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## What's Fair in Divorce Property Distribution: Cross-national Perspectives from Survey Evidence

Marsha Garrison\*

*[W]hen love has vanished, there's only money left to divide . . . .*<sup>1</sup>

Americans are more likely to experience divorce than any other type of civil litigation.<sup>2</sup> Nearly half of American marriages end in divorce, with the result that more than a million divorces are concluded in the United States each and every year.<sup>3</sup>

Since the advent of no-fault divorce in the 1960s and 1970s, both divorce litigation and negotiation have focused predominantly on the distribution of property and debt. Many divorcing couples do not have minor children, and spousal support is today awarded only rarely.<sup>4</sup> But virtually all divorcing couples have debts, and most have assets.<sup>5</sup>

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1. MARCIA MILLMAN, *WARM HEARTS AND COLD CASH: THE INTIMATE DYNAMICS OF FAMILIES AND MONEY* 11 (1991).

2. See Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1116 (1988) (“Divorce and its incidents are, for most disputants, the only occasion on which they will come into contact with the law in a formal sense.”); see also Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921, 922 n.3 (2007) (reporting that 75% of N.Y. court filings are divorce actions, a figure that does not include uncontested divorces).

3. See *Births, Marriages, Divorces, and Deaths: Provisional Data for 2009*, 58 NAT'L VITAL STAT. RPTS. 25, tbl. 2 (Aug. 27, 2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_25.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf).

4. Data on overall alimony rates are sparse. See Juliet Behrens & Bruce Smyth, *Spousal Support in Australia: A Study of Incidence and Attitudes* 10 (Austl. Inst. Fam. Stud., Working Paper No. 16, 1999) (reporting that 7% of Australian divorce sample had received or paid spousal support); Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241 (2005) (reporting 7–9% alimony rate in Iowa divorce sample and finding that all alimony awards were short-term). In the U.K., one survey found that only 31% of divorced women with children received any form of maintenance—child support or alimony—from a former husband. See Stephen P. Jenkins, *Marital Splits and Income Changes Over the Longer Term* 13, tbl. 3, (Inst. of Soc. & Econ. Research, Univ. of Essex, Working paper No. 2008-07, 2008). At least in the United States, the low incidence of alimony awards has been fairly constant over the long term. 15–17% of surveyed divorced women reported to the U.S. Census Bureau that they had been awarded alimony from the late 1970s through 1989, the last full year the Census Bureau collected alimony data. GORDON H. LESTER, U.S. BUREAU OF THE CENSUS, *CHILD SUPPORT AND ALIMONY: 1989, Current Pop. Rpts., Series P–60, No. 173* at 12

All divorce property-distribution systems aim to achieve a fair division of spousal assets. However, no consensus has emerged as to either the pool of assets available for division or the correct divisional principle. Property distribution schemes are highly divergent in the United States and abroad.

Because of variation in property-division schemes, the same divorcing spouse might receive a dramatically different property award depending on the jurisdiction in which the divorce takes place. Suppose, for example, that Husband and Wife divorce in California. Further assume that, after a 20-year marriage, Husband and Wife have accumulated \$200,000 in assets acquired during the marriage from employment income and that Husband has inherited assets worth \$500,000. Under California's property-division rules, Husband would retain his \$500,000 inheritance; both Husband and Wife would receive half (\$100,000) of the assets derived from marital employment.<sup>6</sup> But, should Husband and Wife divorce in Vermont, Husband's inheritance would be included within the pool of distributable assets. Because each spouse's property award is discretionary, Wife might receive half of the total (\$300,000); she might receive less, or she might receive more.<sup>7</sup>

Which, if either, of these very different distributional schemes best comports with spousal expectations and popular notions of fairness? It seems unlikely that the expectations of married couples vary dramatically from one state to the next. Nor is there any reason to suppose that what is fair in California would dramatically differ from what is fair in Vermont.

For the past 40 years, all commentators have agreed that the basic goal of divorce property distribution is fairness. They have also assumed that the ideal of marital partnership precludes exclusive reliance on title as a basis for determining who gets

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(1990). U.S. census data from the turn of the century indicate that 9.3% of divorces included alimony awards. See PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 127–28 (1959). The typical alimony recipient is long-married and has a very low income in relation to that of her spouse. See Behrens & Smyth, *supra* (all alimony recipients had been in relatively long marriages); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 468–69, tbls. 14–16 (1996); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 711, tbl. 48 (1991).

5. See Garrison, *supra* note 2, at nn. 5–12 (describing research on property and debt holdings of divorcing couples).

6. See CAL. FAM. CODE § 2550 (West Supp. 2011).

7. See VT. STAT. ANN. tit. 15, § 751 (West, Westlaw through law No. 46 of the 2011-2012 session of the Vermont General Assembly (2011)).

what. But, beyond these basics, commentators tend to offer conclusions based on assertion instead of empirical or theoretical evidence. The American Law Institute (ALI), for example, asserts:

After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses. If the marriage ends with the death of the wealthier spouse, the common law has traditionally provided the remedy of a forced share for survivors not otherwise provided for . . . . The [proposed] rule . . . [requires] spouses who live together for many years [to] commit at least some of their [separate-property] resources to one another, in a proportion that increases with the duration of their relationship, unless there is good reason to think that they did not intend that result. This is surely more reasonable than assuming that spouses who live together for many years do not intend to commit any of their resources to one another.<sup>8</sup>

In this explanation of its rule choice, the ALI makes factual assumptions about spousal expectations and behavior. The ALI also assumes that the justifications underlying rules applicable to property distribution at death provide an appropriate model for property distribution at divorce. But the ALI offers no empirical evidence for its factual claims, nor does it offer any factual or policy justifications to support its reliance on probate law. I do not mean to single out the ALI; other analysts have also been long on assertion and short on both empirical and theoretical evidence.<sup>9</sup>

This article presents cross-national survey evidence on property distribution at divorce. Although the sample is not representative of the population as a whole, it does shed light on

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8. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, § 4.12 cmt. a (2002) [hereinafter *ALI PRINCIPLES*].

9. See, e.g., Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 *COLUM. L. REV.* 75 (2004); Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 *NW. U. L. REV.* 1623 (2008).

how young, well-educated adults perceive fairness in property distribution and how they respond to both the classic definitions of property available for divorce distribution and newer schemes like that proposed by the ALI. Part One explains current distribution models, their origins, and why there is no obvious choice between them. Part Two describes the survey evidence, analyzes its implications, and charts an agenda for further research.

## I. PROPERTY DISTRIBUTION AT DIVORCE: METHODS AND MODELS

Each divorce-property distribution scheme must resolve two basic questions. What assets are available for distribution? What principle shall determine the division of that asset pool?

### A. *What Assets Are Distributable at Divorce?*

#### 1. *The Definitional Approaches*

There are two primary approaches to defining the pool of assets available for distribution at divorce. Most American jurisdictions, and a majority of European nations, permit the divorce court to divide only community or marital assets.<sup>10</sup> Under this approach, which I will call the “marital model,” assets a spouse acquires before marriage and assets a spouse acquires during marriage through gift, descent, or devise cannot be distributed to the spouse who does not hold legal title. A minority approach, which I will call the “universal model,” permits the divorce court to divide *all* assets owned by either spouse, without regard to when and how those assets were acquired.<sup>11</sup>

In addition to these two primary definitional models, there are also hybrid systems. For example, the ALI has proposed that a combination of the universal and marital models should govern divorce property distribution. The ALI’s proposal bears a strong

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10. See J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 3.03 (2005); EUROPEAN COMMISSION GENERAL DIRECTION JUSTICE AND HOME AFFAIRS UNIT, *STUDY IN COMPARATIVE LAW ON THE RULES GOVERNING CONFLICTS OF JURISDICTION AND LAWS ON MATRIMONIAL PROPERTY REGIMES AND THE IMPLEMENTATIONS FOR PROPERTY ISSUES OF THE SEPARATION OF UNMARRIED COUPLES IN THE MEMBER STATES* (2003), available at [http://ec.europa.eu/civiljustice/publications/docs/regimes/report\\_regimes\\_030703\\_fr.pdf](http://ec.europa.eu/civiljustice/publications/docs/regimes/report_regimes_030703_fr.pdf) [hereinafter EUROPEAN COMMISSION STUDY].

11. See OLDHAM, *supra* note 10, at § 3.03 n.3 (listing American jurisdictions following the universal approach). European jurisdictions following the universal approach include the Netherlands. See EUROPEAN COMMISSION STUDY, *supra* note 10.

resemblance to the 1990–93 Uniform Probate Code approach to the determination of a surviving spouse’s right to elect against a decedent spouse’s will.<sup>12</sup> Under this proposal, a varying percentage of nonmarital assets is added to the pool of distributable marital assets; the percentage increases with marital duration. Thus, at the beginning of a marriage, the ALI approach requires use of the marital model, while in a long marriage it requires use of the universal approach.<sup>13</sup> Although no state has adopted the ALI proposal, there are a number of jurisdictions that authorize a court to divide some or all nonmarital assets in special circumstances.

In many cases, the definition of divisible assets will not play a major role in determining divorce outcomes. If a couple marries when they are young, it is unlikely that either will have acquired many valuable assets. Unless one or the other comes from a wealthy family, gifts, bequests, and inheritances are unlikely to play a major role in the couple’s financial expectations or planning. In such a case, the asset pool available for distribution of divorce property will be the same no matter which definitional approach—community, universal or ALI—we employ.

In some cases, however, the definition of divisible assets matters. Consider this case:

Hal and Wanda have been married for 30 years. They own the following assets, all acquired during their marriage with employment income:

1. The marital home, owned jointly, valued at \$500,000;
2. Wanda’s pension, owned by Wanda, worth \$1 million;
3. Hal’s pension, owned by Hal, worth \$100,000.

Hal also owns a stock portfolio that he inherited from his grandmother before marriage. The portfolio was worth \$300,000 when Hal and Wanda married, and it is worth \$1.5 million now. Hal made few pension contributions during the marriage because he viewed this inheritance as a retirement nest egg.

In the case of Hal and Wanda, the community model produces a pool of divisible assets limited to \$1.6 million consisting of the marital home and the pensions owned by Wanda and Hal. The universal model produces an asset pool worth \$3.1 million—almost twice the marital model value—because it requires inclusion of Hal’s inherited stock portfolio; indeed, the universal model would require inclusion of Hal’s inheritance even if Hal and Wanda’s marriage terminated three years after it took place instead of 30. The ALI model requires the inclusion of Hal’s inheritance because Hal and Wanda have been married for a long time, but

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12. See UNIF. PROBATE CODE §2–202 (2008).

13. See ALI PRINCIPLES, *supra* note 8, at § 4.12.

none or a very limited portion of the inheritance would have been included in the pool of divisible assets if their marriage had been brief.

## *2. Defining Property, Defining Marriage*

So, what is the optimal definition of divisible property? Should a divorce court treat Hal's inheritance as a divisible asset in some or all cases? Should it matter if Hal and Wanda have been married for a long time? Should it matter if, as in the case of Hal and Wanda, the evidence shows that one or both spouses have made financial decisions based on the existence of this asset?

There is no obvious right answer to any of these questions. The definition of divisible property, like the notion of property in general, is a contested concept:

There is no inevitable content to property, and the choice among its competing configurations entails significant distributive consequences: each additional stick in the owner's bundle of rights, and any expansion of an existing stick, is ipso facto a burden on non-owners. Thus, no arbitration among the different available conceptions of property is possible without some normative apparatus.<sup>14</sup>

Any normative apparatus used to define the pool of property divisible at divorce will reflect prevailing conceptions of marriage and spousal status. Thus, the common law, which reflected a patriarchal vision of marriage under which husband and wife were one legal person,<sup>15</sup> treated a husband as owner of all personal property that his wife brought into the marriage or acquired during it.<sup>16</sup> Although any real property a wife brought into the marriage did revert to her upon her husband's death, the use, rents, and profits of such property belonged to her husband throughout the marriage.<sup>17</sup> A wife who survived her husband had a "dower" entitlement, consisting of a life estate in one-third of real property that her husband held in fee at any time during the marriage, but

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14. Hanoch Dagan, *Values: The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 814–15 (2008).

15. WILLIAM BLACKSTONE, COMMENTARIES 256 (William C. Sprague ed., 9th ed. 1915).

16. See HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS 219–20 (1968). The wife's "paraphernalia," i.e., clothing and jewelry, did revert to the wife upon her husband's death. See *id.*

17. See *id.* at 220.

she had no right to inherit any of his assets.<sup>18</sup> Nor could a wife, through divorce, claim any share of her husband's assets or recover those she had brought into the marriage.

Through the innovation of the trust, the chancery courts did develop doctrines that permitted individuals who wanted to benefit a married woman to get around the common law rules. But these trust doctrines were available only when a wife had a benefactor who clearly specified that she was the intended beneficiary of the property conveyed; for example, a father whose daughter had married a spendthrift could use trust law to ensure that the daughter's husband could not reach certain assets and thus ensure her support. But a wife without such a benefactor could not rely on trust doctrine to protect herself.

During the 19th century, this patriarchal conception of marriage gave way to a more individualistic model. The husband was still the household head; he determined the family's domicile and maintained the right to discipline his wife as well as his children. But the wife now had her separate sphere; she could retain title to property she brought into the marriage and that which she acquired during it. She could also divorce her husband if she could show that he was at fault in causing the dissolution of the relationship. In such a case, the new divorce laws permitted a court to award her child support until the children of the marriage came of age and spousal support (alimony) for her own needs until her death or remarriage. These new divorce remedies were widely seen as compensation for the virtuous wife and mother and punishment for the guilty husband and father.<sup>19</sup> They did not, however, permit a divorced wife to obtain any share of assets held by her husband in his name.

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18. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 475–76 (8th ed. 2009) (describing dower system).

19. Divorce remedies also served to protect the public against the specter of welfare dependency. Early divorce law and early public assistance schemes thus utilized similar eligibility criteria that focused on both dependence and blameworthiness. Public 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* 348–97 (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) and Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 *YALE L.J.* 286 (1962).



Lest one imagine that divorce property distribution rules map neatly onto a prevailing conception of marriage, it is important to note that the civil law countries of Europe, which held equally patriarchal views of marriage and family relationships,<sup>20</sup> typically followed a very different approach to spousal property rights.<sup>21</sup> Under the “community property” or “community of acquests” system, property acquired during the marriage as a result of spousal effort was viewed as an asset of the marriage, without regard to title. To some extent, this view of marital property rights reflects the fact that into the “nineteenth century . . . the married couple . . . formed a working unit. In these circumstances, economic cooperation was an essential aspect of marital relations . . . [and] a major element in spouse selection.”<sup>22</sup> Under the community property model, management rights went to the husband,<sup>23</sup> but both spouses held an infeasible and equal interest in the community assets.

Not only did the community model flourish in many parts of Europe during the same era that the common law accorded wives no marital property rights whatsoever, but European marital-property law reveals a patchwork of rules even within a single geographic area. For example, in parts of Lower Austria, the prevailing concept of marital property, or *Gütergemeinschaft*, held that all property that accrued to the spouses during their marriage formed a common matrimonial pool of wealth, *ein gemeinschaftliches Gut*. The surviving spouse—whether male or female—inherited half of the property and the other half was divided among the children. But, in the Innichen area, a separate property regime and primogeniture prevailed. Under this system, a wife typically retained a right of

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20. See RUDOLF HUBNER ET AL., A HISTORY OF GERMANIC PRIVATE LAW 617–18 (1918) (noting that “[t]he husband, in the patriarchal family law of the prehistoric Indo-Germanic period, enjoyed in the marriage a position so superior to that of woman that language had no word for the conceptions ‘marriage,’ ‘spouses,’ or ‘parents.’ Similarly, the mundium of the old Germanic law still involved a subjection of the bride to the unlimited power of the man to whom she was given in marriage.”).

21. See generally MARTHA C. HOWELL, THE MARRIAGE EXCHANGE: PROPERTY, SOCIAL PLACE, AND GENDER IN CITIES OF THE LOW COUNTRIES, 1300–1550 (1998) (describing the shift from a marital property regime based on custom to one based on contract: in the former, a widow typically inherited her husband’s property; in the latter, she shared it with or simply held it for his family or offspring); TO HAVE AND TO HOLD: MARRYING AND ITS DOCUMENTATION IN WESTERN CHRISTENDOM, 400–1600 (Philip L. Reynolds & John Witte, Jr. eds., 2007).

22. Josef Ehmer, *Marriage*, in THE HISTORY OF THE EUROPEAN FAMILY: FAMILY LIFE IN THE LONG NINETEENTH CENTURY, 1789–1913, at 298 (David I. Kertzer & Marzio Barbagli eds., 2002).

23. See *id.* at 286–87.

possession (similar to the common law dower right) but no vested interests in the marital wealth.<sup>24</sup>

Why did these very different systems develop? One factor that explains regional differences is inheritance law. The common law system, which gave wives no property rights, was coupled with primogeniture. Inheritance law and matrimonial law thus worked hand in hand to ensure that landed estates were not broken up and remained within the same family line.<sup>25</sup> The community property system, on the other hand, was typically coupled with inheritance rules that gave surviving children (or at least male children) equal entitlements.

A second factor was economic organization. To oversimplify, the common law system served the interests of the (male) landed gentry; the community property system tended to favor the interests of artisans and the peasantry. Thus, 17th and 18th century legal reforms in Austria that “were aimed against . . . joint marital property” were, in some areas, effectively overruled by marriage contracts that preserved the older tradition:

[T]his [new] system . . . was not . . . in any way compatible with peasant society. It negated the economic unity of the typical farm, as well as the reality of the “working team” of husband and wife, who with equal contributions—and in some respects, equal rights—conducted their mutual economic activities. Joint marital property as a form detailed by marriage contracts persisted, uninfluenced by legal innovations, into the 20th century.<sup>26</sup>

In sum, marital property law has invariably reflected prevailing views of both marriage and forms of economic organization.<sup>27</sup>

This historical detour does not tell us what system of divorce property distribution is best today, but it does tell us that a successful system will be compatible with prevailing marital ideals and economic realities.

24. See Gertrude Langer-Ostrawsky & Margareth Lanzinger, *More Favored—Less Favored? Women and Men in Different Marital Property Right Systems: A Comparative Study of Marital Property Rights in the Habsburg Empire during the 18th Century*, in LESS FAVORED—MORE FAVORED: PROCEEDINGS FROM A CONFERENCE ON GENDER IN EUROPEAN LEGAL HISTORY, 12TH–19TH CENTURIES (2004).

25. See DUKEMINIER ET AL., *supra* note 18, at 469–70.

26. Langer-Ostrawsky & Lanzinger, *supra* note 24.

27. Other factors—cultural norms, legal norms, local traditions—undoubtedly have played a role in determining which systems have remained in place, as has the capacity of individuals to avoid or contract out of the prevailing regime. When legal rules that do not comport with perceived needs can easily be evaded, there is less pressure to replace them.

### 3. Partnership and Equality: The New Marital Ideals

Today, both patriarchy and the separate-sphere conception of spousal relations have given way to an equality ideal. Almost everywhere, marriage is viewed as a partnership in which each spouse plays an equal role in household decision making and organization.<sup>28</sup> This new ideal of marriage emerged during the 1960s, the same period that witnessed both wives' widespread departure from the home into the wage labor force and the political movement in favor of formal gender equality.<sup>29</sup>

Today, a half-century after these economic and political developments, wives have economic opportunities equal, at least formally, to those of their husbands. Although women's salaries continue to lag behind men's, the gap has narrowed substantially, and, in a growing fraction of married-couple households, women earn the larger share of family income.<sup>30</sup> In light of these developments, a wife's decision to devote herself to unpaid household labor may impose dollar losses on the household equal to or greater than those which the husband's decision to engage in unpaid labor would impose.

The new partnership ideal reflects not only these changed economic realities, but also altered perceptions of marriage, divorce, and family ties. During the 1960s and 1970s, most of the industrialized world, common law and civil law nations alike, instituted reforms that "emphasized the individuality of the members of the conjugal family as well . . . facilitat[ing] their independence from it and each other."<sup>31</sup> The new reforms were

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28. See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1237–38 (2005) ("All fifty states are . . . guided, at least to some degree, by a partnership theory of marriage when considering how to distribute property in the context of divorce, and most scholars and advocates have come to take the theory for granted."); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141 (2004). Cases utilizing partnership concepts to justify particular divorce property awards are collected in Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 § 3 (1985 & Supp. 2009).

29. See, e.g., REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 18 (1963), quoted in ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 164 (1968) (urging that "[m]arriage is partnership to which each spouse makes a different but equally important contribution").

30. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *Wives Earning More than Their Husbands, 1987–2006* (2009), <http://www.bls.gov/opub/ted/2009/jan/wk1/art05.htm>.

31. MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 245 (1983).

gender-neutral; they also emphasized—across a range of issues—the autonomy of individuals instead of the family as a collective entity.<sup>32</sup>

So-called “no-fault” divorce, which augmented or replaced traditional divorce predicated on a showing of matrimonial fault with rules that permitted divorce based on a period of separation or marital breakdown, was an important part of this reform package.<sup>33</sup> Once divorce had been recast as a demand-based entitlement instead of a fault-based remedy, alimony—the damage award that the fault system had made available to a wronged and needy wife—lost its conceptual basis.

Alimony critics—including many feminists and women’s advocates— . . . urged that the traditional emphasis on fault and need in setting alimony awards perpetuated traditional notions of women as dependents and failed to recognize the value of a wife’s contributions as a homemaker and parent. With ever increasing numbers of women in the workplace, the notion of lifetime spousal support also began to seem anachronistic.<sup>34</sup>

Additionally, alimony critics pointed out that, although the alimony claim had theoretically been available to any wife whose husband was at fault in causing the dissolution of the marriage, empirical evidence showed that alimony was in fact seldom awarded and even less frequently paid. Finally, they noted that, when alimony was paid, it required ongoing contact between the former spouses that perhaps encouraged conduct, such as post-divorce litigation, aimed at “punishing . . . past behavior [instead of] beginning entirely new lives.”<sup>35</sup>

These various criticisms of alimony as a principal method of redressing the economic hardship of divorce led commentators in the common law jurisdictions to increasingly prefer property

32. Reforms in a diverse set of family law principles—abortion, divorce, child custody, children’s rights—can all be traced to this transformed view of the family. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Marsha Garrison, *Toward a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241 (1998).

33. Today, no-fault divorce is available in virtually all jurisdictions, typically without the consent of the spouses. In the United States, only two states (Mississippi and Tennessee) currently restrict no-fault divorce to cases involving spousal agreement. See MISS. CODE ANN. § 93-5-2 (West, Westlaw through 2010) (joint petition with separation agreement required); TENN. CODE ANN. § 36-4-101(a)(15) (West, Westlaw through Jun. 2011) (separation agreement required for couples with minor children).

34. Garrison, *Good Intentions Gone Awry*, *supra* note 4, at 630.

35. LEVY, *supra* note 29, at 146.

distribution to alimony as a divorce entitlement. “[I]f a system for division of property between husband and wife upon divorce . . . were adopted and . . . the family has sufficient property to divide,” they argued, “it would be possible to drastically reduce or eliminate alimony as continued support for an ex-spouse.”<sup>36</sup>

Legislatures responded affirmatively; in enacting no-fault divorce grounds, they typically recast alimony as a limited remedy available, in most cases, only for a limited period and for “rehabilitative” purposes. In common law jurisdictions, legislatures also typically enacted laws that permitted the distribution of property to a spouse who did not hold title to the asset or expanded judicial doctrines that permitted a court to distribute a husband’s property to a wife when the husband could not or would not pay alimony or when an alimony award was insufficient to compensate the wife for property she had brought into the marriage.<sup>37</sup> Community property jurisdictions, of course, had already accepted the idea of property entitlements growing out of marital status. In these states and, over time, in the common law jurisdictions as well, debate focused not on whether it was appropriate to divide assets at divorce without regard to title, but on the method by which those assets should be distributed.

## *B. How Should Assets Be Divided?*

### *1. Discretion v. Rules*

Most American jurisdictions adopted—and continue to employ—the so-called “equitable distribution” approach to property distribution, which relies heavily on judicial discretion to achieve a fair outcome. Equitable distribution states typically grant

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36. CITIZENS’ ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON THE STATUS OF WOMEN 8–9 (1968); see also LEVY, *supra* note 29, at 144–47 (urging abolition of alimony except in special cases).

37. In the United States, twenty-two states, by either judicial decision or legislation, gave judges discretionary power to award property to a non-title-holding spouse by 1938. See Harriet Spiller Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROBS. 225, 227 (1939) (citing 2 VERNIER, AMERICAN FAMILY LAWS Supp. 60 (1938 Supp.)). These early property distribution regimes were intended to augment alimony, however, not to provide a property distribution entitlement. Statutes often required judges to transfer property in the guise of an alimony payment and “[m]ost courts gave limited scope to [property distribution principles] . . . , interpreting them merely to protect the interests of a spouse who provided the capital to acquire a particular asset . . . .” Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 72 (1981); see also CLARK, *supra* note 16 at 450.

the decision-maker the capacity to award a spouse any portion of the pool of distributable assets. For example, New York's statutory scheme requires the judge to distribute assets "equitably between the parties, considering the circumstances of the case and of the respective parties."<sup>38</sup> To determine what equity requires, the legislature has provided a list of 13 different considerations that together take account of spousal need, resources, contribution to the marriage, and economic misconduct.<sup>39</sup> A catch-all clause additionally permits consideration of "any other factor which the court shall expressly find to be just and proper."<sup>40</sup> In sum, the statute directs the judge to base the distributional decision on an appraisal of the parties' past conduct, present needs, and future life circumstances, but leaves the scope, methodology, and application of that appraisal to judicial discretion.<sup>41</sup>

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38. N.Y. DOM. REL. L. § 236B(5)(c) (McKinney 2010).

39. The considerations provided for by the legislature are the following:

- (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) the loss of health insurance benefits upon dissolution of the marriage;
- (6) any award of maintenance under subdivision six of this part;
- (7) 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;
- (8) the liquid or non-liquid character of all marital property;
- (9) the probable future financial circumstances of each party;
- (10) 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;
- (11) the tax consequences to each party;
- (12) the wasteful dissipation of assets by either spouse;
- (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (14) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. L. § 236B(5)(d) (McKinney 2010).

40. *Id.* at § 236B(5)(d)(14).

41. Most equitable distribution laws employ lengthy factor lists like that contained in the New York statute. For a comparison of state standards, see OLDHAM, *supra* note 10, § 13.02.

Not every jurisdiction adopted the equitable distribution approach, however. A minority chose to require equal distribution of divisible assets or created a presumption in favor of equal distribution.<sup>42</sup> In the United States, only seven states currently employ an equal division or presumption-of-equal-division approach,<sup>43</sup> but these states include California, one of the most populous in the country, and the ALI has argued that equal division is appropriate except in very limited situations:

Equal division offers a rough compromise between the competing claims of contribution and need . . . . The equal-division rule typically provides that spouse more than he or she contributed financially, but less than a need-based rule might provide, depending upon the definition of need.

The equal-division rule also follows from the sharing premise that necessarily underlies the choice of a marital . . . property system. . . . [E]quality . . . is the rule of the partnership model to which analogy is frequently made. Once the principle that both spouses have claims to the marital property is accepted, dividing that property equally between them is the allocation that least requires justification.<sup>44</sup>

The ALI assumes that a “compromise between the competing claims of contribution and need”<sup>45</sup> is best because it is consistent

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42. See, e.g., CAL. FAM. CODE § 2550 (West Supp. 2011) (equal division); ARK. STAT. ANN. § 9-12-315 (West Supp. 2011) (rebuttable presumption of equal division).

43. Under the Principles, “[t]he spouses are allocated net shares of the marital property or debts that are unequal in value if, and only if, one or more of the following is true”:

(a) Pursuant to § 5.10, § 5.11, or § 5.14, the court compensates a spouse for a loss recognized in Chapter 5, in whole or in part, with an enhanced share of the marital property.

(b) Pursuant to § 4.10, the court allows one spouse an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it.

(c) Marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses’ financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.

(d) Debt has been incurred to finance a spouse’s education, in which case it is treated as the separate obligation of the spouse whose education it financed.

ALI PRINCIPLES, *supra* note 8, at § 4.09(2).

44. ALI PRINCIPLES, *supra* note 8, at § 4.09 cmt. b.

45. *Id.*

with an equality principle. But, the ALI stops short of recommending equal division in all cases because “[i]t is . . . impossible to draft reasonable rules that unambiguously resolve every factual variation. . . . [N]o formulation can eliminate all need for judicial discretion.”<sup>46</sup>

In formulating a distributional model, every lawmaker faces similar choices between individualized and rule-based results. The choice between equal and equitable distribution thus involves a methodological issue: is it better to pursue fairness on an individualized, discretionary basis, looking at the facts of each and every marriage, or is it better to rely on a bright-line rule that will, of necessity, treat very different couples in the same way?

## 2. Evaluating Discretion and Rules

Legislatures have not unanimously favored discretion or rules because each approach entails unavoidable disadvantages. Discretion breeds uncertainty; rules produce inflexibility.

The uncertainty inherent in discretionary standards enhances the possibility of inconsistency; such standards inevitably “increase the likelihood that characteristics of the judge, the court, or the community may affect case outcome.”<sup>47</sup> Inconsistent results are undesirable because like cases fail to receive like treatment.

In addition to this obvious downside, inconsistent results can impede settlement. Divorcing couples reach—or fail to reach—agreement by bargaining “in the shadow of the law”: their negotiations are informed by their understanding of a likely resolution were the case to go to trial.<sup>48</sup> But when legal rules are highly discretionary and imprecise, they cast a blurred shadow that impairs each spouse’s ability to understand his or her legal entitlements and—perhaps even more important—to reach a mutual understanding about those entitlements. Instead of

46. *Id.* at § 4.09 cmt. a.

47. 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 Garrison, *Empirical Analysis of Discretionary Decision Making*, *supra* note 4, at 401 (reporting that political party of judge was significant factor in determining likelihood of permanent alimony); Jessica Pearson & Maria Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982–83) (reporting that younger judges in urban areas were more likely to award custody to fathers than were older judges in rural locations).

48. The classic account of divorce bargaining is contained in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).



consensus on case outcome, each litigant may reach very different expectations, thus exacerbating the difficulty of forging a negotiated settlement and increasing the likelihood of litigation.<sup>49</sup>

Discretionary standards also make divorcing couples dependent upon the expertise of lawyers or other experts in assessing their litigation prospects.<sup>50</sup> Such experts may be able to offer litigants information about likely case outcome, but consulting such experts takes time and money. In the early 1990s, curious about just what it would cost a typical couple—let us call them Mr. and Mrs. Smith—to obtain a no-frills divorce, I had a law student call ten different law firms listing divorce as a specialty in the Brooklyn, Manhattan, and Queens yellow pages. The student asked each firm's representative the likely cost of representing the Smiths in an uncontested divorce and told the firm's representative that the Smiths had been married for five years, were childless, and owned no property except a joint bank account, a car, furniture, and a jointly owned condominium apartment which would be sold, with an equal division of the proceeds. Estimates to handle the Smiths' divorce "ranged from \$469 to \$1,770; the mean was \$931."<sup>51</sup> For a divorce litigant like Mr. or Mrs. Smith, the price of legal representation may well exceed any loss in post-divorce entitlements that lawyer representation could have averted.<sup>52</sup>

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49. 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, *Measuring Legal Change*, 3 J. L. ECON. & ORG. 193 (1987); see also Amy Farmer & Jill Tiefenthaler, *Conflict in Divorce Disputes: Determinants of Pretrial Settlement*, 21 INT'L REV. L. & ECON. 157, 176 (2001) (testing predictions of various litigation models in a sample of divorce cases and concluding that "the results suggest that the more uncertainty about the outcome, the more likely a couple goes to court.").

50. See, e.g., Mnookin & Kornhauser, *supra* note 48, at 979 (under 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 and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 598–602 (1987); Marygold Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1144 (1988); Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565 (1992); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

51. See Garrison, *supra* note 47, at 516 n.387.

52. See, e.g., Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571 (1992) ("Individuals acting in their self-interest will acquire such [legal] advice only if its perceived value exceeds its perceived cost."). Researchers thus report that self-representation at divorce is significantly

Discretionary standards also make it difficult for a divorce litigant to judge whether his or her attorney has negotiated a good deal or a bad one. Indeed, the attorney herself may not know whether she has negotiated a good or bad deal; her capacity to judge success will of necessity be confined to what she learns from reported cases, her own practice experience, and her observations. And, if the reported cases fail to reveal clear and consistent patterns, her own limited set of cases and observations will offer the only “norm” available, a norm that may be normal nowhere else.

In sum, discretion can impede settlement, increase costs, and enhance the likelihood of litigation. Instead of the finely nuanced, individualized outcomes that discretionary standards aim to produce, discretion may produce results that are arbitrary and inconsistent.

Rules, of course, also entail risks. 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.

Consider, for example, criminal-sentencing reform. Until the 1980s, sentencing was highly discretionary; the judge imposing a penalty was expected to consider a broad range of factors—the severity of the crime, past criminal conduct, the defendant’s circumstances and potential for reform—and make an individualized judgment of fairness, akin to that expected in the divorce court. Guidelines that introduced black-letter rules into the sentencing process were adopted because of the growing perception that discretionary sentencing produced inconsistency instead of individualized tailoring. But, the result of reform was a new wave of criticism suggesting the cure was worse than the problem. To many observers, sentences under the new guidelines were more predictable, but less fair.<sup>53</sup>

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correlated with income, age, whether the marriage produced children, property-ownership, and marital duration. See Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 561–66 (1993); Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 162 (1976) (divorce litigants without children and with short marriages were more likely to self-represent).

53. See Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 POL’Y ANALYSIS 1, 3 (2002) (“In 1990, the Federal Courts Study Committee received testimony from 270 witnesses—including judges, prosecutors, defense

Can property-division rules be fashioned that categorize cases in a way that promotes fairness as well as predictability? The ALI's claim that "dividing . . . property equally between [the spouses] is the allocation that least requires justification"<sup>54</sup> assumes that individually tailored property awards are neither a necessary nor a desirable goal of divorce law. And probate law—which determines spousal entitlements at death—does, at least in the United States, rely exclusively on bright-line rules. Under both community property and common law elective share rules, the surviving spouse's entitlement is fixed and unvarying.<sup>55</sup> Individual circumstances such as need, resources, marital contribution and fault are irrelevant to case outcome. 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. U.S. probate law thus strives for certainty at the expense of individualized equity.

Outside the United States, however, probate law is not invariably rule-bound. In the U.K. and most other common law nations, so-called "family maintenance" statutes allow the probate judge to revise a decedent spouse's will, and even legislatively defined intestate shares, in order to equitably provide for the decedent's surviving spouse and other dependents.<sup>56</sup>

Divorce law and probate law also have very different histories. Probate law derives from property law; its primary goal has been the delineation of mechanisms for the orderly transmission of wealth. Probate law's quest for certainty thus reflects its focus on the protection and clarification of rights.<sup>57</sup>

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attorneys, probation officers, and federal officials—and only four people expressed support for the Guidelines: the U.S. Attorney General and three members of the U.S. Sentencing Commission. Surveys of the judiciary have confirmed widespread disapproval of the Guidelines: A 1992 poll found that more than half of all federal judges believe the current system should be completely eliminated, while a 1997 survey concluded that more than two-thirds of federal judges view the Guidelines as unnecessary."); see also Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005).

54. ALI PRINCIPLES, *supra* note 8, at § 4.09 cmt. b.

55. For a description and comparison of spousal entitlements at death under community property and common law rules, see, e.g., DUKEMINIER ET AL., *supra* note 18, at 469–76.

56. See DUKEMINIER ET AL., *supra* note 18, at 521–22; Michelle Harris, *Why a Limited Family Maintenance System Could Help American "Grandfamilies"*, 3 NAELA STUDENT J. 239 (2007).

57. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) (describing fixed rules as "the very stuff of property: their

The ALI can today envision a probate-based system of divorce property distribution because modern divorce law has shifted away from its traditional goal of remedial, fault-based justice. The most obvious example of this trend is the advent of “no-fault” divorce, described in the last section. In a growing number of U.S. and European jurisdictions, the role of fault has also been dramatically curtailed in the determination of alimony and in property division.<sup>58</sup>

However, the shift away from fault-based divorce law has in fact tended to produce discretionary standards rather than bright-line rules like those envisioned by the ALI. A major reason for this result is that the consensus in favor of no-fault divorce has not been accompanied by consensus regarding individual responsibility and marital obligation. Instead, competing visions of family, gender, and individual responsibility have pulled in different directions, producing highly discretionary standards that demand consideration of wildly disparate values.

Nor is it obvious that probate law and divorce law should rely on the same concept of fairness or employ similar methods of determination. Probate law applies when a marriage has survived, intact, until the death of one spouse. Needless to say, the decedent spouse has neither future needs nor the capacity to enjoy his or her assets. Asset division thus does not pit two spouses with different interests against each other, but instead pits the surviving spouse against other individuals whom the decedent spouse wanted to benefit. The minimum-entitlement principles that probate law utilizes to protect surviving spouses against disinheritance also applies against a different pattern of expectations. Survey evidence shows that, except when one or both spouses is genuinely wealthy or has had children with other partners, the overwhelming majority of married men and women want their surviving spouse to inherit everything; a surviving spouse thus will quite reasonably expect to

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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.”).

58. The states are about equally divided on whether fault is relevant to an alimony award. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: “Same-Sex” Marriage Issue Dominates Headlines*, 38 *FAM. L.Q.* 777, 809, chart 1 (2005). In a number of states, marital fault other than dissolution of marital assets may not be considered in property division. In other states, marital fault may be considered by the decision-maker only when egregious. See OLDHAM, *supra* note 10, § 13.02[1][a](describing state rules).

receive the lion's share of the decedent spouse's estate.<sup>59</sup> Divorce law, by contrast, applies when both spouses expect to build new lives without the other. It is far from obvious that the general public or married couples view fairness in the divorce court and the probate court in identical terms.

## II. CHOOSING A MODEL

We have seen that marital property regimes have historically reflected both marital ideals and economic realities. We have also seen that both patriarchy and the "separate sphere" conception of spousal relations have given way to a partnership model of marriage. The new partnership ideal reflects the realities of formal gender equality and increased economic opportunities for women. It also reflects and reinforces both an ethic of spousal sharing and a new vision of spouses as autonomous individuals who can freely exit a dysfunctional relationship.

When average citizens, married or single, talk about marriage, they tend to do so in terms of sharing.<sup>60</sup> "Many [married couples] speak of sharing—thoughts, feelings, tasks, values, or life goals—as the greatest virtue in a relationship."<sup>61</sup> Reflecting this sharing ethic, married couples all over the world overwhelmingly report that they share economic resources and that such sharing is a product of love, trust, and commitment.<sup>62</sup>

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59. See Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 348–64 (1978); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 251–53 (1963); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 311–13 (1975); Project, *A Comparison of Iowans' Dispositive Preferences with Selected provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978).

60. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 90 (1985) (96% of Americans valued "the ideal of two people sharing a life and a home together").

61. *Id.* at 91.

62. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 101, 110 (1983) (reporting that only 12% of surveyed wives and 8% of surveyed husbands strongly disagreed that couples should pool everything); JAN PAHL, *MONEY AND MARRIAGE* 77–78, 83, 126–27 (1989) (reporting, based on study of 102 married couples in the U.K., that spouses see income-sharing as the norm, widely share income, and that, within research sample, couples forgoing pooling were too infrequent to include in analysis); JANET STOCKS ET AL., *MODERN COUPLES: SHARING MONEY, SHARING LIFE* 11, 16–17, 49 (2007) (finding that a majority of couples view sharing resources as natural, describing different pooling systems used by married couples: wife-managed, husband-managed, jointly managed, and independently managed, and finding that a jointly

But what does marital sharing mean at divorce? Clearly, the experts do not agree: how should we choose a fairness model?

One obvious method is to consult the public. Survey data have played an important part in triggering reforms in the law of intestate distribution because the aim of this body of law is to meet the expectations of typical citizens. Divorce law shares this emphasis on meeting expectations. Moreover,

[f]or any law strongly related to societal values . . . , policy-makers need to have an accurate portrayal of current cultural norms and sentiments. . . . [P]olicymakers ought to be concerned about maintaining rules that conflict with lay intuitions about what is right, for they may lead to general disdain for the court or the rule-makers . . . .<sup>63</sup>

The “convenience” samples whose views are shown here are not ideal vehicles for revealing public opinion. All of the respondents are first-year law students at Brooklyn Law School, Sha’arei Mishpat, or the Hebrew University in Israel.<sup>64</sup> While this group is an excellent cohort to provide data on the views of the well-educated young, few of the respondents had themselves been married or had children. We do not know if their views are representative of the general population. However, the sample does provide an opportunity to assess perspectives on fairness within an important population segment and to do so cross-nationally.<sup>65</sup>

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managed pool is the majority practice, while independent-management system is used by a only small portion of couples); Judith Treas, *Money in the Bank: Transaction Costs and the Economic Organization of Marriage*, 58 AM. SOC. REV. 723 (1993) (finding that 95% of married couples pool assets, although sometimes not all assets).

63. Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL’Y & L 212, 215 (2011).

64. I am indebted to Dr. Ayelet Blecher-Prigat of Shar’arei Mishpat College, Hod Hasharon, Israel for administering the survey to first-year students at Shar’arei Mishpat and the Hebrew University.

65. Israeli marriage and divorce law differs from U.S. family law in important ways. Marriage, divorce and (with some exceptions) spousal support are governed by religious law; thus, no-fault divorce is unavailable and post-divorce spousal support is rare. Property distribution is governed by secular law. However, there are two different property regimes. Until 1974, Israeli law relied on something like a community of acquests model although, for marriages of long duration (about 30 years), a presumption of co-ownership was sometimes applied to premarital assets. The Spouse (Property Relations) Law applies to couples who married after 1974. Under the statute, premarital assets and assets acquired by gift, descent, and devise are never distributable at divorce. The law presumes equal division but permits the court to deviate from a 50-50 split. However, there was no case law interpreting the statute until 2008; the law

Survey respondents were asked to identify which factors should be considered in dividing property at divorce. They were also asked whether the division of assets should be rule-based or discretionary. The heart of the survey, however, involved decision making about four individual cases. For each case, respondents were asked to determine what assets were available for distribution and the percentage distribution of both individual assets and the total pool of assets. Finally, respondents were asked whether their decision would change if the higher-income spouse were required to pay spousal support to the lower-income spouse.

The four cases were chosen both to test notions of fairness with respect to the definition of divisible property and the divisional principles that should be applied. Case One involved a long-term marriage in which the wife, with her husband's approval, had given up a valuable career in order to act as a full-time mother and homemaker:

*Case One (Homemaker Wife, Professional Husband)*

Herb and Willa have been married for 16 years. Both are now 46 years old. They have three children aged 15, 12, and 8 years. Both Herb and Willa are accountants. Until the birth of their first child, Willa earned approximately the same salary as Herb; indeed, in one year she earned more. After the birth of their first child, Willa began working a four-day week, while Herb became a partner at a global accounting firm. Shortly before the birth of their second child, Herb and Willa agreed that Willa should focus on providing full-time care for the children and that Herb should focus on being the family breadwinner.

Herb earned \$1,500,000 last year; Willa earned nothing. Herb, Willa, and their three children are all in good health.

All of Herb's and Willa's assets were acquired during their marriage.

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applied only to formal divorces and, under Jewish divorce law, a divorce (*get*) requires the consent of both parties. A statutory amendment enacted in 2008 permits courts to distribute property prior to a formal divorce. Courts are thus beginning to develop case law on the factors that justify deviation from an equal asset division. The Supreme Court has already held that non-economic misconduct (i.e., adultery) does not justify an unequal distribution. I am indebted to Professor Ayelet Blecher-Prigat for this description of Israeli law.

Case Two involved a short, childless marriage in which one spouse had acquired considerable wealth both before and during the marriage.

*Case Two (Short Marriage, Husband with Premarital Wealth)*

Henry and Wilma have been married for two years. Henry is 39 years old and Wilma is 33. They have no children. Both are in good health. Henry is an investment banker; his current salary is \$350,000 per year. Henry also receives annual bonuses; last year's bonus was \$2.5 million, and his bonus the year before that was \$6 million. Since her marriage to Henry, Wilma has not been employed. Before marriage, Wilma earned \$75,000 per year as a public relations officer.

Case Three involved a long-term marriage with a wife who has made virtually all the economic and noneconomic contributions to the marriage.

*Case Three (Hardworking Wife, Deadbeat Husband)*

Hank and Wendy have been married for 20 years. They have no children. Hank is 49 years old, and Wendy is 47. Both are in good health.

Hank has been employed in various positions during the marriage. He is currently employed as a truck driver and earns \$32,000 per year. He is also qualified as a carpenter, electrician, plumber, and an auto body repairperson. Hank has lost approximately 14 jobs during the marriage. Any money that he has earned, Hank has spent on personal items such as motorcycles, handguns, and hunting and fishing equipment.

Wendy is employed in an administrative capacity and earns \$40,000 per year. Wendy has paid all household bills from her salary and has sometimes worked at two or three jobs to do so.

Case Four involved a long-term marriage between two professionals in which the husband, who earned less than his wife, had foregone making pension contributions because of inherited wealth.

*Case Four (Long Marriage, Husband with Inheritance)*

Hal and Wanda have been married for 30 years and have two children, both in their early twenties. Hal is 65 years old, and Wanda is 60. Both are in good health.



Both Hal and Wanda are physicians and, at the time of their marriage, both earned comparable salaries. Wanda has consistently worked full-time, and for the past 15 years, she has earned two-thirds to three-quarters of the family income. Wanda has also, at all times, been the primary caretaker of the children and the primary homemaker. Hal worked full time until last year, when he retired. He currently receives \$30,000 per year in pension benefits; Wanda currently earns \$200,000 per year.

All of these cases tested respondents' notions of fairness in the distribution of assets. Cases Two and Four additionally tested the definition of divisible property; both involved assets that would be indivisible using a community of acquests model:

*Case Two (two-year marriage)*

Henry and Wilma own the following asset acquired *during* their marriage:

- The marital home, owned jointly, valued at \$500,000.

Henry and Wilma own the following assets acquired *before* their marriage:

- Shares in the hedge fund that Henry manages, owned by Henry. Henry purchased the stock before marriage to Wilma for \$5 million. It was worth about \$10 million when Henry and Wilma married and it is worth about \$20 million now.
- Shares in the investment firm where Henry is a partner, owned by Henry. Henry received some of these shares as bonuses and purchased others for a total of \$2 million. Because Henry's firm is not a publicly traded company, it is unclear how much these shares are worth. Estimates range from \$5 million to \$15 million.
- Wilma's pension, owned by Wilma. It was worth \$50,000 when Henry and Wilma married. It is worth \$60,000 now.

*Case Four (30-year marriage)*

Hal and Wanda own the following assets, all acquired *during* their marriage:

- The marital home, owned jointly, valued at \$500,000,
- Wanda's pension, owned by Wanda, worth \$1 million,
- Hal's pension, owned by Hal, worth \$100,000.

- Hal and Wanda own the following assets acquired before their marriage:
- A stock portfolio, owned by Hal, that he inherited from his grandmother. The portfolio was worth \$300,000 when Hal and Wanda married, and it is worth \$1.5 million now. Hal made few pension contributions during the marriage because he viewed this inheritance as a retirement nest egg.

For each listed asset, respondents were asked to specify whether:

- a) This asset's full value is divisible
- b) Some portion of this asset's full value is divisible
- c) This asset is nondivisible

If respondents viewed fairness in terms of universal community, then in *both* Case Two and Four, they should have reported that the full value of each asset was divisible. If they viewed fairness in terms of a community of acquests model, then they should have reported, in *both* cases, that only assets acquired during marriage through marital effort were divisible; all nonmarital assets should have been classified as altogether nondivisible. If they favored something like the ALI accrual model, they should have said that no or only a small fraction of nonmarital property was divisible in Case Two (two-year marriage) but that all was divisible in Case Four (30-year marriage).

Here are the actual results:

Table 1:  
Divisibility of Assets at Divorce (Cases Two & Four), by Asset  
and Respondent Nationality

Asset	U.S. Respondents	Israeli Respondents
<i>2. H premarital hedge fund shares</i>	N=277	N=195
Asset's full value is divisible	7%	12%
Some portion of asset's full value is divisible	42%	47%
Asset is nondivisible	52%	42%
<i>2. H premarital investment shares (hard to value)</i>	N=280	n=192
Asset's full value is divisible	10%	15%
Some portion of asset's full value is divisible	41%	47%

Asset	U.S. Respondents	Israeli Respondents
Asset is nondivisible	49%	38%
2. <i>W premarital pension</i>	N=278	N=192
Asset's full value is divisible	06%	15%
Some portion of asset's full value is divisible	27%	28%
Asset is nondivisible	67%	57%
4: <i>H inheritance</i>	N=259	N=171
Asset's full value is divisible	10%	15%
Some portion of asset's full value is divisible	46%	42%
Asset is nondivisible	44%	44%

Several things stand out here. One is the respondents' apparent rejection of the ALI accrual model. Among the U.S. respondents, only 7% viewed the husband's premarital stock holdings as divisible in the context of a two-year marriage (Case Two), and only 10% viewed the husband's inherited stock holdings as divisible in the context of a 30-year marriage (Case Four); among the Israeli respondents, 12% viewed the husband's premarital stock holdings as fully divisible in a two-year marriage (Case Two), and only 15% viewed the husband's inherited stock holdings as divisible in a 30-year marriage (Case Four). The similarity of these results is particularly striking given that the fact pattern specified, in the case of the 30-year marriage, that the husband had "made few pension contributions during the marriage because he viewed this inheritance as a retirement nest egg." Equally notable is the respondents' lack of consensus with respect to either universal community or the community of acquests model. For each asset, respondents were highly unlikely to report that the asset was fully divisible (universal community rejected). However, for each asset, except the wife's premarital pension in Case Two, more than 40% of both U.S. and Israeli respondents indicated that some portion of the asset should be divisible (community of acquests rejected).<sup>66</sup> In sum, the most striking thing about the results is that *none* of the dominant models was, in these cases, a winner. Indeed, the relative enthusiasm for the "some portion of this asset is divisible" option suggests that many respondents were torn between the all-or-nothing approaches at either end of the spectrum.

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66. None of the differences between the U.S. and Israeli distributional patterns were significant at the .05 confidence level.

Respondents were also ambivalent about one particular type of asset—pensions. Even when a pension was fully accrued during the marriage, respondents were much less likely to say that a pension was fully divisible than they were other, more traditional assets.

Table 2:  
Percentage of Respondents Reporting Marital Assets as Fully  
Divisible, by Asset & Respondent Nationality

Asset	U.S. Respondents	Israeli Respondents
1: Marital home	91%	94%
1. Vacation home	89%	91%
1. H pension	34%	33%
3. Marital home	55%	65%
3. Bank account	52%	56%
3. W pension	12%	15%
4. Marital home	77%	80%
4. W pension	18%	26%*
4. H pension	16%	26%**

\* $p < .06$

For all three of these cases, the pension gap is enormous, and this difference is consistent across national boundaries.

What is also notable looking across these three cases is the large, case-based variation in the proportion of respondents who describe the same type of asset as fully divisible. For pensions, three times as many respondents were willing to consider both the husband's and the wife's pensions as divisible in Case Four as compared to Case Three. Even with the marital home (in all cases jointly owned), more than 90% of respondents viewed this asset as fully divisible in Case One, as compared to only 55% of U.S. and 65% of Israeli respondents in Case Three. What seems to account for these differences is a sense of the underlying equities. Case Three is that of the hardworking wife and deadbeat husband; Case One involves the homemaker spouse and professional husband. Rather than relying solely on divisional principles, some of the respondents seem prepared to use equity as a basis for identifying which property should be initially treated as divisible.

In sum, the best summary of respondents' views on the definition of divisible property is that it is highly individualized. No single definition commands clear support. Instead, individualized decision making is apparent even at the definitional stage.

It is also notable that these general trends applied across national boundaries. Although the Israeli respondents were, in general, more likely than U.S. respondents to describe both marital

and non-marital assets as divisible, the pattern of case-based and asset-based variation is quite consistent across these two cohorts.

Definitional variability was matched, unsurprisingly, by variation in the percentage of assets awarded to each spouse across cases. Respondents did not, at least in their case-based decision making, favor a bright-line rule that applied across cases.

Table 3:  
Distribution of Assets (Marital and Total), by Respondent Nationality

Total Asset Distribution, by Case	U.S. Respondents	Israeli Respondents
<i>Case 1: What percentage of all assets acquired during the marriage should be awarded to the husband, Herb?</i>	(N=285)	(n=195)
less than 25%	1%	4%
26-44%	6%	14%
45-54%	74%	74%
55%-74%	18%	5%
75% or more	1%	1%
<i>Case 2: What percentage of all assets acquired during the marriage should be awarded to the husband, Henry?</i>	(N=279)	(n=193)
less than 25%	2%	2%
26-44%	4%	8%
45-54%	56%	63%
55-74%	28%	17%
75% or more	10%	9%
<i>Case 3: What percentage of all assets acquired during the marriage should be awarded to the husband, Hank?</i>	(N=279)	(N=189)
less than 25%	25%	17%
26-44%	39%	34%
45-54%	34%	43%
55-74%	0%	1%
75% or more	0%	1%
<i>Case 4: What percentage of all assets acquired during the marriage should be awarded to the husband, Hal?</i>	(N=274)	(N=178)

Total Asset Distribution, by Case	U.S. Respondents	Israeli Respondents
less than 25%	4%	4%
26–44%	24%	25%
45–54%	70%	67%
55–74%	0%	5%
75% or more	2%	2%

Case Three, that of the hardworking wife and deadbeat husband, stands out here: only 34% of U.S. and 43% of Israeli respondents thought the husband should receive a relatively equal share of assets, and none thought he should receive the larger share. By contrast, almost three-quarters (74%) of U.S. and Israeli respondents divided assets relatively equally in Case One (professional husband, homemaker wife), and at least two-thirds did so in Case Four (professional couple, husband with inheritance).

The survey responses also showed case-based differences in respondents' views of the role that alimony should play in determining property outcomes, and these were also quite consistent across national boundaries. In Case One, 50% of U.S. and 41% of Israeli respondents answered yes in response to the question "If the divorce decree required Herb to pay post-divorce spousal support to Willa, would you award Herb a larger percentage of the couple's assets?" By contrast, 59% of U.S. and 58% of Israeli respondents said the wife in Case Four should receive more property if she were required to pay post-divorce support to her husband, and 67% of U.S. and 65% of Israeli respondents agreed the wife in Case Three should receive more property in such circumstances.<sup>67</sup>

Gender differences in distributional patterns were not consistent across the four cases. In Case One, 82% of U.S. female and 63% of U.S. male respondents divided assets relatively equally, a difference significant at the .01 confidence level. However, more men than women awarded the wife a larger-than-equal share, with the result that outcome variation declined substantially looking at the proportion of respondents who awarded the wife a relatively equal or larger share of assets (90% men, 96% women). In the remaining cases, gender differences in distributional patterns were relatively, perhaps surprisingly, slight.

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67. 53% of U.S. and 40% of Israeli respondents reported that the Case Two Husband should receive more property if he were required to pay spousal support.

The case-based results were largely mirrored in the responses to the question "What factors should be taken into account in the division of property at divorce?" More than 90% of all respondents indicated that both the needs and interests of the couple's children should be considered. U.S. respondents were far more likely to list other considerations. Cross-national variation is particularly evident for economic and noneconomic misconduct, a result that explains the Israeli respondents significantly greater adherence to an equal division norm.

Table 4:  
What factors should be taken into account in divorce property distribution?

Factor	U.S. Respondents	Israeli Respondents
Each spouse's economic contributions to the marriage	89%	78%
Each spouse's noneconomic contributions to the marriage	84%	75%
Needs and interests of children of the marriage	96%	91%
Each spouse's economic needs	72%	68%
Each spouse's economic misconduct**	77%*	50%
Each spouse's noneconomic misconduct	64%	47%

\* $p < .001$ , \*\* $p < .01$

For all respondents, however, contribution clearly outweighs need as a distributional consideration, except for the needs of the couple's children. Contribution also outweighs misconduct, although close to two-thirds of U.S. and almost half of Israeli respondents felt noneconomic misconduct should be taken into account.

In sum, the respondents' choices, both with respect to the cases themselves and their responses to general decision making factors, suggests a preference for a divisional approach that results in equal division in typical cases, but preserves some level of individualized decision making (although the Israeli respondents were more likely to adhere to equal division than were the Americans). And when confronted with the general choice between rules and discretion, the respondents did indeed vote against bright line rules. At the end of the survey, respondents were asked to respond to this statement:

Property division may be legislatively determined by fixed rules (e.g., each spouse receives 50% of all assets or each spouse receives those assets to which he or she has title), judicially determined by an appraisal of the facts of each case (e.g., each spouse receives a “fair” share of all assets, based on consideration of the specifics of this marriage), or determined based on a hybrid approach (e.g., in most cases, each spouse should receive those assets to which he or she holds title, but a judge may deviate from that outcome if extreme hardship would result from this outcome). Which approach is best?

Only 2% of U.S. and 3% of Israeli respondents chose legislative determination as the best approach. Thirteen percent of U.S. and 20% of Israeli respondents chose individualized determination, and 43% of U.S. and 40% of Israeli respondents selected a hybrid approach. But the respondents clearly thought this question was difficult; 42% of U.S. and 38% of Israeli respondents simply didn’t answer it. Thus, while a hybrid approach that combined legislative and judicial judgment received by far the most support, we cannot say it achieved even a majority vote.

We cannot make too much of these results, of course. The sample does not represent the general population. Perhaps equally problematic, the results represent only a “first-time,” off-the-cuff response to the problems of divorce property division. For questions of justice, there is much to be said for an approach that I have elsewhere described as interpretive. The interpretive approach, which bears a strong resemblance to the traditional process of analogical reasoning engaged in by common-law judges, relies on an analysis of both concrete cases and “specific legal principles and policies.”<sup>68</sup>

One or another variant of the interpretive methodology has “found favor with several groups charged with developing policy in areas where feelings run high, but consensus on general principles is lacking”:

For example, a commission appointed by the federal government to develop guidelines for criminal sentencing ultimately rejected reliance on both high theory and intuition in favor of an approach based heavily on past practice. The Commission considered the possibility of devising guidelines based on a deterrence model of

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68. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 873 (2000).



punishment; it also considered guidelines based on a “just desserts” principle: “Why didn’t the Commission sit down and really go and rationalize this thing and not just take history?” In the words of the Commission’s chairperson, “We couldn’t. We couldn’t because there are such good arguments . . . pointing in opposite directions.”

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research similarly found that “the one thing [on which its members] could not agree . . . was *why* they agreed. . . . Instead of securely established universal principles, . . . [t]he locus of certitude in the commissioners’ discussions . . . lay in a shared perception of what was specifically at stake in particular kinds of human situations.” In contrast to the Sentencing Commission, this group did not eschew reliance on principles altogether. Instead, “transcripts of the Committee’s deliberations show a constant back-and-forth movement from principle to case and from case to principle. . . .” The principles relied on by the group were not, however, broad ethical theories, but the more mundane and specific principles employed by bioethicists in resolving individual cases.<sup>69</sup>

The problems inherent in divorce property distribution are not unlike those of criminal sentencing and biomedical ethics. All of these areas involve messy judgments that must take account of an array of competing goals and values. All of them involve decisions that will affect the lives and well-being of individuals. And certainly both criminal sentencing and divorce property distribution share a tendency to look both backward and forward, to assess both individual contributions and needs.

A logical next step is thus to use the same cases and principles given to respondents in convenience samples to smaller groups who would sit and discuss the cases with the aim of using the case facts and general principles to produce decision-making principles. This new research should, ideally, be conducted both with a population like that in my initial research cohort and cohorts that better reflect the general population. With repeated experiments, we may well come closer to answering the elusive question: What’s fair in divorce property distribution?

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69. *Id.* at 875–76.