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# Reforming Divorce: What's Needed and What's Not

Marsha Garrison\*

The New York Matrimonial Commission was appointed in 2004 by Chief Judge Judith S. Kay to “examine every facet of the divorce and custody determination process” and to “recommend reforms to reduce trauma, delay and cost to parents and children . . . .”<sup>1</sup> There can be little doubt that Judge Kay’s initiative was needed. Divorce affects tens of thousands of New Yorkers each year and, all too often, the divorce process is unnecessarily lengthy, expensive, and painful. These problems can, and should, be addressed.

However, the Commission’s recommendations lack the capacity to effectively address the problems Judge Kay identified. Although the Commission was undoubtedly well intended, it failed to examine the reasons that divorce is expensive, slow, and painful. Because its recommendations do not address these root causes, they offer almost nothing in the way of a meaningful remedy.

Had the Commission investigated, it would have found that the major sources of delay, expense and litigation-induced pain are complex divorce procedures and highly discretionary entitlement rules.<sup>2</sup> The combination of these rules and procedures offers litigants very little capacity to predict their divorce entitlements or even to prepare the appropriate forms. The reforms

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1. MATRIMONIAL COMMISSION OF THE STATE OF NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (February 2006), <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>, reprinted here as Appendix A [hereinafter MATRIMONIAL COMMISSION REPORT].

2. When a couple has minor children, these problems are magnified. Minor children create the need to reach agreement on a larger array of issues, open the door to post-divorce disagreement and resulting litigation, and enhance the likelihood that one spouse will suffer a major living-standard loss after divorce. In this brief article, I focus exclusively on entitlement rules and divorce procedures that affect couples with and without minor children; I do not address the particular, and larger, problems of couples with minor children.

proposed by the Commission do not attempt to improve predictability or reduce complexity, nor do they have the capacity to achieve these goals. The Commission's efforts thus represent a failed opportunity. Like many recent divorce "reforms," its various recommendations are likely to benefit divorce lawyers and other divorce professionals far more than they benefit divorcing couples and their children.

## I. Divorce Delay, Expense, and Distress: How Do These Problems Arise?

### A. *The "Typical" Divorce*

As the Commission Report notes, divorce is by far the most common form of civil litigation in New York. Literally seventy-five percent of statewide court filings (excluding the Surrogate's Court) relate to matrimonial actions, and this figure doesn't even include more than 40,000 uncontested divorces that are sought each year.<sup>3</sup>

New York's Office of Court Administration does not collect data about the characteristics of couples who file for divorce, let alone analyze such data to inform divorce-reform efforts. National survey data suggest that the "typical" New York divorce litigant is young and has been married for a relatively short period. Nationally, in 2001, the median age of men and women divorcing for the first time was less than thirty-two; the median marital duration at divorce was eight years.<sup>4</sup>

Young couples divorcing after short marriages rarely accumulate substantial assets. When I studied divorce in three New York counties two decades ago,<sup>5</sup> the median net value of marital

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3. *Id.* at 4. See also N.Y. UNIFIED CT. SYS., 2005 ANNUAL REPORT 10, 13 tbl. 10 & fig.3 (2006).

4. See ROSE M. KREIDER, NUMBER, TIMING AND DURATION OF MARRIAGES AND DIVORCES: 2001, at 8-10, tbls. 8-9 & app. A (2005) (citing U.S. Census Bureau Current Population Rep. 70-97). These data are based on the national Survey of Income Programs and Participation (SIPP) and thus represent weighted estimates. *Id.* at 16.

5. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991) [hereinafter *Good Intentions*]; Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996) [hereinafter *Discretionary Decision Making*].

assets subject to division was only \$18,266<sup>6</sup> or \$31,604 in 2004.<sup>7</sup> And this was a sample in which contested cases—the wealthiest segment of the total divorce pool<sup>8</sup>—were substantially overrepresented. Despite the overrepresentation of relatively wealthy couples, eighteen percent of the total sample had *negative* net worth, i.e., their debts exceeded their assets.<sup>9</sup> Most of the sample did not own professional degrees, licenses, business assets, or even pensions; fifty-nine percent of overall marital property value for the contested case sample was represented by home equity, household goods, and a car.<sup>10</sup>

There is nothing unusual about my mid-1980s divorce sample. The scarcity of marital property was first reported in 1956 in a pioneering study of divorce in Detroit, Michigan; forty percent of the divorcing couples surveyed in this study had no property beyond household possessions, and only eighteen percent had property worth \$4,000 or more.<sup>11</sup> The same phenomenon was “rediscovered” by several other researchers looking at divorce outcomes in other states during the same time period in which I was looking at divorce in New York.<sup>12</sup>

One reason the typical divorcing couple has so little to divide is that the divorce population is disproportionately composed of young couples who are just starting out in life. Another important factor is the disproportionate concentration of divorce among low-income couples. In the United States, divorce is literally twice as likely among couples living below the pov-

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6. See *Good Intentions*, *supra* note 5, at 662 tbl.12.

7. U.S. CENSUS BUREAU, AVERAGE ANNUAL CONSUMER PRICE INDEX RESEARCH SERIES USING CURRENT METHODS (CPI-U-RS) - ALL ITEMS: 1947 TO 2004 (2005), available at <http://www.census.gov/hhes/www/income/income04/cpiurs.html> (last visited Apr. 28, 2007).

8. See *Good Intentions*, *supra* note 5, at 659.

9. See *id.* at 659 tbl.8.

10. See *id.* at 665 tbl.15, 666 fig.1. Asset values could not be determined for couples in the default and consent groups because these couples were not required to file net worth statements. See *id.*

11. See WILLIAM J. GOODE, AFTER DIVORCE 217 (1956).

12. See BARBARA BAKER, FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN (1987); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); James B. McLendon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987).

erty line as it is among the general population.<sup>13</sup> Divorce is also negatively correlated with educational attainment.<sup>14</sup> Income and education are, of course, highly correlated with savings, and it is savings that produce assets.

The many divorcing couples who are relatively poor are highly vulnerable to divorce-induced economic hardship. Divorce has the capacity to push the couple that was barely making it over the edge into not making it all. The reason is simply that two households cannot live as cheaply as one; thus the federal poverty level for a family of three is approximately fifty percent less than that of a family of one plus a family of two.<sup>15</sup> Because divorce divides a formerly unified household into two parts—with two separate bills for rent, utilities, the car payment — it ensures that one, if not both, portions of the now-divided family will experience a living-standard loss. And such a loss is most difficult to absorb if, as in the typical divorce case, the family has a low income and relatively few assets.

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13. See U.S. CENSUS BUREAU, STUDIES IN HOUSEHOLD AND FAMILY FORMATION: WHEN HOUSEHOLDS CONTINUE, DISCONTINUE, AND FORM 18-21 (1992) (Current Population Repts. Series P23-180). See also WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 154-55 (1993) (summarizing research on the relationship between socioeconomic class and divorce rates).

14. Non-marital birth is also more common among the poorly educated. See David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families, in THE FUTURE OF THE FAMILY* 25, 37 fig.2.7 (Daniel P. Moynihan et al. eds., 2004). See also Douglas W. Allen & Margaret F. Brinig, *Bargaining in the Shadow of Child Custody*, U Iowa Legal Studies Research Paper No. 05.25, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=82014](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=82014) (last visited Apr. 28, 2007) (reporting, for a 1997-2002 Oregon divorce sample composed of couples with minor children, that the mean number of years of education for both wives and husbands was thirteen); Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at D7 (reporting unpublished data showing that the ten-year divorce rate for college graduates "has plummeted to just over [sixteen percent] of those married between 1990 and 1994 from [twenty-seven percent] of those married between 1975 and 1979").

15. See U.S. Census Bureau, *Poverty Thresholds 2005*, available at <http://www.census.gov/hhes/www/poverty/threshld/thresh05.html> (last visited Apr. 28, 2007).

B. *How New York's Divorce Law Exacerbates Delay, Expense, and Pain*

1. Divorce Bargaining: A Divorce Law that Casts No Shadow

New York's current divorce law exacerbates the hardship that divorce necessarily produces in several different ways. The first is by making it extraordinarily difficult for couples to understand and reach agreement about their divorce rights and obligations.

Divorcing couples reach—or fail to reach—agreement about property division and spousal maintenance by bargaining “in the shadow of the law”: their negotiations are informed by their understanding of a likely resolution if the case were to go to trial.<sup>16</sup> But when legal rules are highly discretionary and imprecise, they cast a blurred shadow that impairs each spouse's ability to determine his or her legal entitlements and reach a mutual understanding about those entitlements. Instead of consensus on case outcome, each litigant may reach very different expectations, thus exacerbating the difficulty of forging a negotiated settlement. Indeed, it may be impossible for the couple to reach consensus, producing yet more trauma, expense and delay.

New York's rules governing property distribution and spousal maintenance offer the divorcing couple no predictability whatsoever. For spousal maintenance, the Domestic Relations Law 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.”<sup>17</sup> The court is also directed, in determining the amount and duration of maintenance, to consider ten factors

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16. 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).

17. N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney 2006).

that together take account of spousal need, resources, contribution to the marriage, and economic misconduct.<sup>18</sup> A catch-all clause additionally permits consideration of “any other factor which the court shall expressly find to be just and proper.”<sup>19</sup> In sum, the statute directs the judge to base the maintenance 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 statutory rules governing marital property distribution follow 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.”<sup>20</sup> Equity is to be determined based on judicial consideration of twelve soup-to-nuts factors, plus the same catch-all clause.<sup>21</sup>

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18. In determining the amount and duration of support the court shall 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) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary thereof;
- (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.*

19. N.Y. DOM. REL. LAW § 236B(6)(a)(11) (McKinney 2006).

20. N.Y. DOM. REL. LAW § 236B(5)(c) (McKinney 2006).

21. In determining the equitable disposition of property . . . the court shall consider:

- (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;

New York's spousal maintenance and property division rules thus embody the ideal of the equity court. In pursuit of individualized equity, they grant the trial judge more discretion than does any other field of private law.<sup>22</sup>

I do not mean to suggest that New York is unusual in this respect. Only a handful of states require equal division of marital property or have adopted a presumption in favor of equal division;<sup>23</sup> the others direct "equitable" division, typically based on a list of factors akin to that devised by the New York legislature.<sup>24</sup> Spousal maintenance statutes are more diverse, but

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- (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.

N.Y. DOM. REL. LAW § 236B(5)(d) (McKinney 2006).

22. See, e.g., Mary Ann 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 private law.").

23. Only a few states require equal division of marital property. See CAL. FAM. CODE § 2550 (Deering 2006). A few others, like Arkansas, have established a rebuttable presumption in favor of equal division. See ARK. CODE ANN. § 9-12-315 (2006). See generally THOMAS J. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 13-8.1 n.9 (listing state regimes).

24. For a comparison of state equitable distribution laws, see OLDHAM, *supra* note 23, at §§ 13-9 to 13-24.1.



many share the imprecision of New York law.<sup>25</sup> Although the predicament of New York divorce litigants thus is not unique, it is real: highly discretionary standards simply cannot provide as much certainty to litigants who seek to settle their cases as would rules. Discretionary standards may leave weak spouses more vulnerable to strong-arm negotiating tactics.<sup>26</sup> Invariably, they impede settlement and, thus create delay, expense, and anxiety.<sup>27</sup>

## 2. Negotiation and Paperwork: Complexity that Creates the Need for Expert Guidance

Because New York's divorce law itself offers virtually no guidance on litigation outcomes, divorcing couples are dependent upon the expertise of lawyers or other experts in assessing their litigation prospects.<sup>28</sup> These experts can often offer liti-

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25. See Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 24 (2001) (categorizing state alimony-determination factors).

26. See, e.g., Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 596-98 (1987) ("In divorce, the same flexibility that allows generosity and creative arrangements also allows emotional intimidation, asset-hiding, and the exertion of financial leverage."); Mnookin & Kornhauser, *supra* note 16, at 978-80 (discretionary rules disadvantage the more risk-averse party and offer greater opportunities for strategic behavior).

27. 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. LITERATURE 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: The 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").

28. See, e.g., Mnookin & Kornhauser, *supra* note 16, at 979 (Under uncertain standards, "[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 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); 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. 1661 (1989); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

gants more information about likely case outcome, but consulting such experts takes time. It also consumes money—far more money than many divorcing couples can afford.

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 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 \$459 to \$1,770; the mean was \$931.<sup>29</sup>

For a “typical” divorce litigant like Mr. or Mrs. Smith—married for only a few years and with marital assets consisting of a used car, household goods, limited home equity, and a small bank account<sup>30</sup>—the price of legal representation may well exceed any loss in post-divorce entitlements that lawyer representation could have averted.<sup>31</sup> Certainly, a \$1,000 fee will significantly reduce the value of their meager assets available for division. It is also worth noting that, for couples like the Smiths who have managed to agree on their entitlements, legal representation comes down to a \$1,000 paper-preparation fee unaccompanied by any possible equity or efficiency gain.

Couples like the Smiths are extremely numerous. Researchers have found that the *majority* of divorcing couples re-

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29. See *Discretionary Decision Making*, *supra* note 5, at 516 n.387.

30. See sources cited *supra* note 10 and accompanying text.

31. 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 report that self-representation at divorce hearing is significantly 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); Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 162 (1976) (finding that divorce litigants without children and with short marriages were more likely to self-represent).

solve the terms of their divorce themselves with little conflict.<sup>32</sup> These couples consult a lawyer because they, like “most pro se [divorce] litigants, [have] . . . problems with forms or procedures, many of which are not resolved by the available written instructions.”<sup>33</sup> These couples “need” a lawyer for the sole purpose of preparing and filing state-mandated paperwork.<sup>34</sup>

Here again, New York law offers no help to typical divorce litigants. Instead, it mandates the same type of complaint, answer, and agreement in a simple, uncomplicated divorce like that of the Smiths, involving no disagreement and virtually no assets, that it mandates in a complex, highly conflicted case in which millions of dollars are at stake.

### 3. Unpredictability Produces Uncertainty and Inequity

Many litigants somehow stumble through the divorce process without legal assistance. We lack data on the number of unrepresented divorce litigants in New York, but in many states, at least one divorce litigant is unrepresented in three-quarters or more of all divorce cases.<sup>35</sup> The Matrimonial Commission itself notes that, in its meetings with New York matrimonial judges and other experts, “the problem that was universally highlighted as a substantial barrier to the efficient, effective and timely movement of contested matrimonial cases is the number of individuals representing themselves. . . .”<sup>36</sup>

Because New York’s entitlement rules offer little guidance to couples making their own deals, these unrepresented couples are at a decided disadvantage as compared to their represented peers. Although we have little systematic data on the extent of the litigation disadvantage that accompanies lack of legal rep-

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32. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 159 (1992) (reporting that three-quarters of divorcing couples studied “experienced little if any conflict over the terms of the divorce decree”); Cavanagh & Rhode, *supra* note 31, at 138 (reporting that more than sixty percent of divorcing couples studied had resolved all property, support, custody and visitation issues themselves).

33. *RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT* 3 (Am. Bar. Ass’n ed., 1994).

34. See Jacob, *supra* note 28, at 579-81, 584-86 (reporting that many divorcing couples work out an agreement before approaching a lawyer).

35. See Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 *FAM. L.Q.* 403, 403 (2003) (surveying reports).

36. *MATRIMONIAL COMMISSION REPORT*, *supra* note 1, at 57.

resentation in divorce, it seems unlikely that the judicial norms which lawyers rely on in negotiating adversarial settlements carry over as well to the vast group of divorce actions where couples employ one lawyer to serve primarily as a scrivener, or no lawyer at all. For example, among my sample of settled cases, the award of spousal maintenance was highly correlated with the presence of counsel. Where both parties were represented by lawyers, thirty percent of wives obtained spousal maintenance; when neither party was represented by counsel, *no* wives did.<sup>37</sup> Self-selection undoubtedly played some role here. A wife with poor alimony prospects—childless, earning close to her husband's income, married a short time—is less likely to hire a lawyer than is the unemployed homemaker who has been married for a long time to a high income professional. However, it seems unlikely that self-selection fully explains the enormous gap between *pro se* and lawyer-negotiated outcomes. The price of our current discretionary regime, in more difficult and time-consuming negotiation, and in inappropriate outcomes that may result from the failure to obtain legal advice, thus is likely substantial.

These costs are not confined to the unrepresented. New York's property division and spousal maintenance rules are so imprecise that even litigated cases may be altogether unpredictable. As part of my study of divorce in New York, I examined every single trial-court decision on spousal maintenance and property division reported during the first decade of practice under New York's 1984 Equitable Distribution Law, some 383 in total.<sup>38</sup> Some entitlement choices were highly predictable.

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37. See *Good Intentions*, *supra* note 5, at 712-14. Since income information was available only for the contested group (where two-party representation was almost invariable) among this broad sample, comparisons by income category were not possible.

38. All published trial court decisions on alimony and property distribution were included; sources of published decisions included, in addition to the official and West reporters, the *New York Law Journal* and the *Family Law Reporter*, a publication of the Family Law Section of the New York State Bar Association. Appellate decisions were utilized to expand the sample: if the trial court's decision on property distribution and alimony could be determined either from an appellate decision or the record on appeal, the case was included in the sample. Since the records on appeal of 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.

Eighty-three percent of alimony-award decisions, for example, could be predicted 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;<sup>39</sup> indeed, eighty percent of the decisions could be predicted based simply on the wife's percentage of family income.<sup>40</sup> But other entitlement decisions were highly unpredictable: with respect to the length of a durational maintenance award, not a single litigant characteristic enumerated in the statute as relevant to the decision was significantly correlated with the maintenance-award period, and only one percent of the variation in durational periods could be predicted on the basis of *any* information in the case records.<sup>41</sup> Property distribution also evidenced little predictability. In almost half of the sample cases, net marital property was divided relatively equally, but less than fifteen percent of the *variation* in net property outcomes could be predicted based on the statutory factors.<sup>42</sup>

Not only were many entitlement decisions unpredictable, but some of the most important predictive variables were extra-statutory factors that should not affect case outcome. For example, at the trial-court level, the most significant predictive variables for determining whether a spousal maintenance award was permanent or durational were marital duration—relevant under the statutory formula—and the political party of the judge who made the decision, a factor that should be altogether irrelevant.<sup>43</sup> Similarly, the value of the maintenance award was more strongly predicted by the appellate division in which the case was decided than it was by either spouse's income or the value of the net marital property.<sup>44</sup>

If the outcome of litigation is highly uncertain, not even experts can offer clear advice about what constitutes a good or bad negotiated settlement. Nor does a litigant have any capacity to judge whether his or her attorney has negotiated a good deal or a bad one. Indeed, the attorney herself may not know whether

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39. See *Discretionary Decision Making*, *supra* note 5, at 483-84 tbl.27.

40. See *id.* at 486.

41. See *id.* at 489.

42. See *id.* at 454 tbl.8, 463-64 tbl.13.

43. See *id.* at 488-89 tbl.29.

44. See *id.* at 494 tbl.31.

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 teaching the basic family law course, I have often required students to negotiate a divorce settlement agreement. Typically, I have divided the class into teams assigned to represent either the Husband or Wife, who are sometimes played by other class members and sometimes by students from outside the class. I give the students who portray the Husband and Wife detailed instructions on how they should respond to questions from the various attorney teams assigned to represent them, and I invariably tell the student actors that they should accept a settlement agreement if the student team says that it represents a really good deal, or that it is impossible to negotiate a better settlement. Invariably, the various student attorney teams assigned to represent a particular spouse reach wildly different "really good deals" that can't be bettered. When we review the results of this exercise in class, the range of outcomes is enormous and identical settlements extremely rare.

In a large class, this exercise creates numerous administrative difficulties, but I continue to undertake it because I know of no other way to so vividly demonstrate to students both the indeterminacy of the current, highly discretionary divorce regime and the immense power that it confers on divorce lawyers. Because the law offers no guidelines on what represents a fair outcome, divorce litigants must rely on expensive legal experts that they often can ill afford. Adding insult to injury, the law doesn't even give them the capacity to judge their lawyer's work.

The costs of such indeterminacy are magnified when a divorcing couple begins negotiations with different preconceptions about their marital history, needs, and relative contributions. These different perspectives can easily produce fixed, and highly divergent, views of a "fair deal." Without clear legislative standards against which to test those views, divorce negotiations can easily degenerate into a continuation of the marital conflicts that led to divorce proceedings.

The costs of indeterminacy are also magnified by the sheer volume of divorce litigation. Divorce today is a routine matter involving, in the typical case, little conflict and too little wealth to be worth fighting over. These typical divorce litigants and their children deserve a simpler, more predictable, and more equitable divorce process, and divorce reform should strive to achieve such improvements.

## II. Achieving Simplicity, Predictability, and Fairness: What Reforms Would Be Useful?

### A. *The Commission Proposals: The Wrong Targets Produce the Wrong Results*

Strikingly, the Commission offers no proposals whatsoever aimed at divorce simplification or predictability. It does offer a few very limited proposals that aim to increase equity or reduce delay, but even these modest proposals are highly flawed. Indeed, there is real risk that some of these proposals will *increase* the cost and complexity of divorce.

#### 1. Enhanced Earning Capacity

The Commission urges only one substantive shift in New York's indeterminate rules governing property distribution and spousal maintenance—the elimination of enhanced earning capacity as an asset subject to distribution at divorce. The Commission notes that New York is the only state which permits the distribution of these “assets.” It also notes longstanding concerns about their necessarily speculative value, the cost of the valuation process, the possibility of “double counting,” and the likely impact of all these difficulties in increasing divorce expense and delay.<sup>45</sup> The Commission is certainly right that other states have rejected the New York approach to enhanced earning capacity, and for the modest group of individuals affected by New York's distinctive approach, the concerns identified by the Commission are real and deserve attention.

However, the Commission's “solution”—legislative elimination of enhanced earning capacity as a divisible asset coupled with elimination of remarriage as a bar to continued spousal

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45. MATRIMONIAL COMMISSION REPORT, *supra* note 1, at 66.

maintenance and mandated consideration of spousal contribution to enhanced earning capacity as a factor in property division<sup>46</sup>—is incapable of eliminating the problems identified by the Commission. Moreover, this “solution” would create new forms of unpredictability, and it largely ignores the problem that led the Court of Appeals to conclude that enhanced earning capacity should be treated as a divisible asset in the first place.

That problem is aptly demonstrated by the facts of *O'Brien v. O'Brien*, in which the New York Court of Appeals first authorized the division of enhanced earning capacity.<sup>47</sup> In *O'Brien*, the wife had abandoned her own career aspirations and worked full-time, for years, toward the acquisition of the husband's medical degree and license. Two months after that license was awarded—and before the husband had a valuable medical practice or had acquired valuable assets—the husband filed for divorce.<sup>48</sup> The *O'Brien* court thus confronted a case in which there were virtually no marital assets other than the husband's enhanced earning capacity, and a skilled, self-supporting wife who was not a traditional candidate for spousal maintenance.<sup>49</sup> In a case like *O'Brien*, mandated consideration of spousal contribution to enhanced earning capacity in determining the division of marital property is a meaningless remedy: even one-hundred percent of zero is still zero. Nor does elimination of the remarriage bar to receipt of maintenance offer much to a spouse like Mrs. O'Brien. First, the proposed reform would not *require* the trial court to award Mrs. O'Brien maintenance; indeed, it is unclear whether a court *should* award maintenance to a spouse like Mrs. O'Brien given New York courts' longstanding emphasis on need and marital duration as the most important factors in determining whether maintenance should be awarded.<sup>50</sup> Second, maintenance is invariably subject to modification: if Mrs. O'Brien goes back to school and enhances her own earning capacity, or if Dr. O'Brien is injured or becomes ill and loses earning capacity, or if any of a

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46. *Id.*

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

48. *Id.*

49. The Court of Appeals noted that the parties' “only asset of any consequence is the husband's newly acquired license to practice medicine.” *Id.* at 713. Mrs. O'Brien was a teacher with a Bachelor's degree.

50. *See supra* text accompanying notes 40-41.



dozen other possibilities materialize, she may lose the maintenance she was awarded.

Many states have seen spousal maintenance as the appropriate remedy for the Mrs. O'Briens of the divorce world, but the typical reform has been legislation that establishes a fairly definite entitlement to so-called "reimbursement alimony." California, for example, not only permits, but *requires* reimbursement "for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made."<sup>51</sup> Providing even more detailed guidance, the legislature has specified that the amount to be reimbursed "shall be reduced or modified to the extent circumstances render such a disposition unjust, including, but not limited to . . .":

- (1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.
- (2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.
- (3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.<sup>52</sup>

The statute also explicitly excludes educational loans from marital liabilities, assigning these debts to the spouse whose education the loan financed.<sup>53</sup>

Where the Matrimonial Commission offers a new factor that would conceivably, but by no means definitely, permit a

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51. CAL. FAM. CODE § 2641(b)(1) (Deering 2006).

52. CAL. FAM. CODE § 2641(c) (Deering 2006).

53. CAL. FAM. CODE § 2641(b)(2) (Deering 2006).

Mrs. O'Brien to obtain a "larger" share of what may be nothing and a possibility, but no certainty, of obtaining some spousal maintenance, of uncertain value and duration, the California legislature has offered a clear and predictable entitlement. The California statute is sufficiently precise that litigants can ascertain the likely value of that entitlement and determine whether it will be available in their own cases. By contrast, the Matrimonial Commission's proposal doesn't even identify the measure of the new claim it would establish: Should the entitlement be based on the value of the contributions to the degree, as in California, or the value of the enhanced earning capacity that results, as is now the case in New York? The proposal doesn't offer a clue, with the result that litigants should still be forced to value enhanced earning capacity. Should the court ignore older contributions to avoid double-counting, as does the California statute? Should it offset degrees? Again, the proposal offers no guidance whatsoever. In sum, the Commission approach fails to eliminate unpredictability, double-counting, and valuation problems, *and* it creates the very real possibility that spouses like Mrs. O'Brien will be left holding the bag. This is not a useful reform proposal.

A scheme like that enacted by California would be a useful reform. In contrast to the Commission proposal, the California legislation simply and successfully avoids the problems of speculative valuation and double counting; because of these merits and the clear guidance it provides to litigants, it also has the capacity to significantly reduce the expense and delay identified as major problems by the Matrimonial Commission. Its clear guidance should also increase outcome predictability and consistency.

## 2. Process Reforms

Although its enhanced-earning-capacity proposal is the only substantive shift in New York law that the Commission proposes, it does urge a number of procedural reforms. These proposals, like the enhanced-earning-capacity proposal, largely ignore the real problems and thus offer little in the way of meaningful solutions. Indeed, there is real risk that some of these proposals will increase the cost and complexity of divorce without achieving any measurable benefit.

Some of the Commission's process recommendations are poorly targeted but nonetheless unobjectionable. For example, the Commission recommends improved court facilities, more and better court personnel, and a better selection process and training for judges, court-appointed lawyers and court-appointed experts.<sup>54</sup> All forms of litigation would probably benefit from better facilities and better personnel; these recommendations are certainly harmless. However, most of the personnel and facilities benefits would be realized by divorcing couples who actually litigate—a tiny fraction of the total pool of divorce cases—and vague injunctions to improve personnel and facilities leave unidentified both the types of improvement that are necessary and how those improvements should be obtained.

Moving a bit beyond vague nostrum, the Commission urges early screening and case classification in order to track cases according to their likely resource requirements and complexity, greater use of alternate dispute resolution (ADR), and an initiative to “move strongly against divorce mills by, among other things, coordinating with local bar associations to provide free legal services to self-represented litigants.”<sup>55</sup>

For the small pool of contested cases, early screening may be useful *if* it does not add yet another layer of complexity to an already complex process. However, we have little concrete evidence about the capacity of screeners to reliably sort cases into appropriate categories or the factors that enhance those capacities. Early screening is certainly worth trying and testing, but well-designed research, using random selection and control groups, is essential if optimal results are to be achieved.

The same problem—the possibility of more, not less, complexity—is inherent in the Commission's proposal to increase the use of ADR. ADR programs tend to produce a fairly high level of user satisfaction, but we lack evidence that such programs in fact reduce cost and delay. ADR programs have typically been initiated on faith and without controlled research. We thus do not know what percentage of couples who reach

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54. See MATRIMONIAL COMMISSION REPORT, *supra* note 1, at v, x-xii.

55. *Id.* at vi-vii, xii. The Commission additionally suggests new court rules requiring the award of interim counsel fees to a relatively poor spouse.

agreements through mediation would likely have reached agreements without mediation.<sup>56</sup>

Nor do we know whether mediation produces a “better” or more durable settlement, and some evidence suggests that we should be wary of this assumption. Research conducted in New York during the 1990s found that child-custody mediation was far more likely to produce a joint custody award than was an attorney-negotiated or judicially assisted settlement; eighty-four percent of the mediated settlements contained some type of joint custody arrangement, as compared to thirty-seven percent of attorney-negotiated and forty-seven percent of judicially assisted cases. Moreover, thirty-seven percent of mediated, 15.8 percent of attorney-negotiated, and 17.6 percent of judicially assisted agreements specified joint *physical* custody, and many of these joint physical custody agreements included provisions for reduced or no child support.<sup>57</sup> Yet nine months post-divorce, joint physical residence had been maintained in less than half of the surveyed cases; where a shift occurred, it almost invariably produced *de facto* mother custody. The researchers thus concluded that women who mediated a custody dispute were economically disadvantaged as compared to women who used other dispute-resolution mechanisms.<sup>58</sup> The largest and most thorough evaluation of joint custody to date, conducted in California, made similar findings;<sup>59</sup> the California researchers also found that parental conflict *enhanced* the likelihood that joint custody would emerge as a mediated outcome<sup>60</sup> and that, “[i]f parents were initially conflicted, there was little chance that they would become cooperative with time.”<sup>61</sup> Concerns have

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56. See generally Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 *FAM. & CONCILIATION CTS. REV.* 373, 375-76 (1996); Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 *PSYCHOL. PUB. POL'Y & L.* 989 (2000).

57. See Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 *FAM. L.Q.* 223 (1994).

58. *Id.*

59. See MACCOBY & MNOOKIN, *supra* note 32, at 159, 290 (reporting that, in about half of high-conflict joint physical custody cases, children in fact resided with their mothers and expressing concern that “on occasion a divorce mediator may push reluctant parents to accept joint physical custody arrangements as a compromise”).

60. Thirty-six percent of joint physical custody cases in this sample involved “substantial or intense legal conflict.” *Id.* at 150-51 tbl.7.6, 159.

61. *Id.* at 248.

also been raised about the propriety of mediation in cases in which there has been a pattern of domestic violence or domination of one spouse by the other.<sup>62</sup> In sum, ADR may be a cheaper and less-time consuming alternative to traditional case processing in some divorce cases, but further research is needed to know how and when mediation alters case outcomes and the extent to which those alterations negatively affect outcome equity. Any initiative to increase the use of ADR should include a carefully designed research component to make these determinations.

The Commission's recommendations with respect to pro se litigants, on the other hand, are a move in the right direction, but one that doesn't go anywhere near far enough. Much more than "coordinating with local bar associations" to increase the availability of legal services to pro se litigants is needed. Many states have undertaken such comprehensive and carefully designed initiatives.<sup>63</sup> California, for example, initiated a "Unified Courts for Families" program that not only aimed to increase lawyer resources for pro se litigants—and provided millions of dollars in funding for that representation—but also expanded or initiated programs to provide family law facilitators, family law information centers, and self-help centers. The program additionally created a Task Force on Self-Represented Litigants to coordinate a statewide response and six "mentor" courts to test different strategies for meeting the needs of unrepresented litigants.<sup>64</sup> This type of statewide, multi-dimensional and well-funded response stands a chance of reducing divorce delay, cost and pain for the many low-income couples making their way through the divorce process without legal representation. An initiative limited to coordinating with local bar associations does not.

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62. See, e.g., Fiona Raitt, *Domestic Violence and Divorce Mediation*, 18 J. SOC. WELFARE & FAM. L. 11 (1996); Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL L. 447 (1997).

63. See Chase, *supra* note 35, at 403.

64. See *id.* See generally Judicial Council of California Administrative Office of the Courts, *Unified Courts for Families Deskbook: A Guide for California Courts on Unifying and Coordinating Family and Juvenile Law Matters* (2004), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdf/UCFdeskbook.pdf> (last visited Apr. 28, 2007).

B. *Reducing Divorce Delay, Expense, and Pain: What Reforms Can Succeed?*

So, what reforms should the Commission have proposed to reduce divorce delay, expense, and pain?

1. Simplified Divorce Procedures

A good beginning would be court rules or legislation that authorize greatly simplified divorce procedures in uncontested cases where public concerns are minimal and legal counseling is highly unlikely to produce a major benefit to either party. A number of states have already adopted so-called “summary dissolution” procedures of this type. For example, in California, couples without children who have been married for fewer than five years may obtain a summary dissolution of their marriage if their post-marital debts do not exceed \$4,000 (excluding automobile loans), the “total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than twenty-five thousand dollars (\$25,000), and neither party has separate property assets, excluding all encumbrances and automobiles, in excess of twenty-five thousand dollars (\$25,000).”<sup>65</sup> Such a couple may use a state-approved form to execute a simple agreement that sets forth the division of their assets and liabilities and verifies that they have executed any documents required to achieve that division. Six months after the submission of this form to the appropriate court, a motion by either party will produce a divorce judgment; no further paperwork or court appearances by either party are necessary.<sup>66</sup> Oregon has a summary-dissolution procedure that applies to couples married as long as ten years and possessing as much as \$30,000 in assets.<sup>67</sup>

As a first step to reducing the divorce delay and expense, New York should adopt such a scheme. Ideally, it would deviate from the California model by eliminating the post-submission motion to obtain a divorce judgment; there is no reason why a

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65. CAL. FAM. CODE § 2400(a)(7) (Deering 2006).

66. See CAL. FAM. CODE § 2406 (Deering 2006).

67. See OR. REV. STAT. § 107.485 (2006). Oregon’s scheme also permits one spouse to unilaterally initiate a summary-dissolution divorce. See *id.*

joint petition should not automatically generate a divorce decree sent by mail to each party. Nor is there any reason why a couple should be precluded from using summary dissolution for the sole reason that they have some limited home equity.<sup>68</sup>

New York should also look to other states that have initiated comprehensive, statewide programs to meet the needs of pro se divorce litigants. Innovations like family law facilitators and information centers likely could play a significant role in easing couples' difficulties in obtaining appropriate divorce outcomes. In order to obtain the best and most cost-effective package, these and other innovations should be trialed in selected locations and studied, using randomly selected samples and control groups.

## 2. Improving Outcome Predictability and Consistency

Another obvious reform is changes in New York's divorce entitlement rules that would curb outcome inconsistency and enable litigants to make reasonably accurate predictions about their divorce entitlements. The rationale for continued reliance on extensive factor lists and unchannelled judicial discretion is the heterogeneity of values and fact patterns that must be accommodated in divorce decisionmaking,<sup>69</sup> but my research described in Part I showed that, for some entitlement decisions, New York judges in fact rely heavily on a few key variables that do not hinge on a complex, individualized appraisal of relative merit. It also showed that, for other decisions, the statutory factors play no discernible role in determining case outcome. The evidence thus suggests that the current factor lists are either unnecessary or counterproductive; it is time for a simpler and more predictable approach.

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68. Like automobile loans, education debts should also be eliminated from the post-marital debt pool relevant to whether summary dissolution is available. In California, these loans are not considered community debts. *See* CAL. FAM. CODE § 2641(b)(2) (Deering 2006). The summary dissolution procedure booklet should also make clear that such debts are assigned to the spouse who obtains the cololary benefit.

69. *See, e.g.*, P.S. ATIYAH, *LAW AND MODERN SOCIETY* 65 (1983) (“[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 . . .”).

Some of the obvious reforms are straightforward and unlikely to provoke controversy. In my research report on judicial decision making, published more than a decade ago, I noted that:

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 . . . would simply describe current judicial outcomes . . . . Such 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.<sup>70</sup>

Such reforms “rest upon values that the legislature has already adopted and thus require no more than a willingness to codify current decision-making patterns . . . . The extent of judicial consensus on these issues also suggests that broad public support for these limited reforms would be available.”<sup>71</sup>

My research data also pointed to some narrower entitlement-determination issues where legislative guidance would not likely prove to be particularly controversial. For example, cases involving businesses and professional practices were strongly overrepresented in the sample,<sup>72</sup> suggesting the need for clearer standards on appropriate valuation methods and

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70. *Discretionary Decision Making*, *supra* note 5, at 521-22. “Eighty-eight percent of wives married ten or more years who earned less than [thirty percent] of family income were awarded alimony.” *Id.* at 521 n.410.

71. *Id.* at 522.

72. For instance, “[a] business, professional practice, or degree figured in [thirty-eight percent] of the cases decided by judges.” *Id.* at 523 n.413.



separate/marital property apportionment.<sup>73</sup> Judges also used conflicting methods to resolve cases of asset dissipation, suggesting the need for a standardized approach.<sup>74</sup>

Even this modest package of reforms would offer considerable guidance to divorce lawyers and the many divorce litigants who determine their own divorce entitlements without adversarial legal representation. By helping judges to focus on the appropriate circumstances for deviation from clearly stated norms, the reform package should also enhance the development of useful precedents, as well as the likelihood of consistent outcomes in which like persons are accorded like treatment. Finally, this modest package should enhance what legal scholars have variously described as the hortatory or expressive function of the law.<sup>75</sup> 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.

Modest reforms that codify current practice and resolve narrow issues will not, of course, enable divorcing couples to fully predict their entitlements. Recall, for example, that deviation from a relatively equal division of marital net worth, the length of a durational spousal-maintenance award, and the value of a maintenance award were all largely unpredictable based both on the statutory factors and other available case data. For these issues, the development of clearer standards cannot rest on current practice; instead, it will require value judgments, and there will likely be disagreement on how competing values should be accommodated. Consider, for example, my finding that judicial property-division awards were significantly correlated with asset values; departures from equal division tended to benefit the needier spouse at the bottom of the

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73. Many were small, closely-held family businesses that would not be sold and/or had no obvious market value. *Id.* at 523 n.414.

74. *See id.* at 464-65 n.235.

75. *See, e.g.*, Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 293-301 (2000). *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

wealth chart and the spouse who had made greater monetary contributions at the top.<sup>76</sup>

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 . . . . 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?<sup>77</sup>

In order for New York's divorce law to optimally guide divorce settlement negotiations, the legislature must confront and resolve difficult questions like this one.

Moreover, the only reason we know that judicial property-division awards exhibited the pattern I have just described, is because I undertook the research to find out. Reforms that are based on flawed assumptions are highly likely to produce flawed results. For example, New York's 1980 Equitable Distribution Law was predicated on the assumption that wives were typically disadvantaged by the former approach to property distribution, based on title.<sup>78</sup> The reformers seem to have expected that any diminution in spousal maintenance produced by the new, "rehabilitative" alimony concept that was enacted along with the elimination of title-based property distribution would be offset by larger property awards. However, I discovered that the assumptions that underlay the Equitable Distribution Law were inaccurate: husbands did own valuable property more often than wives, but the difference in the median net value of wife- and husband-owned property was only \$800. Moreover, because husbands also tended to have larger debts than wives, the median net worth of wives was slightly higher than that of husbands. And for the typical couple, the property of both husbands and wives was almost completely overshadowed by jointly held assets, divisible under both regimes.<sup>79</sup> The passage of the Equitable Distribution Law thus was not accompanied by any clear increase in the median or average percentage of net

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76. See *Discretionary Decision Making*, *supra* note 5, at 460 tbl.12.

77. *Id.* at 524.

78. See *Good Intentions*, *supra* note 5, at 653.

79. See *id.* at 636 tbl.7.

marital assets wives obtained,<sup>80</sup> but wives' prospects of obtaining a spousal maintenance award, particularly a permanent award, declined dramatically after the Law's enactment.<sup>81</sup>

New York's entitlement rules should be revised to provide greater predictability and outcome consistency, but in order to avoid unanticipated results, legislative change should be predicated on a clear and accurate understanding of current outcomes.

### 3. Research

The final obvious reform is more and better research on divorce patterns and outcomes. This research is now extraordinarily time-consuming and difficult. Were divorcing couples required to fill out a short scannable form, it would be extraordinarily easy. Such a form would not affect case confidentiality, as no identifying information would be necessary. Moreover, divorcing couples already provide all, or virtually all, of the needed information as a precondition to obtaining divorce; transferring that information to a scannable form accessible to researchers would be a simple matter.

Tabulation of these simple, easily completed forms would provide a wealth of data to inform the divorce-reform process and ensure that it produces the desired results. Even relatively straightforward measures, like providing resources to pro se couples, are inhibited by the lack of available data. At this point, we do not know how many couples divorce without any legal representation or how many employ one lawyer primarily as a scrivener. We do not know whether the outcomes in these cases deviate from those obtained when couples are represented by legal counsel. We do not know anything about the characteristics of these couples, nor do we know what proportion have minor children, who add to the complexity of the divorce process.

How can one effectively design services to meet the needs of a population about whom one knows absolutely nothing? How can one reduce delay without information about who exper-

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80. *See id.* at 673-74 tbls.18-19.

81. *See id.* at 697-98 tbls.36-37.

iences delay and how it occurs? How can one solve any problem without accurate information about its causes?

In sum, if the New York court system is serious about reducing divorce expense, delay, and distress, it first needs to obtain accurate and detailed information about the individuals who use the court system to end their marriages. That information is crucial not only for identifying problems, but also for testing, comparing, and refining strategies to address those problems. Data collection thus should take precedence over all other reform possibilities.

### III. Conclusion

The available evidence suggests that the major sources of divorce delay, expense, and litigation-induced distress are complex divorce procedures and highly discretionary entitlement rules; together, such rules and procedures prevent divorcing couples from accurately predicting their divorce entitlements and even from preparing their own paperwork. The reforms proposed by the Commission do not attempt to improve predictability or reduce complexity, nor do they have the capacity to achieve these goals. A better reform model would emphasize simplified divorce procedures for cases where public concerns are minimal and simplified entitlement rules that would increase both the predictability and consistency of case outcomes. The reform package should also include statewide, multi-faceted services directed at pro se litigants. However, any reform initiative should begin with routine, statewide data collection to inform this and future reform efforts.

