983) [hereinafter THE PARENTAL CHILD-SUPPORT OBLIGATION].

30. *See, e.g.*, ILL. REV. STAT. ch. 40, para. 513 (1985). The Uniform Marriage and Divorce Act is typical of state statutes of this kind. The Uniform Act provides in pertinent part:

> § 309. [Child Support]
>
> In a proceeding for dissolution of marriage . . . or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:
>
> (1) the financial resources of the child;
>
> (2) the financial resources of the custodial parent;
>
> (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (4) the physical and emotional condition of the child and his educational needs; and
>
> (5) the financial resources and needs of the noncustodial parent.

UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 400 (1987).

31. GLENDON, *supra* note 12, at 227-32.

32. For example, the Connecticut statute addressing property allocation and alimony provides only vague statutory guidance. That statute reads:

> Assignment of Property. . . . [T]he superior court may assign to either the husband or wife all or any part of the estate of the other. . . . [I]n fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.
>
> Alimony. . . . [T]he superior court may order either of the parties to pay alimony to the other . . . in addition to or in lieu of an [assignment of property]. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties, and the [assignment of property], if any . . . .

CONN. GEN. STAT. ANN. §§ 46b-81 to -82 (West 1986).

discretion in allocation of property and alimony tend to be a blend of fault, status, need, contribution, and rehabilitation.[33]

Justifications for the lack of fixed rules in this area echo those advanced in the area of child custody and support. As one court put it:

> In exercising its broad discretion in rendering a fundamentally fair and equitable decision in each case, the trial court has the difficult task of quantifying the value of the supporting spouse's and [economically dependent] spouse's contributions to the marriage and determining the rights and responsibilities of parties on divorce. Because circumstances vary so much from case to case, this court cannot set down a formula for the trial court to apply in assigning a dollar value for each partner's contribution.[34]

In addition to the general argument that individualized decisions are necessary given the complexity and diversity of families appearing before the court,[35] commentators have offered a variety of rationales for the persistent hold of discretion on family law. One commentator attributes the rise of judicial discretion to the distinctly local nature of family law jurisprudence.[36] Because "state domestic relations chauvinism" produced conflicts among state family codes, judges had to develop a "loosely arranged set of national domestic relations doctrines" to harmonize local law.[37] These vague doctrines allowed judges to assume a "patriarchal stance by evaluating state legislation in terms of their perception of family needs, community interest, and national common law priorities."[38]

Carl Schneider and other commentators suggest that the perpetuation of the discretionary standard relates to some degree to society's failure to articulate and reflect upon the goals of family law.[39] Are laws regulating the family intended to provide the "legal mechanisms minimally required to allow people to order their private lives?"[40] Conversely, do we view family law as a means systematically to strengthen the institution of the family, whatever its current definition?[41] The lack of meaningful detailed substantive standards to protect custodial parents

33. JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 592-96 (2d ed. 1985).

34. Haugan v. Haugan, 117 Wis. 2d 200, 211, 343 N.W.2d 796, 802 (1984).

35. NEELY, *supra* note 24, at 34-38.

36. Grossberg, *supra* note 12, at 819.

37. *Id.* at 819-20.

38. *Id.* at 820.

39. NEELY, *supra* note 24, at 1-28; Schneider, *supra* note 11, at 1050-52.

40. Schneider, *supra* note 11, at 1051.

41. *Id.*

and children after divorce suggests a failure to reach a consensus on the goals of family law and policy in this country.

Perhaps the most compelling and provocative explanation for the reliance on discretion in most aspects of the divorce proceeding comes from feminist legal scholars.[42] Mary Becker, for example, contrasts family and contract law and offers a gender-based explanation for the rights versus discretion dichotomy in these two areas.[43] At the beginning of the nineteenth century, the ideal of individualized discretionary justice played a significant role in contract law in the area of remedies. Juries set damages with few, if any, fixed rules; their only guidance was a nebulous admonition to reach an appropriate decision in light of the actual injuries, needs, and abilities of the parties to the contract.[44] Since that time, however, courts and legislatures have developed rules that severely limit the jury's discretion.[45] Becker notes that no similar movement to curb the "virtually unbounded" discretion in the area of family law has occurred.[46] She suggests that the greater tolerance of discretion in family law than in commercial cases is attributable to the gender of the parties seeking relief.[47]

When a commercial relationship collapses, the parties seeking relief tend to be male. When a family relationship collapses, it is women, not men, who tend to need and seek remedies such as alimony, child custody, and support.[48] Judges and legislators, who are still overwhelmingly

42. *See, e.g.*, GLENDON, *supra* note 12, at 232; Glendon, *supra* note 11, at 1176-77 (observing that judicial discretion reflects a reluctance to impose significant burdens on an absent father in order to force him to support his children); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 34 n.75 (1990) (arguing that reluctance to increase child support results from judicial ignorance of the actual costs of raising children); Sheri A. Ahl, Note, *A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases:* Pikula v. Pikula, 70 MINN. L. REV. 1344, 1349-51 (1986) (noting legislation which amended child custody statute to eliminate presumption of awarding custody to mother, which courts treated as codification of existing law, leaving considerable discretion to the court).

43. Mary Becker, Address at 1989 American Association of Law Schools Annual Meeting (Jan. 6, 1989). *See also* GLENDON, *supra* note 12, at 232 (arguing that today's judges, in exercising their "virtually uncontrolled discretion," tend to protect the former husband's standard of living).

44. E. ALLAN FARNSWORTH, CONTRACTS § 12.8, at 873 (1990).

45. *See, e.g.*, Perfecting Serv. Co. v. Prod. Dev. & Sales Co., 259 N.C. 400, 417, 131 S.E.2d 9, 22 (1963) ("Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion.") (quoting Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 366, 111 S.E.2d 606, 612 (1959)).

46. Becker, *supra* note 43.

47. *Id.*

48. *See* Robert E. Caine, *Child Support Guidelines: Disaster for Parents, Worse for Children*, 201 N.Y. L.J. 2 (1989).

male,[49] are more willing to fashion rules to enforce the bargains men strike in commercial relationships, because they identify and empathize with the parties and place value on the transactions at issue. In the marital relationship, however, the decisionmakers neither value nor understand the choices made by the women seeking relief—the traditional homemaker, for example, who agreed to defer or give up career opportunities and income potential to raise children and provide a home for the family in exchange for financial and emotional support from her husband. In this situation the discretionary standards—giving primarily male judges control over women's income from ex-husbands—have resulted in retention by men of a disproportionate share of family assets after divorce.[50] Thus, Becker maintains that discretionary standards are used to reinforce male power and female subordination by keeping women subject to and dependent upon the judgment of mostly male judges.[51]

Whatever the historical or ideological reasons for broad discretion, the documented failure of this approach to provide fair, consistent decisions in family disputes has forced family law experts to consider new approaches to decisionmaking. In addition to the problem of inequitable results, discretionary standards result in lengthy, expensive litigation and long delays before final orders are entered. These severe practical pressures have resulted in a call by an increasing number of scholars, legislators, and judges for the imposition of more fixed rules in this discretionary system.

## II. THE GROWING CONSENSUS IN FAVOR OF FIXED RULES

The impetus for the change from discretionary to fixed rules in the jurisprudence of family law has come from a variety of sources. The primary pressures have been economic. Litigating a divorce case with one or more contested issues such as custody, child support, or alimony

49. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NATIONAL DATA BOOK: STATISTICAL ABSTRACT OF THE UNITED STATES 1989 256 (110th ed. 1990) (finding that 83.1% of legislators in 1989 were male); 9 BUS. LAW. UPDATE 7 (1988) (finding that as of 1988, 92.6% of federal judges were male and as of 1986, 92.8% of state judges were male).

50. GLENDON, *supra* note 12, at 232.

51. Interestingly, in advocating for fixed rules to protect women in family relationships, feminist scholars like Professor Becker depart from prevailing feminist thought that rules of any kind favor established hierarchies and do not conform with women's experience. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE 64-105 (1982) (reporting on research demonstrating that reliance on rules and rights is more common in the male experience). Within the more specific debate about achieving fairness for women when families divorce, other feminist scholars maintain that a decisionmaking model that recognizes the complexity of relationships has more promise. *See* Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 8-12 (1990).

becomes increasingly more expensive,[52] and the problem is particularly acute for low-income families. The lack of affordable or free legal services for the indigent in the area of domestic law has increased the urgency to re-examine the factors that contribute to the high cost of divorce.[53] Substantial delays in adjudicating domestic cases also have prompted proposals for systemic reform in divorce litigation.[54]

The greatest pressure for change has come from the simple recognition that decisions produced in the discretionary system are unjust. In the child placement area, for instance, ad hoc decisions that flow from broad discretionary standards adversely affect both parents and children. As one commentator has observed:

> The discretionary best interests test would increase the risk of decisions inconsistent with current knowledge of the developmental needs of children. It also could lead to more decisions based on value biases against, for example, unconventional lifestyles . . . . In addition, the uncertainty engendered by the discretionary best interests standard may encourage litigation and increase delays in settling custody disputes. These byproducts of the discretionary approach raise serious questions, not only of judicial economy, but of child welfare. Custody battles and uncertainty about their futures are detrimental to children.[55]

Discretionary standards governing the allocation of family resources after divorce also have produced inequitable decisions. Virtually all studies examining the economic impact of divorce have found that custo-

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52. NEELY, *supra* note 24, at 93-118; *see also* Deborah Rankin, *Personal Finance: Keeping a Lid on a Divorce Lawyer's Bill*, N.Y. TIMES, Mar. 23, 1986, § 3, at 15 (noting that the cost of obtaining a divorce can be staggering if the divorce is contested or involves a custody battle). Data from individual states confirm the general comments on the national level. *See* MONTGOMERY COUNTY COMM'N FOR WOMEN, REPORT OF THE COALITION FOR FAMILY EQUITY IN THE COURTS, MONTGOMERY COUNTY, MARYLAND 2-6 (1989) [hereinafter MONTGOMERY COUNTY].

53. *See, e.g.*, ADVISORY COUNCIL, MARYLAND LEGAL SERVICES CORP., ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR vi (1988) (finding that existing free legal services were serving less than 20% of Maryland's low-income population with critical legal problems, including those with domestic legal problems); LISE L. SCHMIDT & RENEE MONSON, MINNESOTA STATE BAR ASS'N, FAMILY LAW: A SURVEY OF THE UNMET NEED FOR LOW-INCOME LEGAL ASSISTANCE 44 (1989). The problem of access to legal services for domestic problems is not limited to the poor. *Cf.* MONTGOMERY COUNTY, *supra* note 52, at 1, 3 (finding nearly half of those eligible for low-income programs turned away).

54. *See, e.g.*, MONTGOMERY COUNTY, *supra* note 52, at 15-17.

55. Klaff, *supra* note 22, at 357-58. In his condemnation of the best-interest standard, Klaff argues for a return to a fixed rule in favor of the mother as custodian for young children unless proven to be unfit. *Id.* at 335-37, 356. His compelling arguments for abandoning the best-interest test also support the imposition of the gender-neutral primary caretaker standard. *See, e.g.*, Polikoff, *supra* note 22, at 241-43.

dial parents and children are financially devastated by divorce.[56] Most families have insubstantial property to divide,[57] leaving redistribution of family income as the primary means of support for the post-divorce households. Discretionary alimony and child support standards, however, consistently have produced awards inadequate to support the custodial household.[58] Social scientists and children's advocates have documented the negative long-term effect of a reduced standard of living on the emotional, intellectual, and physical development of children.[59] The post-divorce impoverishment of custodial parents, primarily mothers,[60] and their children often is accompanied by a post-divorce rise in the standard of living for noncustodial fathers.[61]

Finally, and perhaps as a result of the problems discussed above, public trust and confidence in judges' ability to resolve disputes in this area are at an all time low.[62] Some dissatisfaction is inevitable given the increased cost of living and emotional trauma that result from any divorce.[63] Both men and women, however, increasingly perceive that some of the most important decisions in their lives will be made for them in an inequitable way. As Judge Neely has noted, "[i]t is almost universally

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56. *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 323 (1985) (finding that female and child poverty increase after divorce, creating an overwhelming gap in the standard of living for divorced men compared to that of the children and ex-wives); Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 199 (1988) (noting that although only one in six households nationally is headed by females, those same households constitute almost one-half of the nation's poor families); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 351-53 (1987) (citing studies conducted in California, Ohio, and Vermont that indicate a grim economic outlook for women in the years following divorce).

57. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1115 (1989).

58. *Id.* at 1106-09; *see infra* notes 80, 86-94 and accompanying text.

59. *See, e.g.*, Martha J. Cox, *Economic Support of Children by Fathers Following Divorce: Some Theoretical and Empirical Considerations*, *in* THE PARENTAL CHILD-SUPPORT OBLIGATION, *supra* note 29, at 157; Judith S. Wallerstein & Dorothy S. Huntington, *Bread and Roses: Non-Financial Issues Related to Fathers' Economic Support of Their Children Following Divorce*, *in* THE PARENTAL CHILD-SUPPORT OBLIGATION, *supra* note 29, at 135; *see also* NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 28-37 (1991) (finding that the poverty and economic instability which may follow divorce have negative effects on children).

60. Cox, *supra* note 59, at 157.

61. One California study disclosed that the standard of living for noncustodial fathers after divorce rose 42%, while the standard of living for mothers and children dropped 73%. Gladys Kessler, *Crisis in Child Support: New Federal Legislation to Alleviate the Problem*, 20 TRIAL, Dec. 1984, at 28, 29.

62. NEELY, *supra* note 24, at 1.

63. *Id.* at 1-5.

thought that in awarding child custody, setting child support, alimony and dividing property, domestic courts behave in a high handed, arbitrary and unjust way."[64]

Many legislators, judges, and commentators have looked to alternative dispute resolution as the panacea to provide quicker, less expensive, and better decisions in domestic disputes. Proponents of alternate dispute resolution argue that the formal court system cannot handle either the volume or the kind of disputes presented in domestic relations cases.[65] Mediation, they argue, provides the greatest opportunity for crafting decisions to meet the particular needs of individual families.[66]

Amidst the voluminous literature and initiatives advocating expansion of both mandatory and voluntary mediation, a few voices of dissent ring out.[67] The dissenters frame much of the criticism of mediation in terms of the potential for manipulation and unfairness when two parties of unequal bargaining power negotiate in an informal setting.[68] An analysis of mediation from the rules versus discretion perspective also suggests that the shift from the courtroom to the more informal processes of the mediation setting may be precisely the wrong direction to look for solutions in this area. Mediation pushes decisions further from the sphere of fixed rights and responsibilities that provide certainty and fairness.

The specific problems that flow from undue reliance on discretion—inconsistent, unpredictable, and unfair decisions—suggest that courts and legislators also should explore solutions to the crisis in domestic-relations litigation that retain the principal benefits of mediation—less expensive and potentially quicker decisions—as well as the guarantees of sound and unbiased judicial decisions. Fixed rules, particularly in deci-

64. *Id.* at 4.

65. *See, e.g.*, Douglas H. Sprenkle & Cheryl L. Storm, *Divorce Therapy Outcome Research: A Substantive and Methodological Review*, 9 J. MARITAL & FAM. THERAPY 239, 245 (1983) (concluding that mediation was superior to litigation to resolve custody and visitation disputes where couples have a "reasonable capacity" to negotiate).

66. *Id.*

67. An analysis of the merits of mediation of domestic disputes is beyond the scope of this Article. Vigorous debate rages, however, as to its potential for reaching sound, equitable decisions. *Compare* Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984) (arguing that mediation may afford women more opportunities for balanced decisionmaking than the adversary court process) *with* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 729-731 (1988) (arguing that both the procedural and substantive change in decisions when custody disputes are mediated rather than litigated create an imbalance in the divorce bargaining process that disfavors women).

68. Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1542 (1983).

sions affecting allocation of family resources after divorce, offer these combined benefits.

First, fixed rules result in more predictable and consistent decisions.[69] Byproducts of predictable decisions should include an increase in early settlements. Lawyers representing parties in divorce litigation can better evaluate the facts of the case and advise the client of a likely decision under a presumption or a fixed rule rather than predicting an outcome under a vague "best interests" or "just and reasonable" standard.[70] If a lawyer can advise litigants of potential outcomes with reasonable certainty, litigants are more likely to enter into settlements to resolve disputes.[71]

More definite standards also should facilitate faster and less expensive judicial decisions. Even in cases in which the parties cannot reach a settlement, the cost of litigating issues of support, custody, and marital property distribution under determinate standards should be significantly less expensive than under the prevailing discretionary standards. Illustrative of a standard that would make domestic litigation quicker and cheaper is the primary caretaker rule in custody litigation. This rule instructs the judge to award custody to the parent who has been most involved in providing day-to-day care, such as preparing meals, purchasing clothes, arranging for medical care, education, and social activities, putting the child to bed at night, and waking the child in the morning.[72] The rule applies in most circumstances, but is subject to rebuttal upon an older child's preference or a finding of unfitness.[73] Litigation under this

69. Linda Elrod, *Kansas Child-Support Guidelines: An Elusive Search for Fairness in Support Orders*, 27 WASHBURN L.J. 104, 110 (1987).

70. Statistics reveal that a substantial number of civil cases, including divorce cases, are settled under current discretionary standards, despite the vagueness of those standards. *See, e.g.*, Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951, 955 nn.2-3 (1979). These statistics can be misleading, however. Although the parties ultimately may resolve many domestic cases by agreement, such agreements rarely happen before filing suit and engaging in extended discovery and one or more preliminary hearings before the court. Thus, the litigation process consumes enormous resources before the parties are able to reach an agreement. *See* NEELY, *supra* note 24, at 98-100.

71. Mnookin & Kornhauser, *supra* note 70, at 956-58. Proponents of child support formulae regularly advance the promise of quicker settlements. Sally F. Goldfarb, *What Every Lawyer Should Know About Child Support Guidelines*, 13 FAM. L. REP. 3031, 3032 (1987).

72. West Virginia adopted a version of this rule in Garska v. McCoy, 167 W. Va. 59, 70-71, 278 S.E.2d 357, 363 (1981). For a full discussion of the merits of the primary caretaker rule, see David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527-38 (1984) (recommending a rule favoring the primary caretaker for children five and under); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-82 (1984) (arguing for a presumptive rule in favor of the primary caretaker); Polikoff, *supra* note 22, at 241-43.

73. Fineman, *supra* note 67, at 772.

rule involves straight factfinding based on the parents' child-rearing behavior throughout the marriage, not subjective judgment-making based on expensive expert testimony.[74]

Similarly, litigation under discretionary standards for child support often involves reliance on experts to establish the cost of meeting the needs of a given child or, at best, extended hearings and testimony from lay witnesses to establish an appropriate figure for child support. A formula for fixing child support, like the ones discussed in Part III of this Article, should require such testimony only to establish the incomes of both parties and the number of children involved, significantly streamlining the hearing of this issue. Thus, litigation of child support under a formula should be quicker and cheaper.[75]

Many commentators also advocate clear-cut post-divorce income-sharing formulae for alimony and marital property distribution, believing that they will improve the negotiation process and reduce the costs of litigation.[76] Proposed rules make asset allocation a function of objective, easily proven facts; readily calculable factors like the number of years the marriage lasted and the incomes of the parties constitute these formulae, rather than amorphous factors that attempt to measure fault of the parties or relative contributions to the marriage. As a result, as with child support and custody hearings under fixed rules, the hearings on alimony and marital property in a fixed-rule regime would be shorter and less costly.

The most compelling argument in favor of fixed rules is the promise of sounder, more equitable decisions. Well-grounded decisions will restore confidence in the legal system's ability to resolve domestic disputes and to treat fairly all family members in a divorce so none suffers disadvantage, particularly the children. The application of fixed rules to arrive at more equitable decisions is most promising when courts seek to divide family assets after divorce to provide for child support, division of marital property and, where appropriate, spousal support. Formulae that shift more assets to the custodial family combat unsound discretionary awards that impoverish custodial parents and children.

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74. *Id.*

75. Litigation of child support based on formulae should be quicker and less expensive than using a needs/ability test. Irwin Garfinkel & Marygold Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q., 157, 174-77 (1990).

76. Singer, *supra* note 57, at 1119-20; *see also* Sally Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 361-65 (1989) (advocating replacing the current criteria for alimony with a substantive standard that requires courts to equalize the standard of living of the divorcing parties).

Advocates of child support formulae support their approach by citing studies predicting that if all child support orders nationwide used formulae instead of the prevailing discretionary standards, noncustodial parents would have owed $26.6 billion in child support in 1984, instead of the $10.1 billion that actually was owed.[77] Collection of court-ordered monetary relief also would improve under rules setting child support orders that apply to everyone.[78] In his critical study evaluating proposed formulae for child support, Robert Williams found that:

> [T]he traditional methods of setting child support awards, though having the advantage of permitting a case-by-case review of circumstances, can lead to the imposition of markedly different child support awards for obligors, even if they have the same number of children and identical income levels. Even the appearance of inequity created by the inconsistent orders inherent in the case-by-case approach can cause resentment and frustration for obligors and obligees alike. Obligors' perceptions of inequitable treatment may be a factor contributing to existing compliance problems with child support as well.[79]

Replacing existing alimony and marital property statutes with post-divorce income sharing formulae also would produce more equitable decisions in these areas. Currently, courts award women alimony infrequently. When they do, those awards are woefully inadequate.[80] Proposed formulae are based on the principle that marriage is a partnership in which both parties make monetary and nonmonetary investments, and both are entitled to a return on those investments after the marriage dissolves.[81] One proposal suggests replacing or supplementing vague standards in existing alimony and marital property statutes with a rule requiring couples to continue their joint financial status for one year for each two years of marriage.[82] In contrast to the meager and infrequent alimony awarded under current statutes, such a formula more fully "compensates both traditional homemakers and the much larger percentage of divorcing women who have held both domestic and market jobs and whose investments in their families and in their husbands' careers

77. Formulae advocates refer to two formulae in particular, the Wisconsin Percentage of Income Standard and the Delaware Melson Formula. Brackney, *supra* note 56, at 199, 203-05.

78. *See* ROBERT G. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: FINAL REPORT, NATIONAL CENTER FOR STATE COURTS II-5 (1987).

79. *Id.*

80. Singer, *supra* note 57, at 1106.

81. The concept of marriage as an economic partnership is firmly entrenched in the language of statutes governing distribution of marital property. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 238-39 (1987).

82. Singer, *supra* note 57, at 1117-21.

have enhanced their husbands' earning power at the expense of their own."[83]

Finally, even in the area of custody, replacing multifactor, highly discretionary standards with rules such as the primary caretaker presumption would foster more decisions that ultimately serve the best interests of the children of divorce. Advocates of the primary caretaker rule argue that it advances the virtues of certainty and predictability while furthering the goal of producing decisions in the best interests of the child.[84] In applying the primary caretaker rule, decisionmakers must look to past behavior rather than attempt to predict future behavior. Judges base decisions on the reasonable assumption that the interests of a child are best served by preserving the relationship that has been the primary source of nurturing and care.[85]

## III. TESTING THE PROMISES: FIXED RULES IN CHILD SUPPORT DECISIONS

Testing the assumptions of fixed-rule advocates—that rules will produce quicker, sounder, and less expensive decisions—through empirical analysis is limited by the fact that courts and legislators have neither adopted nor used widely most of the proposals discussed above. One exception exists, however, in the area of child support, where a national movement has succeeded in replacing broad judicial discretion with fixed rules. The data emerging from the child support experience suggests that litigants and the court system are realizing the promised benefits.

### *A. Background: Implementing The Federal Mandate For Child Support Guidelines*

The inadequacy of most states' discretionary standards in setting initial child support awards took on crisis proportions by the early 1980s. Insufficient child support had become a major cause of the spiraling poverty rate among women and children.[86] Of the 9.4 million custodial parents in 1987, forty-one percent had no child support award.[87] When

83. *Id.* at 1118.

84. Fineman, *supra* note 67, at 770-74; Neely, *supra* note 72, at 180-82.

85. Other proposed fixed rules in the area of custody include a return to the maternal preference and a presumption in favor of joint custody. *See, e.g.*, Klaff, *supra* note 22, at 335-37; Holly Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 27-35 (1985).

86. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1987, CURRENT POPULATION REPORTS, SPECIAL STUDIES, Series P-23, No. 167, at 2-4 (1990) [hereinafter CENSUS BUREAU].

87. *Id.* at 1.

courts did award child support, award levels usually were inadequate, thrusting many children and custodial parents into poverty or a seriously diminished standard of living.[88] In 1987 the average child support for the 3.7 million custodial parents who actually received payments was $2,710 per year.[89] Studies estimating the costs of raising children in intact households demonstrate the inadequacy of such amounts of child support. The average awards comprise only thirty-seven percent of the estimated average monthly expenditure for children in a middle-income household and only fifty-five percent in a low-income household.[90] When the abysmal record of collecting child support is added to the inadequate level of awards, the dimension of this crisis becomes clear.[91] In addition to the inadequacy of the award itself, the traditional system of virtually unlimited judicial discretion in this area led, as it has done in other areas, to "pronounced disparities in awards from court to court, from judge to judge, and from case to case."[92] Although some of the disparity may be attributable to such factors as differences in income of noncustodial parents, the existence of an alimony award, and the type of custody awarded, ample evidence supports the claim that arbitrary differences exist. For example, one study found that in a district court in Denver, the support that judges ordered in single-child families ranged from six percent to thirty-three percent of the obligor's income.[93] In another study, a random sampling of cases revealed that fathers earning $155.00 per week had to pay anywhere from ten dollars to sixty dollars per week for one child, depending on the judge.[94]

These circumstances were brought to the attention of Congress, which became concerned with the lack of objective guidelines for establishing support obligations and the resulting inconsistencies in awards, as

88. Lucy Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENV. U. L. REV. 21, 50 (1979).

89. CENSUS BUREAU, *supra* note 86, at 3-5.

90. Karen Seal, *A Decade of No-Fault Divorce: What it Has Meant Financially to Women in California*, FAM. ADVOC., Spring 1979, at 10, 13-15 (estimating that child support awards are less than half the actual costs of raising a child).

91. In 1987, only one-half of the women with child support orders received the full amount. Almost one-quarter received partial payments while the other one-quarter received nothing. CENSUS BUREAU, *supra* note 86, at 4.

92. Goldfarb, *supra* note 71, at 3032.

93. Yee, *supra* note 88, at 28, 52-53. *But see* MARYGOLD S. MELLI, CHILD SUPPORT AWARDS: A STUDY OF THE EXERCISE OF JUDICIAL DISCRETION (Institute for Research on Poverty, Discussion Paper 734-83) 41-42 (1983) (finding that variations in the approximately 148 child support orders from the four judges studied was more a function of the differences in income of the parties than of the differences in criteria applied by the judges).

94. JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA 12 (1986).

well as the overall problem of inadequate awards.[95] In response to this crisis in child support, Congress enacted a series of related statutes addressing the child support problem beginning in the 1980s.[96] The Child Support Enforcement Amendments of 1984 required, among other things, that each state adopt child support guidelines by October 1987.[97] The statute provides that adoption of mandatory, presumptive, or advisory guidelines is a condition to a state's receipt of continued federal funding for Aid to Families with Dependent Children (AFDC).[98] The guidelines must utilize a quantitative formula, rather than a list of vague, suggestive factors for decisionmakers to consider on a discretionary basis. Federal regulations require that the guidelines be "based on specific descriptive and numeric criteria and result in a computation of the support obligation."[99]

The legislation did not specify the exact method by which states should adopt the guidelines, only that it be "by law or by judicial or administrative action."[100] Individual states, then, had some discretion in choosing the particular mode of formulating their guidelines, although they had to design some type of numeric formula. Congress further specified that the states make the guidelines available to all child support decisionmakers in the state, including judges, hearing examiners, and administrative officers.[101]

In 1988 Congress passed the Family Support Act, which requires that every state establish presumptive child support guidelines, again as a condition for continued federal funding of the state's AFDC program.[102] Under this statute, the child support guidelines adopted in each state must presumptively establish the appropriate child support obligation in

95. H. R. REP. No. 527, 98th Cong., 1st Sess., pt. 4, at 49 (1983).

96. For a discussion of the federal legislation enacted between 1950 and 1984, see Garfinkel & Melli, *supra* note 75, at 159-60.

97. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18(a), 98 Stat. 1305, 1322 (codified as amended at 42 U.S.C. § 667 (1988)).

98. *Id.*; *see also* 45 C.F.R. § 301.10 (1990) (stating that an approved state plan is a condition for federal financial assistance); *id.* § 302.56(a) (requiring that state plans contain child support guidelines). Failure to meet federal requirements under this statute can result in a reduction of federal AFDC funding to a state. A state suffers a one to two percent reduction the first year of noncompliance, a two to three percent reduction the second year, and a three to five percent reduction the third. *See id.* § 305.100.

99. 45 C.F.R. § 302.56(c) (1990).

100. 42 U.S.C. § 667(a) (1988).

101. *Id.* § 667(b).

102. Family Support Act of 1988, Pub. L. 100-485, § 103, 102 Stat. 2343, 2346 (1988) (codified at 42 U.S.C. § 667 (1988)); *see also* 45 C.F.R. § 301.10 (1990) (stating that an approved state plan is a condition for federal financial assistance); *id.* § 302.56(a) (1990) (requiring that state plans contain child support guidelines).

any child support proceeding.[103] The act preserves limited judicial discretion because decisionmakers may rebut the presumption by a specific finding that application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by each state.[104] These requirements in the act strengthened the federal push for standardized child support decisions.

As a result of the federal legislation, states have adopted three major types of child support guidelines.[105] The Income Shares Model, adopted in the majority of states, employs various economic studies to identify the amount of money parents spend on children in intact families at different economic levels.[106] This amount is then pro-rated between the parents in proportion to their respective incomes. The noncustodial parent must pay his or her share as child support; the custodial parent presumably pays his or her share directly for the child(ren). In this model, because the economic studies of intact families suggest that families spend a decreasing percentage of total income on children as income levels increase, the guidelines provide for noncustodial parents at higher income levels to pay a declining percentage of income.[107] In addition, most income shares formulae include cost-sharing for certain child-related expenditures such as child care and extraordinary medical expenses.[108]

The Percentage of Income formula is similar to the Income Shares Model except that no share is calculated for the custodial spouse and no attempt is made to share costs.[109] The formula assumes that a share of the custodial parent's income will go toward the support of the child. The noncustodial parent then supplements that direct support with child support in the amount of a percentage of his or her income.[110] Although variations exist within this model according to how one defines "income," support awards are a straightforward calculation using either a specific flat percentage of the obligor's income or a varying percentage of income, depending upon the income of the obligor.[111] Because there is no cost-sharing in this method, it is a simpler, more straightforward cal-

103. 42 U.S.C. § 667(b)(2) (1988).

104. *See id.*

105. JANICE T. MUNSTERMAN ET AL., NATIONAL CENTER FOR STATE COURTS, A SUMMARY OF CHILD SUPPORT GUIDELINES 9 (1990).

106. *Id.* at 11.

107. *Id.* at 22.

108. *Id.*; *see also* Diane Dodson, *A Guide to the Guidelines: New Child Support Rules Are Helping Custodial Parents Bridge the Financial Gap*, FAM. ADVOC., Spring 1988, at 10, 10 (critiquing the Income Shares Model as producing awards that are too low).

109. MUNSTERMAN ET AL., *supra* note 105, at 12.

110. *Id.*

111. *Id.*

culation than the income shares award. The percentage of income increases, of course, with the number of children to be supported.[112]

The Melson Delaware Formula, adopted in only three states, differs from the other two models by purporting to define child support in terms of a child's basic needs rather than as a percentage of the parent's income.[113] This formula establishes a basic or primary support amount for the number of children in the household and then apportions these needs between the parents based on their respective incomes.[114] The formula permits an additional support allocation if sufficient excess income is available to allow children to benefit from the parent's higher standard of living.

### *B. Initial Reaction to the Guidelines*

The federal mandate to adopt child support guidelines has focused criticism on the mechanics of the particular guidelines chosen within a state, rather than on the question of whether to adopt guidelines at all. Some debate about the value of fixed rules in this area has occurred as states have attempted to comply with the federal legislation.

The more theoretical arguments advanced against the use of child support formulae focus on the appropriate allocation of powers between the legislative and judicial branches. Some commentators argue that guidelines, while presenting a quicker method of deciding child support, undermine the traditional judicial discretion needed to fine tune child support orders according to the needs of the child and the noncustodial parent.[115] According to one critic, judges become mere "computer operators" in this kind of system.[116] This critic also suggests that guidelines, whatever their practical impact, inappropriately shift judicial functions to the legislature.[117] Of course, to the extent that any statutorily fixed rule replaces judicial discretion, the legislature has replaced the judiciary as the decisionmaker. Whether this phenomenon is good or bad depends upon the soundness of the fixed rule.[118]

Others argue that, rather than streamlining the decisionmaking pro-

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112. *Id.*

113. *Id.* at 12-13. This formula is used in Delaware, Hawaii, and West Virginia. *Id.* at 13.

114. *Id.*

115. Caine, *supra* note 48, at 2; *see* Paul E. Levy, *Child Support Guidelines: Point-Counterpoint*, ADVOC. (Idaho St. B. Ass'n.), Nov. 1989, at 9.

116. Levy, *supra* note 115, at 9.

117. *Id.*

118. For a thoughtful discussion of the benefits of vesting decisionmaking power in this area in the legislature as opposed to the judiciary, see Clark, *supra* note 17, at 700-08, and Czapanskiy, *supra* note 51, at 10-11.

cess, the various formulae are too complex, because they require testimony from accountants and other experts to explain their method of defining income or expenses which may be factored into some equations.[119] Opponents also argue that, by increasing child support awards, the guidelines discourage settlements.[120] If child support is set at levels that are confiscatory and punitive, the argument goes, more custody litigation will result. Further, "with such high levels of support required . . . the desire and need for men to preserve assets for themselves would be significantly increased."[121] Consequently, noncustodial parents will agree only to reduced marital property settlements.

The validity of these criticisms can be tested only after substantial experience with the child support guidelines. Preliminary data suggests that these concerns about the guidelines are largely unsupported.

### C. *The Impact of the Guidelines: An Empirical Analysis*

Although a few states adopted guidelines prior to the federal mandate and already had several years' experience,[122] most states have had only two or three years' experience with the guidelines. Data on the impact of this experiment with fixed rules, therefore, is limited. Much of the information available is anecdotal, derived from conversations with lawyers, judges, and parents involved in the litigation of child support. The Center for Policy Research (CPR) has conducted the major study of the impact of the guidelines since states first began adopting advisory guidelines on a widespread basis in 1987.

In October 1989, CPR presented the results of its study assessing the impact of the guidelines to the State Justice Institute in Alexandria, Virginia.[123] The CPR study examined data from three states (Colorado, Illinois, and Hawaii) using the three prevailing guideline models and compared pre-guidelines child support data to post-guidelines implementation information. CPR collected data in three ways: (1) it sent questionnaires to family law attorneys and judges who hear support cases in Colorado, Hawaii, and Illinois; (2) it conducted in-depth interviews with selected legal, judicial, and child support enforcement professionals in

119. Caine, *supra* note 48, at 2; Doris J. Freed & Joel R. Brandes, *Child Support Guidelines—The Final Chapter?*, 201 N.Y. L.J. 3, 6 (1989).

120. Freed & Brandes, *supra* note 119, at 3, 7.

121. *Id.* at 6.

122. Carol Schrier-Polak, *Child and Spousal Support Guidelines: A Current Update*, VA. LAW., Jan. 1990, at 42, 44.

123. CENTER FOR POLICY RESEARCH, THE IMPACT OF CHILD SUPPORT GUIDELINES: AN EMPIRICAL ASSESSMENT OF THREE MODELS, (1989) (No. SJI-87-11G-E-021) [hereinafter CENTER FOR POLICY RESEARCH].

each of the three states; and (3) it conducted case reviews of sample support cases heard prior to and following the adoption of guidelines in each state.[124]

The consensus emerging from the studies and the stories is that child support guidelines are working. The guidelines seem to realize the virtues of having rules that fix, with more certainty than before, the parameters of parents' responsibility to support their children.

### 1. Consistency of Results

The CPR study indicates that, although the consistency[125] among support orders improved, the improvement varied with the type of guideline used and the income level of the parties.[126] A majority of lawyers and judges surveyed believe that adoption of child support guidelines has increased the consistency of the child support amounts that courts award.[127] Approximately sixty percent of judges surveyed in all three states felt that adoption of guidelines had reduced variation in awards.[128] Although an even larger number of attorneys reported greater consistency in awards, their evaluations differed significantly with the type of guidelines the attorneys used in their states. Over seventy percent of attorneys litigating child support under an Income Shares Model (Colorado) and sixty-six percent using the Melson Delaware Formula (Hawaii) believed the guidelines had reduced inconsistency in the awards.[129] In all of the states, judges and lawyers reported the greatest reduction in variability in the awards to low-income families.[130] Interestingly, the presence of a lawyer still had a major impact on the level of support awarded.[131]

Only about half the attorneys in Illinois, however, reported that the Percentage of Income approach had increased consistency.[132] The researchers explained that Illinois attorneys used a similar method of establishing child support before adopting the Percentage of Income model, which already may have provided some consistency in awards.[133]

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124. *Id.* at 9-19.

125. Consistency in child support cases means that two families with similar incomes, the same number of children, and living in areas with close to the same cost of living should end up with similar child support awards. *See id.* at 60.

126. *Id.* at 60-77.

127. *Id.* at 61.

128. *Id.* at 60-61.

129. *Id.*

130. *Id.* at 62, 64.

131. *Id.* at 63.

132. *Id.* at 60.

133. *Id.*

A second child support study, released by the National Center for State Courts (NCSC) in April 1991, reached similar conclusions on consistency.[134] This study analyzed data from more than 1300 child support cases in six urban trial courts. Although the study did not focus principally on the impact of the guidelines, some of its findings are helpful in evaluating the ability of the guidelines to produce consistent awards. The authors of the study found that, while variations in the level of awards continue, almost none of the variation is explained by arbitrary differences among decisionmakers.[135] Instead, case characteristics, particularly the number of children, whether the case was an initial award of support in a divorce case, and whether it was a Title IV-D case,[136] were responsible for much of the variation in support awards.[137] The study concludes that "child support guidelines are probably achieving one of the goals of federal child support legislation: *general* consistency in awards across cases and jurisdictions after consideration of cost of living and other case-related factors (including income of the parties)."[138]

In addition to the CPR and NCSC studies, anecdotal evidence from Virginia indicates that "[m]others, fathers, attorneys, and judges have reported that as a result of Virginia's implementation of support guidelines, support awards tend to be . . . more consistent."[139] Maryland, which has had income share-based guidelines in effect on an advisory basis since 1989, and presumptive guidelines since 1990, reports similar findings of consistency.[140]

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134. JOHN GOERDT ET AL., THE NATIONAL CENTER FOR STATE COURTS AND THE BUREAU OF JUSTICE STATISTICS, ASSESSING CHILD SUPPORT CASELOAD CHARACTERISTICS AND AWARDS IN SIX URBAN COURTS 1 (1991) [hereinafter CHILD SUPPORT]. The six courts involved in the study were selected from a group of 39 urban courts that have provided caseload data for previous National Center for State Court studies. Each court provided data on every case in which a final order establishing, modifying, or enforcing a child support award was entered over a two week period in October 1989. *Id.* at 2-3.

135. *Id.* at 21.

136. In 1974 Congress added Title IV-D to the Social Security Act. Under this law, all states participating in the Aid to Families with Dependent Children (AFDC) program are required to have a public child support enforcement ("IV-D agency") program to help locate absent parents, establish paternity, obtain and periodically modify support orders, and enforce those orders. 42 U.S.C. §§ 651-665 (1982).

137. CHILD SUPPORT, *supra* note 134, at 21.

138. *Id.* at 22.

139. Schrier-Polak, *supra* note 122, at 44. Virginia has had permissive guidelines based on the Income Shares Model since 1988; the statute was amended to make the guidelines presumptive in 1989. *Id.*

140. Lois Stovall, Testimony before the Family and Juvenile Law Section Council of the Maryland State Bar Association, 2-3 (February 1989). Ms. Stovall, a member of the Family Law Committee of the Maryland State Bar Association, based her testimony on interviews with lawyers, judges, and litigants throughout the state of Maryland over a six month period. *Id.* at 1-2.

### 2. Settlement Rates

Although each state's guidelines vary, all share the common benefit of predictability. Under each of the three prevailing models, the parties or lawyers in the child support proceeding can predict the probable amount of child support provided they know the number of children subject to the support order and the income of both parents.[141] This information normally will be accessible to both sides with limited discovery. Most statutes permit the judge or hearing examiner some discretion to deviate from the guidelines in extraordinary circumstances which the statute may specify.[142] Even with a reserve of discretion, the formulae permit a starting point for negotiation or litigation that the prior system of near-absolute discretion lacked completely. Although currently ambiguous, the boundaries of statutorily reserved discretion, narrow on their face, will become clearer as parties litigate cases and judges define "extraordinary."[143] The empirical evidence tends to confirm that the predictability resulting from this fixed rule has increased the number of settled child support cases.

CPR's findings in this area are, at first blush, mixed.[144] In all three states, both judges and attorneys generally agreed that guidelines led to more settlements on child support.[145] The researchers, however, analyzed pre- and post-guideline cases in these states and found no post-guideline decline in the number of cases in which parents contested child support orders and went to full judicial hearing.[146] The fact is that in all three states studied—indeed nationally—the overall number of cases go-

141. For example, under a typical Income Shares Model guideline, a table indicates the presumed level of support for a given number of children under a given combined parental income. The table then divides the support amount by the percentage of the total income which each parent contributes. The noncustodial parent's share is the ordered child support award in the absence of extraordinary circumstances. *See, e.g.*, MD. FAM. LAW CODE ANN. §§ 12-201 to -204 (Supp. 1989).

142. The typical statute permits judges to exercise this discretion to order child support which deviates from the guidelines only when they find that application of the guidelines would be "unjust or inappropriate" in a given case. The statutes specify factors that may lead to such a finding. *See, e.g., id.* at § 12-202(a)(2)(II).

143. The early decisions interpreting the presumptive guidelines mandated by the Family Support Act of 1988 suggest that the scope of discretion to depart from the guidelines will be interpreted narrowly. *See, e.g.*, Gates v. Gates, 83 Md. App. 661, 666-67, 577 A.2d 382, 385 (1990) (stating that criteria to rebut the presumption that the guidelines will apply are the factors set forth in the statute).

144. CENTER FOR POLICY RESEARCH, *supra* note 123, at 60-64.

145. *Id.* at 28.

146. The CPR study found that between 75% and 87% of lawyers and 65% and 90% of judges in the three states agreed that settlements had increased after the guidelines were enacted. The number of cases in which the issue was adjudicated stayed relatively constant before and after adoption of the guidelines at about 4% of cases filed. *Id.*

ing to hearing always has been quite small in relation to the number of cases filed and settled. Judges and lawyers may be responding to the lack of extended discovery and negotiations on child support, which the formulae have replaced. It is not surprising, therefore, that lawyers, and to a lesser extent judges who may monitor settlement negotiations at the pretrial stage, have observed substantial improvements in the settlement process even though the number of settlements has not changed.

Anecdotal evidence from Virginia shows that "[s]ettlements reflecting the support guidelines have replaced unnecessary court hearings, and costs have been reduced because all concerned can predict in advance what the support award is most likely to be."[147] In Maryland, much of the feedback from litigants, lawyers, and judges is similar—the guidelines help settle cases.[148] Some attorneys report that the increased levels of support under the guidelines actually have discouraged settlements. Many believe, however, that this phenomenon is temporary and will reverse itself when lawyers conducting negotiations confidently can advise their clients that the judges probably will order the guideline level of support after a hearing.[149] Similarly, a study of the impact of the guidelines by judicial personnel in one judicial district in Texas reveals a small increase in settled and stipulated child support cases since enactment of its income shares guidelines.[150]

Anecdotal evidence from a law school clinical program in Maryland[151] reveals that the existence of advisory guidelines in the state changed the tone of settlement discussions.[152] Parties no longer throw child support in the "pot" with other economic issues in settlement discussions. Assuming pre-negotiation discovery has been adequate to establish the incomes of both parties and the relevant expenses,[153] parties can begin settlement discussions on this issue with a worksheet indicating a fixed amount of child support. For attorneys experienced with the

147. Schrier-Polak, *supra* note 122, at 44.

148. Stovall, *supra* note 140, at 2.

149. Interview with Marty McGuire, Assistant State's Attorney of the State of Maryland, Non-Support Unit, Baltimore, Maryland (Jan. 5, 1990).

150. CHILD SUPPORT INSTITUTE, STATE BAR OF TEXAS, SETTING CHILD SUPPORT UNDER THE GUIDELINES: WHAT DISCRETION IS LEFT? GG-1, GG-3 (1987).

151. Data from the author's work in the Family Law Clinic at the University of Baltimore School of Law, in which approximately twenty students each year represented 60 to 80 clients in domestic cases. Of these cases, approximately half raise issues of child support.

152. Even before the guidelines became a rebuttable presumption in February 1990, 17 counties in Maryland had been using the guidelines for a year. Telephone interview with Frank Traglia, Acting Executive Director of the Child Support Enforcement Administration, State of Maryland (Jan. 5, 1990).

153. Many states adjust the amount of child support for expenses like child care and health insurance. *See, e.g.*, MD. FAM. LAW CODE ANN. § 12-201(d) (Supp. 1989).

guidelines, the worksheets eliminate protracted discussions about the legitimacy of claimed expenses or debts on either side; parties often incorporate the guideline amount into the agreement. Even when attorneys are less familiar with the guidelines, a worksheet establishing support under the formula focuses discussion and ultimately raises the support levels that parties consider in negotiation.[154]

Another finding in the CPR study which may signify increasing settlements is a comparison of awards judges set after a hearing and those produced under voluntary agreements.[155] The study found a narrower gap in the levels of these two types of awards after the guidelines were adopted. Before enactment of the guidelines, the average award after judicial hearings was almost one-and-a-half times greater than the average negotiated award.[156] After adoption of the guidelines, the difference declined to a four percent discrepancy between judicial awards and those developed by voluntary agreement.[157] While this finding does not address directly whether divorcing couples settle more cases, the narrowing of the gap between post-hearing and settled child support awards suggests that parties use the guidelines as negotiating tools to reach settlements that reflect the guideline amount.

### 3. Time and Expense of Litigating Child Support

Moving from a multifactor discretionary standard to a numeric formula also has reduced the time and expense of litigating child support awards.[158] The attorneys and judges that CPR surveyed in its study found each of the guideline models to be relatively straightforward and easy to calculate.[159] Because the Income Shares and Melson formulae are more complex than the Percentage of Income model, it is not surprising that attorneys and judges felt that these models were difficult for par-

154. Interestingly, while many practitioners reported that the existence of guidelines has facilitated settlements on the issue of child support, some judicial personnel hearing child support cases in Maryland do not believe that the guidelines have had a positive impact on settlements. Bonita J. Dancy and Bernard Raum, Remarks at Child Support Guidelines Conference, Baltimore, Maryland, (March 28, 1990) [hereinafter Child Support Guidelines Conference] (responding to attorneys' comments). As mentioned above, this reaction may result from the fact that hearing examiners do not observe the benefits yielded by the guidelines in the negotiation process. In addition, the overall numbers of cases settled are more likely to increase after attorneys have had more experience with the guidelines and can advise their clients on the relative inflexibility of this fixed rule.

155. CENTER FOR POLICY RESEARCH, *supra* note 123, at 63.

156. *Id.*

157. *Id.*

158. *Id.* at 23-27, 29-30.

159. *Id.* at 23-25.

ents and, to a lesser extent, nonattorney court personnel to use.[160] Because substantially more attorneys and judges using these two models had received training than those using the Percentage of Income model, attorneys and judges did not experience difficulty in applying the Income Shares and Melson formulae.[161]

The authors of the study also analyzed the amount of time elapsing between the filing of a case and the promulgation of a final order. In both Hawaii and Colorado, post-guideline cases were processed to final order more quickly. After guidelines were enacted in Hawaii, the time between filing of the case and entry of the final order declined from nine to 7.2 months.[162] Colorado experienced a similar decline, dropping from 9.5 to 7.4 months.[163] Only Illinois failed to show a statistically significant drop in pre- and post-guideline adjudication time.[164] The authors suggest, however, that such a failure was due to the large increase in cases in Illinois courts in more recent years; the increased caseload acted to offset speedier adjudications of child support under the guidelines.[165]

The reduction of time in litigating child support cases certainly should result in reduced expense for divorcing couples since the most significant cost in domestic litigation is attorney fees. Although not all delay will lead to increased fees, generally the longer a case continues, the greater the fees in the case.[166] In addition, the relative ease of presenting a case under a formula should eliminate the need for costly experts or complex evidentiary presentations.[167]

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160. *Id.* at 23.

161. Sixty-one percent of Colorado attorneys and 72% of Hawaii attorneys reported having received training in the use of the formulae, compared to only 30% of Illinois attorneys. *Id.* About one-half of the judges using the Income Shares and Melson formulae had received training but only 11% of the judges in Illinois received training to apply the Percentage of Income formula. *Id.* at 23-24.

162. *Id.* at 29.

163. *Id.* at 29-30.

164. *Id.* at 29.

165. The authors of the CPR study reviewed samples of cases decided before and after the implementation of the guidelines. *Id.* at 11, 29.

166. NEELY, *supra* note 24, at 98.

167. *See supra* text accompanying note 75. Despite the rather obvious conclusion that replacing the multi-factor discretionary standard with a numeric formula will streamline the hearings in child support cases, some judges surveyed in Maryland did not believe that the content and length of hearings would change with the enactment of the guidelines. Child Support Guidelines Conference, *supra* note 154. As appellate courts make clear the scope of child support hearings under the guidelines, we can expect more trial judges and other court personnel to feel comfortable narrowing the evidence that is admissible in such hearings. *See, e.g.*, Gates v. Gates, 83 Md. App. 661, 666, 577 A.2d 382, 385 (1990) (holding that "[t]he standardized worksheets indicate that the child support determination will be purely numerical with little, if any, room for the former factual considerations.").

The NCSC study found that a large percentage of single parents, especially among poor women, still do not have child support orders.[168] Although the study did not specifically address the question of whether post-guideline child support hearings have been streamlined, this finding suggests that access to proceedings to obtain child support orders has not improved for all segments of the population.

### 4. Level and Adequacy of Support Orders

The most important benefit that fixed-rule advocates promise is sounder, more equitable decisions. In most contexts it is difficult to assess whether fixed rules foster equity. The overwhelming evidence of post-divorce poverty among custodial parents suggests, however, that in the area of child support, sounder decisions usually mean higher awards.[169] Here, the post-guideline evidence is quite clear: The CPR study reveals a "statistically significant increase" in post-guideline award levels.[170] The impact of the guidelines varied somewhat depending upon the income level of the parents involved, but all levels experienced increases. Among the three states studied, "post-guideline award levels increased twenty-six percent in low income families, fifteen percent in middle income households, and . . . six percent in upper income cases."[171] It is not surprising that the state with the worst record in ordering adequate child support—Hawaii—suffered the greatest impact, and the state in which a preguideline sample showed a relatively high award level—Colorado—felt the least significant impact.[172] Apart from a finding that the Percentage of Income model that was used in Illinois produces somewhat lower awards in households with more than one child, the report concludes that "there is little evidence that one state or one formula generates consistently higher awards."[173]

It is clear that child support formulae produce higher awards than discretionary awards, but whether these formulae produce adequate awards is a far more complicated question. Obviously, the primary source of inadequate awards in low-income families is the poverty of both parents, a problem that is largely unaffected by the use of rules or discretion to make child support decisions. The majority of attorneys and judges surveyed did not believe that post-guideline awards would be suffi-

168. CHILD SUPPORT, *supra* note 134, at 24.

169. CENTER FOR POLICY RESEARCH, *supra* note 123, at 37-53.

170. *Id.*

171. *Id.* at 52.

172. *Id.*

173. *Id.*

cient for low-income families.[174] Attorneys and judges responding to the survey consistently acknowledged that "the solution for these families goes well beyond the manipulation of a child support guideline and reflects the more basic problem of extreme income limitations."[175]

Some evidence exists, however, that the lot of low-income custodial parents and children has improved under the guidelines. The CPR study compared the percentage of income that parents spend on their children in intact low-income families with the percentage of income that parents spend on children in post-guideline award families and found the figures to be quite close in all three states.[176] In addition, the fact that post-guideline increases in support orders were greatest in the low-income families studied indicates that the guidelines have increased child support for those families who need it most.[177]

Lawyers and judges surveyed generally perceived post-guideline award levels to be adequate in middle- and high-income families.[178] Again, the use of child support guidelines has brought the amount of family income that is spent on children through child support orders to a level that closely corresponds with estimated expenditures on child rearing in intact middle-income families.[179]

In high-income families,[180] the guidelines did not always narrow the gap between the amount of family income spent on children in intact versus single-parent homes. Under the Percentage of Income model, post-guideline expenditures in high-income households equalled twenty-two percent of combined parental income, compared to nineteen percent in intact households.[181] In Hawaii, which employed the Melson formula, the guidelines narrowed the gap but post-guideline expenditures were still below those reported for intact homes.[182] Colorado, which employed the Income Shares formula, even experienced a drop in the percentage of income spent on children after enactment of the guidelines.[183]

Despite the differential impact of the guidelines upon the application of the three models to high-income families, most attorneys and judges in

174. *Id.* at 54-55.

175. *Id.* at 55.

176. *Id.* at 54-55.

177. *Id.* at 58.

178. *Id.* at 56-58.

179. *Id.* at 56.

180. High income families are defined as single child families with combined parental income of $50,000 or more. *Id.* at 57.

181. *Id.* at 57-58.

182. *Id.*

183. *Id.*

the three states agreed that the guidelines produced equitable and adequate awards.[184] As the authors of the study conclude, "[c]learly the question for families at [the high] income level is the extent to which children should participate in the higher standard of living of an absent parent, not whether minimal needs are being met."[185] The NCSC study did not address the issue of the adequacy of awards but noted "an underlying assumption that awards provided under guidelines should provide at least minimally adequate support."[186]

Preliminary studies examining post-guideline award levels in New Jersey,[187] Maryland,[188] and Texas[189] confirm substantial increases in child support awards after the adoption of guidelines. Although these studies do not analyze the impact of the guidelines across income lines, some of the findings of the CPR study presumably would apply. Thus, increases in awards would be most substantial in low-income families while the impact would become less significant as family income increases.

Given the similarity between child support formulae and other numeric methods for determining alimony and marital property awards, it is reasonable to assume that all such formulae will produce the benefits revealed in the child support data. Assuming a relatively simple and straightforward calculation, these formulae should produce predictable and consistent results that more fairly allocate family resources after divorce.

While the costs of limiting individualized judicial determinations may be greatest in the area of child custody, the success of the child support guidelines suggests that courts and legislatures should consider more widespread adoption of the primary caretaker rule. The benefits of the predictability and underlying soundness of such a rule may outweigh the benefits some families realize after extended litigation under a best-interest standard.

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184. *Id.* at 58.

185. *Id.* at 59.

186. CHILD SUPPORT, *supra* note 134, at 23.

187. CHILD SUPPORT ENFORCEMENT SERVICES, NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, NEW JERSEY CHILD SUPPORT GUIDELINES FIRST YEAR EVALUATION 17 (1987) (finding that the Income Shares Guidelines in that state increased support in a relatively low income population by approximately thirty percent).

188. Diane Dodson, Address at the Money, Power & Gender Conference (Sept. 23, 1989).

189. Susan C. Blackwell, Note, *Child Support Guidelines in Texas: A Step in the Right Direction*, 20 TEX. TECH. L. REV. 861, 890 & n.2 (1989) (citing study in CHILD SUPPORT INSTITUTE, STATE BAR OF TEXAS, SETTING CHILD SUPPORT UNDER THE GUIDELINES: WHAT DISCRETION IS LEFT? GG-1 (1987)).

## IV. CONCLUSION

Under current standards, decisions on such critical issues as spousal and child support, distribution of marital property, and child custody rest largely in the hands of a single judge, whose decision will be guided only by broad indeterminate standards. While theoretically advancing the goal of crafting decisions to fit the needs of diverse individuals and families, the heavy reliance on judicial discretion in family law must be re-examined. The absence of rules fixing rights and responsibilities of parties involved has contributed significantly to the crisis in divorce dispute resolution. Inconsistent, unpredictable, and inequitable decisions are a byproduct of this discretionary system of justice.

New approaches to family law jurisprudence are needed by the legal system and by the parties who look to that system for relief during times of great need and personal crisis. Parties to family disputes, like parties to property or contract disputes, need the predictability and security engendered by laws establishing clear rights and responsibilities. These rights—the right to a predictable, bias-free custody decision; to a reasonable amount of child support which, for many custodial families, is essential to meet basic needs; and to a guaranteed minimum return on one's long-term investment in a marriage, an investment that represents for many parties their life's work—are at least as fundamental as the right to secure title to a piece of land or to obtain financial relief when a contract is breached.[190] Further, laws which fix responsibilities with some uniformity and certainty will encourage both compliance with and respect for the law.

While not all areas of family law are susceptible to a rule or formula, the recent national experience with child support guidelines suggests that fixed rules can work. The data on the impact of child support guidelines is limited at this early stage of implementation. Available information, however, suggests that applying a fixed rule to the calculation of child support will reduce the negative consequences experienced under the prior discretionary standard. Certainly, improvements upon the existing rule are necessary. States have enacted a wide variety of guideline models, each of which has its virtues and its problems. Although some models embody underlying economic data which results in awards that are too low, some models permit too frequent deviation from the guideline, and others may be so rigid as to cause hardship in selected cases. But the

190. The Supreme Court has recognized that a parent's right to "the care, custody, management and companionship of [his or] her children" is an interest "far more precious" than any property right. May v. Anderson, 345 U.S. 528, 533 (1953). *See also* Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (recognizing the importance of the parent-child interest, which warrants deference and protection).

basic ingredients for a workable fixed rule are definitely present. Guidelines have reduced the number of cases litigated; those that the parties do not settle are litigated more quickly and with less expense. Child support orders, whether produced by agreement or after a hearing, are more consistent. Most important, guidelines are fostering more equitable and adequate support.

Scholars and those actively involved in the divorce decision are developing creative and fresh approaches to other family law decisions. These include the primary caretaker presumption to limit the scope and indeterminate nature of the child custody standard, as well as the post-divorce income sharing formulae to replace the discretionary standards for alimony and marital property distributions. Further research and experimentation with these and similar proposals promise protection for those most vulnerable in the divorce decision, the economically dependent spouse and minor child. Judges and legislators should study these proposals and take an active role in developing this emerging approach to family law decisionmaking.

The ideal of discretionary justice certainly has a place in family law. However, given the disastrous impact of the discretionary system on the post-divorce family, courts, legislatures, and family law scholars must examine new approaches to resolving domestic disputes. Professor Cohen predicted that "a new reform wave" would be necessary to "harden" equity and meet the "social demand for certainty" in legal disputes.[191] After years of a highly flexible and adjustable treatment of family law cases, the time for such reforms has arrived; only when they evolve will the courts be able to offer meaningful protection to all parties involved in domestic disputes.

191. MORRIS RAPHAEL COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 261 (1967).