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How Do Judges Decide Divorce Cases - an Empirical Analysis of Discretionary Decision Making

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HOW DO JUDGES DECIDE DIVORCE CASES? AN EMPIRICAL ANALYSIS OF DISCRETIONARY DECISION MAKING

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Judges today have more discretion in divorce cases than in any other field of private law. Although the extent of judicial discretion at divorce is highly controversial, little information on the results of discretionary decision making has been available.

In this Article, Professor Marsha Garrison describes and analyzes the results of an empirical study of judicial decision making in New York during the decade following the adoption of a new divorce law that expanded judicial discretion and changed the legal standards governing alimony and property distribution at divorce. She reports evidence supporting both discretion's critics and *its champions: Some types of decisions made by judges were highly predictable and quite consistent with the statutory madate; others were altogether unpredictable, or evidenced the intrusion of private values into the decision-making process. In interpreting these results, Professor Garrison concludes that discretionary decision making was influenced by the relative clarity and novelty of the governing statutory provision, as well as social and public opinion trends. Based on the research findings, she makes a number of reform proposals aimed at striking a better balance between rule and discretion in divorce decision making.*

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INTRODUCTION

Divorce law has traditionally relied on judicial wisdom to achieve fair results. Instead of bright-line rules, legislatures have typically given judges in the divorce court almost unlimited discretion, bounded only by indeterminate standards or lists of factors that may be considered. Judicial discretion has also been enhanced by the rarity

of jury trials in divorce cases; in almost all divorce actions the judge both determines the facts and interprets the law.[1]

During the past two decades, judicial discretion in divorce cases has expanded. Title-based property division has been succeeded by discretionary distribution principles rather than new bright-line rules.[2] The adoption of gender-neutral divorce laws has similarly enhanced the role of judicial discretion in custody and alimony decisions.[3] In some states, judicial discretion in awarding alimony has been further expanded as a result of the removal of fault barriers to an alimony award[4] and the development of durational alimony as an alternative to a permanent award.[5] Only in the area of child support, as a result of directives from the federal government,[6] has judicial discretion been curtailed.

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1. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 540 (2d ed. 1988) ("Divorce cases are usually tried to the court without a jury, since historically they resembled suits in equity rather than actions at law."). Jury trials are not even available in most states. *See id.* at 540 n.16.

2. Forty-three states now mandate equitable division of marital property. *See* Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 445-46 tbl. IV (1992).

3. The development of gender-neutral standards was spurred by the Supreme Court's decision in Orr v. Orr, 440 U.S. 268 (1979), in which an alimony statute that authorized alimony for wives only was found unconstitutional. Although the Supreme Court has never addressed the constitutionality of a gender preference in custody disputes, many state courts have overruled such rules, either on constitutional grounds or on the basis of conflict with a best interests of the child principle. *See, e.g.*, *Ex parte* Devine, 398 So. 2d 686 (Ala. 1981) (holding rule unconstitutional); Johnson v. Johnson, 564 P.2d 71 (Alaska 1977) (holding that rule violates the best interests principle), *cert. denied*, 434 U.S. 1048 (1978); *Bazemore v. Davis*, 394 A.2d 1377 (D.C. 1977) (en banc) (same).

4. By 1992, only four states had alimony rules under which an award was barred by marital misconduct; 29 states had adopted alimony rules that prohibited the consideration of marital fault in the determination of an award. *See* Walker, *supra* note 2, at 462-63 tbl. VII.

5. Alimony was traditionally awarded until the death or remarriage of the recipient. By contrast, durational or "rehabilitative" alimony is awarded for a fixed time period. One survey conducted during the mid-1980s reported statutes or case law on durational alimony in 33 states. Alan M. Grosman & Kathleen G. Heirich Casey, *Rehabilitative Alimony: Myth and Reality*, *in* NEW CONCEPTS IN ALIMONY MAINTENANCE & SUPPORT 1, 23-40 (A.B.A. Sec. Fam. L. 1984).

6. In 1984, Congress enacted legislation that required each state to adopt numerical child support guidelines by October 1987. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18(a), 98 Stat. 1305, 1321-22 (codified as amended at 42 U.S.C. § 667 (1988)). In 1988, Congress mandated that the child support guidelines adopted in each state presumptively establish the appropriate child support obligation in all child support proceedings. Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343, 2346 (codified at 42 U.S.C. § 667 (1988)). Adherence to federal standards is required for continued federal funding of a state's Aid to Families with Dependent Children (AFDC) program. 45 C.F.R. § 301.10 (1994).

The expansion of judicial discretion in divorce cases has met with decidedly mixed reviews. Some commentators have claimed that indeterminate standards produce decisions that are inconsistent, expensive, and biased against women.[7] Others have argued that bright-line rules are too broad, too rigid, and too insensitive to case variation to govern divorce decision making.[8]

Although the debate over judicial discretion in divorce cases often replicates the larger controversy among legal scholars about the relative merits of discretion versus rules,[9] the divorce context is a particularly important one, both because judges wield more extensive discretion in divorce cases than in other types of civil litigation[10] and because of the frequency of divorce proceedings. Americans today are more likely to experience divorce than any other type of civil

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7. For representative criticism of discretionary standards in child custody adjudication, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479-90 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226. For representative criticism of discretionary standards in property and support adjudication, see *infra* sources cited in notes 27-29.

8. *See, e.g.*, Joan M. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 175-76 (1976) (favoring discretion in property division); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2298 (1991) (concluding that discretion should be retained in custody adjudication).

9. The literature on the rules versus discretion controversy is extensive and wide-ranging, encompassing the views of legal philosophers, social scientists, and economists. For some noteworthy examples from the perspective of legal philosophy, see, e.g., AHARON BARAK, JUDICIAL DISCRETION (1989); STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION (1986); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); George P. Fletcher, *Some Unwise Reflections About Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 69; Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975). For economic analyses, see, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 612 (1992). For social science perspectives, see the various essays contained in THE USES OF DISCRETION (Keith Hawkins ed., 1992).

10. *See infra* note 26 and sources cited therein.

litigation.[11] Fairness to the many families affected by divorce law demands standards that achieve predictable and consistent outcomes.

Evaluation of the arguments about judicial discretion at divorce has been hampered, however, by the paucity of data on how judges make decisions under current discretionary standards. Although there has been considerable research on divorce outcomes over the past two decades,[12] research focusing on judicial decision making at divorce has been rare. We know almost nothing about the characteristics of the decision-makers, the cases they decide, or the impact of appellate courts. As to the outcomes produced by the judicial process, the evidence consists of a handful of reports that suggest contradictory conclusions.[13]

In order to decide how much discretion judges should have, we need better information about the results of current discretionary decision making: Do judges rely on many factors in reaching a decision or only a few? Do judges agree on which factors are

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11. *See* Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1112 n. 74, 1116 (1988) (describing research on state court caseloads and reporting that "[d]ivorce and its incidents are, for most disputants, the only occasion on which they will come into contact with law in its formal sense").

12. *See* ADVISORY COMMITTEE ON WOMEN IN THE COURTS, REPORT ON THE FINANCIAL IMPACT OF DIVORCE IN RHODE ISLAND (1991) (on file with author); BARBARA BAKER, ALASKA WOMEN'S COMM'N, FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN (1987) (on file with author); LESLIE J. BRETT ET AL., WOMEN AND CHILDREN BEWARE: THE ECONOMIC CONSEQUENCES OF DIVORCE IN CONNECTICUT (1990) (on file with author); GLORIA STERIN & JOS. M. DAVIS, DIVORCE AWARDS AND OUTCOMES: A STUDY OF PATTERN AND CHANGE IN CUYAHOGA COUNTY, OHIO, 1965-1978 (1981); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 J. CONTEMP. L. 301 (1990); Barbara R. Rowe & Alice M. Morrow, *The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage*, 24 WILLAMETTE L. REV. 463 (1988); Karen Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, FAM. ADVOC., Spring 1979, at 10; Charles E. Welch, III & Sharon Price-Bonham, *A Decade of No-Fault Divorce Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411 (1983); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986). For comparable research findings outside the United States, see, e.g., JOHN EEKELAAR & MAVIS MACLEAN, MAINTENANCE AFTER DIVORCE (1986) (England); Margaret Harrison et al., *Payment of Child Maintenance in Australia: The Current Position, Research Findings, and Reform Proposals*, 1 INT'L J.L. & FAM. 92 (1987) (Australia).

13. *See infra* notes 37-40 and sources cited therein.

important and their relative weights? Does the pattern of decision making vary depending on factors such as the judge's age, sex, experience, or location? Does it exhibit consistent biases based on litigant characteristics such as gender or social class? Do judicial decisions differ from the results of settled cases? Do the cases judges decide differ from the typical divorce action? Only when we know how judges make decisions, and how their decisions affect the settlement process, can we decide whether and how judicial discretion should be curtailed.

One reason for the lack of evidence on these questions is that judicial divorce decisions are in fact a rarity; the vast bulk of cases are settled.[14] Divorce researchers, in attempting to portray overall outcomes, have thus understandably given short shrift to judges. While the outcomes of settled cases might reveal the impact of indeterminate rules on the settlement process, researchers have typically described only aggregate data; my recent research on the impact of New York's 1980 Equitable Distribution Law[15] was the first to assess the predictability and range of divorce outcomes.[16]

In this article I describe and analyze the results of an empirical study of judicial decisions on alimony, property distribution, and child support, dating from a major statutory reform in the research state's alimony and property distribution rules in 1980 to that reform's tenth anniversary. My analysis suggests that the exercise of discretion is a complex phenomenon: Depending on which of the various discretionary decisions made by judges we focus, the research findings provide evidence to support the claims of *both* discretion's critics and champions. There is evidence of regional variation, class bias, the intrusion of private values into the decision-making process, of utter

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14. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) ("[T]he overwhelming majority of divorcing couples resolve distributional questions concerning marital property, alimony, child support, and custody without bringing any contested issue to court for adjudication."). Experts generally estimate that no more than 10% of divorce actions are contested. *See, e.g.*, CLARK, *supra* note 1, at 755; Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 108 (1974); *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 159 (1992) (finding that formal adjudication occurred in approximately 1.5% of California divorce sample); Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transactions Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 294 tbl. II (1993) (finding that 5.38% (Wisconsin) and 10.13% (Virginia) of sample divorce cases went to trial).

15. 1980 N.Y. Laws 281 (codified as amended at N.Y. DOM. REL. LAW § 236B (McKinney 1986 & Supp. 1995)).

16. Garrison, *supra* note 12, at 685-96, 706-11.

unpredictability, *and* of highly predictable decision making consistent with the statutory standard; there is evidence both to support and contradict the claim of gender bias in judicial decision making; there is evidence of settlement results that are highly consistent—and inconsistent—with the decision-making patterns of judges.

In interpreting these results, I found that what at first glance appears contradictory and chaotic in fact evidences the natural evolution of discretionary decision making. While the claims on both sides of the current debate over discretion in divorce cases typically rely on a static, "snap-shot" perspective, my research results support an alternate view of discretion as a dynamic, evolutionary phenomenon that is guided by the legislature's directives (or lack thereof), shaped by cumulative judicial experience, and set in a shifting social context. While this is not a novel view of discretion—it has been variously embraced by theorists writing from both a social science and economic perspective[17]—it is one that is often neglected in the debate over the appropriate role of discretion in divorce. It is also a view of which we have had little empirical evidence.

In this article I offer empirical evidence on the results of discretion and the influences to which it is subject. These data will, I believe, enrich both the current debate over discretion in the context of divorce and our general understanding of discretionary decision making. Part I of the article describes the discretion available to judges under current divorce laws, the origins of that discretion, and the comparative advantages of discretionary standards and rules. Part II describes the background against which the divorce decisions studied were made: the law under which the cases were decided, the judges who made the decisions, and the divorcing couples who litigated. Part III describes my findings on judicial decision making, before and after appeal, compares them with the settlement patterns that emerged in my earlier research, and assesses the predictability of judicial decisions. Part IV offers an interpretation of my specific findings and discusses its implications for the debate over discretionary decision making at divorce.

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17. *See, e.g.*, THE USES OF DISCRETION, *supra* note 9; Diver, *supra* note 9; Ehrlich & Posner, *supra* note 9; Kaplow, *supra* note 9; Richard Lempert, *Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board*, *in* THE USES OF DISCRETION, *supra* note 9.

I. JUDICIAL DISCRETION AT DIVORCE: ITS EXTENT, ORIGINS, AND ALTERNATIVES

A. Divorce Law: The Model of Equity

The statute books today grant judges almost unlimited discretion in divorce cases. Consider, for example, New York's statutory rule governing alimony. The statute specifies that

> the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties.[18]

The court is also directed, in determining the amount and duration of maintenance, to consider ten factors that together take account of spousal need, resources, contribution to the marriage, and economic misconduct.[19] A catch-all clause additionally permits consideration of "any other factor which the court shall expressly find to be just and proper."[20] In sum, the statute directs the judge to base the alimony

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18. N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney 1986 & Supp. 1995).
19. The statute requires courts to consider:
    1. the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
    2. the duration of the marriage and the age and health of both parties;
    3. the present and future earning capacity of both parties;
    4. ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
    5. reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
    6. the presence of children of the marriage in the respective homes of the parties;
    7. the tax consequences to each party;
    8. contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
    9. the wasteful dissipation of marital property by either spouse;
    10. any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration . . . .

Id.

20. *Id.* § 236B(6)(a)(11).

decision on an appraisal of the parties' past conduct, present needs, and future life circumstances, but leaves the scope, methodology, and use of that appraisal to judicial discretion.

The statute governing marital property distribution in New York follows a similar pattern. The judge is directed to distribute the property "equitably between the parties, considering the circumstances of the case and of the respective parties."[21] Equity is to be determined based on judicial consideration of twelve soup-to-nuts factors plus the same catch-all clause.[22]

New York's rules are by no means atypical. Only seven states require equal division of marital property or have adopted a presumption in favor of equal division;[23] the other forty-three mandate "equitable" division, typically based on a lengthy factor list

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21. *Id.* § 236B(5)(c) (McKinney 1986).

22. The factors are:

1. the income and property of each party at the time of marriage, and at the time of the commencement of the action;
2. the duration of the marriage and the age and health of both parties;
3. the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
4. the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
5. any award of maintenance under subdivision six of this part;
6. any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
7. the liquid or non-liquid character of all marital property;
8. the probable future financial circumstances of each party;
9. the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
10. the tax consequences to each party;
11. the wasteful dissipation of assets by either spouse;
12. any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
13. any other factor which the court shall expressly find to be just and proper.

Id. § 236B(5)(d).

23. California, Louisiana, and New Mexico require equal division of marital property. CAL. FAM. CODE § 2550 (West 1994); LA. REV. STAT. ANN. § 9:2801(4)(b) (West 1991); N.M. STAT. ANN. § 40-4-7 (Michie 1994). Idaho, Texas, Washington, and Wisconsin have established an equal division presumption. IDAHO CODE § 32-712(1) (1990 & Supp. 1995); TEX. FAM. CODE ANN. § 5.02 (West 1993); WASH. REV. CODE ANN. § 26.09.080 (West 1994); WIS. STAT. ANN. § 766.31 (West 1995). For state-by-state categorization, see J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 13.02, at 13-8.1 n.9 (1994); Walker, *supra* note 2, at 445-46 tbl. IV.

akin to that devised by the New York legislature.[24] Alimony statutes are more diverse in their details but equally uniform in their lack of restrictions on judicial discretion in deciding whether alimony should be awarded and in determining its duration and value.[25]

Today's alimony and property division rules, like current child custody standards, thus invite the judge to evaluate each litigant's past and to predict his or her future. They embody the ideal of the equity court in their quest for individual justice. In pursuit of equity, they grant the trial judge more discretion than does any other field of private law.[26]

B. The Debate Over Discretion

In recent years many commentators have argued that judicial discretion at divorce should be sharply curtailed. Some argue that indeterminate standards have produced decisions that are arbitrary rather than equitable.[27] Others contend that discretionary standards have resulted in decisions that generally favor husbands at the expense of their wives and children.[28] Critics of judicial discretion

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24. For a comparison of state standards, see Family L. Rep. Reference File—State Divorce Laws (BNA) 401-53 (1993); OLDHAM, *supra* note 23, § 13.02, at 13-8.1 to 13-26.4. For a list of states that mandate consideration of non-monetary contributions, economic misconduct, and marital fault, see Walker, *supra* note 2, at 451-52 tbl. V.

25. For a comparison of state alimony rules, see Family L. Rep. Ref. File (BNA) 401-53 (1993).

26. For similar views, see, e.g., Gary Crippen, *The Abundance of Family Law Appeals: Too Much of a Good Thing?*, 26 FAM. L.Q. 85, 89 (1992) ("The uncertainty of many family law standards is unique.") [hereinafter Crippen, *Abundance*]; Mary A. Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167 (1986) ("Family Law . . . is characterized by more discretion than any other field of public law.").

27. *See, e.g.*, OLDHAM, *supra* note 23, § 13.02(2), at 13-23 to 13-24; Glendon, *supra* note 26, at 1168-72; Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 219-26 (1991).

28. *See, e.g.*, MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 91-92 (1987) (claiming that judges tend to protect the former husband's standard of living at the expense of ex-wives and children); WEITZMAN, *supra* note 12, at 194-214, 395-400 (describing and criticizing judicial attitudes toward economic decisions at divorce); Murphy, *supra* note 27, at 218-19 ("[D]iscretionary standards . . . have resulted in retention by men of a disproportionate share of family assets after divorce."); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 198-208 (Stephen D. Sugarman & Herma H. Kay eds., 1990) [hereinafter CROSSROADS] (claiming that current rules reinforce gender inequalities).

also urge that bright-line rules would reduce the cost of divorce litigation and foster settlement.[29]

Discretion's critics are undeniably right that vague rules increase the likelihood that characteristics of the judge, the court, or the community may affect case outcome.[30] Nor can discretionary standards provide as much certainty to litigants who want to settle their cases as would rules;[31] because the results of litigation are uncertain, the parties are dependent upon the expertise of lawyers or other experts in assessing their litigation prospects[32] and perhaps more vulnerable to strong-arm negotiating tactics.[33]

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29. *See, e.g.*, OLDHAM, *supra* note 23, § 13.02(2), at 13-24 (concluding that current discretionary rules discourage settlement); Glendon, *supra* note 26, at 1170 (concluding that under current discretionary rules "the economically stronger party gains negotiating leverage"); Stephen J. Brake, Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. REV. 761, 788 (1982) (arguing that a fixed rule system is preferable to equitable property distribution because it "is inexpensive, predictable, and able to minimize the need for litigation").

30. *See generally* KENNETH C. DAVIS, DISCRETIONARY JUSTICE 3-26, 52-96, 215-33 (1969) (discussing potential for injustice when decision-maker possesses extensive discretion). For empirical evidence on the impact of nonlegal factors on custody decision making at divorce, see Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 718-23 (1982-83) (reporting that younger judges in urban areas were more likely to award custody to fathers than were older judges in rural locations).

31. Most litigation models suggest a higher litigation rate when the law is uncertain. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067, 1092-93 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) [hereinafter *Selection of Disputes*]; George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 197-200 (1987); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56-58 (1982). For criticism of the thesis that uncertainty fuels litigation, see, e.g., Theodore Eisenberg, *Commentary on "On the Nature of Bankruptcy": Bankruptcy and Bargaining*, 75 VA. L. REV. 205, 209-11 (1989); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 346 n.30 (1986).

32. *See, e.g.*, Mnookin & Kornhauser, *supra* note 14, at 979 (stating that under an uncertain standard "[a] lawyer may be necessary simply for a person to learn what his bargaining chips are"). For descriptions of the lawyer's role in the settlement process, see Howard S. Erlanger et al., *Participation & Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 590-602 (1987); Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565, 579-86 (1992); Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1144 (1988) [hereinafter *Process of Negotiation*]; Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1670-87 (1989); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 99-125 (1986) [hereinafter *Law & Strategy*].

33. *See, e.g.*, Erlanger et al., *supra* note 32, at 596-98 ("In divorce, the same flexibility that allows generosity and creative arrangements also allows emotional intimidation, asset-

But these inevitable aspects of discretion do not inexorably produce arbitrariness, bias, or uncertainty. First of all, judicial discretion at divorce is not as unlimited as statutory law alone would suggest. Judges are also bound, in Cardozo's words, by "[a] thousand limitations."[34] The most obvious of these limitations is the appellate court's power of reversal. In addition to this systemic restraint upon judicial discretion, judges respond to precedent, to the informal norms of the courthouse, and to those of the profession. These constraints establish a perimeter beyond which judicial decisions are unlikely to stray.[35] It is possible that the boundaries imposed by appellate courts and informal norms sufficiently limit judicial discretion so as to ensure a fairly high level of consistency. Coupled with the mediating function of lawyers, these limitations may provide as much guidance to litigants and the settlement process as would a bright-line approach.[36]

Although the debate over discretion is central to divorce law today, we have little evidence on how much inconsistency, bias, and expense discretion has in fact produced. On the issue of inconsistency, the reports are contradictory. Some studies of child support decisions report marked disparities in the results of like cases, the decision-making patterns of different judges, and even the decisions

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hiding, and the exertion of financial leverage."); Mnookin & Kornhauser, *supra* note 14, at 978-80 (noting that discretionary rules disadvantage the more risk-averse party and offer greater opportunities for strategic behavior).

34. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 61 (1924), *quoted in* Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, *in* THE USES OF DISCRETION, *supra* note 9, at 47, 79.

35. For more detailed analysis of these constraints, see Martha Feldman, *Social Limits to Discretion: An Organizational Perspective*, *in* THE USES OF DISCRETION, *supra* note 9, at 163, 174-83; Schneider, *supra* note 34, at 79-88. For descriptions of the judicial socialization process, see, e.g., Lenore Alpert et al., *Becoming a Judge: The Transition from Advocate to Arbiter*, 62 JUDICATURE 325 (1979); Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359 (1972).

36. For a detailed exposition of this position in the context of custody decision making, see Schneider, *supra* note 8, at 2252-60, 2290-93. The substitution of bright-line rules for vague standards does not necessarily decrease litigation. *See* Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 452-59 (1990) (finding that custody litigation rate did not decrease after replacement of best interests test with primary caretaker presumption). Nor does the replacement of a bright-line rule with a vague standard necessarily increase litigation. *See, e.g.*, Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 501-05 (1979) (finding that custody litigation rate did not increase after replacement of maternal presumption custody rule with best interests test).

of a single judge.[37] But other reports describe child support decisions under discretionary standards as fairly predictable[38]—almost as predictable, indeed, as reported outcomes under determinate child support guidelines.[39] On alimony[40] and property division[41] the data are also mixed. The claim of gender bias in judicial decision making finds support in post-divorce income surveys, which uniformly report that former wives and children in their

37. *See* JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA 12 (1986) (finding that among sample of fathers with one child earning between $145 and $155 per week, support ordered ranged from $10 to $60 per week); Ann Nichols-Casebolt et al., *Reforming Wisconsin's Child Support System*, *in* STATE POLICY CHOICES: THE WISCONSIN EXPERIENCE 172, 176 tbl. 9.2 (Sheldon Danziger & John F. Witte eds., 1988) (finding that awards ranged from zero to more than 100% of noncustodial parent's income); Kenneth R. White & Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75, 76-83 (1976) (finding that alimony and child support awards to families in similar circumstances varied widely based on differing judicial philosophies); Lucy M. 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, 27-30, 37-38 (1979) (finding that judicially ordered child support varied widely).

38. MARYGOLD S. MELLI, CHILD SUPPORT AWARDS: A STUDY OF THE EXERCISE OF JUDICIAL DISCRETION 41-42 (University of Wisconsin Institute for Research on Poverty Discussion Paper 734-83) (1983) (finding that variation in child support orders made by four judges was more a function of income differences than differing criteria); Melli et al., *supra* note 32, at 1164 (finding that among samples including both stipulated and judicially determined cases, the number of children, income of supporting parent, and couple's estimated net worth accounted for almost 50% of variation in value of child support).

39. *See* MACCOBY & MNOOKIN, *supra* note 14, at 120-23 tbl. 6.1, 156 tbl. 7.7 (finding that 54% of variation in child support awards made under California's child support guidelines was explicable; father's income and number of children were the most important predictive variables).

40. *Compare* MACCOBY & MNOOKIN, *supra* note 14, at 124 (finding that 50% of variation in alimony award values was explicable) *and* Robert F. Kelly & Greer L. Fox, *Determinants of Alimony Awards: An Empirical Test of Current Theories and a Reflection on Public Policy*, 44 SYRACUSE L. REV. 641, 696-97 tbl. 3, 700 (1993) (finding that alimony decision was predictable in 96% of dual-earner and 91% of single-earner cases) *with* White & Stone, *supra* note 37, at 80 (concluding that predictive alimony model could not be developed because "[f]ew discernible trends appeared to exist in relation to each judge and alimony").

41. *Compare* Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 854-55 (1988) (reporting, based on survey of 138 judicial decisions, that judges seldom deviated from an equal division of marital property except in extraordinary circumstances, typically involving a spouse in poor health) *with* Harriet N. Cohen & Adria S. Hillman, *Diagnosis Confirmed: EDL Is Ailing*, N.Y. ST. B. ASS'N FAM. L. REV. July 1985, at 3, 3 (reporting, based on survey of 70 judicial decisions, that judges generally awarded wives less than 50% of the marital property and de minimis shares of businesses and professional practices).

custody have lower per capita incomes[42] and living standards[43] than former husbands. But it ignores the substantial body of data showing that, on average, wives fare better than husbands under discretionary property distribution schemes.[44] As to the claims regarding the

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42. BAKER, *supra* note 12, at i (finding that in Alaska divorce sample, wives' mean per capita income fell by 33% while husbands' rose by 17%); BRETT ET AL., *supra* note 12, at 7 (finding that in Connecticut divorce sample, wives' mean per capita income fell by 16%, while husbands' rose by 23%); Garrison, *supra* note 12, at 720-21 (finding that in New York divorce sample, wives' mean per capita income fell by 32% while husbands' rose by 82%); McLindon, *supra* note 12, at 392 (finding that in New Haven, Connecticut, divorce sample wives' mean per capita income declined by 31% while husbands' increased by 90%); Wishik, *supra* note 12, at 98 (finding that in Vermont divorce sample, wives' mean per capita income fell by 33% while husbands' rose by 120%).

43. *See* WEITZMAN, *supra* note 12, at 337-43 (finding that one year after legal divorce, divorced wives experienced a 73% decline in their standard of living while divorced husbands experienced a 42% improvement); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 488 (1985) (finding that in the first year after divorce, the economic status of divorced wives who did not remarry fell an average of 30%); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 643-44 (1988) (reporting that a recalculation of Weitzman's data suggests that the average decline in divorced wives' standard of living was 33%); RHODE ISLAND ADVISORY COMMITTEE REPORT, *supra* note 12, at 22-23 (finding that the average decline in standard of living of divorced mothers with custody of minor children was 24%); Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAM. 115 (1984) (finding that in the first year after divorce, the economic status of divorced wives fell an average of 30%). For similar research findings outside the United States, see, for example, EEKELAAR & MACLEAN, *supra* note 12, at 69-71 (United Kingdom); Margaret Harrison et al., *Payment of Child Maintenance in Australia: The Current Position, Research Findings and Reform Proposals*, 1 INT'L J.L. & FAM. 92, 101-06 (1987); *see also* Annemette Sorensen, *Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States*, *in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE 263 (Lenore J. Weitzman & Mavis Maclean eds., 1992) [hereinafter INTERNATIONAL PERSPECTIVE] (surveying reports and describing methodological issues in measuring changes in standard of living).

44. *See* STERIN & DAVIS, *supra* note 12, at 112 (finding that divorced wives in Cuyahoga County, Ohio received an average of 77% of net worth when divorce based on fault and 61% when divorce based on separation agreement); Garrison, *supra* note 12, at 673 tbl. 18 (finding that divorced wives in three New York counties received an average of 55% of net worth); McLindon, *supra* note 12, at 383 (finding that divorced wives in New Haven, Connecticut received an average of 68% of net worth); Rowe & Morrow, *supra* note 12, at 475 (finding that divorced wives married for 10 or more years in three urban Oregon counties received an average of 50% of net worth when home owned and 64% when home not owned); Judith A. Seltzer & Irwin Garfinkel, *Inequality in Divorce Settlements: An Investigation of Property Settlements and Child Support Awards*, *in* CHILD SUPPORT ASSURANCE: DESIGN ISSUES, EXPECTED IMPACTS, AND POLITICAL BARRIERS AS SEEN FROM WISCONSIN 79, 90 tbl. 4.2 (Irwin Garfinkel et al. eds., 1992) (finding that the mean percentage of divorced mothers' total property award was 54%). *But see* BAKER, *supra* note 12, at 8 (finding that divorced wives in Anchorage, Alaska received an average of 29% of net worth when divorced by dissolution and 50% when divorced by traditional procedure).

impact of discretionary standards on the settlement process, there is currently no direct evidence on how judicial decisions deviate, if at all, from the patterns exhibited in settled cases. And, although there are data supporting the claim that discretionary standards breed more litigation than do rules,[45] there is also evidence suggesting that divorce litigants frequently reach settlement decisions with little awareness of, or concern for, legal norms.[46]

Even if all the claims of discretion's critics are correct, evidence showing that the substitution of bright-line rules would improve matters is lacking. Rules, like discretion, entail inevitable disadvantages. The most obvious of these is inflexibility. Hard and fast rules work well where there is broad consensus on the right results in easily definable case categories. But where consensus is lacking or where the boundaries between case categories are blurred, the price of certainty may well be inequity. These concerns are particularly acute in areas of the law that aim, as has divorce law, at individually tailored results.

Consider the federal government's recent reform of criminal sentencing.[47] Prior to that reform, criminal sentencing was highly discretionary. The judge was expected to make an individual judgment, akin to that expected by divorce law, about the defendant's past and future.[48] Reforms were introduced because of a growing perception that the result of discretion was inconsistency rather than individual tailoring.[49] These concerns, similar to those that have been voiced in response to discretionary decision making at divorce,

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45. *See* Brinig & Alexeev, *supra* note 14, at 294 tbl. II (reporting higher litigation rate for Virginia divorce sample (indeterminate rules) than for Wisconsin divorce sample (more certain rules)).

46. *See, e.g.*, Erlanger et al., *supra* note 32, at 600 ("Legal constraints are decidedly less important [to divorce settlement than emotional and financial issues]; many parties even disregard the advice of their attorneys."); Jacob, *supra* note 32, at 579-81, 584-86 ("In divorce it seems that attorneys do not typically conduct the negotiations [and] agreements are often worked out in private with very little apparent law talk."); *see also infra* note 164 and sources cited therein (describing low rate of legal representation in divorce cases).

47. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 (1994) and 28 U.S.C. §§ 991-98 (1988 & Supp. 1993)).

48. For a description of common law sentencing, see STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988).

49. The literature is extensive. *See, e.g.*, ALFRED BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (1983); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974).

led to the introduction of sentencing "guidelines" that reduce judicial discretion in order to ensure more predictable, uniform punishments. But the result of reform has been a new wave of criticism suggesting that the cure has been worse than the problem.[50] Sentences under the guidelines are undeniably more predictable, but also, in the eyes of many observers,[51] much less fair.

C. *Discretion vs. Rules: A Question of Values*

A fundamental (and frequently overlooked) issue in the debate over discretion at divorce is thus the model of justice upon which divorce law rests. Should divorce law continue to strive for the results of a Solomon or seek instead those of a tax code? The former approach necessitates a large measure of discretion, the latter a large number of rules.

The modern attack on discretion impliedly assumes that individually tailored results are not a necessary, or perhaps even a desirable, goal of divorce law. Certainly a radically different decision-making model governs when marriage terminates through death rather than divorce. Probate law nowhere permits judicial discretion in the determination of spousal rights. Under both community property and common law elective share rules, the surviving spouse's entitlement is fixed and unvarying; individual circumstances such as need, resources, marital contribution, and fault are irrelevant to case

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50. *See, e.g.* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 135-43 (1990); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); *see also* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 171-72 (1995) (describing level and sources of dissatisfaction with guidelines).

51. Only 7% of federal and state judges polled by the American Bar Association indicated that the federal sentencing guidelines have worked "well" or "very well," while 51% said that they had worked "very poorly" or "somewhat poorly." Don J. DeBenedictis, *The Verdict Is In*, A.B.A. J., Oct. 1993, at 79. Fifty-nine percent agreed with the statement that "federal guidelines established to standardize prison sentences [should] be scrapped." *Id.*

outcome.[52] Probate law thus strives for certainty at the expense of individualized equity.

The stark contrast between divorce and probate law, both of which regulate spousal economic rights at marital dissolution, invites inquiry: Why are the rules so different? The most common explanation focuses on the need for certainty in probate law, as compared to the need for individualized results in family law.[53] But this, of course, restates the difference rather than explains it.

A more fundamental explanation can be found in the historical foundations of these two bodies of law. Probate law derives from property law; its primary goal has been the delineation of mechanisms for the orderly transmission of powers and entitlements. Probate law's quest for certainty thus reflects its focus on rights, their protection, and their clarification.[54] But the common law historically granted wives[55] and children[56] virtually no property or support rights. Divorce law, which emerged from ecclesiastical[57] and welfare law,[58] was thus the exclusive province of fault-based remedies.

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52. The surviving spouse's fractional share of the decedent's assets is specified with finality by the legislature, as is the asset pool to which that fraction will apply. For a description and comparison of spousal entitlements under community property and common law rules, see, e.g., WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES 116-27, 133-49 (1988).

53. *See, e.g.*, Glendon, *supra* note 26, at 1167.

54. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) (describing fixed property rules as "the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests").

55. At marriage, the husband gained control of any property the wife owned previously. The wife lost the ability to buy or sell land without her husband's consent, to enter into contracts, or even to make a will. *See* CLARK, *supra* note 1, § 8.1, at 498-501; RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 374-75 (1988); ELIZABETH B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861, at 7-29 (1987). After marriage, the wife's sole property entitlement was dower, which entitled the wife who survived her husband to a life estate in one-third of all real property owned by the husband during the marriage. CLARK, *supra* note 1, § 8.1, at 500-01.

56. Although the common law recognized a father's right to his child's labor, it accorded children no corollary right of support or inheritance except in the case of entailed property. *See* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 287-90 (1964). For descriptions of the development of the child support obligation, see EEKELAAR & MACLEAN, *supra* note 12, at 1-3, 19-31; tenBroek, *supra*, at 289-312.

57. For a detailed historical description of the religious background of divorce law, see PHILLIPS, *supra* note 55, at 1-190.

58. For descriptions of the welfare law origins of divorce law support entitlements, see EEKELAAR & MACLEAN, *supra* note 12, at 1-10, 19-22; tenBroek, *supra* note 56, at 262-63,

Alimony, like the divorce decree itself, was available only to the wife who had been wronged by her husband.[59] Although child support laws first arose to protect the public treasury rather than a matrimonial victim,[60] divorce statutes enacted during the nineteenth century[61] merged the twin themes of public protection and remedial justice.[62] Alimony and child support were seen as compensation for the virtuous wife and mother, punishment for the guilty husband and father, and protection for the public against the specter of welfare dependence.[63] Divorce law's reliance on discretion thus reflects its origins as an equitable remedy.

D. The Recent History of Divorce Reform: A Study in Paradox

It is possible to envision replacing discretion with rules today because modern divorce law has shifted away from its traditional goal

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59. The alimony remedy, first developed by the English ecclesiastical courts, was designed to provide recompense to the wife whose husband had both profited from property that she had brought into the marriage and caused the dissolution of the marriage itself. Alimony was from its inception an equitable remedy designed to mitigate the harshness of common law property rules. *See* EEKELAAR & MACLEAN, *supra* note 12, at 6. For a description of the history and development of the alimony concept in American law, see HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 420-27 (1st ed. 1968) [hereinafter CLARK, FIRST EDITION].

60. Child support was first identified as a legal obligation by the Elizabethan Poor Laws. For descriptions of the Poor Law origins of English and American child support laws, see EEKELAAR & MACLEAN, *supra* note 12, at 1-3, 19-31; Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 199 (1955); tenBroek, *supra* note 56, at 278-86.

61. The liberalization of rules governing access to divorce over the last couple of centuries has been extensively documented. *See, e.g.*, LYNNE C. HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 27-51, 233-83 (1980); PHILLIPS, *supra* note 55, at 403-18; GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 34-49 (1991); LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 149-59, 181-82 (1990).

62. For a detailed description of the Field Code provisions relating to family law and their links with contemporary poverty law, see, e.g., tenBroek, *supra* note 56, at 291-317.

63. Public assistance schemes developed similar eligibility criteria. Benefits were available only to the "worthy" poor, a group that excluded the wife who had abandoned a husband without good cause. Even the mother's pension movement of the early twentieth century extended welfare benefits only to widowed or abandoned mothers of young children. *See* 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 369-97 (Robert H. Bremner ed., 1971) (quoting extensively from contemporary accounts of the mother's pension movement). For analyses of nineteenth century views on the link between poverty and morality, see GERTRUDE HIMMELFARB, THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE (1983); Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962). The classic history of American welfare policy during this era is ROBERT H. BREMNER, FROM THE DEPTHS: THE DISCOVERY OF POVERTY IN THE UNITED STATES 204-68 (1956).

of remedial, fault-based justice. The most obvious example of this trend is the widespread introduction of "no-fault" divorce grounds. A showing of marital fault is, in the vast majority of states, no longer a requirement for obtaining a divorce;[64] divorce is thus a right rather than a remedy. In a growing number of states, the role of fault has also been dramatically curtailed in the determination of alimony[65] and in property division.[66]

As the theme of fault in divorce law has waned,[67] the theme of dependency prevention has, not surprisingly, waxed. The redefinition of alimony, from a remedy for the matrimonial victim to "maintenance" for the ex-spouse incapable of self-support is a prime example of this shift in emphasis.[68] Another lies in the area of child support, where the federal government, pursuant to its authority over public assistance programs for children, has mandated major revisions of the traditional rules.[69]

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64. Some form of no-fault divorce is today available in all states. *See* Fam. L. Rep. Ref. File (BNA) 401-53 (1993). Only three states (Mississippi, New York, and Tennessee) restrict no-fault divorce to cases involving spousal agreement. *See* MISS. CODE ANN. § 93-5-2(1) (1994) (requiring joint petition with separation agreement); N.Y. DOM. REL. LAW § 170(6) (McKinney 1988) (requiring husband and wife to live separate and apart for one year pursuant to a separation agreement before no-fault divorce will be granted); TENN. CODE ANN. § 36-4-101(12) (1991) (requiring separation agreement for couples with minor children).

65. *See supra* note 4.

66. In a number of states, marital fault other than dissolution of marital assets may not be considered in property division. *See, e.g.*, JOHN D. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION § 9.03[1] (1989) (describing state rules). In other states, marital fault may be considered by the decision-maker only when egregious. *Id.*

67. This development has produced a substantial critical literature. *See, e.g.*, ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (1992); MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 137-48 (1993); Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 10 (1990); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 79-80 (1991). For expanations of the declining role of fault in family law, see REGAN, *supra*, at 34-67; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1833-70 (1985).

68. For descriptions and criticisms of this trend, see, e.g., Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993); Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988); Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988); Katherine K. Baker, Comment, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1202-12 (1988).

69. *See* ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 1-6 (1993) (providing history of federal reforms); *see also* Harry D. Krause, *Child Support Reassessed*, *in* CROSSROADS, *supra* note 28, at 169-74 (describing the federal requirements).

The new emphasis on dependency prevention also enhances the appeal of rules, as welfare law has, like divorce law, shifted away from eligibility determinations based on moral judgment toward a neutral, rule-based system of administration.[70] It is thus no accident that the new child support laws restrict judicial discretion, traditionally as extensive for child support as for alimony determination and property distribution,[71] through numerical guidelines.[72]

Both the shift in divorce law away from fault-based outcomes and the enhanced role of dependency prevention as a theme of divorce law thus contribute to the growing appeal of rules: Neither the protection of rights nor the administration of public benefits are today thought to require individualized equitable judgments. But the underlying shift in social values regarding marriage, gender roles, and the family[73] that is reflected in these divorce law trends also, ironically, has enhanced the appeal of discretionary standards. The abolition of gender-based standards in custody and alimony determination, and the elimination of title-based property distribution rules and fault barriers to an alimony award, have all produced more, rather than less, discretionary decision making.

Discretion has prevailed over rules because social consensus about the right rules to apply to these decisions has been slow to develop.[74] The rapid acceptance of no-fault divorce laws simply did

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70. For descriptions and analyses of this trend within public assistance law, see KIRSTEN GRØNBJERG ET AL., POVERTY AND SOCIAL CHANGE 133-62 (1978); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1200 (1983); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 35-37 (1985).

71. New York's prior child support law, for example, directed the judge to "give such direction . . . for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." N.Y. DOM. REL. LAW § 240(1) (McKinney 1986) (amended 1994).

72. For descriptions of the various numerical guidelines in effect, see CLAIRE B. GRIMM & JANICE T. MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, A SUMMARY OF CHILD SUPPORT GUIDELINES (National Center for State Courts 1991); Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 162-68 (1990).

73. For descriptions of these shifts, see e.g., ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 85-112 (1985); JOSEPH VEROFF ET AL., THE INNER AMERICAN: A SELF PORTRAIT FROM 1957 TO 1976 (1981); Arland Thornton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873 (1989).

74. The primacy of discretion may also reflect more general legal trends. Legal theorists have seen a general tendency toward the expansion of judicial discretion during the modern era and have noted that "[m]uch of the trend derives from modern legislation

not produce consensus regarding divorce obligations and entitlements. Differing paradigms of gender and marital roles, coupled with competing visions of individual autonomy and commitment, have instead produced controversy over custody standards,[75] alimony,[76] and property division.[77] This controversy over divorce law standards is part of a much larger national debate on the issues of family, gender, and individual responsibility, a debate that has been as divisive as it has been impassioned.[78] The "war over the family"[79] has not been concluded, and it is thus unclear whether bright-line rules can be drafted that would embody any genuine public consensus.

Legislatures today therefore confront a paradox in divorce law. The declining role of fault, coupled with the increased importance of dependency prevention as a theme of divorce law, argue in favor of a rule-based system of justice. But the competing rules that have emerged embody such vastly different, and emotionally charged,

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which delegates very extensive powers to the judges to decide various questions as they think fit, or as may seem just and equitable, rather than in accordance with pre-defined and fixed rules of law." P.S. ATIYAH, LAW AND MODERN SOCIETY 36 (1983); *see* P.S. ATIYAH, FROM PRINCIPLES TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW (1978) [hereinafter ATIYAH, PRINCIPLES TO PRAGMATISM]; GALLIGAN, *supra* note 9, at 72-84; ROBERTO M. UNGER, LAW IN MODERN SOCIETY 192-200 (1976).

75. *Compare, e.g.*, MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE 79-94, 180-84 (1991) (favoring primary caretaker presumption) *with* Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, at 35-41 (1986) (favoring joint custody) *and* Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615, 630-43 (1992) (favoring custody standard based on replication of past parental roles) *and* Schneider, *supra* note 8, at 2293-98 (favoring retention of best interests standard).

76. *Compare, e.g.*, Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 577-90 (1990) (favoring universal permanent alimony in amount that would equalize spouses' post-divorce living standard) *with* Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 53-74 (1989) (favoring alimony when spouse makes marital investment resulting in post-marriage reduction in earning capacity if decision is financially rational and results in increased marital income or if decision is based on child care needs) *and* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-21 (1989) (favoring alimony based on marital duration).

77. *Compare, e.g.*, FINEMAN, *supra* note 75, at 36-52, 175-80 (favoring need-based equitable property distribution) *with* WEITZMAN, *supra* note 12, at 108 (favoring equal property distribution).

78. *See* BRIGITTE BERGER & PETER L. BERGER, THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND (1983). For academic commentary on family law as a means of promoting marital commitment and responsibility, see, e.g., GLENDON, *supra* note 28, at 107-11; REGAN, *supra* note 67, at 93-117. On the role of family law in promoting gender equality, see, e.g., FINEMAN, *supra* note 75, at 51-52, 173-76; SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 170-86 (1989).

79. *See* BERGER & BERGER, *supra* note 78.

assumptions about the nature of marriage and parenthood that a grant of judicial discretion has appeared to be the better part of legislative valor.

E. Prospects and Problems in Reducing Judicial Discretion

The likely result of this paradox is legislative initiatives that aim to channel, rather than eliminate, judicial discretion. Such channeling can be accomplished in a variety of ways. Legislatures can: require specification of the facts that justify the decision to facilitate review; mandate, rather than merely invite, consideration of issues that are deemed crucial; limit the issues judges may consider in reaching decisions; delineate weights that factors should receive; or establish presumptive outcomes. Nor need the choice be the same for all cases. The legislature might restrict or even eliminate discretion in one category of cases, while preserving it in others. The important question for divorce law today thus is not whether rules should replace discretion, but how discretion and rule should be balanced.[80]

This choice is not always an obvious one. Rule changes designed to achieve one goal can produce unanticipated, or even contrary, results. Consider California's adoption of an equal marital property division rule to replace its prior equitable distribution regime.[81] The change was predicated upon the assumption that, under the old regime, property was typically divided into relatively equal shares; the new rule was thus expected to curb variation without altering overall outcomes.[82] But researchers later determined that women had typically received more than half of the marital property under the old law and that deferred distribution of the marital home in cases involving minor children declined dramatically under the new one.[83] The change in legal standards thus unexpectedly had a detrimental impact on wives and children.

Unintended results can also occur, of course, when bright-line rules are replaced with discretionary standards. New York's

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80. For a similar perspective, see KENNETH C. DAVIS, POLICE DISCRETION 151-58 (1975) ("Most practical problems about rule and discretion do not invite choosing between rule and discretion; they invite choosing between one mix of rule and discretion and another mix of rule and discretion.").

81. For descriptions of California's divorce law reform, see, e.g., HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 43-61 (1988); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 26-55 (1987).

82. *See* WEITZMAN, *supra* note 12, at 75.

83. *Id.* at 74; Seal, *supra* note 12, at 12.

Equitable Distribution Law, which replaced a title-based property distribution rule with an equitable distribution principle, was designed to benefit divorced wives, who were thought to receive considerably less property than husbands under the title-based distribution law.[84] But because wives actually received, on average, slightly more net property than did husbands under the old rules,[85] the new law had little impact on the average property distribution.

These examples suggest that the right mix of rule and discretion cannot be achieved without a detailed understanding of current outcomes and the manner in which they are produced. An understanding of judicial decision making can aid this inquiry in two important ways: Judges' decisions reveal both the range of current results (and thus the need for limitations on discretion) as well as the degree of consensus about appropriate outcomes in particular case categories.

One key issue in determining the right mix of rule and discretion, for example, is the extent to which judges actually employ the extensive discretion they possess. Researchers in a variety of contexts have noted the tendency of decision-makers to rely on a small number of norms or key facts when determining case outcomes.[86] If judges decide most divorce cases on the basis of such routine norms—and there is evidence that comports with this hypothesis[87]—the negative impact on individual equity from the adoption of formal rules embodying these judicial norms should be quite modest. If the results of settled cases are considerably more variable than those of cases decided by judges, the advantages of a rule reducing judicial discretion could also be substantial. If the outcomes of settled cases are fully consistent with judicial decisions, however, the advantages of a formal, bright-line rule would be slight.

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84. For historical accounts of New York's divorce reform, see Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375 (1988-89); Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); Jessica C. Brynteson, Note, *Recent Developments: Equitable Distribution in New York*, 45 ALB. L. REV. 483, 486-90 (1980-81).

85. *See* Garrison, *supra* note 12, at 673-74 tbls. 18 & 19.

86. *See, e.g.*, DAVIS, *supra* note 80, at 150-51; RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 75-78 (1986); Lempert, *supra* note 17, at 185, 216-17. For a list of research reports, see *infra* note 358.

87. *See* Reynolds, *supra* note 41, at 854-55 (reporting, based on evaluation of 138 judicial opinions from six equitable distribution states, that judges rarely deviated from equal property division except in extraordinary cases, which typically involved spousal disability).

Analysis of judicial decision making can also reveal the range of factors relevant to case outcome, the level of agreement among judges on the importance and ordering of those factors, and the extent to which judges' private values influence results. If, for example, judges exhibit a high degree of consensus on the relevant case variables, but that consensus is not reflected in settled cases, a bright-line rule capturing judicial consensus would seem both achievable and useful. If judicial decisions are highly variable, and more strongly correlated with judicial characteristics than with the factors specified by the legislature, the case for reducing judicial discretion in order to promote consistency is also strong—but the inability of judges to reach consensus suggests difficulty in fashioning a rule that will achieve broad public support. If, on the other hand, judges with varied backgrounds, in different locations, consistently reach similar results in similar cases, and those results are faithfully mirrored in settled cases, it is not apparent that judicial discretion should be curtailed at all.

An analysis of judicial decision making can also help us determine the type and level of restraint to impose upon judicial discretion in order to achieve desired results. If judicial decision-making patterns shift significantly after a minor statutory limitation is imposed, it is unlikely that major intrusions will be necessary to achieve legislative goals. The impact of appellate case law can, of course, be similarly measured. Analysis of judicial decision making thus offers one of the best available methods for measuring how much we need limitations on judicial discretion and how likely it is that various limitations will work. Indeed, it is unlikely that legislative change can be effective without such information.

Despite its importance, surprisingly little research on judicial decision making at divorce is currently available.[88] None of the available research provides a unified look at economic entitlements; child support, alimony, or property division are instead considered in a vacuum. None describes the characteristics of the decision-makers or the litigants. None compares the pattern of judicial decisions with that of settled cases or analyzes the impact of appellate courts. None tracks the pattern of decisions over time or through a change in the applicable legal standard.

My research on judicial decision making under New York's Equitable Distribution Law was designed to fill some of these gaps.

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88. *See supra* notes 37-41 and sources cited therein.

The next section describes the background against which the research was conducted: the law, the research sample, the judges, and the couples whose cases were decided.

II. THE DECISION MAKING BACKGROUND: THE LAW, THE RESEARCH SAMPLE, THE JUDGES, AND THE LITIGANTS

A. New York's Equitable Distribution Law

New York's Equitable Distribution Law[89] was enacted in 1980 after almost a decade of public debate and legislative negotiation.[90] At the time of the 1980 reform, New York had one of the most traditional American divorce regimes. Most states had by this point adopted equitable property distribution principles[91] and introduced short-term, rehabilitative alimony;[92] in a growing number the role of fault in alimony determination had also been substantially limited.[93] But, at the time of the reform, property division in New York was based on title.[94] Alimony rules were fault and gender based;[95] they contained no provision for short-term or rehabilitative alimony.

The reform brought New York's alimony and property division rules into the new divorce law mainstream.[96] The new alimony law eliminated marital fault as a barrier to an alimony (renamed "maintenance" under the new statute) award,[97] made the determination of

89. N.Y. DOM. REL. LAW § 236b (McKinney 1986 & Supp. 1994).

90. *See supra* note 12 and sources cited therein.

91. In 1978 New York was one of only six states (Florida, Mississippi, New York, Pennsylvania, Virginia, and West Virginia) that awarded property to the titleholder. Doris J. Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 116-17 tbl. IV (1979).

92. *See supra* note 5.

93. Freed & Foster, *supra* note 91, at 118-26 tbl. V (listing trends that "downgrade marital fault [in alimony determination]").

94. N.Y. DOM. REL. LAW § 234 (McKinney 1977) (amended 1986).

95. Under the former law, only wives were eligible for alimony; a wife who was guilty of misconduct sufficient to justify a divorce was not entitled to alimony. *See id.* § 236A.

96. The new law did not bring New York into the mainstream in terms of the grounds for divorce. Although the majority of states had adopted some form of unilateral no-fault divorce by 1980, New York did not. It remains one of a handful of states that permit divorce only upon a showing of fault or spousal agreement. *See supra* note 64.

97. *Compare* N.Y. DOM. REL. LAW § 236 (McKinney 1977) *with* 1980 N.Y. Laws 281(B)(6) (codified as amended at N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986 & Supp. 1993)).

alimony gender-neutral,[98] and introduced the concept of short-term, rehabilitative alimony;[99] a detailed factor list was also added.[100] The new property division legislation adopted the view of marriage as an economic partnership in which both monetary contributions and services as a spouse, parent, and homemaker contribute to the marital estate;[101] it accordingly granted judges broad discretion to distribute property acquired during the marriage based on a lengthy factor list[102] and without regard to title.[103]

While the Equitable Distribution Law thus adopted a mainstream approach to alimony and property division, New York courts, in interpreting the new statute, have defined divisible property more expansively than have other state courts. In contrast to all other

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98. *Compare* N.Y. DOM. REL. LAW § 236 (McKinney 1977) *with* 1980 N.Y. Laws 281(B)(6) (codified as amended at N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986 & Supp. 1993)).

99. *See* 1980 N.Y. Laws 281(B)(6) (codified as amended at N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986 & Supp. 1993)) (authorizing the court to determine the "duration of maintenance" and listing as factors for consideration "the present and future capacity of the person having need to be self-supporting" and "the period of time and training necessary to enable the person having need to become self-supporting"); *see also* 1980 NEW YORK STATE LEGISLATIVE ANNUAL, MEMORANDUM OF ASSEMBLYMAN GORDON W. BURROWS 130 [hereinafter ASSEMBLY MEMORANDUM] (describing the objective of maintenance under the new statute as "award[ing] the recipient spouse an opportunity to achieve independence").

100. *Compare* N.Y. DOM. REL. LAW § 236 (McKinney 1977) (providing that "the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the length of the marriage, the ability of the wife to be self-supporting, the circumstances of the case and of the respective parties") *with* 1980 N.Y. Laws 281(B)(6) (codified as amended at N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986 & Supp. 1993)) (listing 10 specific factors for the court to consider in awarding spousal maintenance). An additional factor has been added since 1980, bringing the current total to 11. 1986 N.Y. Laws 436-37, codified at N.Y. DOM. REL. LAW § 236(B)(6)(b)(5) (McKinney 1986).

101. *See* ASSEMBLY MEMORANDUM, *supra* note 99 (describing "basic premise" of legislation as view that "modern marriage should be viewed as a partnership of coequals"); 1980 N.Y. Laws 1863, GOVERNOR'S MEMORANDUM (describing premise of legislation as view that marriage is an economic partnership).

102. 1980 N.Y. Laws 281 (codified as amended at N.Y. DOM. REL. LAW § 236(B)(5) (McKinney 1986 & Supp. 1993)). The original legislation contained nine factors plus a catch-all clause; three more factors have since been added. Factor lists of this type are now the norm. Walker, *supra* note 2, at 451-52 tbl. V.

103. Premarital property, gifts (except between spouses), inheritances, and personal injury awards were classified as separate property and thus unavailable for distribution. 1980 N.Y. Laws 281 (codified as amended at N.Y. DOM. REL. LAW § 236B(1) (McKinney 1988)). Most equitable distribution states have adopted similar classification schemes. Walker, *supra* note 2, at 445-46 tbl. IV.

appellate courts that have considered the issue,[104] the New York Court of Appeals held that a professional degree or license acquired during the marriage constitutes divisible marital property;[105] lower courts have accordingly classified as divisible[106] assets that would be indivisible elsewhere.[107]

Although New York's highest court defined marital property expansively, it has offered mixed signals on non-economic contribution to the marital partnership. The court held that the increased value of one spouse's separate property accrued during the marriage is subject to division when due, at least in part, to the indirect contributions of the other as a spouse and homemaker.[108] But it also ruled that homemaking contributions do not necessarily mandate an equal asset share.[109]

The impact of the new law on judicial decision making has been highly controversial. Some women's advocates and divorce lawyers have argued that many judges exhibit gender bias by undervaluing

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104. For a listing of the cases and a description of their reasoning, see OLDHAM, *supra* note 23, § 9.02[1].

105. O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).

106. *See, e.g.*, Elkus v. Elkus, 572 N.Y.S.2d 901, 901 (N.Y. App. Div. 1991) (classifying increased value of opera singer's career as marital property); Morimando v. Morimando, 536 N.Y.S.2d 701, 701 (N.Y. App. Div. 1988) (classifying license and certification as physician's assistant as marital property); McGowan v. McGowan, 535 N.Y.S.2d 990, 990 (N.Y. App. Div. 1988) (classifying Master's degree in teaching as marital property); Morrongiello v. Paulsen, 16 Fam. L. Rep. (BNA) 1459, 1459 (N.Y. Sup. Ct. 1990) (classifying law degree as partly marital property where husband completed two years of law school after marriage), *modified*, 601 N.Y.S.2d 121 (N.Y. App. Div. 1993); McAlpine v. McAlpine, 539 N.Y.S.2d 680, 681 (N.Y. Sup. Ct. 1989), *modified*, 574 N.Y.S.2d 385 (N.Y. App. Div.. 1991) (classifying Fellowship in Society of Actuaries as marital property).

107. *See* Lenore J. Weitzman, *Marital Property in the United States*, *in* INTERNATIONAL PERSPECTIVE, *supra* note 43, at 132 tbl. 5.3 (summarizing state rules). Some states have adopted rules that provide for monetary reimbursement to a spouse who has significantly contributed to the other's acquisition of education during the marriage. *Id.*

108. Price v. Price, 503 N.E.2d 684 (N.Y. 1986). The New York statute, unlike community property rules, does not specify that the title-holding spouse's efforts that enhance the value of separate property during the marriage create divisible marital property. On the contrasting community property rules, see, e.g., J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 WIS. L. REV. 585, 587.

109. Arvantides v. Arvantides, 478 N.E.2d 199, 200 (N.Y. 1985) (upholding reduction of wife's share of husband's dental practice from 50% to 25% based on the "modest nature of plaintiff's contributions to the dental practice," and stating that since "the plaintiff . . . also received an award of maintenance, medical expenses, insurance benefits and the more valuable of the two homes owned by the parties, the distribution cannot be said to be inequitable").

nonmonetary contributions to the marriage.[110] They have also claimed that courts typically award wives *de minimis* shares of professions and business assets, less than half of total marital property, short-term alimony even after a long marriage, and inadequate counsel fees.[111] Other experts describe these claims as unfair and contend that judges have exercised their discretion evenhandedly.[112]

Although the charges on both sides have been largely based on anecdote rather than empirical proof, the New York legislature was sufficiently concerned about the claim that long-married wives were typically awarded short-term alimony that, in 1986, it amended the alimony provisions of the statute.[113] The amendments did not reduce judicial discretion, however. Instead, they added new factors designed to "inform the trial courts that long-term maintenance awards were to be considered."[114] The impact of these

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110. NEW YORK TASK FORCE ON WOMEN IN THE COURTS, REPORT 121 (1986) [hereinafter TASK FORCE REPORT] (finding that "[m]any lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership"); Harriet N. Cohen & Adria S. Hillman, *New York Courts Have Not Recognized Women as Equal Marriage Partners*, 5 EQUIT. DIST. RPTR., Mar. 1985, at 93, 94 [hereinafter Cohen & Hillman, *New York Courts*] (concluding, based on analysis of 70 reported decisions, that judges undervalue homemaker contributions and exhibit gender bias); *see also* Georgia Dullea, *Women's and Bar Groups Fault Divorce Law*, N.Y. TIMES, Aug. 5, 1985, at A1 (describing allegations of gender bias in application of Equitable Distribution Law).

111. *See* TASK FORCE REPORT, *supra* note 110, at 98-120 (describing testimony of witnesses at public hearings and results of attorney survey); Cohen & Hillman, *New York Courts*, *supra* note 110, at 94; Cohen & Hillman, *supra* note 41, at 3, 4; Dullea, *supra* note 110, at A1.

112. *See, e.g.*, TASK FORCE REPORT, *supra* note 110, at 97-98 & n.160 (describing testimony of witnesses at public hearings); *id.* at 109-18 (describing responses of attorney survey respondents); Henry H. Foster, *A Second Opinion: New York's EDL Is Alive and Well and Is Being Fairly Administered*, N.Y. ST. B. ASS'N FAM. L. REV. Apr. 1985, at 3, 4-5 (criticizing Hillman & Cohen as "deceptive when they manipulate New York cases to fit *a priori* conclusions . . . and . . . unfair in their condemnations of the EDL and New York courts").

113. *See* 1986 NEW YORK STATE LEGISLATIVE ANNUAL, MEMORANDUM OF ASSEMBLYWOMAN MAY W. NEWBURGER 356 (describing judicial misinterpretation of maintenance provisions of equitable distribution law as basis for amendments); *see also* 1986 N.Y. Laws 3210, GOVERNOR'S MEMORANDUM (same).

114. Myrna Felder, *Courts, Legislature Struggle to Answer Property Questions*, N.Y. L.J., July 19, 1990, at 1, 4; *see* 1986 N.Y. Laws 436-37 (codified at N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986). The "where practical and relevant" limitation on the marital standard of living factor was deleted, N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney 1986); "the ability of the . . . [applicant] to be self-supporting" was added to the factor requiring the court to consider "the time and training necessary . . . to become self-supporting," *id.* § 236B(6)(b)(4)); and two new factors were added. One of the new factors required the court to consider "reduced or lost lifetime earning capacity of the

amendments, like the Equitable Distribution Law itself, remains controversial.[115]

B. The Research Sample

My analysis of judicial decision making under the Equitable Distribution Law is part of a larger research project aimed at determining the impact of the change in legal standards upon divorce outcomes.[116] For analysis of the statute's overall impact, data were drawn from the court files of approximately 900 divorces filed in 1978, two years before enactment of the Equitable Distribution Law, and from the files of approximately 900 divorces filed in 1984, four years after the law's passage. In order to examine regional variation in case outcomes, cases were selected in equal numbers from three diverse counties: one from New York City, one from the suburban belt surrounding it, and one representative of the mixed urban/rural upstate region.[117] Analysis of the case data revealed that the average property distribution varied little over the research period but that the frequency and duration of alimony awards declined markedly.[118] Case outcomes for both time periods were also highly variable; the passage of the law thus appeared to have little effect in improving the consistency of results.[119]

Judicial decision making under the new statute could not be analyzed through data from this sample because, as a result of the extreme infrequency of divorce trials, it contained almost no judicial decisions. A judicial case sample that represented decisions over a longer period was also desirable in order to detect shifts in decision-making patterns over time and the impact of the 1986 statutory

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party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage," *id.* § 236B(6)(b)(5); the other explicitly noted that the "court may award permanent maintenance," *id.* § 236B(6)(c)).

115. *See, e.g.*, Cynthia Cooper, *State's Lawyers Differ Over Law's Success in First Ten Years*, N.Y. L.J., July 19, 1990, at 1, 7 (reporting contrasting views of prominent divorce lawyers on achievements of Equitable Distribution Law).

116. Most states adopted equitable property distribution principles gradually or altered the grounds for divorce at the same time that standards governing property distribution and/or alimony were changed. The passage of New York's Equitable Distribution Law thus offered an unusual research opportunity to test the impact of change in divorce entitlement rules upon divorce outcomes.

117. For more information on the research counties and relevant population characteristics, *see* Garrison, *supra* note 12, at 643-48.

118. *See id.* at 675, 697-98.

119. *See id.* at 685-96, 706-11.

amendments. A separate sample of judicial opinions was thus compiled.

The judicial sample was assembled from decisions published during the first ten years after the Equitable Distribution Law became effective. All published trial court decisions on alimony and property distribution in New York State were included.[120] Appellate decisions were utilized to expand the sample: If an unpublished trial court decision could be determined either from the appellate decision itself or from the appellate record, the case was included in the sample. This approach yielded a total of 383 decisions dating from the statute's effective date of September 1, 1980, to September 1, 1990.[121]

It is impossible to ascertain to what extent this sample is representative of the larger pool of judicial decisions, including those that are both unreported and unappealed, or even what fraction of the total it represents. New York State's Office of Court Administration maintains no statistics on the number of trial court decisions, the publication rate, or the appeals rate in divorce cases. Nor is it possible to determine whether, or how, the outcomes and decision-making patterns revealed in the sample might deviate from those of the total pool of judicial decisions. Given the filtering effects

120. Sources of published decisions included, in addition to the official and West reporters, the *New York Law Journal* and the *Family Law Review*, a publication of the Family Law Section of the New York State Bar Association.

121. Because the records on appeal for appellate cases decided in 1990 were unavailable at the time data collection terminated in August, 1992, only trial decisions could be obtained for the year 1990. The number of 1990 decisions included in the study was thus smaller than the total for each earlier year.

of both publication[122] and appeal,[123] however, it is likely that some deviation is present.

It is equally likely, however, that the decision-making patterns exhibited in the judicial sample reveal many aspects of the larger decision-making reality. The sample is large and extends over a ten-year period. The cases come from all regions and judicial districts in the state.[124] (See Appendix, Figure A1.) Nearly two hundred judges are represented. Moreover, it is from published opinions that trial judges derive the legal principles that guide their decision making; to stray too far from the norms of published opinion is to invite appeal, reversal, and publication.

Published opinions also invite our attention because they represent the public face of the law. Most observers of the divorce process know no more about divorce decision making than what they read in published opinions or glean from experience in a particular court or locale. Journalists, legislators, law professors, and lawyers in other areas of practice rely heavily upon published opinions. Even the judge or lawyer who handles a high volume of divorce actions is likely to know little more than what is available from published opinions outside his or her geographic area. The body of published opinions is thus the primary determinant of public and professional opinion about divorce.[125]

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122. *See, e.g.*, Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 527-28 (1989) (finding that success rates in constitutional tort litigation varied significantly when published appellate decisions were compared with district court cases litigated to trial); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 782-83 (1992) ("Published cases are neither a representative sample of district court cases nor a selection of all important cases."); Peter Siegelman & John J. Donohue III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1133 (finding that published employment discrimination cases differed from unpublished cases in significant and predictable ways).

123. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1191-93 (1991) (finding that a cross-section of intent-based civil rights actions that had been appealed was not a random sample of cases decided by opinion at the trial level); *Selection of Disputes*, *supra* note 31, at 28-29 (finding that parties do not appeal a random cross-section of completed cases).

124. The case distribution of the sample by judicial district roughly tracks the overall distribution of litigation in New York. *See* STATE OF NEW YORK, THIRTEENTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 22-23 tbl. 5 & 6 (1991).

125. *See* Eisenberg & Schwab, *supra* note 122, at 502-04 (comparing perspectives of nonjudicial observer of courts, trial court judge, and appellate judge).

The judicial sample does offer, however, a larger and more detailed vision of trial court activity than is available to the observer who relies on published opinions for information about trial processes. Most published opinions are authored by appellate courts, and thus may focus narrowly on a particular aspect of the trial judge's order without revealing either the decision as a whole or the background information on which the trial judge relied. For appellate decisions in the sample, this background information was obtained from appellate records. Although appellate records are typically available to the public in New York,[126] not even the most devoted student of divorce practice is likely to examine one more than occasionally.[127]

While the sample is thus not ideal, it represents as complete a picture of divorce decision making as we are likely to obtain. Previous studies of judicial decision making at divorce have relied on samples that were significantly smaller, less geographically and judicially diverse, and more limited in time and background information.[128] None of the earlier studies examined the entire range of economic decisions, the impact of judicial characteristics upon outcomes, or differences in the outcomes produced by judicial decision in contrast to settlement.

C. *Who Decides: The Judges*

As it was rare for any judge to have decided more than one or two of the sample cases,[129] 198 different decision-makers, from all

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126. In New York, unpublished trial court decisions in divorce actions are not available to the public without a court order. *See* N.Y. DOM. REL. LAW § 235(1) (McKinney Supp. 1986). Appellate records in divorce actions are public documents unless a court order is entered declaring the record confidential. This practice is rare. In constructing the sample, only nine cases were rejected because of confidential records. A list of these cases is on file with the author.

127. Examination of these records is inhibited by significant publication delays and poor indexing. The records for appeals filed prior to April 1984 are available in bound volumes, but no uniform index to these records could be located. Records for later cases are available on microfiche. As of September 1992, the microfiching of appeals decided in 1989 remained incomplete. Eleven 1989 cases were thus rejected because the records on appeal were unavailable. As of September 1992, uniform yearly indices were available only through 1986. For later cases, it was thus necessary to consult five or six different "temporary" indices to find a particular case record; even then, some records could not be found. A list of cases excluded because their records on appeal could not be located is on file with the author.

128. MELLI, *supra* note 38; *Process of Negotiation*, *supra* note 32, at 1138-42; Reynolds, *supra* note 41, at 844-52; White & Stone, *supra* note 37, at 75-76; Yee, *supra* note 37, at 21-22.

129. Sixty percent of the judges decided one sample case, 17% two, 12% three, 7% four, 2.5% five, and 3% more than five. The three most frequently represented judges

parts of New York State, are represented. While the size and geographic range of the group might suggest a fair amount of diversity among the judges, in many respects they were a remarkably homogeneous group. Overwhelmingly, they were male, "sixtyish," and the product of a local education. Only 7% of the judges were female. Only 18% were under the age of fifty-five; 48% were clustered between the ages of fifty-five and sixty-four.[130] Eighty-five percent attended either college or law school at a school in or near the community in which they sat as a judge; more than half attended both college and law school locally.[131]

The judges exhibited more diversity in the extent of their judicial experience (see Table 1), and in their political party and religious affiliations.[132]

(thirteen cases, ten cases, and nine cases) all served in special divorce parts in New York City's busiest courts, and thus appear to be overrepresented because of the sheer volume of divorce actions each adjudicated. The affirmance rate for these three judges was not significantly different from that of the entire group.

130. Their mean age was 60.6 years; their median age was 61.0 years (n=185).

131. Fifty-three percent (n=175) attended both college and law school locally. Seventeen percent attended a college with a national reputation; 15% attended a regional college outside the judge's area; and 69% attended a local college (n=164). Twenty-four percent attended a law school with a national reputation; 4% attended a regional law school outside the judge's area; and 72% attended a local law school (n=175).

132. Information on religious affiliation was available for less than half (n=92) of the judges, however.

TABLE 1: JUDICIAL EXPERIENCE OF JUDGES WHO DECIDED SAMPLE CASES, AT END OF RESEARCH PERIOD (SEPTEMBER, 1990)

Years of Judicial Experience	% (n=184)	Cumulative %
0 - 4 years	7%	7%
5 - 9 years	13%	19%
10 - 14 years	36%	56%
15 - 19 years	26%	82%
20 - 29 years	16%	98%
30 + years	3%	100%
Median Years of Experience Mean Years of Experience	14.0 14.6	

In contrast to the judges' age,[133] sex,[134] education,[135] and judicial experience,[136] party[137] and religious affiliation were strongly and significantly correlated with the location of their courtrooms. Fifty-four percent of judges for whom political party affiliation could be determined[138] were Republican and 46% Democratic; given the dominance of the Democratic Party in New York City and of the

133. The judges' average age was 62.8 in New York City (n=49), 61.6 in the suburban counties surrounding New York City (i.e. Nassau, Suffolk, and Westchester) (n=67), and 58.2 in upstate counties (n=69).

134. Female judges (n=14) were not disproportionately concentrated in any single area of the state. Thirty-six percent were located in New York City, 29% in suburban counties, and 36% in upstate counties.

135. Fifty-nine percent of New York City judges (n=46) attended both college and law school locally, as compared to 52% of suburban judges (n=63) and 50% of upstate judges (n=66). The average educational status score of New York City judges (n=43) was 3.8, as compared to 4.2 for suburban judges (n=61) and 3.7 for upstate judges (n=64).

136. The average length of judicial experience was 14.9 years for New York City judges (n=45), 14.2 years for suburban judges (n=69), and 14.4 years for judges in upstate counties (n=70).

137. Chi-square=44.13359 D.F.=2; p<.00001.

138. n=155. Although the vast majority of the judges represented in the sample were elected, the common practice of cross-endorsement, *see* THE FUND FOR MODERN COURTS, JUDICIAL ELECTIONS IN NEW YORK: VOTER PARTICIPATION AND CAMPAIGN FINANCING OF STATE SUPREME COURT ELECTIONS: 1981, 1982 AND 1983 (Oct. 1984) (on file with author), prevented determination of political party affiliation in some cases.

Republican Party in upstate New York, it is not surprising that 88% of New York City judges were Democrat and 75% of upstate judges were Republican.[139]

Religion, too, was highly correlated with geography.[140] Overall, 53% of the judges identified themselves as Catholic, 23% as Protestant, and 24% as Jewish. Protestant judges were disproportionately concentrated in upstate counties, Jewish judges in New York City, and Catholic judges in the suburban counties.[141] As a result, the religious composition of the judiciary from each region was quite different.[142]

Given the lack of published data on the characteristics of the trial court judiciary in New York, the extent to which the sample judges are representative of their peers on the trial bench is not altogether clear.[143] It was possible to obtain information on the age and sex of New York State judges active during 1992;[144] on these bases, the judges in the sample are a fairly representative group.[145]

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139. Sixty-seven percent of the suburban judges (n=57) were Republican.

140. Chi-square=21.37957 D.F.=4; p=.00027.

141. Among judges identified as Protestant (n=20), 65% were located in upstate counties, 20% in the suburban counties, and 15% in New York City. Among judges identified as Catholic (n=48), 50% were located in suburban counties, 40% upstate, and 10% in New York City. Among judges identified as Jewish (n=24), 50% were located in New York City, 29% in suburban counties, and 21% in upstate counties.

142. Among those judges for whom religious affiliation could be determined, in New York City (n=20), 60% were Jewish, 25% Catholic, and 15% Protestant. In the suburban counties (n=35), 69% were Catholic, 20% Jewish, and 11% Protestant. In the upstate counties (n=36), 51% were Catholic, 35% Protestant, and 14% Jewish.

143. Demographic information on judges represented in the sample was obtained from a variety of sources: M.L. HENRY, JR., THE FUND FOR MODERN COURTS, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1977-1992 (1992) (on file with author); MARIE T. HOUGH (ED.), THE AMERICAN BENCH: JUDGES OF THE NATION (1975-92 eds.); 10, 11 MARTINDALE-HUBBELL LAW DIRECTORY (1992); THE FUND FOR MODERN COURTS, *supra* note 137; THE FUND FOR MODERN COURTS, JUDICIAL ELECTIONS IN NEW YORK, VOTER PARTICIPATION AND CAMPAIGN FINANCING OF STATE SUPREME COURT ELECTIONS 1978, 1979, AND 1980 (1982) (on file with author); New York State Unified Court System, Court Operational Services, COSJ Master in Last Name Sequence (1992) (on file with author); Search of NEXIS, Northeast Region libraries (1993).

144. New York State Unified Court System, *supra* note 143.

145. Fourteen percent (n=1420) of New York State judges active in 1992 were women; the judges' average age was 58.67 years (n=1143); *see also* JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES 128-29 (1980) (reporting average age for New York State trial judges in 1977 as 58.3 and noting that American trial judges are "overwhelmingly" white and male); NEW YORK STATE TASK FORCE ON JUDICIAL DIVERSITY, REPORT 1-3 (1992) (on file with author) (reporting that about 12% of state's supreme—i.e., general trial—court justices are women and noting lack of racial and ethnic diversity among the state's judiciary).

Nor is it clear whether judicial characteristics typically play an important role in determining case outcomes. Despite general consensus that judges' decisions may be affected by their past experience and personal values, litigation theorists do not agree on the extent to which such influences can be detected and measured in the outcomes of litigated cases.[146] The prevailing litigation models derived by economists typically posit no correlation between judicial characteristics and case outcomes, on the theory that litigants will take judicial predilections into account during settlement negotiations.[147] Litigation models developed by political scientists, by contrast, assume that "the political values and orientations of the judges do affect the way they resolve judicial issues, especially when precedents are conflicting or when the court is being asked to tread in new and uncharted realms,"[148] and thus posit that judges' life experience and values[149] will have a measurable impact on judicial decision making. Empirical researchers have reported results that support both viewpoints.[150]

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146. The following discussion draws on an excellent summary of the debate in Vicki Schultz & Stephen Patterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167-70 (1992).

147. *See Selection of Disputes*, *supra* note 31, at 35 ("The selection hypothesis . . . presumes that the parties . . . anticipate the predilections of a judge, just as they would anticipate the application of a legal rule or the collective attitudes of a jury. Thus, the rate of success in contested civil bench trials similarly ought to tend toward equality among judges."). The selection hypothesis has been criticized as inadequate in a number of contexts, however. *See, e.g.*, Eisenberg, *supra* note 31, at 211-12; Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988).

148. ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 52 (1983).

149. Judicial values have typically been determined through political party affiliation. *See, e.g.*, Malcolm M. Feeley, *Another Look at the "Party Variable" in Judicial Decision Making: An Analysis of the Michigan Supreme Court*, 4 POLITY 91, 93 (1971) (describing party affiliation as "a crude, but . . . effective, background indicator of judges' values because it indicates a collection of like-minded persons . . . , is an important socializing institution, and is an important reference group for people active in public affairs").

150. *See, e.g.*, CARP & ROWLAND, *supra* note 148, at 32-36, 64-73 (identifying the appointing president as an important predictor of federal judges' decisions, particularly in civil rights and civil liberties cases); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131-32 (1993) (revealing a significant difference between decisions of male and female federal judges in employment discrimination and search and seizure cases but not in obscenity cases); Eisenberg & Johnson, *supra* note 123, at 1190-91 (suggesting that federal judges' age, race, sex, prior prosecutorial experience, and prior judicial experience in state court were significantly correlated with case outcome in race discrimination cases, but that political affiliation was not); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 9 AM. POL. SCI. REV. 491, 501-03 (1975) (finding that judge's age and political party were

One reason for the difference in results may be an underlying difference in the type of cases examined. The economists have tended to focus on routine tort and commercial litigation, while the political scientists have typically addressed more controversial issues such as crime, civil rights, and civil liberties. Neither group has examined divorce. Nor has either group focused on outcomes, like those that characterize much of divorce litigation, where the result is best described as a "how much" rather than a "who won." The research reported here thus offers the opportunity to assess the impact of judicial characteristics on litigation outcomes in a new, and important, context.

D. *The Litigation Pyramid: Characteristics of the Judicial Sample as Compared to the General Divorce Population and the Settlement Case Sample*

While judges who decided sample cases are, in all probability, fairly representative of their peers on the trial court bench, the couples whose cases they heard are definitely not representative of the larger divorce population. Nationally, half of divorcing couples

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important background variables in civil liberties and criminal cases); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 333, 334, 337 (1962) (finding that political party and religion were important predictors of state and federal supreme court judges' decisions in criminal court); *Selection of Disputes*, *supra* note 31, at 35-36 (finding substantially similar success rates in contract and negligence cases decided between 1960 and 1980 before five different federal district court judges); Schultz & Patterson, *supra* note 146, at 1172, 1177 (finding that Democratic judges, appointees, and courts were significantly more likely to rule in favor of sex discrimination plaintiffs than their Republican counterparts, but not more likely to rule in favor of race discrimination plaintiffs); *see also* Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeal, 1955-1986*, 43 W. POL. Q. 317, 322-23 (1990) (supporting the hypothesis that Democratic judges have more liberal voting records than Republican judges); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-78*, 75 AM. POL. SCI. REV. 355, 362-63 (1981) (suggesting that the appointing president and party identifiers are predictors of justices' voting records on civil liberty and economic issues); Timothy B. Tomasi & Jess A. Velona, *All the Presidents' Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) (finding that Reagan judicial appointees' voting patterns did not differ significantly from those of other Republican judges); S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352, 360-62 (1962) (finding Democratic judges more favorably inclined to workmen's compensation and unemployment compensation claims than their Republican counterparts); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 625-27 (1973) (identifying age, federal administrative experience, and religion as primary factors accounting for United States Supreme Court Justices' voting records in criminal cases).

have been married for less than seven years,[151] and four of ten have not had children together.[152] Half of divorcing wives are younger than thirty-three; half of divorcing husbands are younger than thirty-six.[153] Although national statistics on employment levels, income, education, and wealth at divorce do not exist, the available data demonstrate that divorce is more likely when the husband is poorly educated[154] or unemployed;[155] the poverty rate among divorcing couples is thus higher than that of married couples generally.[156]

When compared to this general divorce population, the judicial sample was disproportionately older, longer married, and more likely to have children. The median marital duration for the sample was

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151. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 92 tbl. 132 (1992) [hereinafter STATISTICAL ABSTRACT] (stating that median marital duration at divorce is 7.0 years).

152. Thomas J. Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1100 n.4 (1992).

153. *See* STATISTICAL ABSTRACT, *supra* note 151, at 92 tbl. 132 (reporting median age at divorce in 1988 of 35.1 years for husbands and 32.6 years for wives).

154. *See* DONALD J. HERNANDEZ, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STUDIES IN HOUSEHOLD AND FAMILY FORMATION: WHEN HOUSEHOLDS CONTINUE, DISCONTINUE, AND FORM 10-12 tbl. E (Current Population Reports, Series P-23, No. 179) (1992) [hereinafter HOUSEHOLD CONTINUITY] (reporting that the rate of divorce or separation within two years was 6% when husband had completed four or more years of college, as compared to 13% when husband had completed eight or fewer years of school). Divorced persons are also somewhat less likely to have completed four or more years of college education than are married persons with a spouse present. *See* STATISTICAL ABSTRACT, *supra* note 151, at 144 tbl. 221 (reporting that 23% of married persons with a spouse present have completed four or more years of college, as compared to 17% of divorced persons).

155. *See* HOUSEHOLD CONTINUITY, *supra* note 154, at 12-15 tbls. F & G (reporting divorce/separation rate among married couples of 6.9% over two-year period when husband worked, as compared to 10.9% when only wife worked and 14.2% when neither worked).

156. Recent Census data suggest that divorce is approximately twice as likely among couples with incomes below the poverty line as it is among others. *See* HOUSEHOLD CONTINUITY, *supra* note 154, at 2, 18-21 tbl. I. Census researchers have also reported that, among families with children, 21% of those that experienced the loss of the father from the household during a two-year survey period were already poor, a poverty rate double that of married couple households generally. *See* SUZANNE M. BIANCHI, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FAMILY DISRUPTION AND ECONOMIC HARDSHIP: THE SHORT-RUN PICTURE FOR CHILDREN 2 (Current Population Reports, Series P-70, No. 23) (1991). For complementary research reports, see Rand D. Conger et al., *Linking Economic Hardship to Marital Quality and Instability*, 52 J. MARRIAGE & FAM. 643 (1990); J. Haskey, *Social Class and Socio-Economic Differentials in Divorce in England and Wales*, 1984 POPULATION STUD. 419; Jeffrey K. Liker & Glen H. Elder, Jr., *Economic Hardship and Marital Relations in the 1980s*, 48 AM. SOC. REV. 343 (1983). For surveys of the research data, see WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 152-57 (1993); Patricia Voydanoff, *Economic Distress and Family Relations*, 52 J. MARR. & FAM. 1099, 1105-09 (1990).

more than double that reported by the Census Bureau for divorced couples nationally; the median age of both husbands and wives was about a decade older. In contrast to the below-average educational attainments and incomes of the general divorce population, the median educational level,[157] family income,[158] and net worth[159] of the judicial sample were markedly higher than those of married couples in the United States. (See Table 2.)

157. In 1991, 81.4% of married, non-separated persons in the U.S. had completed high school; 23% had completed four or more years of college. STATISTICAL ABSTRACT, *supra* note 151, at 144 tbl. 221.

158. In 1990, the median income of married couples' households was $39,895. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1991, at 40 tbl. 13 (Current Population Reports, Series P-60, No. 180) (1992).

159. *See* T.J. ELLER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1991, at xv tbl. J (Current Population Reports, Series P-70, No. 34) (1994) [hereinafter HOUSEHOLD WEALTH] (stating that in 1991, median net worth of U.S. married couples was $60,065).

TABLE 2: SELECTED CHARACTERISTICS OF JUDICIAL AND SETTLEMENT SAMPLES, AND U.S. DIVORCE POPULATION[160]

Case Characteristic*	Judicial Sample (n=383)	Settlement Sample (n=315)	U.S. Divorce Pop.
Age (median years): husband	45.0	40.8	35.1
wife	43.0	38.1	32.6
Income (median $1000s):			
family	63.3	49.5	n.a.
husband	47.6	35.5	
wife	10.7	12.8	
Marital duration (median years)	17.3	12.7	7.1
Net worth (median $1000s)	181.3	29.6	n.a.
Children of the marriage:			
% with children	81.3	72.7	60.0
% with minor children	61.4	70.0	n.a.
mean # minor children	1.2	1.3	0.9
Education (% 4 or more years of college): husbands	74.6	36.7	n.a.
wives	50.0	30.1	
Employment (% working):			
husbands	87.3	92.9	n.a.
wives	58.9	72.5	
Occupational status (% in high status job)[161]: husbands	30.3	18.1	n.a.
wives	3.9	3.3	

* All monetary values are in 1990 dollars.[162]

160. All statistics for the U.S. divorce population are from STATISTICAL ABSTRACT, *supra* note 151, at 92 tbl. 132.

161. The following occupations were classified as high status: architects, business executives, dentists, engineers, government officials and managers, lawyers, commissioned military officers, physicians, professors, and scientists.

162. The multiplier was obtained by dividing the consumer price index for the year in which the trial court decided the case by the consumer price index for 1990. *See* STATISTICAL ABSTRACT, *supra* note 151, at 468 tbl. 737. Dollar values throughout this

These differences were marked, and statistically significant, even when the judicial group was compared to the subset of my New York divorce sample in which the divorce was initially contested[163] (hereinafter the "settlement sample") and thus had the potential to go to trial. Couples in the settlement sample were also older, longer married, and higher income than the general divorce population. They were also far more likely to have employed attorneys than are divorcing spouses generally; while the majority of divorcing couples today employ only one attorney or none at all,[164] 97% of the couples in the settlement group employed attorneys for both spouses.[165] The settlement sample thus appears to be fairly representative of that segment of the divorce population for which litigation is plausible.[166] It represents the world of divorce as seen by the divorce lawyer rather than the judge.

When compared to the settlement group, couples in the judicial sample were still older, longer married, and higher income. But the most striking difference was in asset values. Approximately one quarter of the judicial sample had net assets exceeding half a million dollars; the median value of their net assets was more than six times

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Article represent 1990 dollars.

163. A case was considered contested if it was initiated on fault grounds, *see* N.Y. DOM. REL. LAW §§ 170(1)-(4) (McKinney 1988), and the defendant spouse answered the complaint. *See* Garrison, *supra* note 12, at 642-43. The settlement case sample corresponds to the sample segment described as the "contested case sample" in my earlier report on the impact of New York's Equitable Distribution Law. *Id.*

164. For descriptions of the data, see Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 B.Y.U. J. PUB. L. 123 (1994); Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 280, 281-82 (1993). The research reports include BAKER, *supra* note 12, at 2-3 (both spouses represented in 21% of Alaska divorce sample); Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS L.J. 553, 594 (1993) (both spouses represented in 10% of Arizona divorce sample, neither spouse represented in 52%).

165. By contrast, 11% of couples in the full, weighted divorce sample had two-party representation in one research county; 47% had such representation in another. In the third research county, the proportion could not be determined due to missing data. *See* Garrison, *supra* note 12, at 646.

166. For most divorcing couples, the available evidence suggests that litigation is quite implausible. Researchers report that most agree on the terms of the divorce and thus have nothing to litigate. *See, e.g.*, MACCOBY & MNOOKIN, *supra* note 14, at 159 (reporting that three-quarters of divorcing couples studied "experienced little if any conflict over the terms of the divorce decree"); Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 138 (1976) (reporting that more than 60% of sampled divorcing couples had resolved all property, support, custody, and visitation issues themselves); Jacob, *supra* note 32, at 579-81, 584-86 (reporting that many divorcing couples worked out an agreement before approaching lawyer).

that of the settlement sample. (See Appendix, Table A1.) Although higher asset values for judicial sample are expectable given the group's higher family incomes[167] and lengthier marriages,[168] the magnitude of the difference is still notable.

Most of the group's assets were acquired during the marriage and therefore subject to division. Couples in the judicial sample were less likely to claim debts[169] and no more likely to claim separate property than were their counterparts in the settlement sample.[170] Nor did separate property comprise, on average, a larger fraction of their total assets.[171] The median value of net marital assets in the judicial group was thus more than seven times greater than that of couples in the settlement sample. (See Table 3.)

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167. Family wealth is generally correlated with family income. *See* HOUSEHOLD WEALTH, *supra* note 159, at 2 tbl. 1. On the relationship between family income and wealth among divorcing couples, see, e.g., BAKER, *supra* note 12, at 7; WEITZMAN, *supra* note 12, at 59-60. Asset values were positively and significantly correlated with family income for both case groups. For the judicial sample, $p<.001$. For the settlement sample, $p<.001$.

168. Marital duration was significantly and positively correlated with asset values for both case samples. For the judicial sample, $p=.018$. For the settlement sample, $p=.011$. Other divorce researchers have also noted a significant relationship between marital duration and family wealth. *See, e.g.*, WEITZMAN, *supra* note 12, at 58; Rowe & Morrow, *supra* note 12, at 470. Married couples with an older householder are also likely to have higher asset values than those with a younger householder. HOUSEHOLD WEALTH, *supra* note 159, at xv tbl. J.

169. Debts were claimed by 49% (n=383) of couples in the judicial sample, as compared to 82% (n=315) of those in the settlement group.

170. Thirty-three percent of couples in the judicial sample claimed separate property; 37% of the settlement group did so.

171. The value of separate property comprised an average of 11% of the value of total assets in the judicial group and 10% in the contested sample. In both groups, the value of separate property tended to comprise a larger proportion of the asset values of couples in short marriages. *See* Appendix, Table A2.

TABLE 3:
VALUE OF MARITAL ASSETS (1990 DOLLARS), BY CASE GROUP*

Property Value	Judicial Sample				Settlement Sample			
	Gross Asset Value		Net Asset Value		Gross Asset Value		Net Asset Value	
	%	cum.%	%	cum.%	%	cum.%	%	cum.%
(Negative Value)			(4)	(4)			(22)	(22)
$0-$9,999	14	14	12	16	29	29	17	39
$10,000-$29,999	6	20	6	21	19	47	17	55
$30,000-$49,999	7	27	7	29	11	59	7	63
$50,000-$99,999	10	37	10	38	14	72	13	76
$100,000-$199,999	19	56	19	57	11	84	10	85
$200,000-$299,999	12	67	11	68	3	87	3	89
$300,000-$499,999	9	77	9	77	4	91	4	93
$500,000-$999,999	13	90	13	90	5	97	4	97
$1 mil. or more	10	100	10	100	3	100	3	100
Median Value	$166,255		$159,632		$ 33,120		$ 22,916	
Mean Value	$572,840		$523,910		$281,312		$251,669	

* Percentages may not add to 100 due to rounding.

Couples in the judicial sample were also far more likely to own their own home and to possess business assets, real estate, and a pension than were couples in the settlement group (see Appendix, Table A3) or married couples generally.[172] Indeed, they were wealthy enough that they often failed even to list personal possessions or household goods among their assets. The composition of each case group's average asset pool was thus quite different.

Most of the judicial sample's wealth was owned jointly or by the husband. Property owned by the wife represented, on average, only 9% of family assets, while joint property represented 52% and husband-owned property 39%.[173]

The wealth gap between husbands and wives in the judicial sample was matched by a large disproportion in their average incomes and occupational status.[174] In half of the cases, the husband's income represented at least 85% of family income; 30% of husbands were in high-status jobs, as compared to only 4% of wives.[175] On each measure, the average difference between husbands and wives was much larger in the judicial sample than in the settlement group.[176] (See Table 2.)

Whether and how the disproportionate wealth and status of judicial sample husbands might have affected the litigation process is unclear. Judicial sample cases took, on average, much longer to conclude than did those in the settlement sample,[177] but case duration may have been enhanced by spiteful litigation tactics as well as case complexity; in 22% of the judicial sample cases, for example, some portion of the interim support payments ordered by the court

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172. *See* HOUSEHOLD WEALTH, *supra* note 159, at 8-9 tbl. 1.

173. This gap was much smaller in the settlement sample, where the value of husband-owned property represented, on average, 11% of total assets, and wife-owned property represented 7%. In the judicial sample, the median value of joint property was $72,019, of husband-owned property $35,923, and of wife-owned property $0. In the settlement sample, the median value of husband-owned property was $3136, and of wife-owned property it was $2133.

174. The value of husband- and wife-owned property was also significantly correlated with individual income. For the relationship between the value of the husband's property and his income, $p<.001$. For the relationship between the value of the wife's property and her income, $p<.001$.

175. *See supra* Table 2.

176. *See supra* note 173. For further detail, see Garrison, *supra* note 12, at 656-57 tbl. 7.

177. The mean case duration in the judicial sample was 2.23 years (n=294), as compared to 1.36 years in the settlement sample (n=310).

were unpaid when the case went to trial.[178] Moreover, although researchers have reported that social status influences the manner in which judges exercise discretion,[179] researchers have not investigated intrafamilial litigation. We do not know whether judges view family members as having one uniform social status or, alternatively, view them as separate individuals. Nor do we know if the results that researchers have reported are equally applicable in the divorce context.

It is clear, however, that in comparison to the general divorce population—and even the settlement group where litigation was threatened—the judicial sample was disproportionately composed of cases involving very high stakes. In many cases, the income and occupational status gap between husband and wife was sufficiently great that divorce had the potential to cause a long-married, economically dependent wife's standard of living to plummet from the extremely comfortable to the nearly impoverished.

The overrepresentation of such cases is not surprising. Litigation to trial appears to be most likely when the stakes are high.[180] But it serves as a reminder of the fact that the picture of divorce that judges see in the courtroom, and that is thus reflected in published opinions, is by no means representative of divorce generally; indeed, it is not even an accurate reflection of what the divorce lawyer sees in her office, a case set that likely resembles the settlement sample.

The judicial sample shows us only the tip of the litigation pyramid. Although these cases can thus tell us little about divorce as experienced by the typical American couple, we have every reason to believe that they accurately represent what judges see in their courtrooms. They can thus tell us a good deal about the reality of judicial decision making at divorce.

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178. Typically these arrears were not trivial. The median value of unpaid child support and alimony arrears was $8,110; the mean was $13,227 (n=68).

179. For descriptions of the research, see DONALD BLACK, THE BEHAVIOR OF LAW 13-31 (1976) [hereinafter BLACK, BEHAVIOR]; DONALD BLACK, SOCIOLOGICAL JUSTICE 9-13 (1989); M.P. Baumgartner, *The Myth of Discretion*, *in* THE USES OF DISCRETION, *supra* note 9, at 129, 142-48.

180. *See, e.g.*, RICHARD J. POSNER, ECONOMIC ANALYSIS OF LAW § 21.4, at 522 (3d ed. 1986); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); *Selections of Disputes*, *supra* note 31, at 25-29; *see also* Patricia M. Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 362-67 (1983) (discussing the factors involved in the decision to settle); W. Kip Viscusi, *The Determinants of the Disposition of Products Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 331-32 (1986) (discussing factors involved in decision to drop a claim).

III. JUDICIAL DECISION MAKING UNDER NEW YORK'S EQUITABLE DISTRIBUTION LAW: PROPERTY DIVISION, ALIMONY, AND CHILD SUPPORT

A. Property Division

1. The Results of Judicial Decision Making vs. Settlement: The Judicial and Settlement Samples Compared

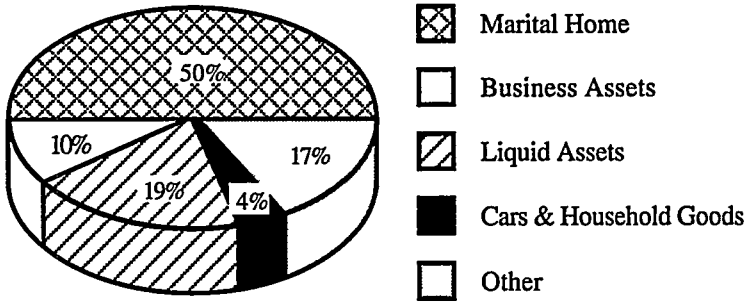
a. Average Outcomes

Given the significant disparities between the judicial and settlement samples in the ownership, composition, and value of marital property, it would not be surprising if the ultimate distributions of marital property were different as well. But the mean division of marital property and debt in the two case sets was in fact extremely similar: At the trial level, judges awarded wives an average of 49% of marital property, 24% of marital debt, and 49% of net marital property; in the settlement sample, wives received an average of 51% of marital property, 31% of marital debt, and 55% of net marital property. On average, then, the results of litigation do not appear significantly different from those of settlement.[181] (See Tables 6, 7, and 8).

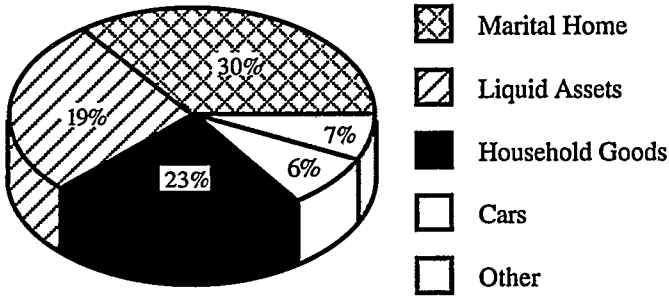
The composition of the typical award to wives in each group was also quite similar. In both case groups, the wife's average property award was heavily concentrated in home equity, and the value of nonliquid property substantially outweighed liquid assets. (See Figure 1.)

181. The average division of marital property and net marital property did not differ significantly. The average division of marital debt narrowly escaped significance (T=-1.94; p=.054).

FIGURE 1: COMPOSITION OF AVERAGE PROPERTY AWARD TO SAMPLE WIVES, BY ASSET TYPE AND CASE GROUP



Judicial Case Group



Settlement Case Group

Although home equity constituted a larger percentage of the average award to wives in the judicial sample than it did in the settlement group, the difference appears to reflect the lower home ownership rate of the latter case set more than an alternate distributional pattern. Although wives in the judicial sample were significantly more likely to obtain occupancy of the home than were their counterparts in the settlement group (see Table 4),[182] they were not more likely to obtain ownership. Sale of the home (immediate or future), typically with a relatively equal division of the net proceeds,[183] was also more common in the judicial sample. The average percentage of marital home equity received by wives in the two case groups was thus virtually identical.

182. The disposition of the marital home was strongly correlated with custodial status (chi-square=40.49478 D.F.=6; p<.0001). When the wife was the sole custodian of the couple's minor children, she received occupancy or ownership of the home in 68% of the cases; husbands, too, were more likely to obtain occupancy of the home when serving as the custodial parent, although the relationship was not as strong. But disposition of the home was also strongly correlated with custody in the settlement group and, among wives in that group with sole custody, a similar percentage (62%; n=95) obtained occupancy of the marital home. Nor did sale of the home differ significantly by case group. *See* Garrison, *supra* note 12, at 683 n.196; Appendix, Table A4.

The award of occupancy was also strongly correlated with marital duration (chi-square=37.22217 D.F.=6; p<.0001). Judicial sample wives married for less than 10 years obtained occupancy 45% of the time, as compared to 69% for wives married between 15 and 20 years. A judicial decision was, again, not associated with a significantly higher likelihood of an occupancy award. *See* Garrison, *supra* note 12, at 682.

183. Home equity was divided relatively equally (45%-55%) in 60% (n=296) of the judicial sample cases (cases in which the home was determined to be separate property excluded). The wife obtained no share of home equity in 5% of the cases; between 15% and 45% in 6% of the cases; between 56% and 99% in 9% of the cases; and 100% in 31% of the cases. The tendency toward equal division was slightly greater (63%) after appeals were taken into account.

TABLE 4: DISPOSITION OF MARITAL HOME (WHEN OWNED), BY CASE GROUP

Distribution of Marital Home	Judicial Sample % (n=303)	Settlement Sample % (n=188)	Difference
Title to Wife with Payment to Husband	5%	5%	0
Title to Wife without Payment to Husband	29%	36%	+7
Occupancy to Wife	22%	6%	-16***
Total Occupancy to Wife	56%	47%	-9
Title to Husband with Payment to Wife	5%	11%	+ 6*
Title to Husband without Payment to Wife	5%	18%	+13***
Occupancy to Husband	2%	3%	+ 1
Total Occupancy to Husband	12%	32%	+20***
Home Sold:			
Immediate	33%	21%	-12**
Future (after termin. of occupancy order)	24%	9%	-15***
TOTAL SALES	57%	30%	-27***
Home Equity Division:			
Mean wife's %	64%	62%	-2
Median wife's %	50%	63%	+13

* p<.05, ** p<.01, *** p<.001

The greater importance of business assets and pensions as components of the wife's share also appears to reflect ownership rates more than distributional differences. When the distribution of individual assets is considered by type, judicial sample wives' average

share of business assets and pensions was not markedly higher than that of wives in the settlement sample; nor, indeed, did the average distribution of any asset type differ significantly by case group.[184] (See Table 5.)

TABLE 5: DISTRIBUTION OF INDIVIDUAL MARITAL ASSETS, BY ASSET TYPE AND CASE GROUP

Asset Type	Judicial Sample		Settlement Sample	
	Wife's Mean %	(n)	Wife's Mean %	(n)
Automobiles	48%	(297)	42%	(378)
Business Interests	23%	(147)	19%	(64)
Household Goods	76%	(138)	58%	(163)
Liquid Assets:				
Bank Accounts	49%	(288)	48%	(601)
Other	40%	(161)	40%	(125)
Professional Licenses	18%	(38)	**[185]	
Real Estate:				
Marital Home	64%	(296)	63%	(188)
Other Real Estate	29%	(174)	27%	(95)
Retirement Assets:				
Pensions	31%	(216)	29%	(64)
Other[186]	40%	(135)	40%	(91)
Other Assets	40%	(244)	45%	(339)
All Assets	45%	(2130)	44%	(2069)
All Debts	28%	(249)	34%	(1028)

184. Whether the wife was awarded a particular asset was highly correlated with the ownership of that asset ($p<.0001$).

185. In the settlement groups, professional degrees and licenses were coded as business assets due to the extreme infrequency with which they were listed as assets.

186. This category includes annuities, Keogh accounts, IRAs, and employee profit-sharing plans.

Although judicial decision thus was not associated with any tangible advantage to wives in terms of the percentage or types of marital assets awarded, judicial sample wives nonetheless emerged from the divorce better off than their counterparts in the settlement group. The reason is simply that, because couples in the judicial sample generally had much more valuable assets, the wife's percentage share was worth more. Indeed, the median value of the wife's net property award was approximately ten times higher in the judicial sample than in the settlement group.[187]

b. The Tendency Toward Equal Division

Although average outcomes in the judicial and settlement case groups were not markedly different, the averages derive from significantly different distributional patterns.[188] Settlement outcomes were highly disparate and widely distributed along a zero to one hundred percent scale.[189] Judicial outcomes, by contrast, exhibited a strong tendency toward equality. Although marital debts were disproportionately distributed to husbands in both case groups (Table 6), judges divided marital assets (Table 7) and net marital wealth (Table 8) relatively equally in almost half of the cases for which a distribution could be determined.[190]

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187. The median value of the wife's net property award was $93,990 in the judicial sample and $9,375 in the settlement group. The average value of the wife's net property award was, in the judicial sample, $282,954, and, in the settlement sample, $105,672.

188. The distributional pattern for marital debt did not vary significantly by case group. The differences in the distributional pattern for marital assets (chi-square=72.53542 D.F.=4; p<.0001) and net marital assets (chi-square=73.29290 D.F.=4; p<.0001) were highly significant.

189. *See* Garrison, *supra* note 12, at 685-87.

190. Although an exact percentage distribution of marital debts, property, or net marital property could not be calculated in some cases because of missing or suspect valuations, these problems were much less common in the judicial sample than in the settlement group. Even when an exact percentage could not be calculated, judges typically provided enough information to permit approximation of the distribution within a few percentage points. Tables 6 through 8 are based on these approximations where relevant. Marital property and net marital property results excluding cases where approximations were made were also calculated; they did not differ significantly. *See infra* Appendix, Tables A5 & A6. For a discussion of methodological issues in the calculation of distributional percentages, see Garrison, *supra* note 12, at 668-70.

TABLE 6: PERCENTAGE DISTRIBUTION OF NET UNSECURED MARITAL DEBTS (COUPLES WITH MARITAL DEBTS), BY CASE GROUP

Debt Distribution	Judicial Sample % (n=80)	Settlement Sample % (n=158)
67% + to Husband	68%	60%
56%-66% to Husband	5%	4%
Relatively Equal*	14%	8%
56%-66% to Wife	0%	3%
67% + to Wife	14%	25%
Median % to Wife	1%	10%
Mean % to Wife	24%	34%

* Relatively Equal = Between 45% and 55%

TABLE 7: PERCENTAGE DISTRIBUTION OF MARITAL ASSETS (COUPLES WITH MARITAL ASSETS), BY CASE GROUP

Asset Distribution	Judicial Sample % (n=277)	Settlement Sample % (n=142)
67% + to Husband	16%	34%
56%-66% to Husband	18%	7%
Relatively Equal*	46%	12%
56%-66% to Wife	9%	8%
67% + to Wife	13%	39%
Median % to Wife	50%	51%
Mean % to Wife	49%	51%

* Relatively Equal = Between 45% and 55%

TABLE 8: PERCENTAGE DISTRIBUTION OF MARITAL NET WORTH (COUPLES WITH POSITIVE NET WORTH), BY CASE GROUP

Net Marital Property Distribution	Judicial Sample % (n=323)	Settlement Sample % (n=104)
67% or more to Husband	16%	33%
56%-66% to Husband	16%	5%
Relatively Equal*	48%	12%
56%-66% to Wife	7%	10%
67% or more to Wife	13%	41%
Median % to Wife	50%	54%
Mean % to Wife[191]	50%	55%

* Relatively Equal = Between 45% and 55%

While this is not as large a percentage of equal distributions as that reported by another researcher who reviewed a substantial number of reported judicial decisions on property division at divorce,[192] it is approximately four times the proportion of the settlement sample with a relatively equal net asset distribution. (See Table 8.) Indeed, the distributional patterns of the judicial and settlement groups are almost mirror images, with judicial outcomes clustered at the center and settlements toward the extremes.

The judicial tendency toward equal division[193] also increased significantly after the first few years of experience with equitable property distribution.[194] Thirty-three percent of the cases decided between 1980-83 resulted in a relatively even division of net worth, as compared to 54% of those decided between 1984-86. The tendency toward equal division appears to have levelled off at this point,

191. A trimmed mean (most extreme five percent of the cases eliminated) is reported for the settlement sample. *See* Garrison, *supra* note 12, at 673 n.174.

192. Reynolds, *supra* note 41, at 854-55 (reporting that courts seldom deviated from an equal division except in extraordinary circumstances).

193. The judicial preference for equal division was also apparent in the distribution of specific assets and debts. Judges tended to divide equally, or not at all. Judges awarded 67% of listed marital assets and debts (n=2380) outright to one or another spouse and divided 26% equally (i.e., exactly 50-50). Only 8% were divided disproportionately.

194. Chi-square=10.75732 D.F.=2; p=.00461.

however, as the percentage of cases resulting in equal division did not increase during the period from 1987 to 1990.[195]

The judicial sample differed from the settlement group in the direction as well as the likelihood of a disproportionate outcome. In the judicial sample, 61% of disproportionate outcomes favored the husband and 39% the wife. In the settlement sample, these percentages were exactly reversed.[196]

The tendency toward disproportion favoring the husband in the judicial sample should be read in context, however. Because judges were far more likely to divide net assets equally, judicial sample wives were somewhat more likely to be awarded an equal or larger share of net marital assets than were their counterparts in the settlement group;[197] indeed, fewer than a third (32%) of husbands in the judicial group were awarded a disproportionate share of net marital assets.[198] The evidence thus fails to support the claim that judges typically award wives less than half of the marital assets.[199] It instead suggests the emergence of an equal division norm.

2. The Predictability of Equitable Property Distribution

a. Statutory Factors and Case Outcomes

Disproportionate outcomes were not only less common within the judicial sample but also more predictable. Among couples in the settlement group, property outcomes were not significantly correlated with any of the litigant characteristics specified in the statute as relevant to property distribution and for which case information was available. Neither age, marital duration, employment, health, income, occupational status, the award of custody, or the award of alimony was significantly correlated with the percentage division of net marital assets.

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195. Relatively equal division occurred in 47% of the 1987-90 cases (n=98).

196. Cases with negative net worth are included. When cases with negative net worth (where disproportion was particularly likely to benefit the wife and which were more numerous in the settlement sample) were excluded, disproportionate outcomes favored the wife in 54% of settlement sample cases, and 38% of judicial sample cases.

197. The wife received a relatively equal or larger share of net marital assets in 68% of judicial sample cases and 63% in settlement group cases. *See supra* Table 8.

198. If cases involving professional degrees and licenses—assets that are not characterized as divisible marital property except in New York, *see supra* notes 104-07 and sources cited therein—are excluded, 70% of judicial sample wives were awarded a relatively equal or larger share of marital net worth.

199. *See supra* note 111 and sources cited therein.

Judicial outcomes, by contrast, were significantly correlated with several of the statutory factors. Although marital duration, age, the award of alimony, and the award of custody again evidenced no significance as predictive variables,[200] a cluster of variables related to the wife's relative need—her health, employment, income, occupational status, and the percentage of family income that she earned—were all significantly correlated with the percentage division of net marital assets at the .05 confidence level or better.[201]

While a correlation between these variables and the property division outcome is not surprising given the legislative requirement that such factors be considered in marital property distribution,[202] it is intriguing that wives' income, employment, health, and occupational status were significantly related to case outcomes while husbands' were not. Even more surprising is the direction of the correlations. Indications that the wife was particularly needy—poor health, unemployment, low income, low occupational status, and income representing a small fraction of family income—were all *negatively* correlated with the wife's percentage award.[203] Wives in poor health, for example, were significantly less likely to receive an equal or larger share of marital assets than were wives in good health.[204] Similarly, women earning half or more of family income were four times as likely to be awarded a disproportionate share of the net marital property as were their counterparts earning less than ten percent of family income.[205] (See Table 9.) These data strongly support the claim by women's advocates that judges tend to give more

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200. For correlation coefficients and p values, see *infra* Appendix, Table A7.

201. Among cases involving minor children, the percentage of the obligor's income awarded in child support, and the value of combined alimony and child support, were also significantly related to the division of net marital assets. *See infra* Appendix, Table A7.

202. *See supra* note 19 (listing statutory factors).

203. All of these variables except occupational status were significantly correlated with the wife's percentage of net marital assets at the .05 confidence level or better: the wife's health, p=.007; her unemployment, p=.028; her income, p=.022; her percentage of family income, p=.005. The correlation between the wife's occupational status and her percentage award of net marital assets barely escaped significance at the .05 level (p=.051).

204. p=.007. In almost two-thirds of the cases in which the wife was identified as having poor health the husband was granted a disproportionate share of the net marital assets; only 5% of wives in poor health received a disproportionate share themselves. This finding contrasts with that of Professor Reynolds, who reported, based on a review of 138 published property division decisions from six states, that disproportion in favor of one spouse was typically associated with that spouse's poor health. *See* Reynolds, *supra* note 41, at 854-55.

205. p=.005. For a similar finding, see Seltzer & Garfinkel, *supra* note 44, at 99-100 tbl. 4.5 (finding, based on analysis of Wisconsin sample composed of couples with children, that divorced mother's income was significant positive predictor of her property award).

weight to monetary contributions than to contributions as a spouse and parent.[206]

TABLE 9: PERCENTAGE DISTRIBUTION OF NET MARITAL ASSETS (JUDICIAL SAMPLE: COUPLES WITH POSITIVE NET WORTH), BY PERCENTAGE OF FAMILY INCOME EARNED BY WIFE

Percentage Distribution of Net Marital Assets	Wife's Income/ Family Income			
	0%-9% (n=93)	10%-29% (n=73)	30%-49% (n=49)	50% + (n=25)
Disproportionate Share to Husband	41%	31%	25%	28%
Relatively Equal*	48%	53%	49%	28%
Disproportionate Share to Wife	11%	16%	26%	44%

* Relatively Equal = Between 45% and 55%

A cluster of property-related variables was also significantly linked to the net distribution, and some of these relationships again suggest a tendency to elevate monetary over other contributions. If, for example, the husband owned a business or possessed a professional license—and husbands almost invariably held these assets when they were present in the pool of marital property[207]—he was significantly more likely to obtain a disproportionate share of the marital wealth.[208] (See Table 10.) Wives were awarded a relatively equal or larger share of net assets in three-quarters of the cases in which the husband did not own such an asset, as compared to roughly half of the cases in which he did.[209]

206. *See supra* note 110 and sources cited therein.

207. Excluding assets classified as separate property, husbands owned 86% of businesses (n=147) and 86% of professional degrees and licenses (n=36).

208. Chi-square=19.21572 D.F.=4; p=.0007.

209. Wives were generally awarded very low percentages of business and professional assets. The average share of a husband-owned business (n=127) awarded the wife was 16%; the median share was 0%. The average share of a husband-owned professional degree or license (n=13) awarded the wife was 17%; the median was 13%.

TABLE 10: PERCENTAGE DISTRIBUTION OF NET MARITAL ASSETS (JUDICIAL SAMPLE: COUPLES WITH POSITIVE NET WORTH), BY HUSBAND'S OWNERSHIP OF BUSINESS OR PROFESSIONAL LICENSE

Percentage Distribution of Marital Net Worth	Husband Did Not Own Business, Professional Degree or License (n=231)	Husband Owned Business, Professional Degree or License (n=91)
Disproportionate Share to Husband	25%	48%
Relatively Equal*	52%	40%
Disproportionate Share to Wife	23%	12%

* Between 45% and 55%

Although husbands owning either a business or a professional degree were disproportionately likely to obtain the lion's share of the marital wealth, husbands with professional degrees did particularly well: Fully 54% of this group obtained a disproportionate share of net marital assets.[210] This result is perhaps foreseeable given the novelty of the property interest at stake, the lack of consensus on whether it should be treated as a divisible asset at all, and appellate case law finding disproportionate division of professional assets equitable.[211]

But the correlation between title and the percentage division of net assets is more surprising. Although an express aim of New York's Equitable Distribution Law was to ensure that title did not determine the distribution of assets acquired during the marriage, the percentage of marital assets solely owned by the husband (but not the wife) was a significant predictor of the divisional outcome.[212] Husbands who owned at least 60% of marital assets were more than twice as likely to receive a disproportionate share as were their counterparts owning less than 20%. (See Table 11.) Title, unlike the litigant characteristics enumerated in the statute or the other property-related factors

210. n=26. Forty-four percent of husbands owning businesses (n=77) obtained a disproportionate share of net marital assets.

211. *See supra* notes 104-09 and accompanying text.

212. p<.001.

considered, was also significantly correlated with the net property division in the settlement group.[213]

TABLE 11: PERCENTAGE DISTRIBUTION OF NET MARITAL ASSETS (JUDICIAL SAMPLE: COUPLES WITH POSITIVE NET WORTH), BY PROPORTION OF MARITAL ASSETS OWNED BY HUSBAND

Percentage Distribution of Net Marital Assets	Husband's Property/ All Marital Property		
	0%-19% (n=132)	20%-59% (n=89)	60%-100% (n=88)
Disproportionate Share to Husband	20%	34%	48%
Relatively Equal*	53%	48%	39%
Disproportionate Share to Wife	27%	18%	12%

* Relatively Equal = Between 45% and 55%

The other property variables significantly related to the divisional outcome do not suggest a uniform judicial preference for monetary contribution as compared to need, however. The value of the husband's (but not the wife's) separate property was positively, and significantly, correlated with the wife's percentage award;[214] comparatively needy wives whose husbands had substantial separate property tended to receive a disproportionate share of marital property. The distributional outcome was also significantly correlated with the value of marital property; the smaller the value of net assets, the greater the likelihood that the wife would receive a disproportionate share.[215] Thus in the handful of cases where debts exceeded assets, 80% of husbands were required to assume disproportionate

213. p<.001. Among cases in the settlement sample, where wives tended to own a larger percentage of marital property, *see supra* text accompanying note 173, the percentage of marital assets owned solely by the wife was also significantly correlated with the net property division (p<.001).

214. p=.032. The ratio of the husband's separate property to marital property was also significantly correlated with the percentage distribution of net marital assets (=.037). Neither the value of the wife's separate property, nor the ratio of her separate property to marital property, were significantly correlated with the percentage distribution of net assets. *See* Appendix, Table A7.

215. p=.013.

liability, and approximately 80% of wives received a relatively equal or larger share of net marital assets when those assets were worth less than $50,000.[216] But when net assets were worth at least $400,000, only 55% of wives were awarded a relatively equal or larger share. (See Table 12.)

TABLE 12: PERCENTAGE DISTRIBUTION OF NET MARITAL ASSETS (JUDICIAL SAMPLE), BY VALUE OF NET MARITAL ASSETS

Percentage Distribution of Net Marital Assets	Net Value Marital Assets				
	<$0 (n=5)	$ 0 - 49,999 (n=72)	$50,000 199,000 (n=98)	$200,000 399,999 (n=54)	$400,000 or more (n=94)
Greater Share to Husband	80%	22%	26%	28%	46%
Relatively Equal*	20%	49%	49%	54%	45%
Greater Share to Wife	0%	29%	25%	19%	10%

* Relatively Equal = Between 45% and 55%

To the extent that disproportionate distribution to one spouse was predictable, it thus tended to reflect monetary contribution to the marriage instead of need. The husband's ownership of a large percentage of marital assets, of a business or professional license,[217] and a higher value for net marital assets were all associated with an increased likelihood that the husband would receive a disproportionate percentage of marital net worth.[218] The spouse who had

216. In the cases involving negative net worth, husband disproportion indicates a greater share of net debts and thus represents a benefit to the wife. *See infra* note 225.

217. The presence of other types of assets in the pool of marital property had no predictive value. For example, despite the fact that husbands owned 85% of all pensions (n=236) and 94% of all pensions classified as marital property (n=220), pension ownership was not significantly correlated with the net property distribution. The average share of a husband-owned pension classified as marital property (n=180) awarded the wife was 20%; the median share was 0%. In the pension cases the wife was typically awarded offsetting property; in the business and degree cases she was not.

218. The husband's ownership of a business or professional license was significantly and positively correlated with his share of marital assets ($p<.001$) and marital net worth

contributed more income to the marriage tended to receive more property. But this apparent judicial emphasis on monetary contribution was not uniform. In cases of relative poverty, the wife—in all probability the needier party—tended to receive the lion's share of the assets. The husband's ownership of a relatively large amount of separate property was, again, associated with disproportion in favor of the less-propertied wife.

b. The Predictability of Net Worth Distribution: More Detailed Analysis

Property division outcomes were also analyzed taking into account a variety of judicial characteristics and other case variables unrelated to the legislative factors in order to determine whether these extra-statutory considerations had any value in predicting divisional outcomes. They did not: Neither the judge's sex, age, religious affiliation, political party, judicial experience, nor educational status score was significantly correlated with judicial sample net worth distributions.[219] Nor, in the judicial sample, did the case processing time, case region, the gender of the spouse against whom the divorce was granted, or the specific fault allegations upon which the divorce was based demonstrate a significant relationship to the net worth distribution.[220]

For the settlement sample, variables that might suggest strategic bargaining behavior were also assessed. No significant predictive relationships were found. Although litigation theorists have often posited that women confronted with the possibility of a custody battle may make economic concessions to obtain custody,[221] an unrealized custody threat by the husband was insignificantly related to the distributional outcome.[222] Nor did case processing time, another

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(p<.001). The value of net marital assets and the husband's percentage share of those assets were also positively and significantly correlated (p<.001).

219. *See infra* Appendix, Table A7.

220. The gender of the plaintiff and the fault findings were significantly linked to the divisional outcome at the .05 confidence level in the settlement sample but did not, when regression analysis was employed, significantly contribute to the predictive capacity of the regression model. For correlation coefficients and p values, see *infra* Appendix, Table A8.

221. *See, e.g.*, MACCOBY & MNOOKIN, *supra* note 14, at 44-56; WEITZMAN, *supra* note 12, at 242-43; Mnookin & Kornhauser, *supra* note 14, at 963-66; Robert H. Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1032-33 (1985).

222. A custody request by the husband is, of course, only a rough measure of the degree of conflict over custody. Intense conflict may precede the filing of the divorce papers; conversely, some lawyers may request custody for their client when the request

potential conflict indicator,[223] evidence a significant predictive relationship.

Regression analysis[224] was then employed to determine the relative impact of property and litigant-related variables on property division, as well as the extent to which these variables could be used to predict disproportionate outcomes. Table 14 shows the results of that analysis for the judicial sample, excluding cases with negative net worth.[225] The column headed "standardized regression coefficient" shows the magnitude and direction of the effect of the independent variable upon the distribution of net marital property.[226] The column headed "t Stat." shows the t statistic, used to test the significance of an individual coefficient, and the level of significance attained.[227] The Table shows the results when all variables significant at the .05 confidence level or better are used ("Full Model") and, in the right column ("Parsimonious Model"), the results when

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lacks credibility. My finding on the lack of a significant relationship is, however, consistent with that of Professors Maccoby and Mnookin, who employed parents' own conflict ratings and still found no significant relationship between conflict level and support outcomes. *See* MACCOBY & MNOOKIN, *supra* note 14, at 154-57.

223. *See id.* at 138-39.

224. For discussions of multiple regression analysis, see MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 323-442 (1990); MICHAEL S. LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION 47-74 (1980).

225. In cases involving negative net worth the distributional percentage typically gives a misleading impression of case outcome. Suppose that a couple owns $7000 in assets and $10,000 in debts. If the wife is awarded $5000 in debts and $4000 in assets, while the husband is awarded $5000 in debts and $3000 in assets, the wife gets 33% of net worth (-$1000/-$3000) and the husband 67% (-$2000/-$3000). But the wife is better off than her husband. In order to include negative net worth cases in the analysis, the distribution of property and debt was also analyzed by adding debts to assets and calculating each spouse's share of the pool on a 100-point scale. This approach, which I have termed "distribution of the marital estate," was also employed in analysis of the settlement case sample property/debt distribution data. *See* Garrison, *supra* note 12, at 670-71. Only five judicial sample cases in which the division of net marital assets could be determined involved negative net worth. Regression analysis of the distribution of the marital estate, including these cases, did not vary substantially from the analysis displayed in Table 14. The full and parsimonious regression models explicated 14% of the variability in outcomes; the parsimonious model eliminated the same variables.

226. More precisely, the regression coefficient shows the effect that one standard deviation difference in the independent variable would have on the standardized score. For example, the regression coefficient for the wife's income is .148981, which means that a difference of one standard deviation in this variable is predicted to cause a difference of .148981 standard deviation in the percentage distribution of net marital property. Because the coefficient is positive, a higher income is predicted to produce a higher percentage share of net marital property for the wife. *See* FINKELSTEIN & LEVIN, *supra* note 224, at 332-36.

227. For a more detailed explanation of the t-statistic, see *id.* at 352-53.

variables that fail to significantly improve the model's predictive power are eliminated. After this elimination, only five variables—the husband's ownership of a business or professional license, the wife's income, the value of net marital property, the proportion of marital property owned by the husband, and the value of the husband's separate property—significantly contributed to the prediction of net worth distribution. The predictive power of both the full and parsimonious regression models is also quite modest; both explain less than 15% of the variation in net property division outcomes.[228] Moreover, the results displayed in Table 13 derive from a reduction of net property distribution percentages to five categories: When the regression model was employed to predict actual percentages,[229] its predictive capacity was, not surprisingly, even smaller.

228. Regression analysis of results for the smaller group of cases involving minor children, where the percentage of the obligor's income awarded as child support was a highly significant predictor of the net property division outcome, was somewhat more successful in explicating the variation in outcomes. The full regression model, employing the same variables listed in Table 14 and the child support percentage, explicated approximately 24% of the variation in outcomes.

229. The full model (n=159), employing the same variables, accounted for 12% of the variance.

TABLE 13: REGRESSION ANALYSIS OF NET MARITAL PROPERTY DISTRIBUTION JUDICIAL SAMPLE: TRIAL COURTS (CASES WITH POSITIVE NET WORTH) DEPENDENT VARIABLE = PERCENTAGE AWARD TO WIFE[230]

Independent Variable	Full (n=247) Model		Parsimonious (n=247) Model	
	Standard. Regression Coefficient	t Stat. (p=)	Standard. Regression Coefficient	t Stat. (p=)
Husband Owns Marital Business or Degree	-.204901	- 3.179 (.0017)	-.203676	-3.254 (.0013)
Wife's Employment	-.068899	- .895 (.3717)		
Wife's Income	.148981	1.904 (.0581)	.154735	2.499 (.0131)
Wife's Health	-.039545	-.621 (.5353)		
Wife's Income/ Family Income	-.058650	-.697 (.4864)		
Net Marital Property Value	-.183989	-2.727 (.0069)	-.178067	2.499 (.0062)
% of Marital Property Owned by Husband	-.131919	-2.044 (0421)	-.132144	- 2.065 (.0400)
Husband's Separate Property Value	.175077	2.857 (.0049)	.175304	2.874 (.0044)
Constant		10.235 (.0000)		24.984 (.0000)
Proportion of variability explained by model:[231]	13.79%		14.24%	

230. Coded as five ranks based on the wife's percentage award of net marital assets: 1 = less than 34%; 2 = 34%-44%; 3 = 45%-55%; 4 = 56%-66%; 5 = more than 66%.

231. The percentages refer to the "adjusted R Square." The multiple correlation coefficient, R, is the correlation between the regression estimates and the observed values

The data do support the claim that judges often fail to award an equal share of business or professional assets to the nontitled spouse. And in cases where the couple is relatively wealthy, the claim that judges give greater weight to monetary contributions than to contributions as a spouse, parent, and homemaker finds some support. But these tendencies were by no means uniform and their value in explaining outcome variation is modest. Some divisional outcomes could also be explained by reference to relatively unusual case facts. For example, when one spouse had committed a crime against a family member, the other was almost invariably awarded the lion's share of the assets.[232] Dissipation or concealment of significant marital assets often produced a skewed distribution as well.[233] Both of these situations are relevant to the distribution decision under the New York statute[234] and judges clearly took them into account.[235]

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of the dependent variable. The squared multiple correlation coefficient, R Square, can thus be interpreted as the proportion of the total variability of the dependent variable that is explained by the regression equation. R Square ranges between 0 (no association) and 1 (a perfect fit). Since the regression equation is optimally fitted to the data, R Square is biased upward; to compensate, R Square is generally adjusted downward, and the revised estimate is called the adjusted R Square. *See* FINKELSTEIN & LEVIN, *supra* note 224, at 345-46.

232. In four of the five sample cases in which the husband had committed criminal acts involving a family member, the wife received a disproportionate share of the net marital property. *See* Brancoveanu v. Brancoveanu, 535 N.Y.S.2d 86, 90 (N.Y. App. Div. 1988), *appeal dismissed*, 538 N.E.2d 358 (N.Y. 1989), *cert. denied*, 502 U.S. 854 (1991); Thompson v. Thompson, N.Y. L.J., 1/5/90, at 28, col. 3 (Sup. Ct.); Vasquez v. Vasquez, N.Y. L.J., 4/4/86, at 13, col. 1 (Sup. Ct.); Wenzel v. Wenzel, 472 N.Y.S.2d 830, 835 (Sup. Ct. 1984). In the one exception, Valenza v. Valenza, N.Y. L.J., 1/16/90, at 31, col. 4 (Sup. Ct.), the wife as well as the husband was found guilty of criminal misconduct.

233. *See, e.g.*, Farenga v. Farenga, N.Y. L.J., 3/14/83, at 16, col. 1 (Sup. Ct.); Lenczycki v. Lenczycki, 543 N.Y.S.2d 724, 726-27 (N.Y. App. Div. 1989); Mahon v. Mahon, 514 N.Y.S.2d 446, 447 (N.Y. App. Div. 1987); Whelan v. Whelan, N.Y. L.J., 9/24/81, at 12, col. 5 (Sup. Ct.).

234. Dissipation of assets is specifically listed as a factor in property division. N.Y. DOM. REL. LAW § 236B(5)(d) (McKinney 1986). Marital fault is not listed as a factor but, interpreting the last clause of the statute authorizing the judge to consider "any other factor which the court shall expressly find to be just and proper," appellate courts have ruled marital fault relevant if egregious. *See, e.g.*, Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113-14 (N.Y. App. Div. 1984). In interpreting this test, courts have found criminal violence, including assault, rape, kidnapping, a long history of physical abuse, and attempted murder to constitute egregious fault, but have found that lesser offenses fail to qualify. For a useful summary of the cases, see McCann v. McCann, 593 N.Y.S.2d 917, 920-22 (Sup. Ct. 1993).

235. Neither evidenced a significant predictive relationship, however. One reason why asset dissipation evidenced no significant relationship with case outcome is the varying methodologies employed by judges confronting a case by dissipation. In some instances judges included the value of the unavailable property in the pool of marital assets subject to distribution and assigned it to the guilty spouse. Trial court judges typically distributed

But, overall, the explanatory value of the legislative factors is quite slight. More often than not, judicial deviation from the new equal division norm is simply inexplicable from the data at hand.

Property distribution outcomes were, ironically, more predictable in the settlement sample, at least if cases involving negative net worth are excluded from the analysis. Using regression analysis, slightly more than 30% of the variation in outcomes could be predicted. But the predictive variables were the percentages of marital property to which each spouse held title.[236] Moreover, the inclusion of cases where debts exceeded assets—a far more numerous group in the settlement than in the judicial sample and one where wives tended to do comparatively well—eroded the value of title as a predictive variable substantially;[237] for this larger case set, only 6% of case variation was explicable.

Thus, in neither the judicial nor the settlement sample is it possible to explain much of the variation in results on the basis of the available case information. The lingering impact of title is apparent in both case sets. Some of the statutory factors were significantly correlated with case outcomes. But judicial consensus on when and how to deviate from the new equal division norm is not apparent, and the relative rarity of equal division in the settled cases, a result that cannot be explained on the basis of strategic bargaining, is striking. What is perhaps most notable about the property division data is simply that they explain so little.

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this enhanced pool relatively equally. *See, e.g.*, Vogel v. Vogel, 549 N.Y.S.2d 438, 440 (N.Y. App. Div. 1989); Contino v. Contino, 529 N.Y.S.2d 14, 14-15 (N.Y. App. Div. 1988); Gottlieb v. Gottlieb, N.Y. L.J. 6/29/82, at 15 col. 1 (Sup. Ct.); *see also* Harrell v. Harrell, 502 N.Y.S.2d 57, 58-59 (N.Y. App. Div. 1986) (remitting case to trial court where that court had failed to include value of dissipated assets in pool distributed and awarded husband who had dissipated assets an equal share of those remaining). In other cases (particularly when the value of the missing assets could not be determined), the court simply awarded the lion's share of the remaining assets to the blameless spouse. *See, e.g.*, Lenczycki v. Lenczycki, 543 N.Y.S.2d 724, 727 (N.Y. App. Div. 1989); Mahon v. Mahon, 514 N.Y.S.2d 446 (N.Y. App. Div. 1987); Farenga v. Farenga, N.Y. L.J., 3/14/83, at 16, col. 1 (Sup. Ct.); Whelan v. Whelan, N.Y. L.J., 9/24/81, at 12 col. 5 (Sup. Ct.).

236. No other variables contributed significantly to the model's predictive capacity.

237. Twenty-two percent of couples in the settlement sample had debts exceeding their assets, as compared to 4% in the judicial sample. *See supra* Table 3.

B. *Alimony and Child Support*

1. The Award of Alimony

a. The Judicial and Settlement Samples Compared

Although litigation to trial appeared to confer no remarkable advantage on judicial sample wives with respect to property division, it was associated with a higher alimony rate. At the trial court level, 62% of wives in the judicial sample were awarded alimony,[238] an award rate more than four times that of divorced women in both New York state[239] and the nation,[240] and approximately double the alimony award rate of wives in the settlement sample.

The best predictors of alimony in both the judicial and settlement groups were spousal income[241] and marital duration;[242] the high alimony rate for the judicial cases thus reflects, in part, the greater proportion of lengthy marriages, low-income wives, and high-income husbands in this group. For example, the alimony rate for employed women married less than ten years varied insignificantly by case group. But there were approximately twice as many women with these characteristics in the settlement group as in the judicial sample. (See Table 14.)

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238. Three husbands (.8%) were awarded alimony as well.

239. *See* Garrison, *supra* note 12, at 697 (alimony award rate in three New York counties was 12% in 1984).

240. *See* GORDON H. LESTER, JR., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY 1989 1 (Current Population Reports, Series P-60, No. 173) (1991) (reporting that 15% of women who had ever divorced or separated as of 1990 had been awarded alimony).

241. For correlation coefficients and p values, see *infra* Appendix, Table A14.

242. Similar relationships between alimony and income, and alimony and marital duration, have been noted by other researchers. *See, e.g.*, STERIN & DAVIS, *supra* note 12, at 140-41; WEITZMAN, *supra* note 12, at 169, 179; Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 294 (1988); McLindon, *supra* note 12, at 363-64; Rowe & Morrow, *supra* note 12, at 476-77; Wishik, *supra* note 12, at 88.

TABLE 14: PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY MARITAL DURATION, WIFE'S EMPLOYMENT STATUS, AND CASE GROUP

Marital Duration & Wife's Employment Status	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
Unemployed wives married ≥ 10 years	83%	(116)	49%	(47)	-34***
Unemployed wives married < 10 years	74%	(31)	50%	(32)	-24*
All Unemployed Wives	82%	(151)	52%	(79)	-30***
Employed wives married ≥ 10 years	53%	(170)	27%	(132)	-34***
Employed wives married < 10 years	23%	(39)	21%	(73)	-2
All Employed Wives	48%	(214)	26%	(208)	-22***

* p<.05, *** p<.001

The higher alimony award rate in the judicial group does not appear to result simply from sample composition, however. Long-married and low-income wives, who had the highest alimony award rates in both case sets, had significantly higher award rates when the case was judicially decided. Among women married twenty or more years, for example, 69% of the judicial group were awarded alimony compared to 39% in the settlement sample. (See Table 15.)

TABLE 15: PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY MARITAL DURATION AND CASE GROUP

Marital Duration	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
0 - 4 years	50%	(14)	27%	(44)	-23
5 - 9 years	46%	(59)	28%	(71)	-18*
10 - 14 years	58%	(77)	29%	(68)	-29***
15 - 19 years	64%	(73)	22%	(51)	-42***
20 or more years	69%	(144)	39%	(79)	-30***
All Sample Cases	62%	(377)	31%	(313)	-31***

* p<.05, *** p<.001

Similarly, 89% of wives who earned less than 10% of family income were awarded alimony by the judges, as compared to an alimony award rate of 58% for this group in the settlement sample.[243] (See Table 16.)

TABLE 16: PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY WIFE'S INCOME PERCENTAGE (WIFE'S INCOME/FAMILY INCOME) AND CASE GROUP

Wife's Income/ Family Income	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
0% - 9%	89%	(113)	58%	(76)	-31***
10 - 29%	76%	(86)	31%	(49)	-45***
30 - 49%	39%	(56)	12%	(57)	-27**
50% or more	4%	(28)	4%	(23)	-0

** p<.01, *** p<.001

Litigation to trial was thus associated with a higher alimony award rate both because the judicial sample contained more long-married and low-income wives—the group with the best alimony prospects—and because wives with these characteristics received alimony awards more frequently from judges than through the settlement process.

b. Changes in Judicial Alimony Decision Making Over Time

The advantages of litigation were not consistent over the ten year period reviewed. The judicial alimony award rate for the period 1980-83 was fourteen percentage points higher than for the period 1987-90; a later decision year was, in fact, a significant negative predictor of an alimony award.[244] Nor was the lower alimony rate for the later period confined to women in short marriages. Women married for twenty or more years experienced a decline in their alimony prospects identical to that experienced by women married for less than ten years. (See Table 17).

243. Similar differences are observable in many segments of the sample population. For a comparison of alimony award rates by wife's income, husband's income, and custody status, see *infra* Appendix, Tables A8-A10.

244. p=.018.

TABLE 17: JUDICIAL SAMPLE ALIMONY AWARDS, BY MARITAL DURATION AND TIME PERIOD

Marital Duration	Time Period					
	1980-83		1984-86		1987-90	
	%	(n)	%	(n)	%	(n)
0 - 9 years	65%	(20)	32%	(25)	46%	(28)
10 - 19 years	68%	(37)	58%	(72)	61%	(41)
20 or more years	75%	(44)	73%	(59)	56%	(41)
All Sample Cases	71%	(102)	60%	(161)	57%	(114)

The alimony prospects of women who earned an extremely small percentage of family income were unaffected by the lower award rate in later research years, however. Wives earning less than 10% of family income were not significantly less likely to be awarded alimony in the last triennial period than they were in the first. (See Table 18.) Women earning at least 30% of family income, on the other hand, saw their alimony prospects decline by almost half over the research period. The declining alimony award rate over the ten year period reviewed thus appears to reflect increased judicial emphasis on need as compared to other factors.

TABLE 18: JUDICIAL SAMPLE ALIMONY AWARDS, BY WIFE'S INCOME PERCENTAGE AND TIME PERIOD

Wife's Income Percentage (Wife's Income/ Family Income)	Time Period					
	1980-83		1984-86		1987-90	
	%	(n)	%	(n)	%	(n)
0% - 9%	91%	(32)	87%	(53)	89%	(28)
10 - 29%	78%	(23)	74%	(35)	75%	(28)
30% or more	40%	(25)	23%	(35)	21%	(24)
All Sample Cases	71%	(102)	60%	(161)	57%	(114)

2. The Duration of Alimony

a. The Judicial and Settlement Samples Compared

In contrast to the markedly higher judicial alimony rate, litigation to trial was not associated with significantly enhanced prospects of a permanent alimony award. Only 35% of judicial alimony awards were permanent, as compared to 31% in the settlement group.[245]

Nor were long-married and older women more likely to be awarded permanent alimony by judges than through the settlement process. Although marital duration was a highly significant predictor of a permanent award for both case groups,[246] permanent awards to long-married wives were no more frequent in the judicial sample than in the settlement group. (See Table 19.)

TABLE 19: PERCENTAGES OF SAMPLE ALIMONY AWARDS THAT WERE PERMANENT, BY CASE GROUP AND MARITAL DURATION

Marital Duration	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
0 - 9 years	24%	(33)	28%	(32)	+ 4
10 - 19 years	28%	(93)	20%	(30)	- 8
20 or more years	46%	(98)	45%	(31)	- 1
All Sample Cases	35%	(230)	31%	(93)	- 4

Age, too, was a significant predictor of a permanent award for both case sets,[247] but the likelihood of a permanent alimony award for women over fifty was actually somewhat lower in the judicial sample than in the settlement group.[248]

Nor, when time-limited alimony was awarded, were judicial awards likely to extend over a significantly longer period. The

245. The difference was not significant.

246. For the judicial sample, $p<.001$. For the settlement sample, $p=.024$. The difference in permanency rates by case group was not significant for any marital duration category.

247. For the judicial sample, $p=.003$. For the settlement sample, the husband's rather than the wife's age was statistically significant ($p=.050$). The difference in permanency rates by case group was not significant in any age category.

248. For a more detailed presentation, see *infra* Appendix, Table A13.

average length of a time-limited award was 5.0 years in the judicial sample[249] and 4.6 years in the settlement group.[250]

b. The Impact of Statutory Change Upon Judicial Awards

Although the 1986 amendments to the Equitable Distribution Law[251] were intended to reverse the trend toward durational alimony, these amendments had no apparent impact. The proportion of alimony awards that were permanent was *lowest* in 1987-90, after the amendments went into effect. (See Table 20.) Indeed, a later decision year was a significant negative predictor of a permanent award.[252] The passage of the amendments was, however, associated with stabilization of the permanent alimony rate among long-married wives; although the permanent alimony rate for this group did not increase after 1986, wives married twenty or more years did not see a further decline in their prospects of a permanent alimony award. Wives married for shorter periods, on the other hand, saw the likelihood of permanent alimony continue to fall.

TABLE 20: PERCENTAGES OF JUDICIAL SAMPLE ALIMONY AWARDS THAT WERE PERMANENT, BY MARITAL DURATION AND TIME PERIOD

Marital Duration	Time Period					
	1980-83		1984-86		1987-90	
	%	(n)	%	(n)	%	(n)
0 - 9 years	31%	(13)	38%	(8)	8%	(12)
10 - 19 years	46%	(24)	26%	(43)	15%	(26)
20 or more years	50%	(32)	44%	(43)	44%	(23)
All Sample Cases	44%	(70)	35%	(97)	25%	(63)

249. The median was 4.1 years; judicial awards ranged from 0.9 to 26.0 years (n=148).

250. The median was 3.5 years; settlement awards ranged from 1.0 to 13.0 years (n=62).

251. For a description of the amendments, see *supra* notes 113-14 and accompanying text.

252. p=.022.

3. The Value of Alimony and Child Support

a. The Judicial and Settlement Samples Compared

In contrast to the similarity of judicial and settlement permanence outcomes, the average value of both alimony[253] and child support[254] varied substantially by case group. The average value of combined alimony and child support in the judicial group[255] was, indeed, almost double its value in the settlement sample.[256] (See Table 21.)

TABLE 21: MEAN ALIMONY AND CHILD SUPPORT AWARDS (1990 DOLLARS), BY CASE GROUP

Mean Award (1990 Dollars)	Judicial Sample $ per month (n)	Settlement Sample $ per month (n)	Difference
Alimony:			
when awarded	$1084 (233)	$ 978 (98)	- 106
all cases	$ 677 (373)	$ 307 (312)	- 370***
Child Support:			
per family	$ 778 (225)	$ 481 (196)	- 297***
per minor child	$ 430 (225)	$ 301 (196)	- 129**
Total Alimony & Child support:			
minor children	$1474 (225)	$ 709 (208)	- 765***
no minor children	$ 675 (143)	$ 429 (97)	- 246
all cases	$1163 (368)	$ 620 (305)	- 543***

** p<.01, *** p<.001

253. The median monthly alimony award was $685 in the judicial sample (n=233) and $405 in the settlement group (n=98).

254. The median monthly child support award was $683 in the judicial sample (n=196) and $378 in the settlement group (n=196).

255. Judicial awards were not more likely to include enhancements of the basic alimony and child support package than were awards based on settlement, however. For a comparison of enhancements to child support by case group, see *infra* Appendix, Table A15. Provision for the payment of college expenses was, indeed, more common in the settlement group than in the judicial sample. *See infra* Appendix, Table A15.

256. The median monthly combined award was $815 for the judicial sample (n=368) and $324 for the settlement sample (n=305).

While the higher dollar values of judicial alimony and child support awards reflect, to some extent, the higher incomes of couples in the judicial sample, judicial awards also constituted a larger percentage of obligor income. For judicial cases involving minor children, the average percentage of obligor income awarded in combined alimony and child support was 31%, as compared to 23% in the settlement sample.[257] Although the difference between the settlement and judicial groups was not significant at all income levels (see Table 22), it was consistent over the ten-year period reviewed.[258]

TABLE 22: MEAN PERCENTAGE OF OBLIGOR'S GROSS INCOME (1990 DOLLARS) AWARDED AS ALIMONY AND CHILD SUPPORT, BY OBLIGOR'S INCOME AND CASE GROUP

Obligor's Gross Income (1990 Dollars)	Mean % of Income Awarded as Child Support		Mean % of Income Awarded as Child Support & Alimony	
	J Group (n)	S Group (n)	J Group (n)	S Group (n)
$0-$34,999	29% (38)	21%* (76)	38% (38)	24%** (76)
$35,000-$69,999	18% (77)	17% (47)	31% (77)	22%** (47)
$70,000 +	13% (59)	9% (14)	25% (59)	19% (14)
All Sample Cases	19% (174)	18% (137)	31% (174)	23%*** (137)

J Group= Judicial Group; S Group=Settlement Group

Difference between group means: * p<.05, ** p<.01, *** p<.001

257. For cases not involving minor children, the average percentage of obligor income awarded as alimony in the judicial sample was 15%, if $0 awards are included in the calculation, or 22%, if $0 awards are excluded; in the settlement sample, the average percentage was 8% ($0 awards included) or 21% ($0 awards excluded).

258. In the judicial sample, the average percentage of obligor income awarded as child support was 18% (n=49) in 1980-83; 18% (n=71) in 1984-86; and 22% (n=51) in 1987-90. The average percentage of obligor income awarded in combined alimony and child support (for cases involving minor children) was 31% (n=49) in 1980-83; 30% (n=73) in 1984-86; and 32% (n=52) in 1987-90.

Alimony and child support payments also constituted a larger fraction of the recipient's post-divorce income in the judicial sample. (See Table 23). For women with minor children, for example, the value of alimony and child support represented an average of 62% of post-divorce income, as compared to 44% in the settlement group.

TABLE 23: MEAN PERCENTAGE OF RECIPIENT'S TOTAL INCOME (INCLUDING ALIMONY AND CHILD SUPPORT) REPRESENTED BY ALIMONY AND CHILD SUPPORT, BY RECIPIENT'S INCOME (EXCLUDING ALIMONY AND CHILD SUPPORT) AND CASE GROUP

Recipient's Gross Income (1990 Dollars)	Child Support Award/Recipient's Total Income: Mean %		Child Support & Alimony Award/ Recipient's Total Income: Mean %	
	J Group (n)	S Group (n)	J Group (n)	S Group (n)
$0-$4,999	51% (66)	68%** (47)	97% (66)	94% (47)
$5,000-$19,999	32% (53)	26%* (70)	51% (53)	32%*** (70)
$20,000 +	19% (48)	12% (48)	27% (48)	14%*** (48)
All Sample Cases	36% (167)	34% (165)	62% (167)	44%*** (165)

J Group= Judicial Sample; S Group=Settlement Group
Difference between group means: * p<.05, ** p<.01, *** p<.001

b. Payment of Legal Expenses

The more valuable child support and alimony awards achieved by judicial decision did not, of course, come free. The average value of judicial sample wives' legal fees was $30,795;[259] in half of the cases

259. n=115. The median value of wives' fees was $16,024.

for which a comparison could be made, the wife's fees were equal to more than a year of combined alimony and child support payments.[260] Although judicial sample husbands were also more likely to shoulder some or all of their wives' legal fees than were their counterparts in the settlement case group,[261] this difference stemmed largely from a higher proportion of cases requiring joint payment of the wife's fees. In these joint payment cases, judges generally failed to specify either the wife's total fees or the percentage that the husband was required to pay; information on the value of legal fees was also rarely available in the settlement sample files. The data thus do not permit comparison of wives' legal expense obligations by case group, but it is entirely possible that the higher child support and alimony awards to women in the judicial sample were more than offset by higher expenses associated with obtaining a litigated divorce judgment. (See Table 24.)

260. n=89. The median ratio of a wife's fees to her combined annual alimony and child support award was 1.28; the mean ratio was 3.17.

261. In the settlement sample, payment of the wife's legal fees by the husband was significantly and positively correlated with the wife's award of alimony ($p<.001$), the husband's income ($p=.047$), the value of combined alimony and child support ($p=.025$), and the percentage of the husband's income awarded in combined alimony and child support ($p<.001$). Payment of the wife's legal fees by the husband was significantly and negatively correlated with the wife's income ($p=.004$). The wife's employment status, the custody of minor children, the percentage of family income she earned, and marital duration were not significantly related to the payment of her counsel fees.

In the judicial sample, the husband's payment of the wife's counsel fees was significantly and positively correlated with the wife's award of alimony ($p<.001$), the husband's income ($p=.010$), the value of combined alimony and child support ($p<.001$), the wife's employment status ($p=.003$), and the percentage of the husband's income awarded in alimony and child support ($p<.001$). The husband's payment of the wife's counsel fees was also significantly — and negatively — correlated with the percentage of family income earned by the wife ($p<.001$) and the wife's income ($p<.001$). Marital duration and custody status were not significantly related to the the husband's payment of the wife's counsel fees.

TABLE 24: PAYMENT OF SAMPLE WIVES' LEGAL FEES, BY CASE GROUP

Wife Category Fees Paid by:	Judicial Sample % (n)	Settlement Sample % (n)
Alimony Recipients Fees	(205)	(83)
paid by: Husband	34%	39%
Joint	38%	18%
Wife	28%	42%
Custodial Parents*	(176)	(142)
Fees paid by: Husband	26%	25%
Joint	43%	18%
Wife	31%	56%
All Wives	(324)	(266)
Fees paid by: Husband	25%	22%
Joint	34%	16%
Wife	41%	61%

* Cases with joint or split custody excluded.

4. Post-Divorce Income and Standard of Living

Even if the impact of their legal expenses is ignored, child support and alimony awards to women in the judicial sample were typically inadequate to prevent a marked drop in their post-divorce standard of living. Although women in this group suffered a slightly smaller average decline in per capita income and standard of living than did women in the settlement sample, the difference was insignificant.[262] In both case sets, the average woman's standard of living[263] fell markedly, while that of her husband improved. (See

262. A comparison of median per capita income changes produced comparable results. In the judicial sample, the median ratio of the husband's post to pre-divorce per capita income was 163%; the wife's was 61%. In the settlement sample, the median ratio of the husband's post to pre-divorce per capita income was 172%; the wife's was 63%.

263. Per capita income fails to accurately measure standard of living because it ignores economies of scale. A variety of equivalence scales have been developed to take account of economies of scale and thus produce a more realistic measure of living standards. These equivalence scales typically adjust family income by family size raised to a power ranging between 0.2 to 1 (the size elasticity), with 1 representing per capita income and 0.2 representing an adjustment that assumes very large economies of scale. For discussions of equivalence scales, see, e.g., B. Buhmann et al., *Equivalence Scales, Well-being, Inequality and Poverty: Sensitivity Estimated across Ten Countries using the Luxembourg Income Study (LIS) Database*, REV. INCOME & WEALTH 115 (June 1988); Sorensen, *supra* note 43, at 273-74. Change in post-divorce standard of living is extremely sensitive to the equivalence scale utilized. *See* Sorenson, *supra* note 43, at 280 tbl. 15.5 (comparing post-divorce change in living standards using four different measurements). Post-divorce

Table 25.) Because judicial sample wives were more likely to receive some portion of the husband's post-divorce support obligation in the form of alimony, it is indeed possible, given the prevalence of short-term alimony awards, that they would be worse off than their settlement group counterparts within a few years after the divorce.

TABLE 25: CHANGES IN HUSBANDS' AND WIVES' PER CAPITA INCOME AND LIVING STANDARDS POST-DIVORCE, BY CASE GROUP

Household Category	Judicial Sample		Settlement Sample	
	Median Per Capita Income (1990 Dollars) Mean %	(n)	Median Per Capita Income (1990 Dollars) Mean %	(n)
Pre-Divorce Family	$20,544	(287)	$14,781	(205)
Husband's household after divorce:	$35,177	(296)	$27,028	(221)
Ratio of post to pre-divorce per capita income:	172%	(266)	182%	(196)
Ratio of post to pre-divorce living standard:*	126%		135%	
Wife's household after divorce:	$12,515	(292)	$9,710	(262)
Ratio of post to pre-divorce per capita income:	71%	(266)	68%	(196)
Ratio of post to pre-divorce living standard:*	61%		57%	

* Measured as ratio of post to pre-divorce per capita income, adjusted by family size$^{(0.73)}$.

In both case sets there was also significant variation in the ratio of the wife's to husband's post-divorce standard of living. In both

change in living standard was measured here using a size elasticity of 0.73, which approximates the size elasticity underlying the U.S. Bureau of Labor Statistics (BLS) standard budgets for urban families. *See* Buhmann et al., *supra*, at tbl. 2; Sorensen, *supra* note 43, at 273. Professor Weitzman also relied on the BLS equivalence scale in assessing post-divorce change in living standards, but measured the change in income over the BLS Lower Standard Budget for a family of comparable size. WEITZMAN, *supra* note 12, at 338-39, 481-82 n. 19. The average living standard changes (+42% for husbands; -73% for wives) Weitzman reports, *id.* at 338-39, have been criticized by some demographers as unlikely results given her underlying data on per capita income changes. *See* Hoffman & Duncan, *supra* note 43, at 643-44.

groups, wives in the highest income category married to husbands in the lowest actually enjoyed a higher post-divorce living standard, on average, than did their husbands, while wives in the lowest income category married to husbands in the highest experienced the largest relative decline. (See Table 26 and Appendix, Table A11.)

TABLE 26: MEAN RATIO OF WIFE'S POST-DIVORCE STANDARD OF LIVING*/HUSBAND'S POST-DIVORCE STANDARD OF LIVING* (JUDICIAL SAMPLE), BY HUSBAND AND WIFE PRE-DIVORCE INCOME

Wife's Income	Husband's Income					
	$0 - $34,999		$35,000-$59,999		$60,000 +	
	mean ratio	(n)	mean ratio	(n)	mean ratio	(n)
$ 0 - $4,999	.48	(21)	.26	(32)	.23	(42)
$5,000 - $19,999	.42	(40)	.45	(31)	.33	(24)
$20,000 +	1.83	(19)	.88	(29)	.44	(29)
All Sample Wives	.77	(80)	.52	(92)	.32	(95)

* Measured by post-divorce family income adjusted by size$^{(0.73)}$.

This pattern suggests that the prime determinant of post-divorce living standards is the pre-divorce income of each spouse, rather than income transfers in the form of alimony and child support. The ratio of the wife's and husband's post-divorce living standards was significantly and positively correlated with the percentage of family income earned by the wife[264] and the value of her income.[265] The award of alimony to the wife[266] and the value of combined alimony and child support,[267] on the other hand, were (at least for cases in the judicial sample) significant negative predictors of the ratio.

264. In both the judicial and settlement samples, p<.001.

265. In both the judicial and settlement samples, p<.001. In the judicial sample, the ratio was not significantly correlated with the value of the husband's income (p=.244); in the settlement sample it was significantly correlated (p=.003).

266. In the judicial sample, p=.008; in the settlement sample, p=.217.

267. In the judicial sample, p=.020; in the settlement sample, p=.261.

While a judicial decision was thus associated with the award of more valuable alimony and child support, in amounts representing a higher proportion of obligor and recipient income, these transfers were, in the vast majority of cases, inadequate to ensure wives and children a post-divorce living standard equal to that enjoyed by the husband.[268] Nor was the average gap between the post-divorce living standards of wives and husbands significantly smaller in the judicial sample than the settlement group.

It is important to note, however, that the post-divorce gap in the living standards of husbands and wives produced by discretionary decision making was not demonstrably greater than that which would be produced under New York's new, determinate child support guidelines. Although these guidelines curtailed judicial discretion in order to reduce post-divorce income disparities,[269] the average percentage of obligor income awarded as child support in both the judicial and settlement samples was fairly equivalent to what one would predict under the support guidelines. Although direct comparisons are not possible,[270] the results of discretionary decision making do not appear to be markedly different from those mandated under these new bright-line rules.

5. The Predictability of Alimony and Child Support Decision Making

a. The Award of Alimony

In contrast to property division, where only a few of the factors enumerated in the statute had explanatory value, the award of alimony was significantly correlated with a long list of litigant

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268. Only 16% of wives in the judicial sample had post-divorce adjusted incomes equal to or greater than their husbands' post-divorce adjusted incomes (n=267).

269. *See supra* note 43 and accompanying text (discussing such disparities).

270. New York's child support guidelines describe the presumed child support amount as a percentage of the obligor's gross income. For one child the percentage is 17%; for two, 25%. N.Y. DOM. REL. LAW § 240.1-b(b)(3) (McKinney Supp. 1995). As the average number of children in the judicial sample was 1.2, one would expect the rate to be about 19%. But the guidelines include alimony in the child support calculation only if the agreement or court order establishing the alimony award requires an adjustment in child support upon the termination of the alimony obligation, *id.* § 240.1-b(b)(5)(vii)(C), and mandates pro rata apportionment of reasonable child care expenses related to employment or job training in addition to the percentage award, *id.* § 240.1(c)(4). The presumed percentages also apply only to combined parental income less than $80,000. *Id.* § 240.1-b(c)(2).

characteristics deemed relevant by the legislature.[271] In both the judicial and settlement groups, the variables most strongly correlated with the award of alimony were the wife's income, employment, and the percentage of family income that she earned. In the judicial sample, the wife's education, occupational status, health, marital duration, whether the marriage produced children, the percentage of the husband's income paid in child support, and the husband's occupational status were also significant at the .05 confidence level, as were the value of the wife's assets, net marital assets, and her net property award.[272]

Although a number of statutory variables that demonstrated significance within the judicial sample failed to do so within the settlement group, the strength and direction of the variable correlations in the two case sets were often quite similar.[273] Only one variable, the husband's income, was significantly related to the alimony decision in the settlement case group and failed to demonstrate significance in the judicial sample.

The relationship between various nonstatutory factors and alimony awards was also assessed. In the judicial sample, the likelihood of an alimony award varied significantly by case region; a later decision year was also significantly and negatively correlated with the alimony outcome.[274] The only judicial characteristic that demonstrated significance at the .05 confidence level was the judge's age,[275] although the judge's sex narrowly escaped significance at the .05 confidence level.[276] Neither the judge's political party, length of judicial experience, educational background, or religion was significantly correlated with the alimony outcome. In the settlement sample, variables suggesting strategic bargaining—case processing time and an unrealized claim of custody by the husband—again failed to

271. For the statutory factors, see *supra* note 19.

272. For correlation coefficients and p values of these variables (except value of wife's assests), see *infra* Appendix, Table A12.

273. Variables that were significantly correlated with the alimony decision in the judicial but not the settlement sample included: whether the marriage had produced children, the award of custody, the percentage of the husband's income paid in child support, the wife's education, the wife's health, marital duration, the value of the couple's net marital assets, the value of the wife's property, and the value of her net property award. For a comparison of correlation coefficients, see *infra* Appendix, Table A12.

274. *Id.*

275. Younger judges were less likely to award alimony than older judges (p=.039).

276. Female judges were less likely to award alimony than male judges (p=.051).

evidence a significant predictive relationship with the alimony decision; the case's fault ranking did, however.[277]

Logistic regression analysis[278] was employed to determine the relative impact of statutory, judicial, and other case-related variables on alimony outcomes and the extent to which these variables could be used to predict alimony awards. Table 27 shows the results of that analysis for the judicial sample. The Table shows each variable's "odds multiplier,"[279] a statistic that measures the variable's average impact upon the odds of obtaining alimony, and "R" value,[280] a statistic that measures the extent to which, among all cases, the alimony outcome is predicted by this variable. The left column displays results for the full logistic regression model, taking into account all independent variables significant at the .05 confidence level or better.[281] The right column displays results for the most parsimonious model that fits the data, in which variables that do not significantly enhance the predictability of alimony outcomes are deleted.

277. The gender of the plaintiff also narrowly escaped significance at the .05 confidence level (p=.059).

278. Logistic regression is ordinarily employed instead of least-squares (multiple) regression when the dependent variable (in this case alimony) is dichotomous. *See* FINKELSTEIN & LEVIN, *supra* note 224, at 447-52; DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION (1989). For examples of logistic regression analysis applied to litigation outcomes, see DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (capital punishment); Eisenberg & Johnson, *supra* note 123, at 1178-97 (federal civil rights actions); Schultz & Patterson, *supra* note 146, at 1095-1149 (Title VII litigation).

279. The odds multiplier is obtained by taking the antilog of the regression coefficient. *See* HOSMER & LEMESHOW, *supra* note 278, at 58. On the distinction between an odds multiplier and a probability multiplier, see BALDUS ET AL., *supra* note 278, at 383-84.

280. *See* BALDUS ET AL., *supra* note 278, at 71 n.34.

281. One variable significant at the .05 confidence level, the wife's education, is excluded from the analysis. The addition of this variable did not enhance the predictability of the model when included and would have necessitated, given the large number of cases with missing data for this variable, the reduction of the sample size by almost half.

TABLE 27: LOGISTIC REGRESSION ANALYSIS OF ALIMONY AWARDS (JUDICIAL SAMPLE: TRIAL COURTS)
DEPENDENT VARIABLE = AWARD OF ALIMONY TO WIFE

Independent Variable	Full (n=235)	Model	Parsimonious (n=235)	Model
	Odds Multiplier (p=)	R Value	Odds Multiplier (p=)	R Value
Wife's Income/ Family Income	.0104 (.0196)	-.1041	.0334 (.0503)	-.0781
Wife's Income	.9999 (.0005)	-.1861	.9999 (.0004)	-.1887
Wife's Employment	1.3026 (.4630)	.0000		
Marital Duration	1.0412 (.0784)	.0654	1.0429 (.0341)	.0911
Marriage Produced Children	.7300 (.2899)	.0000		
Decision Year	1.0522 (.5663)	.0000		
Net Marital Property Value	1.0000 (.1628)	.0000	1.0000 (.0023)	-.1557
Wife's Net Property Award Value	1.0000 (.4699)	.0000		
Wife's Job Status	.7368 (.3295)	.0000		
Husband's Job Status	.6205 (.0129)	-.1196	.6115 (.0051)	-.1394
Wife's Health	2.6286 (.0379)	.0864		
Judge's Age	1.0456 (.0700)	.0592		
Constant	(.6709)		(.0000)	
% of Cases Accurately Predicted by Model:		85.11%		83.40%

Both models produced accurate predictions of alimony outcomes in more than 80% of the cases, although the parsimonious model, which fit the data equally well, achieved predictive results almost as good as the full model far more economically. With information on the percentage of family income earned by the wife, the value of her income, marital duration, the value of net marital property, and the husband's job status, the model accurately predicted alimony outcomes for 83% of the cases, a rate considerably better than that achievable by random assignment.[282] Although the model achieved highly disparate results depending on whether alimony was awarded or not, the improvement over random assignment was substantial for each category.[283] Application of the parsimonious model to the larger set of cases in which values for the five predictive variables were available produced equivalent predictive results.[284]

Given the potential use of alimony as a tax reduction device in cases where child support is payable,[285] the sample was also subdivided into two segments—one including all cases in which the wife was awarded child custody and thus was eligible for child support ("the child support segment"), the other including all cases in which the husband had no potential child support liability—in order to detect any differences in decision making based on tax considerations. Although the subdivision of the sample did not substantially alter the overall predictability of the alimony award,[286] the variables that

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282. Random assignment of 62% of the cases to the alimony group should produce an overall 53% accuracy rate.

283. The full model accurately predicted 92% of the cases in which alimony was awarded and 71% of those in which it was not; the parsimonious model accurately predicted 90% of the cases in which alimony was awarded and 70% of those in which it was not. *See supra* Table A17. Random assignment of 62% (the alimony rate) of the cases to the alimony group should produce a 62% accuracy rate for the alimony cases and 38% accuracy rate for the nonalimony cases.

284. The model correctly predicted 83.5% of the cases (n=261). Within this larger case set, replacing the net value of marital property in the regression model with the value of the wife's net property award increased the accuracy rate from 83.5% to 84.2% (n=260). The substitution changed the prediction rate in the no alimony category to 68.2% and in the alimony category to 92.4%.

285. For more detailed information on the taxability of alimony and child support payments, see JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 837-42 (3d ed. 1992); IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 757-94 (2d ed. 1991).

286. In the child-support segment of the sample, the parsimonious model achieved an accuracy rate of 65% for the no alimony cases and 91% for alimony cases. In the other segment, the parsimonious model achieved a prediction rate of 67.5% for no alimony cases and 84.5% of alimony cases. In each case, the regression model's accuracy rate constituted an improvement over random assignment to the alimony and no-alimony groups.

were the most powerful predictors did differ. Among the child support segment, the percentage of family income earned by the wife, marital duration, and the value of the wife's net property award were the most useful alimony predictors; the percentage of obligor income awarded as child support did not significantly contribute to the predictive power of the model. In the other segment of the sample, the absolute value of the wife's income, her health, and the husband's job status were the most powerful predictive variables. These results suggest the possibility that cases in which alimony is an alternative to child support may be subject to somewhat different decision-making norms than are those in which alimony represents the only possible means of income transfer.

Regression analysis was also applied to alimony outcomes in the settlement sample. The relative importance of the predictive variables within the regression model for this group was fairly consistent with the results obtained for the judicial sample (the most important were the percentage of family income earned by the wife and the husband's job status) although the accuracy rate achieved was several percentage points lower. This accuracy rate still constituted a substantial improvement over random assignment overall[287] and within the alimony category; the improvement over random assignment within the no-alimony category was modest, however.[288]

While regression analysis thus suggests that much of the variation in alimony outcomes can be explained by reference to the statutory factors, the number of inexplicable outcomes was still substantial, particularly in the settlement case group.[289] Forty-five percent of settlement sample wives earning less than 20% of family income were *not* awarded alimony, and the case data fail to reveal why.[290] The importance of the husband's job status as a predictive variable is also notable. The husband's status was, in both case sets, a more powerful predictive variable than his income, suggesting that socioeconomic class may play a role in alimony determination, independent of its

287. The full regression model accurately predicted 72.8% of the cases; the parsimonious model predicted 75.7%. Random assignment should produce an overall accuracy rate of 58%.

288. The full regression model accurately predicted 80.2% of no-alimony cases and 60.0% of alimony cases; the parsimonious model accurately predicted 81.4% of the no-alimony cases and 66.0% of alimony cases. Random assignment, by contrast, should successfully predict 70% of no-alimony cases and 30% of alimony cases.

289. *See* Garrison, *supra* note 12, at 706-11.

290. *See id.* at 707-08 tbl. 46.

correlation with income, that comparatively disadvantages women in low-status families.

But the analysis also suggests that the legislative scheme did play a significant role at trial and in settlement negotiations. A substantial majority of alimony outcomes could, for both case groups, be explained on the basis of the statutory factors alone. The analysis also reveals that, among all variables for which case information was available, the spouses' relative need was the dominant factor in alimony determination. Indeed, with information on the percentage of family income earned by the wife alone, it was possible to accurately predict 80% of alimony outcomes in the judicial sample[291] and 72% of those in the settlement group.[292] This result, coupled with the failure of any fault-related variables to contribute significantly to the predictability of alimony results, suggests that the "rehabilitative" alimony concept adopted by the New York legislature, which posits alimony as a remedy for need rather than a reward for marital virtue, now reigns as the governing principle in alimony determination.

b. The Duration of Alimony

In contrast to the wealth of litigant characteristics recited in the alimony statute that were significantly correlated with judges' alimony award decisions, only three variables—the wife's age, her health, and marital duration—were significantly correlated with the decision to award alimony for an unlimited time period.[293] A similar pattern was evident in the settlement sample, where the wife's health, marital duration, and (curiously) the husband's age were the only variables to demonstrate significance at the .05 confidence level or better.[294]

In the judicial sample, several nonstatutory factors were also significantly correlated with the permanence of alimony. The decision year was again a significant negative predictor of a permanent award.[295] Democratic judges were significantly less likely to award

291. Using the wife's percentage of family income alone, it was possible to accurately predict 58.95% of the no-alimony cases, 90.96% of the alimony cases, and 80% overall (n=283).

292. Using the wife's percentage of family income alone, it was possible to accurately predict 77.54% of the no-alimony cases, 61.2% of the alimony cases, and 72.2% overall (n=205).

293. For correlation coefficients and p values, see *infra* Appendix, Table A14.

294. *See infra* Appendix, Table A14.

295. p=.022.

permanent alimony than were Republican judges.[296] (See Table 28.) And the judge's educational background was significantly correlated with alimony permanence as well. Judges with high educational status scores[297] and those who had attended both college and law school outside the region[298] in which they served were significantly more likely to award permanent alimony than judges educated locally and those with low status scores.

TABLE 28: PERCENTAGE OF JUDICIAL ALIMONY AWARDS TO WIVES THAT WERE PERMANENT, BY JUDGE'S POLITICAL PARTY

Duration of Alimony Award	Republican Judges (n=101)	Democratic Judges (n=83)
Permanent Alimony Awarded	40%	25%
Durational Alimony Awarded	60%	75%

In order to assess the relative importance of litigant and case characteristics in determining the permanence of judicial alimony awards, logistic regression analysis was again employed, using all variables that demonstrated significance at the .05 confidence level. Table 29 displays the results of that analysis.

296. Chi-square=4.76917 D.F.=1; p=.02897.

297. p=.013. Educational status and the regionality of the judge's education were themselves strongly correlated (p<.001). The judge's political party was not significantly linked with either the regionality of the judge's education (p=.099) or the judge's educational status score (p=.133).

298. Chi-square=18.18364 D.F.=2; p=.00011.

TABLE 29: LOGISTIC REGRESSION ANALYSIS OF ALIMONY PERMANENCE (JUDICIAL SAMPLE: TRIAL COURTS) DEPENDENT VARIABLE = PERMANENT ALIMONY TO WIFE

Variable	Full (n=137)	Model	Parsimonious (n=137)	Model
	Odds Multiplier (p=)	R Value	Odds Multiplier (p=)	R Value
Wife's Age	1.0258 (.4681)	.0000		
Wife's Health	.6537 (.1981)	.0000		
Marital Duration	.9338 (.0443)	.1073	.9462 (.0074)	.1708
Decision Year	1.2227 (.2131)	.0000		
Judge's Political Party	1.6568 (.0191)	.1402	1.5892 (.0210)	.1369
Judge's Education	.9127 (.4232)	.0000		
Constant	(.3205)		(.0001)	
% of Cases Accurately Predicted by Model:		70.07%		67.15%

Both the parsimonious and full regression models attained an accuracy rate around 70%,[299] considerably lower than that achieved with the decision whether to award alimony, and slightly lower than that produced by regression analysis of permanence outcomes in the

299. Application of the parsimonious regression model to the larger set of cases for which data on marital duration and the judge's political party were available (n=178) produced a similar overall prediction rate (67.4%), but with more extreme variation by category. The model accurately predicted 90.7% of permanent awards, but only 21.7% of those that were nonpermanent.

settlement sample.[300] For both the judicial and settlement groups, the model's accuracy rate nonetheless constituted an improvement over random assignment overall[301] and for cases in which nonpermanent alimony was awarded;[302] for permanent awards, however, the model failed to improve over random selection in either case group.[303] The limited success of the regression model in predicting alimony permanence was also, for the judicial sample, dependent on the judge's political party variable. Indeed, the judge's political party was a more important predictor of alimony permanence than every other variable except marital duration.

The length of the alimony period for nonpermanent awards was even less predictable than alimony permanence. In the judicial sample, not a single litigant characteristic enumerated in the alimony statute as relevant to the decision was significantly correlated with the length of a durational alimony award. Several nonstatutory factors—the case region, the appellate department, the judge's age, and the judge's political party—were correlated, at the .05 confidence level or better, with the length of the alimony period, but their explanatory value was slight.[304] Several litigant characteristics were significantly related to the length of the alimony period in the settlement sample,[305] but regression analysis, employing these variables, explained less than 1% of the variation in durational outcomes. The alimony duration decision thus presents a fairly marked contrast to the more basic decision on whether alimony should be awarded. While the alimony *award* decision appears to be fairly predictable,

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300. The prediction rate for both the full and parsimonious models was 74.7%.

301. In the judicial sample, random assignment should produce an overall accuracy rate of 55%; in the settlement sample, random assignment should produce an overall accuracy rate of 57%.

302. In the judicial sample, random assignment should produce an accuracy rate of 65% for nonpermanent award cases, while the regression model accurately predicted 86.5% (full model) or 84.3% (parsimonious model) of nonpermanent awards. In the settlement sample, random assignment should produce an accuracy rate of 69% for nonpermanent awards, while the regression model accurately predicted 91.67% (full model) or 96.67% (parsimonious model).

303. In the judicial sample, random assignment should produce a 35% accuracy rate for permanent awards, while the regression model correctly predicted 30.6% (full model) or 35.4% (parsimonious model) of permanent awards. In the settlement sample, random assignment should produce a 31% accuracy rate for permanent awards, while the regression model accurately predicted 37.0% (full model) or 25.9% (parsimonious model) of permanent awards.

304. The proportion of variability explained by these variables was 5.8%.

305. The length of the marriage, as well as the husband's income, age, and education were all significantly linked to the alimony period at the .05 confidence level or better.

highly correlated with the specific factors and principles contained in the alimony statute, and largely uninfluenced by personal judicial values, the alimony *duration* decision does not.

c. The Value of Alimony and Child Support

i. Cases Involving Minor Children

Although a range of income and status-related variables were significantly correlated with the value of both child support and child support combined with alimony,[306] the obligor's income demonstrated the strongest correlation with each.[307] In the judicial sample, two nonstatutory case variables, the decision year and appellate department, were significantly correlated with the value of child support, whether or not alimony was included.[308] In the settlement sample, the obligor's income was again the most important predictive variable, although the recipient's income demonstrated a much stronger relationship with the child support outcome than it did in the judicial sample.[309]

Regression analysis was performed in order to determine the relative strength of the predictive variables and their utility in predicting the value of the award. Table 30 shows the results of that analysis for cases in the judicial sample.[310]

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306. *See infra* Appendix, Table A16.

307. For the value of child support and combined child support and alimony, $p<.0001$.

308. Several other variables, including the case duration and region, demonstrated a significant relationship with the value of child support depending on whether alimony was counted as part of its value. *See infra* Appendix, Tables A16 & A17. None of these variables ultimately contributed to the predictability of child support when regression analysis was utilized.

309. Variables suggesting strategic bargaining (the case duration, and an unrealized custody threat by the husband) were also significantly linked to case outcomes. But the relationships were the opposite of what bargaining theory would suggest: a longer case duration and an unrealized custody threat were both *positively* correlated with the value of child support (although an unrealized husband's custody threat was not significantly correlated with the value of child support plus alimony). *See* Appendix, Tables A30 & A33. Use of a custody contest threat as a bargaining chip would, of course, suggest a negative correlation. Although the custody contest threat did not contribute significantly to the regression model, the case duration variable did (at least when the value of alimony was excluded).

310. Two variables significant at the .05 confidence level, the recipient's education and the obligor's education, are excluded from the analysis. The addition of these variables did not enhance the predictability of the model when included and, given the large number of cases with missing data for these variables, would have necessitated a large reduction in sample size.

TABLE 30: REGRESSION ANALYSIS OF CHILD SUPPORT AWARDS (ALIMONY EXCLUDED) (JUDICIAL SAMPLE: TRIAL COURTS) DEPENDENT VARIABLE = VALUE OF CHILD SUPPORT (1990 DOLLARS)

Independent Variable	Full (n=134) Model		Parsi-monious (n=134) Model	
	Standard. Regression Coefficient	t Stat. (p=)	Standard. Regression Coefficient	t Stat. (p=)
Obligor's Income	.606522	7.843 (.0000)	.594826	9.897 (.0000)
Obligor's Job Status	-.058442	-.814 (.4171)		
Recipient's Income/Family Income	.066505	1.644 (.1027)		
Decision Year	.161647	2.438 (.0162)	.210526	3.499 (.0006)
# of Minor Children	.271017	4.455 (.0000)	.262227	4.427 (.0000)
Judge's Sex	.102856	1.644 (.1027)		
Judge's Experience	-.032889	-.535 (.5938)		
Sole Custody to Mother	.126776	2.077 (.0399)	.142092	2.409 (.0174)
Appellate Department:				
1st	-.030937	-.450 (.6538)		
3rd	.014028	.228 (.8201)		
4th	-.049351	-.808 (.4207)		
Constant		-2.811 (.0058)		-4.028 (.0001)
Proportion of Variability Explained by Model:[311]		53.74%		54.29%

311. The percentages refer to the adjusted R Square. *See supra* note 231 (defining the adjusted R Square).

Both the full and parsimonious regression models explicated slightly more than half of the variation in child support awards. The obligor's income was by far the most powerful predictive variable, a result quite consistent with those reported by other researchers who have employed regression analysis to determine the predictability of child support under both discretionary standards[312] and presumptive child support guidelines.[313] Interestingly, regression analysis did not eliminate the decision year as a predictive variable, thus suggesting a trend toward higher child support awards over the research period.

Adding the alimony award to the value of child support did not improve, but instead slightly diminished, the predictability of case outcomes.[314] Although the obligor's income remained the most important predictive variable, the recipient's percentage of family income also contributed significantly to the model when alimony was taken into account. The regression models thus suggest that judges made child support decisions with little regard to the characteristics and income of the parent-recipient, using alimony as means of adjustment. They also suggest that extrastatutory factors (or at least those factors on which information was available) did not play an important role in child support determination.

Regression analysis of child support values in the settlement group revealed slightly different predictive relationships and explained a somewhat lower proportion of outcome variability.[315] The obligor's income was, again, by far the most powerful predictive variable, but the recipient's relative need, as measured by her percentage of family income, here demonstrated a significant predictive relationship to the child support award, whether or not alimony was included in its value.

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312. *See* Melli et al., *supra* note 32, at 1164 (finding that the number of children, income of supporting parent, and couple's estimated net worth accounted for almost 50% of variation in child support values).

313. *See* MACCOBY & MNOOKIN, *supra* note 14, at 122 tbl. 6.1, 156 tbl. 7.7 (finding 54% of variation in child support awards explicable, with the father's earnings and the number of children the most important predictive variables).

314. The adjusted R Square was .49520 for the full regression model and .50599 for the parsimonious model.

315. When the value of alimony was excluded, the adjusted R Square was .46553 for the full and .44118 for the parsimonious regression model. When the value of alimony was included, the adjusted R Square was .39572 for the full and .39436 for the parsimonious regression model.

ii. Cases Without Minor Children

Although several income and status-related variables were significantly correlated with the value of alimony in judicial sample cases without minor children,[316] regression analysis revealed the obligor's income to have little predictive weight as compared to the value of the obligor's property and the appellate department in which the case was decided. (See Table 31.[317]) Although the small sample size prevents conclusive interpretation of the results, these two variables explicated approximately two-thirds of the variation in alimony values. The small number of settlement sample cases without minor children in which alimony was awarded[318] precluded regression analysis of these outcomes.

316. In the judicial sample, the husband's income, wife's income, percentage of family income earned by the wife, the husband's job status, the value of husband-owned property, the value of the wife's net property award, the fault ranking, the judge's political party, and the appellate division were significantly linked to the value of the alimony award at the .05 confidence level or better. For correlation coefficients and p values, see *infra* Appendix, Table A18.

317. Two variables significant at the .05 confidence level, the husband's job status and the judge's political party, are excluded from the analysis. The addition of these variables did not contribute significantly to the predictability of the model and would have reduced the sample size by a fairly large margin.

318. n=28.

TABLE 31: REGRESSION ANALYSIS OF ALIMONY VALUE (JUDICIAL SAMPLE: TRIAL COURTS—CASES WITHOUT MINOR CHILDREN) DEPENDENT VARIABLE = VALUE OF ALIMONY AWARD TO WIFE (1990 DOLLARS)

Independent Variable	Full (n= 41) Model		Parsimonious (n= 41) Model	
	Standard. Regression Coefficient	t Stat. (p=)	Standard. Regression Coefficient	t Stat. (p=)
Fault Ranking	.017450	.174 (.8628)		
Husband's Income	.079866	.712 (.4818)		
Wife's Income	.094304	.607 (.5481)		
Wife's Income/ Family Income	-.224294	-1.371 (.1802)		
Wife's Net Property Award Value	-.317090	-2.240 (.0324)		
Husband-Owned Property Value	.740757	5.066 (.0000)	.509548	5.165 (.0000)
Appellate Division:				
1st	.366469	3.431 (.0017)	.476615	4.831 (.0000)
3rd	-.034322	- .368 (.7157)		
4th	-.076928	- .771 (.4463)		
Constant		2.244 (.0321)		5.333 (.0000)
Proportion of Variability Explained by Model:[319]		71.70%		68.88%

319. The adjusted R Square.

6. Alimony and Child Support Decision Making: A Summary

A review of the data on the predictability of alimony and child support reveals a striking fact: Virtually every possible claim regarding discretionary decision making finds support somewhere.

On the issue of consistency, there is evidence of regional variation (the value of alimony in cases without minor children), class bias (the award of alimony), the intrusion of private values into the decision-making process (alimony permanence), different decision-making patterns from one year to the next (alimony, alimony permanence, child support values), utter unpredictability (the duration of nonpermanent alimony awards), and of highly predictable decision making quite consistent with the statutory mandate (the award of alimony, child support values).

On the issue of gender bias, there is evidence that judicial decisions produced post-divorce income disparities, comparable to those reported in settled cases,[320] that seriously disadvantage women and children. But the average percentage of obligor income judges awarded under discretionary standards does not appear to be smaller than the average percentage judges would presumptively award under the determinate child support guidelines now in effect in New York. Judges were less prone to award alimony, and particularly permanent alimony, over the research period. But the decline in alimony was offset, for women with minor children, by higher child support awards, a shift that, given the taxability of alimony and its loss upon remarriage, may have provided a net advantage to women with minor children.

On the issue of how discretionary decision making affects the settlement process, the picture is also mixed. No strategic bargaining effects were evident.[321] Depending on which decision we consider, settlements were either highly consistent with judicial decision-making patterns (alimony, child support) or quite inconsistent (alimony duration).

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320. *See supra* note 42 and sources cited therein.

321. One possible explanation for this result is suggested by Seltzer and Garfinkel, who found evidence of property for support trade-offs when husband and wife had relatively equal incomes, but "[i]n most cases the parent who receive[d] a favorable property settlement also receive[d] a favorable support award." Seltzer & Garfinkel, *supra* note 44, at 105, 107. Based on this finding, they suggest that in the typical divorce negotiation characterized by inequality, the more powerful spouse does not need to engage in strategic bargaining.

What we do not see in the alimony and child support data is *overall* consistency. Depending on where we look, there is evidence that suggests both discretion's success and its failure.

C. *The Impact of Appellate Courts*

1. The Likelihood of Affirmance

Because many judicial sample cases were obtained from appellate records, the sample's overall appeal rate is very high; some aspect of the trial decision was appealed in 77% of the cases. In contrast to the propensity of state appellate courts to affirm trial decisions reported outside the divorce context,[322] in the majority of sample appeals the trial court order was modified, the case remanded for reconsideration, or both. Only 30% of trial decisions appealed were fully affirmed.[323] (See Table 32.) Although the likelihood of affirmance did not vary substantially over the research period, appellate courts were significantly less likely to remand the case to the trial court in later years than in earlier ones;[324] 37% of appeals resulted in remand during the first triennial period as compared to 17% during the last.

322. *See, e.g.*, Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 574; James W. Meeker, *Criminal Appeals over the Last 100 Years*, 22 CRIMINOLOGY 551, 553 (1984); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403, 406-07 (1987); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1209-10 (1978).

323. This rate is fairly consistent with that reported by another researcher who evaluated appellate activity in family law appeals. *See* Crippen, *Abundance*, *supra* note 26, at 94 tbl. 1 (finding that in 39% of published 1990 family law opinions by the Minnesota Court of Appeals the decision below was wholly affirmed, as compared to 52% of published opinions on all topics).

324. Chi-square=16.50258 D.F.=6; p=.0113.

TABLE 32: APPELLATE ACTIONS, BY TIME PERIOD

Appellate Action	Time Period		
	1980-83 % (n=80)	1984-86 % (n=144)	1987-90 % (n=74)
Affirmed	30%	32%	28%
Modified or Reversed	34%	39%	56%
Remanded			
For lack of reasons	10%	6%	3%
For reconsideration of specific issues	14%	13%	7%
Modified and remanded	13%	11%	7%

The likelihood of affirmance was significantly correlated with the gender of the appellant. Although litigation theorists have tended to assume that the party with the greater resources has the best chances of winning,[325] that conjecture was not borne out here. Husbands, who as a group had much higher incomes and more valuable assets than wives,[326] had significantly smaller chances of obtaining a remand or modification of a trial court order.[327] Although husbands were almost twice as likely to appeal as were wives (see Table 33), the trial court's order was fully affirmed twice as often when the husband appealed as when the wife did. The fact that husbands were so much more likely to appeal may, indeed, be the reason for their lower chances of success; one team of researchers has reported (not surprisingly) the highest appellant success rates among litigants who are highly selective in electing to appeal.[328]

325. *See, e.g.*, BLACK, BEHAVIOR, *supra* note 179, at 21-23; Galanter, *supra* note 14, at 124-25 ; Marc Galanter, *Afterward: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 357 (1975); Wheeler et al., *supra* note 322, at 438-43.

326. *See supra* text at notes 173-75.

327. Chi-square=11.22773 D.F.=4; p=.0241.

328. Wheeler et al., *supra* note 322, at 441.

TABLE 33: ACTIONS BY APPELLATE COURTS

Appellate Action*	Appeal By:			
	Husband (n=146)	Wife (n=78)	Both (n=73)	Total (n=297)
Affirmed	38%	18%	27%	30%
Modified or reversed	40%	46%	41%	42%
Remanded				
Without modification	14%	24%	18%	18%
With modification	8%	12%	14%	10%
All Remands	22%	36%	32%	28%

* Final actions as of September 1992.[329]

The rates of affirmance, modification, and remand also varied significantly among appellate courts.[330] Of the state's four appellate departments, the rate of affirmance ranged from 17% to 43%, and the rate of modification or reversal from 28% to 72%.[331]

2. Property Division

Appellate activity focused primarily on property distribution. In almost two-thirds of the cases appealed, the distribution of marital net worth was modified or remanded for reconsideration by the trial court. (See Table 34.) The most common appellate action was modification of the percentage distribution of a particular asset, debt, or the overall net worth distribution; the remainder involved remand or modification of a valuation or lump sum distribution. Appellate courts were also far more active with respect to assets than debts. The trial court's debt distribution was modified in only 3% of appeals;

329. In 10 sample cases, there was a second appeal from the trial court's reconsideration after remand; six were modified, three affirmed, and one remanded to the trial court again. Since the sample results were calculated as of September 1992, it is possible that the final count of cases involving more than one appeal might be higher, as some of the later cases could not have reached an appellate court a second time by that date.

330. Chi-square=15.49927 D.F.=6; p=.0167 (based on final actions).

331. The rate of affirmance was highest in the Third Department (43%), and lowest in the First Department (17%); the Second Department affirmance rate was 28%; the Fourth Department rate was 24%. The rate of reversal or modification was highest in the First Department (72%) and lowest in the Third Department (28%). The Second Department modification/reversal rate was 42%; the Fourth Department rate was 56%.

overwhelmingly these modifications were in the wife's favor.[332] Overall, however, appellate modification of asset and debt distribution did not favor either party. Wives benefitted in 52% of the cases in which the net worth distribution was modified, husbands in 48%.[333]

TABLE 34: APPELLATE MODIFICATION OF TRIAL COURT PROPERTY AND DEBT DISPOSITION

Appellate Action*	% (n=297)
Modified	
Valuation of debt or asset	12%
Amount of lump sum payment	3%
Percentage division of asset or debt	27%
Remanded	
For reconsideration based on lack of reasons for distribution	6%
For reconsideration of valuation or asset/debt distribution	17%
Total Property Remands and Modifications	65%

* Percentages do not add to 100 due to multiple appellate actions per case.

Although neither husbands nor wives consistently benefitted from appellate modification of trial court property distribution orders, modification was significantly less likely when the trial court had divided a couple's net worth relatively equally.[334] (See Table 35.) Only 31% of trial court distribution orders were modified when the division of net worth was relatively equal, while more than twice that number were modified when the husband received the lion's share of net assets. Appellate modifications also tended to benefit the party to whom the trial court had awarded the smaller asset share.

332. In eight of nine cases in which the appellate court modified the debt distribution, the wife benefitted.

333. This pattern did not vary significantly over the 10 year period reviewed, nor was the direction of the altered distributional outcome significantly correlated with the income of either spouse, the value of their total assets, the value of their marital assets, or case location.

334. Chi-square=47.64651 D.F.=8; p<.0001.

In general, then, appellate activity enhanced the likelihood of equal division rather than the fortunes of husbands or wives as a group. The median and average percentage share of net property awarded to sample wives remained constant after appeals were taken into account, but the proportion of cases in which relatively equal division was ordered rose from 48% to 58% of the total.[335]

TABLE 35: APPELLATE MODIFICATION OF TRIAL COURT ORDERS DIVIDING MARITAL ASSETS AND DEBTS, BY PERCENTAGE DISTRIBUTION OF TRIAL COURT

Trial Court's % Distribution of Marital Net Worth	No Modification (n=162)	Modification Benefiting Husband (n=53)	Modification Benefiting Wife (n=57)
67% + to Husband	33%	13%	54%
56%- 66% to Husband	50%	7%	43%
Relatively Equal*	69%	17%	14%
56% - 66% to Wife	54%	39%	8%
67%+ to Wife	45%	42%	21%

* Relatively Equal = Between 45% and 55%

335. Cases involving negative net worth are excluded (n=323). Post-appeal, 24% of the cases resulted in disproportion favoring the husband and 15% in disproportion favoring the wife. If cases involving businesses or professional degrees are excluded, the proportion of cases resulting in relatively equal division rises to 62% (n=240). Among this smaller group, disproportion favoring the husband occurred in 18% of the cases and disproportion favoring the wife in 20%.

3. Alimony and Child Support

Appellate action regarding alimony or child support was much less common[336] and more difficult to categorize. Trial courts' alimony decisions were almost never reversed. In only five cases did an appellate court reverse a trial court decision not to award alimony; in only three was a decision to award alimony overruled. The alimony rate after appeal (63%) was thus almost identical to the trial court rate (62%).

Appellate modification of the value of alimony or child support was also relatively uncommon. The appellate court modified the value of alimony in only 12% of appeals where the trial court had awarded alimony,[337] and in only 9% of the child support cases where an appeal was taken.[338] Some of the modifications simply reallocated payments between alimony and child support. Thus, in only nineteen cases was the total value of child support and alimony altered.[339] Nine of these modifications were increases and ten were decreases; they evidenced no particular pattern. Remands for reconsideration of alimony or child support were even more rare. Such orders were made in only nine cases, all involving the value of the alimony or child support award.

Appellate courts were somewhat more likely to alter the duration of an alimony award; in 17% of appeals from a trial court alimony award,[340] the appellate court changed the duration of the award. Half of these modifications altered the permanence of the award; the other half altered the time period over which durational alimony was payable. The modifications did not show that appellate courts were more willing to award permanent alimony than trial courts, however. Among the seventeen cases in which the trial court was reversed on alimony permanence, approximately two-thirds (11 of 17) imposed time-limited instead of permanent alimony. Overall, 33% of alimony awards were thus permanent after appeal, as compared to 35% pre-

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336. This finding is consistent with that of another divorce researcher. *See* Crippen, *Abundance*, *supra* note 26, at 91 n.28 (finding that Minnesota appellate courts have specifically imposed or reduced a maintenance award on only three occasions during two decades). It is also consistent with the finding of a low reversal rate by state appellate courts generally. *See supra* note 322 and sources cited therein.

337. n=191.

338. n=186.

339. Cases in which the trial court's alimony order was reversed are excluded.

340. n=191. The two cases in which the trial court's alimony award was reversed are excluded here and in other portions of the analysis of appellate activity.

appeal. Although the difference was not significant, the appellate process did enhance the likelihood of permanent alimony for long-married, older women and reduce it for others.[341] Age and marital duration may thus have been given somewhat greater emphasis by appellate than by trial court judges.

Appellate modifications of the time period over which durational alimony was payable evidenced no particular pattern, however. In the seventeen cases where appellate courts so modified the award, a longer payment period was imposed in 59%, and a shorter term in 41% of the cases. The alterations did not appear to benefit any particular group, nor was the typical modification substantial. On average, the term of the award, when modified, was altered by only 2.5 years.

4. The Impact of Appellate Courts on Outcome Predictability

Although the actions of appellate courts did alter the predictability of alimony and property distribution outcomes slightly, their impact was not substantial. With respect to net worth distribution, the values of correlation coefficients and levels of significance often shifted, but only one variable (the wife's employment) that had demonstrated significance at the .05 confidence level at the trial level, failed to do so post-appeal.[342] And only two variables (the ratio of the wife's separate property to marital property and the appellate department) that had failed to demonstrate significance at the trial level did so after appeal. Regression analysis explained a somewhat larger proportion of variability in appellate than trial outcomes,[343]

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341. The following table illustrates this point:

PERCENTAGE OF ALIMONY AWARDS THAT WERE PERMANENT

Wife's Marital Status and Age	Trial Court % (n)	Appellate Court % (n)
Wives Married At Least 15 Years and At Least 45 Years Old	54% (63)	59% (63)
Other Wives	28% (120)	23% (120)

Cases with missing data on wife's age or marital duration are excluded. The correlation coefficients for marital duration and the wife's age both increased in value at the appellate level, as did the level of significance for each of these variables. *See infra* Appendix, Table A14.

342. For correlation coefficients and p values, see *infra* Appendix, Table A7.

343. The regression model explained 20.0% of variability post-appeal, as compared to 13.8% pre-appeal.

but the enhanced success of the regression model was partially dependent on regional variation in case outcomes, with a decision from the first appellate department a significant negative predictor of the wife's percentage share. The ratio of the wife's separate property to marital property also contributed significantly to the regression model; counterintuitively, a higher ratio was positively correlated with the wife's percentage award.

For alimony awards, appellate action altered the strength and significance of the variable correlations only in trivial respects.[344] No litigant characteristic that had, at the trial level, demonstrated significance at the .05 confidence level failed to exhibit at least that level of significance after appeal. No litigant characteristic demonstrated significance after appeal that had failed to do so previously. Logistic regression analysis of post-appeal alimony outcomes yielded a model that varied insubstantially from the model applicable to trial courts, and yielded a prediction rate less than three percentage points different.[345]

Although appellate courts were more active with respect to the permanence and duration of alimony, their activity again failed to substantially alter the predictability of these decisions.[346] Marital duration remained the most important predictive variable (indeed, its predictive value increased). Regression analysis of alimony permanence did achieve a somewhat improved prediction rate, however.[347] The judge's political party failed to contribute significantly to the regression model post-appeal, while the decision year did for the first time. The duration of a nonpermanent award remained, post-appeal, altogether unpredictable.[348]

Perhaps most important, the appellate opinions do not evidence clear, consistent guidance to trial courts. Trial judges had no apparent methodology for computing the length of a durational alimony award, for example. But in modifying the duration of alimony, appellate courts typically offered little methodological help. The factors most frequently mentioned by appellate courts as bases for changing the

344. For correlation coefficients and p values, see *infra* Appendix, Table A12.

345. The full regression model accurately predicted 82.7% of the cases post-appeal, compared to 85.1% pre-appeal.

346. For correlation coefficients and p values, see *infra* Appendix, Table A14.

347. The full regression model accurately predicted 76.4% of cases post-appeal, the parsimonious model 72.9%. The full regression model predicted 70.1% of cases pre-appeal, the parsimonious model 67.15%.

348. Only one litigant characteristic, the award of sole custody to the wife, achieved new significance post-appeal (p=.015).

alimony time period were the amount of time the wife would need to become self-sufficient and the age of the children. But it was rare for an appellate court to link self-sufficiency to any specific events,[349] and no consensus on how the children's age should affect the alimony decision was evident.[350] Sometimes, indeed, the court offered no reasoning for altering the duration of alimony at all.[351]

Appellate activity thus tended to enhance the predictability of trial court outcomes, but only by modest margins. One reason for this result is that the norms established by appellate courts were followed quite faithfully by trial judges; consistently, the same variables demonstrated significant relationships at the trial and appellate levels. This pattern suggests that, where trial court judges exhibit confusion, appellate courts could produce more predictable results. That appellate courts have failed to do so seems to reflect a lack of consen-

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349. *See, e.g.*, Wood v. Wood, 526 N.Y.S.2d 608, 610 (N.Y. App. Div. 1988) (extending alimony award from two to five years for homemaker married 3.5 years "to give her adequate time to prepare to reenter the job market"); Morton v. Morton, 515 N.Y.S.2d 499, 500-01 (N.Y. App. Div. 1987) (extending alimony award from one to five years for wife married for 17 years and a homemaker for 16 years; "A period of five years . . . should be sufficient to provide the defendant with the necessary financial support for retraining and readjustment." (citations omitted)); Durso v. Durso, 483 N.Y.S.2d 101, 102 (N.Y. App. Div. 1984) (extending alimony award from three to six years for wife who was married for 20 years and a homemaker for 18 years; "Until such time as she can earn a substantially higher income, the defendant's sustained efforts to educate herself so that she can become fully self supporting should not be a reason to limit the duration of the maintenance award."); Patti v. Patti, 472 N.Y.S.2d 20, 21 (N.Y. App. Div. 1984) (extending alimony award from two to four years for wife married 16 years and a homemaker for 14 years; "four years requested by the plaintiff is a more appropriate period which would permit her, after 14 years out of the work force, to refresh her skills and better prepare herself to become self supporting").

350. Among cases involving minor children, the children's age did not demonstrate a significant predictive relationship to the duration of alimony before or after appeal; the level of correlation was slightly lower post-appeal. *See infra* Appendix, Table A14. For cases discussing the children's age, see, e.g., Schoenfeld v. Schoenfeld, 563 N.Y.S.2d 500, 502 (N.Y. App. Div. 1990) (reducing permanent alimony award to five years; "Such a limitation will allow the wife to remain at home until her children are thirteen and almost eleven years of age, respectively."); Stempler v. Stempler, 532 N.Y.S.2d 550, 552 (N.Y. App. Div. 1988) (extending alimony award from five to seven years "because of the age [six] of youngest child" [child's age is unspecified in opinion but available from record on appeal]); Patti v. Patti, 472 N.Y.S.2d at 21 (extending alimony award from two years to four for homemaker of 14 years married 16 years; "likely that the son [14 years old] will live with the plaintiff for at least four more years" (citations omitted)).

351. *See, e.g.*, Weinstein v. Weinstein, 508 N.Y.S.2d 950, 951 (N.Y. App. Div. 1986) (extending alimony award from five to seven years; "Under all of the facts and circumstances of this case, it is our view that maintenance in the amount of $200 per week should have been granted to the plaintiff wife for a period of seven years . . . rather than five years . . . .").

sus at both levels of the litigation process on how to employ the discretion granted by the legislature.

IV. JUDICIAL DECISION MAKING IN RETROSPECT: DIRECTIONS FOR DIVORCE REFORM

A. Interpreting the Data

1. Discretion's Diversity

If any single thing is apparent from this inquiry into judicial decision making at divorce, it is that the results of discretionary decision making are by no means uniform. Each discretionary decision judges made—property division, the award of alimony, the duration of alimony, the value of alimony and/or child support—presents its own unique features. Depending on which economic decision we take as an example, evidence can be found to support the claims of either discretion's critics or its champions.

Discretion's champions might use the alimony award data, which suggest a fair degree of consensus among judges on the litigant characteristics that determine an alimony claim and on their relative weight. That consensus not only reflects the factors specified in the legislative scheme but, as the results of settlement track those of judicial decision making tolerably well, appears to have been quite faithfully transmitted to the practicing bar. The data on alimony and child support values similarly suggest a fair degree of consensus among judges on a decision making model, a consensus that both comports with the statute and is reflected (albeit imperfectly) in the results of settled cases.

Discretion's critics, on the other hand, might point to the alimony duration data, which suggest the intrusion of private values as decision-making criteria and the lack of developed consensus within the judiciary on the relevance and weight to be accorded particular litigant characteristics. The apparent link between trial court permanence decisions and political party, for example, suggests just the sort of arbitrariness that critics have complained about; so do the apparent class bias in alimony awards, the regional variation in alimony values, and the complete unpredictability of alimony duration decisions. The property division data also lend weight to the critics' claims. Judges seem to agree on relatively equal division as a prototypical outcome, but do not appear to have reached sufficient consensus on the factors that justify departure from equal division, to

permit reliable outcome predictions. The infrequency of equal division in the settled cases also suggests that judges were not able, at least during the Equitable Distribution Law's first few years, to transmit the new norm to the divorce bar. Moreover, the judicial tendency to award the ill and relatively needy wife less than half of the net assets certainly runs counter to the equal partnership principle that underlies the statute.

Discretion thus sometimes produced outcomes that appear to rely more on private values than on public standards. Outcomes were sometimes unpredictable, and sometimes failed to reflect the factors that the legislature had specified as relevant. Judicial consensus was not necessarily reflected in the outcomes of settled cases. But discretionary decision making was at times highly predictable and highly correlated with the legislative scheme. The results of settlement sometimes mirrored, albeit imperfectly, those achieved through litigation, and no evidence of distortions in settlement outcomes due to strategic bargaining could be found.

2. Explaining Discretion's Diversity

How can we explain these disparities?

a. Discretionary Standards Differ

One relevant factor may be differences in the discretionary standards themselves.[352] Some discretionary standards subtly curtail the exercise of discretion, while others do not. Professor Mnookin, for example, reports the "rather surprising" finding that every pregnant minor who sought judicial authorization for an abortion under a statute permitting waiver of parental consent based on a judicial finding that the minor is mature or that "an abortion would be in her best interests" ultimately obtained it.[353] His explanation for this finding was that judges, many of whom personally opposed abortion, believed it impossible to justify finding both that a minor was insufficiently mature to choose an abortion, and that it was also in her best interests to bear a child: "The law puts judges in the

352. *See* Lempert, *supra* note 17, at 214-15 (describing the importance of "the mandate and clarity of the law as understood by the decision-maker" in determining how discretion is exercised).

353. Robert H. Mnookin, Bellotti v. Baird*: A Hard Case*, *in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 239-40 (Robert H. Mnookin ed., 1985).

ridiculous position of being rubber stamps," one judge complained. "There is no way you could substantiate such a decision."[354]

While no provisions of the Equitable Distribution Law constrained judicial discretion this tightly, there were differences in the level of restraint imposed by specific statutory provisions. Some were premised on coherent themes or principles that tended to rein in discretion; others were not. Viewed from this perspective, the unpredictability of durational alimony awards may derive, in part, from the "rehabilitation" concept that underlies the alimony provisions of the law.[355] Judges, in an apparent attempt to conform their decisions to the rehabilitation principle, tended to focus on when the alimony recipient would become self-supporting. But while it is easy to predict this time period when the alimony recipient plans to obtain further job training, neither the statute nor the rehabilitation concept outlines any logical method for making such a prediction in the far more typical case in which the recipient does not. The economic circumstances of an older alimony recipient with little education and a job history confined to low wage, dead-end employment cannot be expected to improve. The predictive question, in these cases, verges on incoherence and thus may have enhanced the unpredictability of judicial response.

By contrast, the "partnership of coequals,"[356] concept that underlies the property distribution rules offers a clear decision-making principle applicable to each and every case: Equal partnership implies equal treatment. Given this underlying statutory principle, it is not hard to see why judges gravitated to an equal division norm. The statute itself invites, indeed drives, judges in this direction. Nor is it surprising that appellate courts have enhanced the tendency toward equality. With a statute premised on equal partnership, this is the most logical result and the one easiest to justify.

Given the equality norm underlying the property division provisions of the statute, the extent of judicial consensus on equality is perhaps less surprising than the number of departures from that norm. Even after appeals are taken into account, slightly more than 40% of the cases resulted in *unequal* division. A partial explanation lies, again, in the nature of the constraints imposed by the statute: It is an underlying principle that suggests equality, rather than a literal statutory command. Moreover, the statute, by requiring a mul-

354. *Id.* at 240.
355. *See supra* note 99 and accompanying text.
356. *See supra* note 101 and sources cited therein.

tifaceted consideration of case circumstance, implies that departure is appropriate in a variety of circumstances.[357]

b. "Familiarity Breeds Precedent"

A second explanation for the diversity of results derives, I believe, from the relative novelty of some statutory commands as compared to others: The extent of judicial experience under a discretionary standard will, like the discretionary standard itself, affect the manner in which judges exercise their discretion. The reasons for this phenomenon are uncomplicated. Decision-makers gravitate toward routine decision-making norms when repetitively confronted with cases of a similar type.[358] Judges, moreover, are expected to strive for like results in like cases and thus rely heavily on accumulated precedents.[359] Routinized norms also serve a time allocation function, permitting the decision-maker to give adequate consideration to the atypical.[360] Judges thus gravitate toward factual and legal stereotypes in order to achieve consistent and efficient results.

As a result of this tendency toward consistency, the predictability of both judicial decisions and lawyer-negotiated settlements may vary substantially based on a decision-making standard's age and case

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357. Appellate courts have also endorsed departures from equality. *See supra* note 109.

358. *See* DAVIS, POLICE DISCRETION, *supra* note 80, at 150-51; Lempert, *supra* note 17, at 216-17; Schneider, *supra* note 8, at 2282-83. For contextual research describing the tendency toward routinized decision making, see ROBERT M. EMERSON, JUDGING DELINQUENTS (1969) (juvenile court judges); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 233-43 (1970) (insurance claims adjusters); Lempert, *supra* note 17, 216-26 (public housing eviction board); Douglas W. Maynard, *The Structure of Discourse in Misdemeanor Plea Bargaining*, 18 LAW & SOC'Y REV. 75 (1984) (prosecutors); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52 (1967) (public defenders and private defense counsel); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965) (public defenders). For discussion of the psychological factors that contribute to routinized decision making, see, e.g., DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); Vladimir J. Konecni & Ebbe B. Ebbesen, *The Mythology of Legal Decisionmaking*, 7 INT'L J.L. & PSYCHIATRY 5, 6-7, 15-16 (1984).

359. For a classic account of this process, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28-36 (1921) [hereinafter CARDOZO, THE JUDICIAL PROCESS].

360. LEMPERT & SANDERS, *supra* note 86, at 83-88. Routinized decision-making norms thus offer many of the benefits of formal rules. As Professor Schauer has put it, "[W]e are able to do what we can precisely because rules free us from having to do anything else." SCHAUER, *supra* note 9, at 230.

volume.[361] The intrusion of disparate private values into the decision-making process, as indicated by the correlation of case outcomes with judicial characteristics, appears most likely when the decision-making standard is young and when the case volume is light. Clear decision-making norms that rely on a few key facts are, conversely, more likely to be encountered as the standard ages and as case volume increases.

The research results conform quite closely to this "natural history" of discretionary decision making. Standards for determining child support did not change at all as a result of the 1980 Equitable Distribution Law.[362] Judges could thus rely on an established consensus developed over decades, and judicial decisions on the value of child support were accordingly quite predictable. By contrast, durational alimony, where judicial decisions were quite unpredictable, was newly established as a norm by the 1980 law. Judges and lawyers had only the statute to guide the decision-making process. So, too, with property division. Given the fact that New York had no marital property distribution scheme prior to the Equitable Distribution Law, judges and lawyers confronted a blank slate.

c. Consensus Does Not Hold

Yet another explanatory factor for the diverse results achieved by the Equitable Distribution Law is the dynamic nature of judicial consensus. The flexibility inherent in a discretionary standard permits dramatic shifts in judicial perceptions and decision-making patterns.[363] Rules thus codify the consensus of a given moment; discretion embraces the consensus of yesterday, today, and tomorrow.[364]

The shifting nature of judicial consensus is evident in the fact that the year of decision was a significant predictor of the award of alimony, the likelihood of a permanent alimony award, and the value

361. For a detailed discussion of the time factor in precedent promulgation and its relation to the choice between rules and discretionary standards, see Kaplow, *supra* note 9, at 612-14; Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992); Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986).

362. Nor did the new alimony statute's specification of factors necessitate any major departure from traditional decision-making patterns for the alimony component of the total transfer payment.

363. For a fascinating example, see Lempert, *supra* note 17, at 204-13.

364. *See* SCHAUER, *supra* note 9, at 160 (describing tendency of rules to enhance the status quo and give power to the past).

of child support (as well as child support and alimony combined). The flexibility inherent in a discretionary standard permitted child support awards to drift upward. It permitted the percentage of cases in which alimony and permanent alimony were awarded to drift downward as well.

These shifts tracked social and public opinion trends. Over the ten-year research period, increasingly large numbers of married women with young children were in the paid labor force,[365] a shift that decreased not only the need for both short- and long-term alimony, but public support for such transfers as well. The period also saw a genuine sea change in public sentiment regarding child support. Over the decade the low value of child support awards came under intense public and political scrutiny;[366] during the later years of the research period, child support guidelines, which would eventually supplant discretionary decision making altogether, were being actively debated in the state legislature.[367] By contrast, judges were not required to respond to a new public opinion climate or to the threat of major statutory change in the area of property division, and these outcomes were not significantly related to the decision year.[368]

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365. In 1980, 45.1% of married women with children under the age of six were in the paid labor force, as compared to 59.9% in 1991. STATISTICAL ABSTRACT, *supra* note 151, at 388 tbl. 620.

366. Professors Beller and Graham report that the *New York Times Index* listed "child support" as a separate category for the first time in 1980; by 1986 the listings under that heading had grown to two full columns. BELLER & GRAHAM, *supra* note 69, at 5.

367. Child support guidelines legislation was first introduced in the New York legislature in 1985. In part due to the vigorous and effective opposition of the New York State Bar Association, the legislature did not enact a bill until 1989. *See, e.g.*, Paul Browne, *State Bar Weight Felt Against Measure on Child Support*, N.Y. L.J., August 12, 1988, at 1; E.R. Shipp, *Support Formula Stymied in Albany*, N.Y. TIMES, Sept. 4, 1988, at 36. The continuing debate over the legislation helped to focus media attention on child support issues, both in the popular press, *see, e.g.*, Editorial, *Divorce Lawyers Thrilled at Bill's Demise*, DAILY NEWS, Sept. 9, 1988, at 12; Editorial, *Cheapskates and Child Support*, N.Y. TIMES, Dec. 5, 1988, at A22, and in the legal press, *see, e.g.*, Henry H. Foster & Grier H. Raggio, *An Analysis of Proposed Law for 'Equitable' Child Support*, N.Y. L.J., May 14, 1987, at 1; Martin Fox & Gary Spencer, *New Drive for Child Support Guidelines*, N.Y. L.J., Dec. 13, 1988, at 1.

368. *See infra* Appendix, Table A19. Social consensus regarding the equal partnership conception of marriage perhaps expanded during the research period, but did not change direction. For example, the Uniform Probate Code provisions relating to the spousal right of election were substantially revised in order "to bring elective-share law into line with the contemporary view of marriage as an economic partnership." UNIF. PROBATE CODE art. 2, pt. 2, general cmt. (1990). Revisions to New York's estates law, introduced in the legislature toward the end of the research period, enlarged the intestate share of a surviving spouse from one-third to one-half of the probate estate and enhanced the spousal right of election through the expansion of testamentary substitutes and abolition of the so-

While it would be impossible to establish clear links between the decision-making climate and judicial decisions themselves, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[369] The tides of social change do not, of course, break with equal force upon all decision-makers, a fact perhaps evidenced by the tendency of older judges to award alimony more frequently than younger ones, and of Republican judges to award permanent alimony more frequently than Democratic judges.

The variable rate and manner in which individual judges respond to changing social and legal conditions, coupled with the resulting tendency of judicial consensus to shift over time, thus ensure that the results of discretionary decision making can never be perfectly predictable. Indeed, given the rapid pace of change in public opinion and in gender and marital roles during the research period, it is perhaps surprising that the judicial decisions reviewed exhibited as much predictability as they did.

3. Evaluating Discretion's Results

a. Consistency, Gender Bias, and Settlement Patterns

The research findings, which at first glance appear chaotic and contradictory, thus reveal, in the end, some consistent themes. They show us judges struggling conscientiously to give form and content to their discretionary mandate, a process guided by legislative directives (or lack thereof), shaped by experience, and set in a shifting historical context. They show us the impact of individual values and social climate. And they also show us the channelling effect of institutional norms, appellate precedent, and legislative principle, which tend over time to produce more uniform and predictable case outcomes.

On the issue of consistency, the research findings thus suggest that if trial judges are given clear legislative and appellate guidance, discretionary divorce decision making may, over time, produce highly predictable results. Discretionary decision making will, of course, remain subject to shifting trends,[370] but the tendency of discretion

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called "right of election trust." *See* Act of July 24, 1992, ch. 595, 1992 N.Y. Laws 595 §§ 8, 25 (*codified at* N.Y. EST. POWERS & TRUSTS LAW § 4-1.1, 5-1.1A (McKinney Supp. 1995)).

369. CARDOZO, THE JUDICIAL PROCESS, *supra* note 359, at 168.

370. For example, the alimony decisions of younger and Democratic judges (who were less prone to award alimony and permanent alimony) appear to reflect an underlying preference for formal gender equality. But this model of equality has, at least since the middle of the research period, been subjected to repeated criticism from feminist critics.

to evolve toward routinized norms should ultimately produce patterns that are more reliant on institutional values than on individual judicial predilection.

That judges have failed to achieve predictable and consistent outcomes in many areas of divorce decision making appears to derive from the novelty of the statutory provisions, coupled with the conflicting, and at times incoherent, principles upon which judges have been directed to base the decision-making process. Novelty will pass. But how fast and how well courts will evolve clear decision-making principles where legislative guidance is sparse remains to be seen. The research findings thus suggest that discretion *could* produce fairly consistent results, but do not reveal whether it *will.*

On the issue of gender bias, the research findings suggest equally ambiguous conclusions. Judicial decisions often reflected traditional gender stereotypes. For example, judges who awarded the wife a small share of business or professional assets sometimes justified that decision by noting that the wife had been awarded substantial alimony, a choice that reflects, and reinforces, a tradition of wifely dependence upon an economically dominant husband who controls the family purse strings.[371] The tendency of judges to award husbands the lion's share of marital debts, and to require little or no child support from women who did not obtain custody, also suggest reliance on this stereotype of wifely dependence.

But as these varied examples make plain, judicial adherence to traditional gender stereotypes did not uniformly advantage either husbands or wives. The conscious and unconscious influence of gender stereotype should not be confused with consistent bias. Of the former, there is plentiful evidence. Of the latter, there is little.

See, e.g., FINEMAN, *supra* note 75; OKIN, *supra* note 78; Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296. As these criticisms of formal equality gain a broader audience, it is altogether possible that the preferences—and the decisions—of these judges will shift direction.

371. *See, e.g.*, Arvantides v. Arvantides, 478 N.E.2d 199, 200 (N.Y. 1985) (upholding reduction of wife's share of husband's dental practice: "When it is considered that [the wife] has also received an award of maintenance, medical expenses, insurance benefits and the more valuable of the two homes owned by the parties, the distribution cannot be said to be inequitable as a matter of law."). More typically, the pattern described is not explicitly recognized by the court. *See, e.g.*, Behrens v. Behrens, 532 N.Y.S.2d 893 (N.Y. App. Div. 1988); Wood v. Wood, 526 N.Y.S.2d 608 (N.Y. App. Div. 1988); Morton v. Morton, 515 N.Y.S.2d 499 (N.Y. App. Div. 1987); Pulitzer v. Pulitzer, N.Y. L.J., 10/22/85, at 11, col. 2B, *modified*, 523 N.Y.S.2d 508 (N.Y. App. Div. 1988); Ginter v. Ginter, N.Y. St. B. Ass'n Fam. L. Rev., Sept. 1990, at 23, 25.

It is true that the results of the discretionary decision-making process ultimately produced considerable inequality in post-divorce living standards. On average, women and children suffered a sharp decline in their standard of living, while men obtained an improvement. But we cannot attribute this result simply to judicial bias. The New York legislature, which reduced judicial discretion in awarding child support in order to improve children's post-divorce living standards, adopted guidelines that would presumptively transfer no more income to women and children than did judges acting under discretionary standards.[372] For the typical family, where husband earns substantially more than wife, this "improvement" over discretionary decision making produces outcomes fairly comparable to those produced by judges.[373] We are all, as Professor Regan reminds us, "both cause and effect of the gender system, which means that we may unwittingly reproduce it even as we seek its demise."[374]

As for the impact of discretionary decision making on the settlement process, the research shows that settlements can track the results of judicial decision making tolerably well. No adverse effects due to strategic bargaining behavior could be found; custody-for-money trade-offs, thought to be common under discretionary standards, were not evident. But strategic behavior may take different forms than theorists have supposed.[375] More importantly,

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372. *See supra* notes 262-69 and accompanying text.

373. *See* David M. Betson et al., *Trade-Offs Implicit in Child-Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 12 tbl. 3 (1992) (assuming custodial parent earns $10,000 and noncustodial $20,000, under a child support model similar to the New York statutory guidelines, the ratio of post-divorce to pre-divorce scaled surplus income was 1.24 for noncustodial household and 0.41 for custodial household with one child). The New York statute does provide for pro rata apportionment of child care expenses when custodial parent is working or in school, however, N.Y. DOM. REL. LAW § 240.1-b(c)(4) (McKinney Supp. 1995), which would tend to improve these ratios somewhat.

374. Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1494 (1992).

375. The high rate of noncompliance with temporary support orders among cases in the judicial sample may evidence strategic behavior, for example. It is also possible, of course, that strategic behavior is much less common than theorists have supposed. Researchers have noted, in varied contexts, that the existence of an ongoing relationship tends to reduce the likelihood of adversarial behavior. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW 270-75 (1991) (neighboring and concurrent landowners); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1977) (prosecutors and defense counsel); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-61, 63-64 (1963) (parties to commercial contracts); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2040-42 (1987) (buyer-seller contractual relationships).

the tendency of settlements to predictably track judicial decision patterns, and the lack of strategic bargaining effects, may be due to the high rate of legal representation in the settlement sample and thus unrepresentative of results in the general divorce population.[376]

Overall, the research results suggest that discretionary decision making at divorce is not clearly inferior to rule-based decision making. It is capable of producing consistent, predictable results. It is no more prone to gender bias than recent legislative rules. At least if the settlement process is guided by lawyer intermediaries, adverse effects resulting from discretionary standards are not demonstrable.

b. Discretion and Rule: The Tendency Toward Convergence

It is also probable that, in some instances, discretion and rule will produce relatively equivalent results. The reasons for this phenomenon derive from the contrary effects of rule and discretion on the decision-making process. As noted above, discretionary standards will typically, through the development of informal rules of thumb and formal precedents, become more rule-like. An historical example of this channelling tendency of discretion can be found in child custody law. Courts, ostensibly deciding custody based on a broad examination of a child's best interests, over time adopted what might be best described as a set of presumptions: in favor of the mother for a child of "tender years;" in favor of the parent preferred by a mature child; against the parent whose conduct exposes the child to immorality.[377]

In contrast to the channelling tendency of discretion, rules tend to produce exceptions.[378] Indeed, the narrower the rule that constrains the decision-making process, the greater the likelihood and the number of exceptions that will occur. These exceptions may

376. Professors Maccoby and Mnookin, who also failed to find evidence of money-for-custody trade-offs in their research on divorce outcomes in California, hypothesized that the explanation lay in California's bright-line "child support schedules and community property rules [which] substantially constrain such trade-offs" and in the difficulty of "fathers to engage in strategic behavior [regarding custody] that appears credible to their spouses." MACCOBY & MNOOKIN, *supra* note 14, at 160. Lawyers, like bright-line rules, may significantly reduce the credibility of custody threats.

377. For a description of the rules and case law, see, e.g., CLARK, FIRST EDITION, *supra* note 59, at 584-87.

378. *See, e.g.*, Rose, *supra* note 54, at 578-90 (giving detailed examples of how "the straightforward common law crystalline rules [of property law] have been muddied repeatedly by exceptions and equitable second-guessing").

result from judicial interpretation of the rule itself,[379] rejection of the rule in favor of a competing rule or higher principle,[380] or even from legislative reaction to judicial rule enforcement that results in perceived injustice.[381]

As a result of these divergent tendencies, the results of discretionary and rule-based decision making, if shaped by similar principles within the same historical context, may ultimately converge. Marital property distribution is a potential example of this phenomenon. With only a few years' experience with equitable property distribution, it appears that New York courts already view equal division as a prototypical outcome, or perhaps as an analytical starting point. Professor Reynolds, reviewing a collection of reported equitable property distribution decisions from six states with older equitable division regimes, reports that judges almost never divided marital property unequally.[382] By contrast, in a state like California that has an established equal division rule, it has been necessary to carve out exceptions to the equality requirement to meet equitable concerns: for cases of negative net worth,[383] for cases in which the custodial parent needs the home,[384] and for cases of asset dissipation.[385] Judicial decisions made under a mature equitable property distribution standard and a mature equal division rule thus may not, in the end, differ greatly.

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379. The law of wills offers some good examples. *See, e.g.*, Engle v. Siegel, 377 A.2d 892 (N.J. 1977) (excluding application of anti-lapse statute based on determination that testator probably intended an inconsistent result); Johnson v. Johnson, 279 P.2d 928 (Okla. 1954) (admitting to probate a typewritten, unsigned, and unexecuted will on theory that handwritten addition republished will by codicil); *see also* BURTON, *supra* note 9, at 191-99 (describing competing claims regarding judicial interpretation of the law).

380. The classic example is the case of Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889), in which the New York Court of Appeals denied the beneficiary of a will who had murdered the testator his legacy: "[A]ll laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud . . . or to acquire property by his own crime." *Id.* at 190. *Riggs* has attracted the attention of many students of judicial discretion. *See, e.g.*, BURTON, *supra* note 9, at 51-62; CARDOZO, THE JUDICIAL PROCESS, *supra* note 359, at 40-43; DWORKIN, *supra* note 9, at 23-39.

381. For example, legislatures have enacted elective share statutes that expand the range of includible assets in order to ensure that the elective share entitlement cannot be circumvented through will substitutes. *See, e.g.*, LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 488 (1991).

382. Reynolds, *supra* note 41, at 854-55.

383. CAL. FAM. CODE § 2622(b) (West 1994).

384. CAL. FAM. CODE §§ 3801-3802 (West Supp. 1994).

385. CAL. FAM. CODE § 2602 (West 1994).

B. *Directions for Divorce Reform*

1. Discretion and Rule: Their Costs and Constraints

The choice between discretion and rule is not, however, immaterial. Like Professor Coase's well-known theorem positing the irrelevance of liability rules,[386] a claim of immateriality might have merit in a timeless world of perfect information and insignificant transaction costs. But this is not the world of divorce litigation. Real-world constraints on time, information, and money not only render the theorem invalid, but offer a framework for determining the appropriate balance between discretion and rule. While the research suggests that discretionary and rule-based decision making at divorce can, and ultimately may, produce similar results, the costs of discretionary and rule-based decision making, and the actors on whom they are imposed, are quite different. The choice between discretion and rule should take these differences into account.

One important difference is the greater cost of obtaining information about a law's content when it is embodied in a discretionary standard. A rule provides its own notice of the applicable legal standard. A discretionary standard does not. Lawyer intermediaries may, of course, offer litigants as much certainty as would a rule—the findings from this research project confirms that they often do—but lawyer assistance is neither cheap nor certain. Based on an informal telephone survey of law offices that advertise divorce as a specialty, an uncontested, uncomplicated divorce now costs, in New York City, almost $1,000.[387] For the "typical" divorce litigant, who has been married for perhaps seven years and has divisible marital assets consisting of a used car, household goods,

386. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

387. Ten law firms, all randomly selected from those listing divorce as a specialty in the Brooklyn, Manhattan, or Queens, N.Y. telephone directory Yellow Pages, were telephoned. A representative of each firm was asked the "likely cost" of representation in an uncontested divorce. The firm representative was told that the prospective divorcing couple had been married for five years, had no children, and no property except for a joint bank account, a car, furniture, and a jointly owned condominium apartment (which they planned to sell and equally divide the proceeds). Estimates ranged from $469 to $1770; the mean was $931. There is no national data on lawyer fees for simple, uncontested divorces, but wide regional variation is probable. *See* Grace G. Blumberg, *Who Should Do the Work of Family Law?*, 27 FAM. L.Q. 213, 218 (1993) (reporting anecdotal evidence of regional variation in rate of pro se representation and cost of legal representation in divorce cases).

limited home equity, and a small bank account,[388] the price of legal representation may well exceed any loss in post-divorce entitlements that legal representation could have averted.[389] Without large-scale public funding of legal services, it is thus unlikely that the current, relatively low rate of legal representation at divorce will increase.[390] Indeed, quite to the contrary, researchers have reported a trend toward increased self-representation in divorce actions.[391]

Although we have little systematic data on the extent of the litigation disadvantage that accompanies lack of legal representation in divorce, it seems unlikely that the judicial norms on which lawyers rely in negotiating adversarial settlements carry over as well to the vast numbers of divorce actions where couples employ one lawyer to serve primarily as a scrivener, or no lawyer at all.[392] These infor-

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388. *See* Garrison, *supra* note 12, at 743 app. tbl. 5 (comparing asset ownership patterns for state divorce samples).

389. *See, e.g.*, Kaplow, *supra* note 9, at 571 ("Individuals acting in their self-interest will acquire such [legal] advice only if its perceived value exceeds its perceived cost."); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1532 n.74 (1984) (stating that self-representation "simply constitutes a conscious and efficient allocation of human resources, from which there is no reason to 'protect' the consumer"). Researchers have reported that self-representation at divorce is significantly correlated with income, age, education, occupation, whether the marriage produced children, property ownership, and marital duration. Sales et al., *supra* note 164, at 561-66; *see also* Cavanagh & Rhode, *supra* note 166, at 162 (finding that divorce litigants with no children and short marriages were more likely to represent themselves).

390. According to a New York state survey, "[r]elatively few legal services programs across the state will accept matrimonials," and approximately 80% of *pro bono* legal assistance programs indicated that "divorce is an area where demand consistently exceeds the supply of attorneys." COMMITTEE ON LEGAL AID, NEW YORK STATE BAR ASS'N, THE NEW YORK LEGAL NEEDS STUDY 70-71 (1993). New York is by no means unique. Surveys uniformly report that only about 15%-20% of the legal needs of the poor and 60% of the needs of moderate income Americans are currently met. *See, e.g*, AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 37 (1989); James Podgers, *Legal Profession Faces Rising Tide of Nonlawyer Practice*, A.B.A. J., Dec. 1993, at 51, 53 (estimating that 40% of legal needs of moderate-income persons go unmet).

391. *See* Garrison, *supra* note 12, at 646 tbl. 2 (reporting decreased percentage of divorce cases with two-party representation between 1978 and 1984 in two New York counties); Sales et al., *supra* note 164, at 594 (reporting that the percentage of divorce cases in Maricopa County, Arizona involving at least one unrepresented party rose from 24% in 1980 to 90% in 1990).

392. Among cases in my full research sample (excluding judicial decisions), the award of alimony was highly correlated with the presence of counsel. Where both parties were represented by lawyers, 30% of wives received an alimony award; where neither spouse was represented by counsel, *no* wives obtained alimony awards. *See* Garrison, *supra* note 12, at 710-11. To be sure, self-selection plays a role here. A wife with poor alimony

mational costs of discretion are magnified by the sheer volume of divorce litigation today.[393] While divorce may not yet be as certain as either death or taxes, some experts estimate that two-thirds of couples married during the 1990s will ultimately divorce or separate.[394] Even today, more than a million divorces are processed annually in the United States.[395] The price of our current discretionary regime—in lawyers' fees necessitated by the imprecision of current standards and in inappropriate outcomes that may result from the failure to obtain legal advice—thus is likely substantial, and argues in favor of more rule-like standards.

Rules do not come without their own corollary set of disadvantages, of course. The search for the right rule imposes heavy "up-front" costs on the rulemaking authority. If unsuccessful, rulemaking imposes additional costs on litigants, who may bear the burden of being inappropriately categorized, and on courts that must attempt to fashion remedies.[396]

These are not insignificant difficulties. The most recent wave of divorce law reform, the introduction of numerical child support guidelines, offers a good example of the problems. The federal mandate in favor of child support presumptions was designed to increase award levels and decrease their variability.[397] But research on the impact of the new rules suggests that the failure of New York's

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prospects—childless, earning an income close to that of her husband, married a short time—is less likely to obtain (and pay) for legal representation than is the unemployed homemaker married for a long time to a high-income professional. It was impossible to ascertain the magnitude of the legal representation effect for the full research sample, however, because income information was available only for the settlement group (where two-party representation was almost invariable).

393. Experts agree that case volume is a key factor in choosing between rule and discretion. *See, e.g.*, DAVIS, *supra* note 30, at 6 ("When more than a handful of parties are affected, creation of a new law through either statutory enactment or administrative rulemaking is much more desirable than creation of new law through judicial decision."); Ehrlich & Posner, *supra* note 9, at 274 ("The benefits of detailing a rule will be greater the larger the amount of activity governed by it . . . ."); Kaplow, *supra* note 9, at 621 ("The central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct.").

394. William J. Goode, *World Changes in Divorce Patterns*, *in* INTERNATIONAL PERSPECTIVES, *supra* note 43, at 24; *see also* Teresa Martin & Larry Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37, 40 (1989) (predicting that two-thirds of recent first-marriages will experience "marital disruption").

395. STATISTICAL ABSTRACT, *supra* note 151, at 90 tbl. 127.

396. *See* Ehrlich & Posner, *supra* note 9, at 267-70; Kaplow, *supra* note 9, at 579-80, 599-601.

397. *See* BELLER & GRAHAM, *supra* note 69, at 164-65; Garfinkel & Melli, *supra* note 72, at 160-62.

support guidelines to improve upon the results of discretionary standards is by no means unique. Researchers report that, in most states, the introduction of guidelines was associated with relatively small increases in award levels[398] and insubstantial improvements in award variability.[399] Although women's advocates vigorously supported the adoption of guidelines on the theory that they would significantly lessen the gap between husbands and wives post-divorce, there is no evidence that this has occurred.[400] Overall, it appears that the guidelines have had only a modest impact in achieving their aims.[401]

The reasons why child support guidelines have not had a more dramatic effect are varied. First, no state adopted guidelines that explicitly aim at ensuring children a post-divorce standard of living equal to that of the noncustodial parent.[402] Perhaps motivated by fears that this model would produce undesirable work disincentives for the custodial parent and payment disincentives for the obligor,[403] states instead adopted guidelines that aim to transfer to the custodial parent that portion of the obligor's income that would have been

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398. The largest, and best-designed, research to date is reported in Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 24 FAM. L.Q. 325, 343 (1991) (reporting that in only one (the one with the lowest pre-guideline award level) of three research states did all income groups experience significant increases in the level of child support attributable to mandatory guidelines; in one state no income group did). For a listing and brief description of other research reports, see Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 489-90 n.80 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT (1993); DONALD J. HERNANDEZ, AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT AND THE ECONOMY (1993)).

399. *See* Garrison, *supra* note 398, at 489 n.79 (describing and summarizing research reports).

400. *See* MACCOBY & MNOOKIN, *supra* note 14, at 260-61 (under California's child support guidelines sample mothers experienced decline in standard of living post-divorce while fathers experienced improvement). Maccoby & Mnookin's findings do not compare post-divorce standard of living before and after guidelines, but the small increases in support associated with the adoption of guidelines are clearly inadequate to significantly affect the gap in husbands' and wives' post-divorce living standards.

401. *See* Thoennes et al., *supra* note 398, at 345 (describing results of research in three states and concluding that "the changes brought by passage of the guidelines have been modest"); *see also* BELLER & GRAHAM, *supra* note 69, at 248-50 (describing negative and positive effects associated with the introduction of advisory guidelines).

402. *See* IRWIN GARFINKEL, ASSURING CHILD SUPPORT 88 (1992).

403. For discussion of the work incentive effects of various guideline models, see Betson et al., *supra* note 373, at 15-18.

expended on children in the intact family.[404] But for the typical family in which the noncustodial parent earns the larger income, this approach appears to ensure, as we have seen, a post-divorce living standard gap of the same magnitude as that produced through discretionary decision making.[405] Moreover, researchers have found that single parents typically spend a considerably larger fraction of their incomes on their children than do two-parent households.[406]

As this recent history demonstrates, even with consensus on the basic goals to be achieved, imperfect information and conflicting subsidiary goals may produce a highly flawed rule. These problems are magnified in the divorce context by lack of public consensus on which values should take precedence in the formulation of more rule-like standards. The rationale for continued reliance on discretion is thus the heterogeneity of values and fact patterns that must be accommodated in divorce decision making.[407]

2. Curtailing Judicial Discretion: Some Modest Proposals

Given the competing advantages and disadvantages of rule and discretion, what, if any, type of limitations on discretion do the research results suggest as appropriate?

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404. *See* GARFINKEL, *supra* note 402, at 88. The most widely used guideline model (the "income shares" model) sets child support as a percentage of family income, utilizing percentages derived from research on the proportion of income spent on children in intact families. Thirty-two states have adopted some form of the income shares model. *Id.* at 87. The "percentage of income" model, which also derives from this research, has been adopted in another nine states; eight other states use a modified version. *Id.*

405. *See* Betson et al., *supra* note 373, at 11-12 tbl. 3 (reporting that when noncustodial parent earns $20,000 and custodial parent earns $10,000, under income shares model the custodial parent's ratio of post to pre-divorce scaled surplus income is 0.41, while noncustodial parent's ratio is 1.24).

406. *See* DAVID M. BETSON, ALTERNATIVE ESTIMATES OF THE COST OF CHILDREN FROM THE 1980-86 CONSUMER EXPENDITURE SURVEY (1990) (concluding that, based on 1980-86 Consumer Price Survey (CPS) data, child-related percentage of total family expenditure in a two-child family was 35% in a two-parent and 53% in a single-parent household); EDWARD P. LAZEAR & ROBERT T. MICHAEL, ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 90, 98 (1988) (concluding that, based on 1972-73 CPS data, the proportion of family income expended on children in a two-child family was 27% in a two-parent and 53% in a single-parent household). *But see* FAMILY ECONOMICS RESEARCH GROUP, U.S. DEP'T OF AGRICULTURE, EXPENDITURES ON A CHILD BY FAMILIES, 1992, 10 (1992) (concluding that "expenses on a child in single-parent households are [only] slightly higher than those in two-parent households").

407. *See, e.g.*, ATIYAH, PRINCIPLES TO PRAGMATISM, *supra* note 74, at 11 ("[Divorce] law . . . is now largely based on the assumption that the infinite variety of circumstances is such that the attempt to lay down general rules is bound to lead to injustice. Justice can only be done by the individualized, ad hoc approach . . . .").

First, the research results do not, in my view, support the claim that divorce is too factually varied to permit more rule-like standards.[408] For some divorce decisions, judges appear to rely heavily on a few key facts. These key facts are objective variables, such as marital duration and income, that do not hinge on a complex, individualized appraisal of relative spousal merit. It is indeed notable that, even in a state where marital fault retains its vitality as a ground for divorce, fault-related variables—the gender of the defendant against whom the divorce was granted, the specific fault findings—did not significantly contribute to the predictability of any economic decisions made by judges.[409]

That is not to say that the current discretionary regime is ripe for replacement with rules as precise as those applicable to marital dissolution at death. Judges do not appear to rely *exclusively* on a few key facts and they appear willing to take highly unusual case circumstances, including extreme fault, into account. On some issues, the research results reveal no judicial consensus whatsoever. What appears warranted are modest limitations on judicial discretion that clarify the results for typical case categories, while preserving judicial discretion to fashion appropriate remedies for the atypical. Limitations on discretion in awarding alimony and in distributing marital property appear to be particularly desirable and achievable.

Alimony decision making is a good reform target because key facts can be identified that explain a substantial majority of alimony decisions and that suggest presumptions altogether compatible with the principles underlying the current discretionary standard. To state legislatively a presumption in favor of alimony for the long-married spouse whose earnings (and earning capacity) constitute a relatively small fraction of family income, and against alimony when spousal earning capacity is relatively equal or when the marriage is short and childless, would simply describe current judicial outcomes.[410] Such

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408. Recent research on self-representation in divorce actions reveals that many litigants do not experience divorce as necessitating complex and highly individualized decision making. Those who do not hire an attorney—the new majority— tend to describe their divorces as simple and uncomplicated. *See* Sales et al., *supra* note 164, at 562, 598.

409. In the settlement sample, some or all of the fault-related variables were significantly correlated with the net marital property distribution, *see infra* Appendix, Table A7, the award of alimony, *see infra* Appendix, Table A12, and the value of child support, *see infra* Appendix, Table A16, but in no instance did a fault-related variable significantly contribute to the predictability of case outcomes when regression analysis was utilized.

410. Eighty-eight percent of wives married 10 or more years who earned less than 30% of family income were awarded alimony.

presumptions comport with—and would clarify—the principles that underlie the existing discretionary statute, in addition to enhancing the predictability of case outcomes.

Property division is another obvious reform target due to the strength of the equal division norm and the conformity of this norm with the statutory principles. Under a standard premised on the view of marriage as a partnership of equals, and with more than half of all cases ultimately resulting in a relatively equal division of net assets, there is no obvious justification for failing to specify that relatively equal division is the most typical outcome, or an analytical starting point.

These limitations on judicial discretion appear to be not only warranted but politically feasible. They rest upon values that the legislature has already adopted and thus require no more than a willingness to codify current decision-making patterns: Such modest amendments would merely clarify what judges now do. The extent of judicial consensus on these issues also suggests that broad public support for these limited reforms would be available.

While these are modest limitations on judicial discretion, they would nonetheless provide considerable information to divorce litigants who determine their own divorce entitlements without adversarial legal representation. They would also offer more guidance to divorce lawyers and judges than does current law. By enabling judges to focus on the appropriate circumstances for deviation from the norms, the development of precedents would be enhanced, as would the likelihood of consistent outcomes in which like persons are accorded like treatment. Finally, these modest measures would enhance what legal scholars have variously described as the hortatory or expressive function of the law.[411] By expressing the normative principles that underlie divorce entitlements in more concrete, accessible form, the power of those principles to shape goals and conduct is expanded. These modest measures may thus accomplish much.

The data also point to a variety of procedural issues where modest reforms would be useful. The extent of noncompliance with temporary child support and alimony orders, for example, suggests the

411. *See, e.g.*, ATIYAH, PRINCIPLES TO PRAGMATISM, *supra* note 74, at 11; Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); REGAN, *supra* note 67, at 176-84; Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

need for stiffer sanctions.[412] The overrepresentation of cases involving businesses and professional practices[413] suggests the need for clearer legislative guidance on valuation and separate/marital property apportionment.[414] The conflicting methods judges utilized when resolving a case of asset dissipation suggest the need for a standardized approach.[415]

The reforms I have outlined will not, of course, accomplish all that is desirable. They would not, for example, improve current results on the duration of alimony at all. Here the research data offer no simple solutions. On alimony permanence, the data demonstrate a strong correlation between permanence and marital duration, but they also suggest that consensus on marital duration as the basis for permanence has declined. On the duration of a nonpermanent award, they show the lack of any meaningful predictive relationships. These results demonstrate the desirability of constraints on judicial discretion. They demonstrate the need for new decision-making models. But they offer no guidance for cutting through the thicket of competing values that the derivation of such standards will necessitate.

With respect to property division, the modest revisions of current law I have outlined also represent a first step, rather than a complete reform program. A description of the typical property division outcome, for example, would ideally be stated as a presumption and coupled with a concise list of circumstances, or common fact patterns, that justify deviation from the presumptive norm. But with more than 40% of cases overall—and a majority in some case categories—ultimately resulting in unequal division, it is not altogether clear that a presumption, placing the burden of persuasion on the litigant who urges a contrary result, is warranted.

The problem lies in the apparent lack of judicial consensus on the bases for deviation from equal division and the extent to which discernible trends will almost certainly prove controversial. The significant relationship between separate and marital property—a link explicitly authorized by the current statute—is unlikely to arouse

412. *See supra* note 178 and accompanying text.

413. A business, professional practice, or degree figured in 38% of the cases decided by judges.

414. Many were small, closely-held family businesses that neither would be sold nor had an obvious market value; apportionment issues were common as well. For a discussion of how valuation and apportionment issues contribute to litigation, see Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 151-59 (1989).

415. *See supra* note 235 and accompanying text.

controversy. But the apparent links between distributional outcomes and title, business ownership, and asset values are likely to produce debate over the extent to which such factors *should* influence outcomes. These tendencies did not explain much of the variation in results, and it is far from clear that they represent any genuine judicial or public consensus on what is "equitable" when distributing marital property.

Nor is it obvious whether (and how) these factors should influence case outcomes. Consider, for example, the link between asset values and property distribution. Judicial departures from equality benefitted the needier spouse at the bottom of the socioeconomic ladder and the spouse who had made greater monetary contributions at the top. The tendency for the wife's percentage award to vary based on wealth thus benefitted poor women and harmed those who were wealthy. A presumption of equality that applied regardless of asset values would, conversely, advance the interests of wealthy women at the expense of their poorer—and far more numerous—counterparts. This one example thus raises basic questions about the relative roles of need, monetary contribution, and formal equality as bases for property division.[416] Is it appropriate to prefer the needier spouse at the bottom of the socioeconomic ladder; is it appropriate to prefer the asset producing spouse at the top? Is wealth an appropriate basis for departure from equality at all? If it is, to what extent and how?[417]

The relationship between the husband's ownership of a business or his possession of a professional degree/license and property distribution outcomes also raises fundamental issues of equity and consistency.[418] Judges seemed loath to distribute these assets

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416. For a more detailed discussion of the incompatibility of need and contribution as factors in property distribution, see Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 289-95 (1989).

417. The possibilities are numerous. One might follow probate law and exempt certain assets from distribution. For example, household goods, the car, the family home, might be exempted based on the needs of minor children or on a more general need-based standard. One might apply different rules to debts than to assets, or to cases where debts exceed assets.

418. The tendency to award the title-holding spouse a disproportionate share of business and professional assets remains evident in recent New York cases that post-date the research period. *See, e.g.*, Patricia B. v. Steven B., 588 N.Y.S.2d 874, 876 (N.Y. App. Div. 1992) (awarding wife one-third of husband's periodontal practice and holding that "there is no basis in law for beginning an analysis concerning a business or a professional practice with a presumption that the parties must divide such an asset on an equal basis").

equally, at least in part due to the sense that they represent future income—the source of future alimony and child support payments—rather than tangible material wealth.[419] With respect to professional degrees, the weight of critical commentary, as well as statutory and appellate case law outside New York, concurs with judicial sentiment.[420] Some commentators have suggested the capitalization and distribution of future income in all cases.[421] But no commentator has endorsed the approach peculiar to New York, which treats as divisible the future income stream of the doctor (if she obtained her degree while married) while ignoring that of the ambulance driver, billing clerk, and hospital president.[422] Thus, even though wives tended to obtain a small share of professional degree assets, they were still better off than their counterparts in the other forty-nine states. They were also better off than their New York counterparts whose spouses obtained degrees before marriage or whose future income was not dependent on the possession of such a license. (This may be yet another reason for judicial reluctance to divide such assets equally.)

The judicial tendency to treat business assets like professional degrees is also intriguing and warrants further research. The primary component of the value of a professional practice is often nonmarketable goodwill;[423] this may explain why judges tended to lump these assets in with degrees. But husbands who owned more traditional businesses—a machine shop,[424] soda distributorship,[425]

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419. The novelty of the property interest involved in some of these cases, on the other hand, does not appear to have troubled the judges. They were entirely willing to treat intangible assets like pensions—the status of which was quite controversial at the beginning of the research period—much as they did the bank account and family car.

420. *See* Weitzman, *supra* note 107, at 132 tbl. 5.3 (summarizing state rules). Some states have adopted rules that provide for monetary reimbursement to a spouse who has significantly contributed to the other's acquisition of education during the marriage. *See id.*

421. *See, e.g.*, WEITZMAN, *supra* note 12, at 110-11 (urging division of "career assets" such as education, job experience, seniority, networks of professional contacts, or a track record or reputation that commands a good salary); Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 788 (1988) (arguing that the "source of the enhanced earning capacity . . . is irrelevant"); Cynthia Starnes, *Divorce and the Displaced Homemaker*, 60 U. CHI. L. REV. 67, 131-38 (1993) (urging division of spouses' enhanced earning capacity at divorce).

422. *See, e.g.*, OLDHAM, *supra* note 23, § 9.02[1], at 9-11 ("It would be Alice-in-Wonderlandish to say that education is property only sometimes.").

423. For detailed discussion of issues related to goodwill evaluation in professional practices, see OLDHAM, *supra* note 23, § 10.03[3].

424. Stein v. Stein, N.Y. L.J., Aug. 19, 1982, at 12 (N.Y. Sup. Ct.).

425. Romano v. Romano, 519 N.Y.S.2d 850 (N.Y. App. Div. 1987).

advertising agency,[426] type-setting firm,[427] glass and tile installation company,[428] wholesale jewelry business[429]—were also highly likely to retain most of its value. Some of these outcomes could be explained as a result of the highly personal nature of the business's goodwill[430] or as a result of the statutory mandate that the appreciated value of premarital property remains separate unless due to the efforts of the nontitled spouse.[431] Interpreting the latter requirement, New York courts have held that homemaking contributions suffice to create divisible marital property,[432] but the statutory language may nonetheless produce a tendency to consider such assets as presumptively separate. The judges' decisions in these cases also suggest, however, a larger tendency to view an asset representing the source of the title-holder's livelihood as a hybrid standing somewhere between salaried employment and a traditional property interest. These cases thus squarely raise the large, and contentious, question of how marital assets should be defined.

The correlations between property division outcomes and both asset values and business/degree ownership thus expose fundamental issues of principle. The former correlation raises questions about the model of equality upon which our divorce law should rest; the latter, the scope of the estate to which that model should apply. The modest reform of the property division statute that I have suggested cannot resolve these larger issues. Nor would its adoption make their resolution less important.

CONCLUSION

The research results offer legislatures information on which to base some modest, but nonetheless useful, limitations upon judicial discretion. They also offer legislatures—and the public—better information to enrich the continuing debate over divorce standards. They underscore the importance of that debate by revealing the extent to which current standards have thus far failed to achieve consistent, predictable outcomes for many aspects of divorce decision making.

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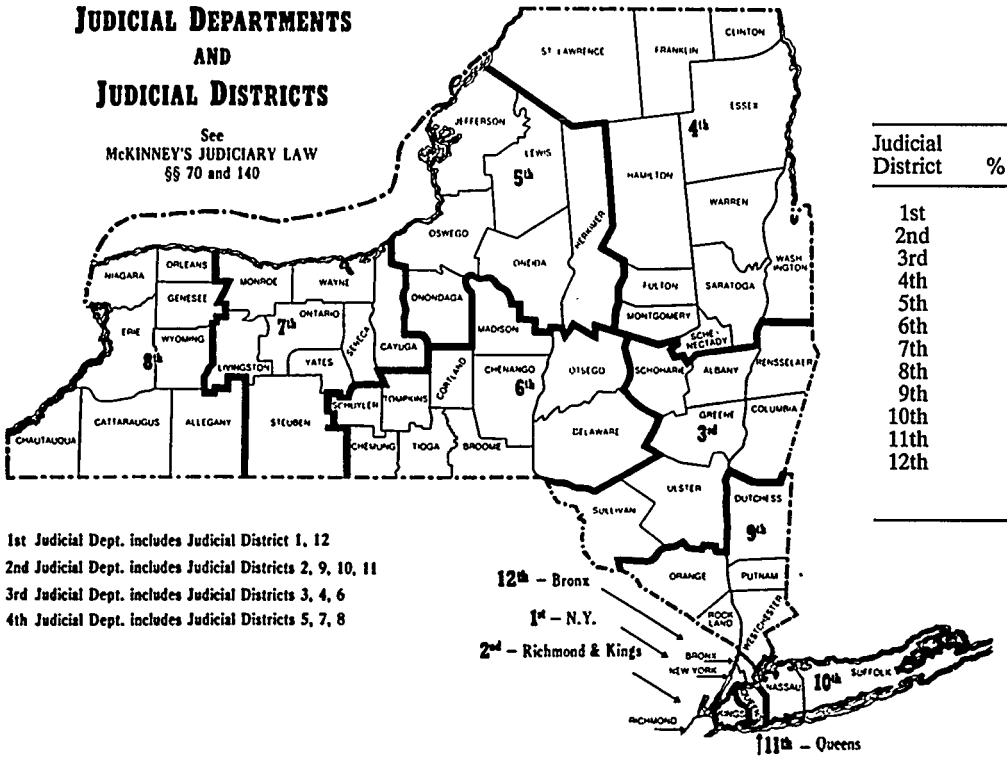
426. McCormack v. McCormack, N.Y. L.J., Oct. 29, 1982, at 7 (N.Y. Sup. Ct.).
427. Beckerman v. Beckerman, 511 N.Y.S.2d 33 (N.Y. App. Div. 1987).
428. Ginter v. Ginter, N.Y. St. B. Ass'n Fam. L. Rev., Sept. 1990, at 21, 23.
429. More v. More, N.Y. L.J., Aug. 10, 1990, at 22 (N.Y. Sup. Ct. Aug. 9, 1990).
430. *See* OLDHAM, *supra* note 23, § 10.03[2].
431. N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986).
432. *See supra* note 108 and accompanying text.

The research data also offer a glimpse of divorce decision making in transition. It is all here: the clash of values that pervades the national debate on issues of family and gender, the chaos that accompanies change, and tentative trends that may mark the emergence of new normative and legal standards. The data provide evidence of the shift in divorce law's central paradigm, from remedial, fault-based justice to a regime focused on formal equality and dependency prevention. They show us the traces of judicial personality and those thousand limitations that constrain judicial choice. They show us the legacy of the past, the uncertainty of the present, and tantalizing hints of the future of judicial decision making at divorce.

FIGURE A1
DISTRIBUTION OF JUDICIAL CASE SAMPLE BY JUDICIAL DISTRICT



Judicial District	% of Cases	(n)
1st	8.4	32
2nd	10.4	40
3rd	4.7	18
4th	3.9	15
5th	1.8	7
6th	6.5	25
7th	2.3	9
8th	3.4	13
9th	16.7	64
10th	28.2	108
11th	12.8	49
12th	.8	3
		383 Total

Figure adapted from the *New York Supplement*; reprinted with permission of the West Publishing Company.

TABLE A1
DISTRIBUTION OF COUPLES' TOTAL ASSET VALUES (1990 DOLLARS), BY CASE GROUP

Property Value	Judicial Sample				Settlement Sample			
	Gross Asset Value		Net Asset Value		Gross Asset Value		Net Asset Value	
	%	cum. %	%	cum. %	%	cum. %	%	cum. %
(Negative Value)			(3)	(3)			(18)	(18)
$ 0 - $ 9,999	10	10	9	12	25	25	18	35
$10,000 - $29,000	6	16	6	18	17	42	16	51
$30,000 - $49,000	5	21	6	24	11	53	8	59
$50,000 - $99,999	12	33	11	34	15	69	14	73
$100,000 - $199,000	19	52	19	53	14	83	11	84
$200,000 - $299,000	13	65	12	65	4	86	4	87
$300,000 - $499,000	9	73	9	74	4	90	4	91
$500,000-$1,000,000	15	89	15	89	6	96	5	97
$1,000,000 or more	11	100	11	100	4	100	4	100
Median Value	$189,326		$181,286		$ 41,045		$ 29,596	
Mean Value	$637,277		$587,359		$300,148		$268,815	

TABLE A2
AVERAGE RATIO OF SEPARATE PROPERTY TO TOTAL PROPERTY, BY MARITAL DURATION AND CASE GROUP

Marital Duration	Judicial Sample		Settlement Sample	
	%	(n)	%	(n)
0 - 4 years	41%	(12)	21%	(44)
5 - 9 years	20%	(54)	10%	(71)
10 - 14 years	10%	(73)	10%	(68)
15 - 19 years	7%	(71)	7%	(51)
20 or more years	8%	(140)	8%	(78)
ALL SAMPLE CASES	11%	(350)	10%	(312)

TABLE A3
OWNERSHIP RATE AND MEDIAN VALUE (1990 DOLLARS) OF REPORTED ASSETS, BY CASE GROUP

Asset Type	Judicial Sample		Settlement Sample	
	% Owning	Median Net Value	% Owning	Median Net Value
Automobiles	47%	$ 5,960	79%	$ 4,077
Business Assets (all)	38%	$186,080	18%	$ 37,324
Professional degrees or licenses	12%	$325,809	**	**
Other business assets	33%	$129,737	**	**
Household goods & furniture	54%	$ 10,692	83%	$ 5,018
Liquid Assets				
Bank accounts	55%	$ 17,688	82%	$ 1,616
Other	35%	$ 13,549	37%	$ 6,799
Nonliquid Assets				
Pensions	49%	$ 40,100	20%	$ 17,315
Other	28%	$ 22,229	30%	$ 6,383
Marital Home	82%	$111,299	60%	$ 48,929
Other Real Estate	34%	$102,675	25%	$ 45,683
Other Assets	33%	$ 12,590		$ 2,950
Debts	47%	$ 14,864	82%	$ 8,368

TABLE A4
DISPOSITION OF THE MARITAL HOME, BY CUSTODY STATUS AND CASE GROUP

Disposition of Marital Home	Custody Status & Case Group							
	Wife Custody		Husband Custody		Jt./Split Custody		No Minor Children	
	JS n=160 %	SS n=95 %	JS n=13 %	SS n=12 %	JS n=8 %	SS n=11 %	JS n=121 %	SS n=70 %
Occupancy to Wife	68%	61%	8%	25%	50%	27%	46%	36%
Occupancy to Husband	7%	16%	54%	58%	13%	73%	12%	41%
Home sold	26%	23%	39%	17%	38%	0%	41%	23%

JS=Judicial Sample; SS=Settlement Sample

TABLE A5
PERCENTAGE DISTRIBUTION OF MARITAL ASSETS (COUPLES WITH MARITAL ASSETS AND COMPLETE ASSET INFORMATION), BY CASE GROUP

Asset Distribution	Judicial Sample (n=162) %	Settlement Sample (n=130) %
67% + to Husband	16%	34%
56%-66% to Husband	18%	7%
Relatively Equal*	45%	12%
56%-66% to Wife	8%	8%
67% + to Wife	13%	39%
Median % to Wife	50%	51%
Mean % to Wife	50%	51%

* Relatively equal=Between 45% and 55%

TABLE A6
PERCENTAGE DISTRIBUTION OF MARITAL NET WORTH (COUPLES WITH POSITIVE NET WORTH AND COMPLETE ASSET & DEBT INFORMATION), BY CASE GROUP

Net Marital Property Distribution	Judicial Sample (n=159) %	Settlement Sample (n=104) %
67% or more to Husband	17%	34%
56%-66% to Husband	19%	5%
Relatively Equal*	39%	14%
56%-66% to Wife	6%	8%
67% or more to Wife	19%	40%
Median % to Wife	50%	54%
Mean % to Wife	51%	55%

* Relatively Equal=Between 45% and 55%

TABLE A7
NET PROPERTY DISTRIBUTION VARIABLE CORRELATIONS, BY CASE GROUP (CASES WITH POSITIVE NET WORTH) DEPENDENT VARIABLE=WIFE'S NET MARITAL PROPERTY PERCENTAGE[1]

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R^2 (n) p=
CASE CHARACTERISTICS			
Fault Judgment[3]	−.028 (299) p=.961	−.0197 (299) p=.734	−.2014 (104) p=.040
Fault Ranking[4]	−.0385 (273) p=.527	.0018 (273) p=.977	−.2600 (104) p=.008
Gender of Plaintiff[5]	***	***	−.1933 (104) p=.049
Length of Proceeding	−.0587 (232) p=.373	−.0486 (233) p=.460	.0850 (100) p=.401
Region*	9.0(8) (323) p=.342	9.1(8) (323) p=.335	9.1(8) (104) p=.336
Appellate Department*	20.7(12) (323) p=.055	21.4(12) (323) p=.045	***
Year of Decision	−.0167 (323) p=.765	−.0433 (323) p=.438	***
JUDICIAL CHARACTERISTICS			
Age	.0200 (305) p=.728	***	***
Educational Status Score[6]	−.0466 (288) p=.431	***	***
Judicial Experience (years)	.0376 (311) p=.509	***	***
Political Party[7]	.0461 (270) p=.450	***	***
Regionality of Education[8]	−.0734 (293) p=.210	***	***
Religion*	14.8(8) (172) p=.063	***	***
Sex[9]	−.0056 (323) p=.920	***	***

LITIGANT CHARACTERISTICS			
AGE			
Husband	.0704	.0260	−.1183
	(251)	(250)	(99)
	p=.234	p=.682	p=.244
Wife	.0073	.0345	−.0945
	(254)	(252)	(98)
	p=.908	p=.585	p=.356
CHILDREN OF THE MARRIAGE			
Marriage Produced Children	.0430	.0465	−.0169
	(323)	(323)	(104)
	p=.446	p=.410	p=.865
Sole Custody to Wife	.0156	.0128	.0360
	(323)	(323)	(104)
	p=.819	p=.520	p=.194
% of Obligor Income	.2367	.2480	.0681
Paid in Child Support	(151)	(150)	(40)
	p=.003	p=.002	p=.676
% of Obligor Income	.2262	.2273	.1995
Paid in Alimony & CS	(151)	(150)	(40)
	p=.005	p=.005	p=.217
Value of Combined	−.0212	−.0744	−.0378
Alimony/Child Support	(309)	(308)	(100)
	p=.710	p=.193	p=.709
Husband's Unrealized	***	***	.0221
Custody Request			(81)
			p=.844
EDUCATION (YEARS)			
Husband	−.1039	−.1280	.1135
	(145)	(147)	(89)
	p=.214	p=.122	p=.290
Wife	−.0178	−.0120	.1595
	(171)	(175)	(83)
	p=.817	p=.875	p=.150
HEALTH[10]			
Husband	.0389	.0468	.0752
	(323)	(323)	(104)
	p=.486	p=.402	p=.448
Wife	−.1518	−.1266	.1662
	(323)	(323)	(104)
	p=.0016	p=.0213	p=.092
INCOME AND EMPLOYMENT			
Husband's Job Status	.0773	.0998	.0372
	(302)	(302)	(72)
	p=.180	p=.083	p=.756
Husband's Income	−.0428	−.0595	−.0982
	(268)	(268)	(77)
	p=.485	p=.332	p=.395
Wife's Employment[11]	−.1274	−.1020	.0917
	(309)	(308)	(92)
	p=.025	p=.074	p=.385
Wife's Job Status[12]	−.1137	−.0821	.0476
	(295)	(295)	(74)
	p=.051	p=.160	p=.687
Wife's Income	.1411	.1241	.0877
	(263)	(263)	(90)
	p=.022	p=.044	p=.411
Wife's Income/Family Income	.1727	.1908	.0332
	(261)	(261)	(64)
	p=.005	p=.002	p=.795

Wife Awarded Alimony	−.0187	−.034	.1515
	(317)	(317)	(104)
	p=.740	p=.952	p=.125
MARITAL DURATION (YEARS)	.0511	.0711	−.0630
	(315)	(315)	(103)
	p=.366	p=.208	p=.527
Length of Separation	.1046	.0990	***
(years)	(300)	(301)	
	p=.071	p=.086	
MARITAL PROPERTY			
Net Worth	−.1379	−.1148	−.1408
	(323)	(322)	(104)
	p=.013	p=.040	p=.154
Marital debt	−.0920	−.0964	−.1162
	(319)	(319)	(104)
	p=.101	p=.086	p=.240
Husband-Owned	−.1056	−.1012	−.1516
Property Value	(304)	(304)	(102)
	p=.093	p=.067	p=.128
Husband-Owned % of	−.2326	−.2775	−.4914
Marital Property	(301)	(302)	(102)
	p=.000	p=.000	p=.000
Husband Owns	−.2250	−.2661	−.1299
Business, Professional	(323)	(322)	(104)
Degree or License	p=.000	p=.000	p=.189
Husband Owns Pension	−.0955	−.0748	***
	(323)	(323)	
	p=.094	p=.180	
Wife-Owned Property Value	.0552	.0649	.1596
	(225)	(222)	(103)
	p=.410	p=.336	p=.107
Wife-Owned % of	.0124	.0103	.4331
Marital Property	(256)	(256)	(103)
	p=.843	p=.870	p=.000
SEPARATE PROPERTY			
Value of Husband	.1193	.1174	−.1261
Owned Property	(323)	(323)	(104)
	p=.032	p=.035	p=.202
Ratio of Husband's	.1191	.1262	.0700
Separate Property	(304)	(304)	(104)
to Marital Property	p=.037	p=.027	p=.480
Value of Wife	.0127	.0346	.0443
Owned Property	(323)	(323)	(104)
	p=.820	p=.535	p=.655
Ratio of Wife's	.0305	.1127	.1043
Separate Property	(304)	(306)	(104)
to Marital Property	p=.594	p=.048	p=.292

[1] Coded as five rankings based on the wife's percentage of net marital assets. 1=less than 34%; 2=between 34% and 44%; 3=between 45% and 55%; 4=between 56% and 66%; 5=more than 66%.

[2] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the chi-square statistic followed by the applicable degrees of freedom (in parentheses).

[3] Coded divorce judgment granted against husband only=1, against both spouses=2, against wife only=3.

[4] Coded 1 through 7, based on combined score taking into account fault judgment (1 through 3) and basis. Adultery ranked 1, cruel and inhuman treatment 2, abandonment 3, mental illness 4.

[5] Coded 1=wife, 2=husband.

[6] Coded 2 through 8, based on combined status scores of judge's college and law school.

[7] Coded 1=Democratic, 2=Republican.

[8] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 3=attended both college and law school locally.
[9] Coded 1=male, 2=female.
[10] Coded 1=good, 2=fair, 3=poor.
[11] Coded 1=employed, 2=unemployed.
[12] Coded 1=high status professional, 2=lower status professional (e.g., accountants, artists, clergymen, computer programmers, decorators and designers, journalists, librarians, musicians, nurses, pharmacists, high school or lower teachers), 3=small business owners, white collar workers (e.g., sales personnel, clerks, cashiers, secretaries), and skilled blue collar workers (e.g., machinists, printers, electricians, butchers, machine operators), 4=students, 5=unemployed, retired, or homemaker.

TABLE A8
PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY WIFE'S INCOME (1990 DOLLARS) AND CASE GROUP

Wife's Income ($1990)	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
$0 - $4,999	87%	(114)	52%	(92)	-35***
$5,000 - $19,999	68%	(105)	28%	(104)	-40***
$20,000 or more	33%	(92)	8%	(80)	-25***

*** p<.001

TABLE A9
PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY HUSBAND'S INCOME (1990 DOLLARS) AND CASE GROUP

Husband's Income ($1990)	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
$0 - $39,999	50%	(112)	26%	(145)	-24***
$40,000 - $79,999	75%	(120)	37%	(60)	-38***
$80,000 or more	77%	(84)	57%	(30)	-30*

*** p<.05; * p<.001

TABLE A10
PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY CUSTODY STATUS AND CASE GROUP

Custody Status+	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
Wife with sole custody	67%	(191)	30%	(132)	-37***
Wife without sole custody	56%	(170)	29%	(167)	-28***

+Cases involving joint or split custody excluded; wife without sole custody category includes cases involving husband custody and cases without minor children.
*** p<.001

TABLE A11
MEAN RATIO OF WIFE'S POST-DIVORCE ADJUSTED FAMILY INCOME/HUSBAND'S POST-DIVORCE ADJUSTED FAMILY INCOME (SETTLEMENT SAMPLE), BY HUSBAND AND WIFE PRE-DIVORCE INCOME

Wife's Income	Husband's Income					
	$0 - $34,999		$35,000-$59,999		$60,000 +	
	mean ratio	(n)	mean ratio	(n)	mean ratio	(n)
$ 0 - $4,999	.24	(26)	.20	(23)	.21	(21)
$5,000 - $19,999	.84	(42)	.41	(24)	.51	(7)
$20,000 +	1.23	(25)	.67	(15)	.45	(11)
ALL SAMPLE WIVES	.78	(93)	.39	(62)	.33	(39)

TABLE A12
ALIMONY CORRELATIONS, BY CASE GROUP DEPENDENT VARIABLE=AWARD OF ALIMONY TO WIFE

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R[1] (n) p=
CASE CHARACTERISTICS			
Fault Judgment[2]	−.0290 (348) p=.589	−.0493 (348) p=.360	.0876 (313) p=.122
Fault Ranking[3]	−.0565 (326) p=.309	−.0776 (326) p=.162	.1127 (312) p=.047
Gender of Plaintiff[4]	***	***	.1067 (314) p=.059
Length of Proceeding	−.0453 (291) p=.442	−.0123 (291) p=.823	−.0169 (310) p=.767
Region*	11.9(2) (377) p=.003	11.8(2) (377) p=.003	3.6(2) (315) p=.169
Appellate Department*	7.2(3) (377) p=.067	7.0(3) (377) p=.072	***
Year of Decision	−.1222 (376) p=.018	−.1308 (376) p=.011	***
JUDICIAL CHARACTERISTICS			
Age	.1097 (356) p=.039	***	***
Educational Status Score[5]	.0418 (339) p=.443	***	***
Judicial Experience (years)	.0160 (362) p=.761	***	***
Political Party[6]	.0352 (313) p=.535	***	***
Regionality of Education[7]	−.0558 (346) p=.301	***	***
Religion*	5.5(2) (196) p=.063	***	***
Sex[8]	−.1008 (376) p=.051	***	***

LITIGANT CHARACTERISTICS			
AGE			
Husband	−.0241	−.0126	−.0220
	(290)	(290)	(305)
	p=.682	p=.831	p=.702
Wife	.0072	.0143	.0371
	(291)	(291)	(305)
	p=.903	p=.808	p=.259
CHILDREN OF THE MARRIAGE			
Marriage Produced Children	.1478	.1473	.0652
	(377)	(377)	(315)
	p=.005	p=.004	p=.249
Sole Custody to Wife	.0955	.0896	−.0255
	(377)	(377)	(315)
	p=.064	p=.082	p=.652
% of Obligor Income	−.2394	−.2092	−.0092
Paid in Child Support	(170)	(174)	(137)
	p=.002	p=.006	p=.915
Husband's Unrealized	***	***	.0870
Custody Request			(200)
			p=.221
EDUCATION (YEARS)			
Husband	.0431	.0431	.0544
	(169)	(169)	(269)
	p=.578	p=.578	p=.374
Wife	−.2403	−.2466	−.0404
	(201)	(201)	(261)
	p=.001	p=.000	p=.516
HEALTH[9]			
Husband	−.0433	−.0126	−.0238
	(377)	(377)	(315)
	p=.401	p=.807	p=.674
Wife	.1979	.2019	.1075
	(377)	(377)	(315)
	p=.000	p=.000	p=.057
INCOME AND EMPLOYMENT			
Husband's Job Status	.1481	.1448	.1277
	(351)	(351)	(237)
	p=.007	p=.007	p=.050
Husband's Income	.0278	.0248	.1077
	(316)	(316)	(235)
	p=.623	p=.660	p=.050
Wife's Employment[10]	.3380	.3367	.2435
	(365)	(365)	(286)
	p=.000	p=.000	p=.000
Wife's Job Status[11]	−.3479	−.3502	−.2070
	(347)	(347)	(246)
	p=.000	p=.000	p=.001
Wife's Income	−.4518	−.4622	−.3725
	(311)	(311)	(258)
	p=.000	p=.000	p=.000
Wife's Income/Family Income	−.5581	−.5795	−.4510
	(283)	(283)	(205)
	p=.000	p=.000	p=.000
MARITAL DURATION (YEARS)	.1199	.1041	.0703
	(367)	(367)	(313)
	p=.022	p=.046	p=.215

MARITAL PROPERTY			
Net Worth	−.1236	−.1280	−.0340
	(373)	(373)	(315)
	p=.017	p=.013	p=.547
Percentage of Marital	−.0441	−.0739	.1515
Property Awarded to Wife[12]	(323)	(323)	(104)
	p=.429	p=.185	p=.125
Value of Wife's Net	−.1287	−.1358	−.0362
Property Award	(373)	(373)	(315)
	p=.013	p=.009	p=.522

[1] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the chi-square statistic followed by the applicable degrees of freedom (in parentheses).
[2] Coded divorce judgment granted against husband only=1, against both spouses=2, against wife only=3.
[3] Coded 1 through 7, based on combined score taking into account fault judgment (1 through 3) and basis. Adultery ranked 1, cruel and inhuman treatment 2, abandonment 3, mental illness 4.
[4] Coded 1=wife, 2=husband.
[5] Coded 2 through 8, based on combined status scores of judge's college and law school.
[6] Coded 1=Democratic, 2=Republican.
[7] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 3=attended both college and law school locally.
[8] Coded 1=male, 2=female.
[9] Coded 1=good, 2=fair, 3=poor.
[10] Coded 1=employed, 2=unemployed.
[11] Coded 1=high status professional, 2=lower status professional (e.g., accountants, artists, clergymen, computer programmers, decorators and designers, journalists, librarians, musicians, nurses, pharmacists, high school or lower teachers), 3=small business owners, white collar workers (e.g., sales personnel, clerks, cashiers, secretaries), and skilled blue collar workers (e.g., machinists, printers, electricians, butchers, machine operators), 4=students, 5=unemployed, retired, or homemaker.
[12] For cases with positive net worth, by five category rankings. For settlement case sample, Valid Group.

TABLE A13
PERCENTAGES OF ALIMONY AWARDS THAT WERE PERMANENT, BY WIFE'S AGE AND CASE GROUP

Wife's Age (years)	Judicial Sample %	(n)	Settlement Sample %	(n)	Difference
39 or less	26%	(66)	26%	(50)	− 0
40 - 49	39%	(70)	30%	(27)	− 9
50 or more	52%	(54)	60%	(10)	+ 8

TABLE A14
PERMANENCE OF ALIMONY CORRELATIONS DEPENDENT VARIABLE=PERMANENCE OF ALIMONY AWARD TO WIFE[1]

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R^2 (n) p=
CASE CHARACTERISTICS			
Fault Judgment[3]	.0488 (215) p=.477	.0005 (218) p=.994	.1726 (93) p=.098
Fault Ranking[4]	.0833 (202) p=.239	.0261 (205) p=.711	.1949 (93) p=.061
Gender of Plaintiff[5]	***	***	.1748 (92) P=.096
Length of Proceeding	.0195 (186) p=.792	−.0127 (187) p=.863	−.0770 (91) p=.468
Region*	2.4(3) (229) p=.301	4.8(2) (232) p=.091	1.9(2) (93) p=.395
Appellate Department*	4.7(3) (229) p=.191	5.5(3) (232) p=.138	***
Year of Decision	.1516 (229) p=.022	.1650 (232) p=.012	***
JUDICIAL CHARACTERISTICS			
Age	−.0581 (216) p=.395	***	***
Educational Status Sscore[6]	−.1736 (202) p=.013	***	***
Judicial Experience (years)	−.0906 (219) p=.182	***	***
Political Party[7]	−.1610 (184) p=.029	***	***
Regionality of Education[8]	.1720 (207) p=.013	***	***
Religion*	4.2(2) (118) p=.123	***	***
Sex[9]	.0789 (228) p=.235	***	***

LITIGANT CHARACTERISTICS			
AGE			
Husband	−.1123	−.1870	−.2108
	(183)	(185)	(87)
	p=.130	p=.011	p=.050
Wife	−.2130	−.3082	−.1233
	(189)	(191)	(87)
	p=.003	p=.000	p=.255
CHILDREN OF THE MARRIAGE			
Marriage Produced Children	−.0258	−.0661	−.1382
	(229)	(232)	(93)
	p=.698	p=.316	p=.106
Sole Custody to Wife	.1154	.1896	−.0624
	(229)	(232)	(93)
	p=.081	p=.004	p=.552
% of Obligor Income	−.0516	.0050	−.3486
Paid in Child Support	(117)	(119)	(93)
	p=.581	p=.957	p=.552
% of Obligor Income	−.0868	.0342	−.2009
Paid in Alimony & CS	(117)	(119)	(40)
	p=.352	p=.712	p=.214
Value of Combined	−.0137	.0016	.0287
Alimony/Child Support	(224)	(227)	(89)
	p=.838	p=.981	p=.789
EDUCATION (YEARS)			
Husband	.1621	.0711	.1895
	(112)	(111)	(79)
	p=.088	p=.459	p=.094
Wife	.1131	.0554	.2120
	(136)	(134)	(75)
	p=.190	p=.525	p=.068
HEALTH[10]			
Husband	.0150	.0390	−.0152
	(229)	(232)	(93)
	p=.698	p=.555	p=.885
Wife	−.1544	−.2465	−.2949
	(229)	(232)	(93)
	p=.019	p=.000	p=.004
INCOME AND EMPLOYMENT			
Husband's Job Status	.0609	.0793	−.1468
	(221)	(220)	(68)
	p=.368	p=.242	p=.232
Husband's Income	.0073	−.0069	.0268
	(208)	(211)	(75)
	p=.917	p=.921	p=.819
Wife's Employment[11]	−.0694	−.0872	−.0891
	(223)	(226)	(88)
	p=.302	p=.192	p=.409
Wife's Job Status[12]	−.0491	−.0270	−.0575
	(221)	(221)	(76)
	p=.467	p=.690	p=.622
Wife's Income	.0173	−.0125	.0915
	(198)	(201)	(82)
	p=.809	p=.860	p=.414
Wife's Income/Family Income	−.0042	.0148	.0434
	(186)	(189)	(66)
	p=.954	p=.840	p=.729

MARITAL DURATION (YEARS)	−.2551	−.3699	−.2344
	(226)	(226)	(93)
	p=.000	p=.000	p=.024
MARITAL PROPERTY			
Net Worth (marital)	.0118	−.0104	.1502
	(230)	(230)	(93)
	p=.859	p=.876	p=.151
Value Wife's Net	−.0759	−.1057	.1151
Property Award	(229)	(229)	(93)
	p=.256	p=.111	p=.272

[1] Coded 1=permanent, 2=durational.
[2] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the chi-square statistic followed by the applicable degrees of freedom (in parentheses).
[3] Coded divorce judgment granted against husband only=1, against both spouses=2, against wife only=3.
[4] Coded 1 through 7, based on combined score taking into account fault judgment (1 through 3) and basis. Adultery ranked 1, cruel and inhuman treatment 2, abandonment 3, mental illness 4.
[5] Coded 1=wife, 2=husband.
[6] Coded 2 through 8, based on combined status scores of judge's college and law school.
[7] Coded 1=Democratic, 2=Republican.
[8] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 3=attended both college and law school locally.
[9] Coded 1=male, 2=female.
[10] Coded 1=good, 2=fair, 3=poor.
[11] Coded 1=employed, 2=unemployed.
[12] Coded 1=high status professional, 2=lower status professional (e.g., accountants, artists, clergymen, computer programmers, decorators and designers, journalists, librarians, musicians, nurses, pharmacists, high school or lower teachers), 3=small business owners, white collar workers (e.g., sales personnel, clerks, cashiers, secretaries), and skilled blue collar workers (e.g., machinists, printers, electricians, butchers, machine operators), 4=students, 5=unemployed, retired, or homemaker.

TABLE A15
ENHANCEMENTS TO ALIMONY & CHILD SUPPORT, BY CASE GROUP

Type of Benefit	Judicial Sample %	(n)	Settlement Sample %	(n)
Automatic Salary or Cost of Living Adjustments				
alimony	1%	(148)	5%	(94)
child support	1%	(235)	2%	(220)
Life Insurance on Obligor				
when minor children[1]	44%	(212)	47%	(200)
spouse only	18%	(130)	17%	(113)
Medical Insurance Premiums				
for minor children[2]	57%	(217)	63%	(220)
for recipient spouse	15%	(343)	12%	(312)
Unreimbursed Medical Costs				
for minor children[3]	14%	(235)	18%	(220)
for recipient spouse	0%	(383)	0%	(315)
Other Child-Related Costs				
child care	6%	(216)	7%	(220)
college expenses[4]	19%	(230)	29%	(220)
private school	6%	(235)	4%	(220)
other	5%	(235)	5%	(220)

[1] In the judicial sample, when provision for maintenance of life insurance was made, 96% of the cases required insurance to be maintained by the father, and 4% by both parents. In the settlement sample, 82% of the cases required insurance to be maintained by the father, and, 1% by the mother, and 17% by both parents.
[2] In the judicial sample, when maintenance of medical insurance was required, the father alone was required to maintain coverage in 89% of the cases, the mother alone in 4%, and both parents in 7%. In the settlement sample, the father alone was required to maintain coverage in 83% of the cases, the mother in 8%, and both parents in 9%.
[3] In the judicial sample, when provision for unreimbursed medical expenses was made, 62% required payment by the father, 2% by the mother, and 36% by both parents. In the settlement sample, 52.5% required payment by the father, and 47.5% by both parents.
[4] In the judicial sample, when payment of college expenses was required, 71% required payment of all expenses by the father and 29% required joint payment. In the settlement sample, 39% required payment by the father and 61% required joint payment.

TABLE A16
CHILD SUPPORT CORRELATIONS DEPENDENT VARIABLE=VALUE OF CHILD SUPPORT EXCLUDING ALIMONY ($1990)

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R[1] (n) p=
CASE CHARACTERISTICS			
Fault Judgment[2]	−.0903 (214) p=.188	−.0954 (214) p=.164	−.1620 (191) p=.025
Fault Ranking	−.1101 (203) p=.118	−.1182 (203) p=.093	−.1026 (190) p=.159
Gender of Plaintiff[3]	***	***	−.1246 (192) p=.085
Length of Proceeding	.0974 (176) p=.198	.1097 (176) p=.147	.2405 (193) p<.000
Region*	1.062 (227) p=.348	1.144 (227) p=.321	3.352 (196) p=.037
Appellate Department*	3.578 (227) p=.015	3.442 (227) p=.018	***
Year of Decision	.2002 (227) p=.002	.2039 (227) p=.002	***
JUDICIAL CHARACTERISTICS			
Age	.0538 (211) p=.437	***	***
Educational Status Score[4]	.0284 (202) p=.688	***	***
Judicial Experience (years)	.1664 (218) p=.014	***	***
Political Party[5]	−.0847 (185) p=.252	***	***
Regionality of Education[6]	.0275 (202) p=.697	***	***
Religion*	.286 (114) p=.752	***	***
Sex[7]	.1822 (226) p=.006	***	***

LITIGANT CHARACTERISTICS			
AGE			
Obligor	−.0333	−.0427	.0283
	(172)	(172)	(190)
	p=.665	p=.578	p=.690
Recipient	−.1092	−.1181	.0077
	(172)	(172)	(189)
	p=.154	p=.123	p=.916
CHILDREN OF THE MARRIAGE			
Sole Custody to Wife	.3617	.3712	.3206
	(227)	(227)	(196)
	p=.000	p=.000	p=.000
Number of Children	.2913	.2838	.1581
	(227)	(227)	(196)
	p=.000	p=.000	p=.027
Husband's Unrealized	***	***	.1559
Custody Threat			(192)
			p=.031
EDUCATION (YEARS)			
Obligor	.2503	.2732	.2896
	(112)	(112)	(168)
	p=.008	p=.004	p=.000
Recipient	.1617	.1787	.2410
	(134)	(134)	(167)
	p=.062	p=.039	p=.002
HEALTH[8]			
Obligor	−.0983	−.1044	−.0697
	(227)	(227)	(196)
	p=.140	p=.117	p=.331
Recipient	−.1257	−.1212	−.1017
	(227)	(227)	(189)
	p=.059	p=.068	p=.156
INCOME AND EMPLOYMENT			
Obligor	.6108	.6178	.4623
	(175)	(175)	(141)
	p=.000	p=.000	p=.000
Recipient	−.0418	−.0706	−.1727
	(164)	(164)	(166)
	p=.595	p=.369	p=.026
Recipient's Income/Family Income	−.2113	−.2317	−.4240
	(163)	(163)	(125)
	p=.007	p=.003	p=.000
Recipient's Job Status	.0151	.0129	−.0871
	(209)	(209)	(160)
	p=.828	p=.853	p=.274
Obligor's Job Status	−.2498	−.2689	−.3962
	(211)	(211)	(151)
	p=.000	p=.000	p=.000

MARITAL DURATION	−.1612	−.1578	.0178
	(220)	(220)	(194)
	p=.017	p=.019	p=.805
MARITAL PROPERTY			
Net Worth	.0073	.0073	.0804
	(225)	(225)	(196)
	p=.913	p=.913	p=.263
Value of Recipient's	.1220	.1237	.1456
Net Property Award	(221)	(221)	(182)
	p=.070	p=.066	p=.050

[1] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the F statistic.
[2] Coded divorce judgment granted against obligor only=1, against both spouses=2, against recipient only=3.
[3] Coded 1=wife, 2=husband.
[4] Coded 2 through 8, based on combined status scores of judge's college and law school.
[5] Coded 1=Democratic, 2=Republican.
[6] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 3=attended both college and law school locally.
[7] Coded 1=male, 2=female.
[8] Coded 1=good, 2=fair, 3=poor.

TABLE A17
COMBINED ALIMONY AND CHILD SUPPORT CORRELATIONS (CASES WITH MINOR CHILDREN) DEPENDENT VARIABLE=VALUE OF ALIMONY PLUS CHILD SUPPORT ($1990)

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R[1] (n) p=
CASE CHARACTERISTICS			
Fault Judgment[2]	−.0870 (212) p=.207	−.0966 (212) p=.161	−.0829 (190) p=.255
Fault Ranking	−.0867 (201) p=.221	−.0899 (201) p=.204	−.0390 (189) p=.594
Gender of Plaintiff[3]	***	***	−.0607 (191) p=.404
Length of Proceeding	.1512 (174) p=.046	.1850 (174) p=.015	.2586 (181) p=.000
Region*	5.713 (225) p=.004	7.634 (225) p=.001	4.965 (184) p=.008
Appellate Department*	3.026 (225) p=.038	3.707 (225) p=.012	***
Year of Decision	.1302 (225) p=.051	.1380 (225) p=.039	***
JUDICIAL CHARACTERISTICS			
Age	.0849 (209) p=.222	***	***
Educational Status Score[4]	.0912 (196) p=.204	***	***
Judicial Experience (years)	.0975 (216) p=.153	***	***
Political Party[5]	.0212 (183) p=.776	***	***
Regionality of Education[6]	.0015 (200) p=.983	***	***
Religion*	1.181 (112) p=.311	***	***
Sex[7]	.0248 (224) p=.712	***	***

LITIGANT CHARACTERISTICS			
AGE			
Obligor	.0690	.0794	.0604
	(170)	(170)	(178)
	p=.366	p=.304	p=.423
Recipient	.0679	.0743	.0752
	(170)	(170)	(177)
	p=.379	p=.335	p=.328
CHILDREN OF THE MARRIAGE			
Sole Custody to Wife	.1492	.1589	.1190
	(225)	(225)	(208)
	p=.025	p=.017	p=.087
% of Obligor Income	−.0763	−.0941	−.0092
Paid in Child Support	(171)	(171)	(137)
	p=.321	p=.221	p=.915
Number of Children	.2049	.1909	.1208
	(225)	(225)	(184)
	p=.002	p=.004	p=.102
Husband's Unrealized	***	***	.0876
Custody Request			(191)
			p=.228
EDUCATION (YEARS)			
Obligor	.2574	.2687	.3210
	(112)	(112)	(132)
	p=.006	p=.004	p=.000
Recipient	.2450	.2770	.2266
	(133)	(133)	(158)
	p=.004	p=.001	p=.004
HEALTH[8]			
Obligor	−.1048	−.1042	.0037
	(225)	(225)	(184)
	p=.117	p=.119	p=.960
Recipient	.0387	.0926	.1046
	(225)	(225)	(184)
	p=.564	p=.166	p=.158
INCOME AND EMPLOYMENT			
Obligor	.6294	.6286	.5924
	(175)	(175)	(140)
	p=.000	p=.000	p=.000
Recipient	−.1899	−.2138	−.1703
	(164)	(164)	(165)
	p=.015	p=.006	p=.029
Recipient's Income/Family Income	−.3964	−.4131	−.2382
	(163)	(163)	(165)
	p=.000	p=.000	p=.002
Recipient's Job Status[9]	.0998	.1192	.0902
	(208)	(208)	(164)
	p=.152	p=.086	p=.211
Obligor's Job Status	−.3277	−.3206	−.4615
	(209)	(209)	(157)
	p=.000	p=.000	p=.000

MARITAL DURATION	.0152	.0230	.0607
	(218)	(218)	(206)
	p=.824	p=.736	p=.386
MARITAL PROPERTY			
Net Worth	−.0160	−.0107	.0261
	(223)	(223)	(208)
	p=.812	p=.873	p=.708
Value of Recipient's	.1038	.1126	.0738
Net Property Award	(219)	(219)	(191)
	p=.126	p=.096	p=.310

[1] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the F statistic.
[2] Coded divorce judgment granted against obligor only=1, against both spouses=2, against recipient only=3.
[3] Coded 1=wife, 2=husband.
[4] Coded 2 through 8, based on combined status scores of judge's college and law school.
[5] Coded 1=Democratic, 2=Republican.
[6] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 2=attended both college and law school locally.
[7] Coded 1=male, 2=female.
[8] Coded 1=good, 2=fair, 3=poor.
[9] Coded 1=high status professional, 2=lower status professional (e.g., accountants, artists, clergymen, computer programmers, decorators and designers, journalists, librarians, musicians, nurses, pharmacists, high school or lower teachers), 3=small business owners, white collar workers (e.g., sales personnel, clerks, cashiers, secretaries), and skilled blue collar workers (e.g., machinists, printers, electricians, butchers, machine operators), 4=students, 5=unemployed, retired, or homemaker.

TABLE A18
ALIMONY AWARD VALUE CORRELATIONS (CASES WITHOUT MINOR CHILDREN) DEPENDENT VARIABLE=VALUE OF ALIMONY (1990 DOLLARS)

Independent Variable	Case Group		
	JUDICIAL		SETTLEMENT
	Trial	Appellate	
	Pearson's R (n) p=	Pearson's R (n) p=	Pearson's R[1] (n) p=
CASE CHARACTERISTICS			
Fault Judgment[2]	.0629 (74) p=.595	−.0010 (75) p=.993	−.0431 (33) p=.812
Fault Ranking[3]	.2467 (66) p=.046	.2439 (67) p=.047	−.0734 (33) p=.685
Gender of Plaintiff[4]	***	***	−.1073 (32) p=.559
Length of Proceeding	.0580 (63) p=.652	.0452 (63) p=.725	.0743 (32) p=.686
Region*	−1.216 (80) p=.302	−1.416 (81) p=.249	.827 (33) p=.447
Appellate Department*	−8.141 (80) p=.000	−8.310 (81) p=.000	***
Year of Decision	−.0859 (80) p=.448	.0330 (81) p=.770	***
JUDICIAL CHARACTERISTICS			
Age	.0612 (78) p=.559	***	***
Educational Status Score[5]	.1759 (76) p=.128	***	***
Judicial Experience (years)	−.0681 (76) p=.559	***	***
Political Party[6]	−.2545 (65) p=.041	***	***
Regionality of Education[7]	−.0042 (77) p=.971	***	***
Religion	1.007 (41) p=.375	***	***
Sex[8]	−.1274 (80) p=.260	***	***

LITIGANT CHARACTERISTICS			
AGE			
Husband	.1980	.1938	.2351
	(66)	(67)	(31)
	p=.111	p=.116	p=.203
Wife	.1232	.1406	.2118
	(70)	(71)	(31)
	p=.310	p=.242	p=.253
CHILDREN OF THE MARRIAGE			
Marriage Produced Children	−.1492	.1710	−.0711
	(80)	(81)	(33)
	p=.209	p=.127	p=.694
EDUCATION (YEARS)			
Husband	−.0920	−.0702	.2351
	(30)	(29)	(30)
	p=.629	p=.717	p=.001
Wife	.2642	.2651	.2745
	(38)	(37)	(27)
	p=.109	p=.113	p=.166
HEALTH[9]			
Husband	−.0140	−.0409	−.0087
	(80)	(81)	(33)
	p=.902	p=.717	p=.962
Wife	−.1151	−.1057	.2247
	(80)	(81)	(33)
	p=.309	p=.348	p=.209
INCOME AND EMPLOYMENT			
Husband's Job Status	−.3410	−.2238	−.5534
	(77)	(78)	(24)
	p=.002	p=.049	p=.005
Husband's Income	.4423	.8086	.9222
	(70)	(71)	(28)
	p=.000	p=.000	p=.000
Wife's Job Status[10]	.1400	.1587	−.1012
	(76)	(77)	(25)
	p=.228	p=.168	p=.630
Wife's Income	−.2715	−.2487	.0129
	(66)	(67)	(30)
	p=.027	p=.042	p=.946
Wife's Income/Family Income	−.4445	−.3814	−.1432
	(63)	(64)	(26)
	p=.000	p=.004	p=.485
MARITAL DURATION	.1920	.2401	.1921
	(78)	(79)	(33)
	p=.092	p=.039	p=.284
MARITAL PROPERTY			
Net Worth	.1165	.3971	.5580
	(79)	(80)	(33)
	p=.306	p=.000	p=.001
Husband-Owned	.7848	.8078	.8006
Property Value	(66)	(67)	(30)
	p=.000	p=.000	p=.000
Wife-Owned	.0386	.0105	.1814
Property Value	(79)	(81)	(30)
	p=.734	p=.926	p=.337
Value of Wife's	.5273	.3795	.3687
Net Property Award	(78)	(79)	(33)
	p=.000	p=.001	p=.035

[1] For nondichotomous categorical variables (i.e., case region, appellate department, and judge's religion), the table displays the F statistic.

[2] Coded divorce judgment granted against husband only=1, against both spouses=2, against wife only=3.
[3] Coded 1 through 7, based on combined score taking into account fault judgment (1 through 3) and basis. Adultery ranked 1, cruel and inhuman treatment 2, abandonment 3, mental illness 4.
[4] Coded 1=wife, 2=husband.
[5] Coded 2 through 8, based on combined status scores of judge's college and law school.
[6] Coded 1=Democratic, 2=Republican.
[7] Coded 0=attended neither college or law school locally, 1=attended either college or law school locally, 2=attended both college and law school locally.
[8] Coded 1=male, 2=female.
[9] Coded 1=good, 2=fair, 3=poor.
[10] Coded 1=high status professional, 2=lower status professional (e.g., accountants, artists, clergymen, computer programmers, decorators and designers, journalists, librarians, musicians, nurses, pharmacists, high school or lower teachers), 3=small business owners, white collar workers (e.g., sales personnel, clerks, cashiers, secretaries), and skilled blue collar workers (e.g., machinists, printers, electricians, butchers, machine operators), 4=students, 5=unemployed, retired, or homemaker.

TABLE A19
PERCENTAGE DISTRIBUTION OF NET MARITAL ASSETS (JUDICIAL SAMPLE: COUPLES WITH POSITIVE NET WORTH), BY WIFE'S HEALTH

Percentage Distribution of Net Marital Assets	Wife's Health		
	Good (n=273)	Fair (n=28)	Poor (n=22)
Disproportionate Share to Husband	30%	29%	63%
Relatively Equal*	48%	57%	32%
Disproportionate Share to Wife	22%	14%	5%

* Relatively Equal=Between 45% and 55%
Chi-square=12,88728 D.F.=4; P=.01184