

1991

Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes

Marsha Garrison

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Other Law Commons](#)

Recommended Citation

57 Brook. L. Rev. 621 (1991)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

GOOD INTENTIONS GONE AWRY: THE IMPACT OF NEW YORK'S EQUITABLE DISTRIBUTION LAW ON DIVORCE OUTCOMES

*Marsha Garrison**

I.	Alimony and Property Division Rules in Historical Perspective	626
A.	The Development of the Alimony Entitlement	626
B.	Equitable Property Distribution: A Remedy for Inadequate Alimony	627
C.	The Shift to Equitable Property Distribution and Its Rationale	628
D.	The New Reform Movement	632
II.	New York's Equitable Distribution Law and Its Consequences	637
A.	Divorce in New York: The Adoption of the Equitable Distribution Law	637
B.	Research Methodology	641
C.	Characteristics of the Research Sites and Sample	643
D.	The Impact of the Equitable Distribution Law	651
	1. The Divorce Process	651
	2. Property Distribution	651
	a. Who Owns the Property?	653

* Professor of Law, Brooklyn Law School.

The research described in this article was made possible by the Alfred P. Sloan Foundation. The Brooklyn Law School Faculty Research Fund provided additional financial support. Over the course of the research I have benefited from the support and suggestions of many. I am particularly indebted to Justice Joseph F. Gagliardi, former Administrative Judge of Westchester County, N.Y., Justice William R. Roy, Administrative Judge of Onondaga County, N.Y., Norman J. Goodman, County Clerk of New York County, N.Y., Elaine Lytel, former County Clerk of Onondaga County, and Andrew J. Spano, former County Clerk of Westchester County, without whose cooperation and assistance the research would not have been possible. David Chambers, Linda Edwards, Carol Lefcourt, Robert Levy, and Martha Minow provided valuable assistance as members of the research project's advisory committee. I also wish to thank Arthur J. Singer, of the Alfred J. Sloan Foundation, and R. Wayne Parsons, of Kane, Parsons & Associates, Inc., for their special contributions to the research project.

b.	How Much Are Their Assets Worth?	658
c.	How Much Property Is Unavailable for Distribution?.....	660
d.	What Is the Value of Marital Property?	662
e.	What Types of Assets Do Divorcing Couples Own?	664
E.	The Distribution of Assets and Debts	668
1.	Methodological Issues in Property and Debt Division Analysis	668
2.	The Overall Distribution of Assets and Debts	670
3.	The Distribution of Some Specific Assets: A Closer Look	679
a.	The Marital Home	679
b.	Pensions	683
c.	Businesses	683
4.	Typical Asset Distribution Patterns: What Kind of Assets Do Wives Receive?	684
F.	Winners and Losers: Variation and Its Rationality	685
1.	The Relationship Between Marital Duration and Property Distribution	687
2.	The Relationship Between Custody and Property Distribution	688
3.	Need and Contribution: The Relationship Between Employment Status, Spousal Income, Alimony, and Property Distribution	689
4.	Other Factors: Fault, Net Worth	694
5.	Summary	696
G.	The Impact of the Law on Alimony and Child Support	697
1.	The Frequency and Duration of Alimony Assets	697
2.	Who Gets Alimony: The Relationship Between Marital Duration, Employment, Income, Custody, and Alimony Awards.....	699
a.	Marital Duration	699
b.	Wife's Employment and Income.....	701
c.	Spousal Income	703
d.	Child Custody	705

3. Variation in Alimony Decision Making and Its Rationality	706
4. The Value of Alimony and Child Support	711
a. The Value of Alimony Awards	711
b. The Value of Child Support Awards	713
c. Child Support and Alimony in Relation to Income	717
d. The Effect of Income Transfers on Post-Divorce Per Capita Income	720
III. What the Data Mean: Directions for Divorce Reform	724
A. Property Division	728
B. Alimony and Child Support	733
Conclusion	739
Appendix	741

INTRODUCTION

Over the past twenty years American divorce law has gone through a period of dramatic change. No-fault divorce swept the nation, bringing in its wake far-reaching changes in the rules that govern the allocation of a couple's income and property. In the first wave of reform, most states enacted laws that deemphasized alimony, the traditional entitlement of a divorced wife, and instead emphasized property distribution as a means of allocating marital wealth and spousal needs. Among property allocation schemes, most states adopted some form of "equitable" property distribution, a system that permits judges to distribute marital property in accordance with their perceptions of the equities of the particular case.

While changes in divorce grounds were largely motivated by the desire to conform the law to existing practice and reduce the level of acrimony in divorce proceedings,¹ changes in the rules

¹ Although divorce laws of this era required a showing of marital fault as a precondition to obtaining a divorce, spouses frequently colluded to fabricate grounds. See Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 (1950); Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 (1936). For historical accounts describing the policy reasons for no-fault divorce reforms, see HERBERT JACOB, *THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 66-69 (1988); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 4-14 (1985); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 91-97. For a

governing alimony and property division were also motivated by a desire to improve the position of divorced wives. The old rules, reformers urged, failed to comport with the modern view of marriage as an economic partnership of equals: the myth of alimony as an entitlement had obscured the fact that it was rarely awarded² and even less frequently paid, while title-based property rules had caused women to get less than their fair share of marital assets.³

This first wave of divorce reform is now the subject of a new reform movement. Critics claim that, rather than helping divorced women, the reforms have hurt them.⁴ They argue that too few women are receiving alimony, in inadequate amounts, and for inadequate periods of time. Moreover, they claim, "equitable" property distribution is in practice inequitable to divorced wives. Property awards are said to be arbitrary and unpredictable, with the result that many women do not receive their fair share of marital assets. Equal distribution of marital assets, some contend, should replace equitable asset distribution.

While recent research reports have established that modest declines in the likelihood of receiving alimony and major declines in the permanence of those awards have indeed occurred following no-fault divorce reforms in some states,⁵ information regarding equitable property distribution is still scanty. Information regarding the interplay between alimony and property distribution is scantier still. Have women typically been getting more, or less, property than men? What factors, if any, predict a large or small award? Is a large property award typically correlated with a small or nonexistent alimony award, or vice versa?

comparative perspective on no-fault divorce reform, see MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987).

² See notes 27-29 *infra*.

³ See note 27 and accompanying text *infra*.

⁴ One prominent critic has argued that the major result of the divorce law revolution "is the systematic impoverishment of divorced women and their children." LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* xiv (1985). For other representative criticism, see, e.g., GLENDON, *supra* note 1, at 63-144; Martha L. Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change*, 1983 WIS. L. REV. 789; Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191 (Stephen D. Sugarman & Herma H. Kay eds., 1990) [hereinafter *CROSSROADS*].

⁵ For a description of the research, see notes 44-48 and accompanying text *infra*.

To what extent have the observed changes resulted from changes in the grounds for divorce or in the rules governing financial entitlements? Definitive answers to such questions have been unavailable.

We need these answers. As a result of a substantial rise in the divorce rate during the 1960s and 1970s,⁶ more families are affected by divorce law. Almost half of current American marriages are now expected to end in divorce,⁷ and every year more than a million do.⁸ The distribution of property and income that is made when divorce occurs will inevitably determine the economic well-being of individuals in these families over the short term and, for some divorcing couples, will have a major impact on their financial status for years to come. Moreover, women and children in households headed by women are the most rapidly growing segment of the poor.⁹ The extent to which the new rules have exacerbated this trend, and to which changed rules can ameliorate it, are urgent issues.

This report describes empirical research I have conducted on divorce in New York and the answers it provides to these important questions. Part I provides some historical background on the origin of the alimony and property rules that are now the subject of controversy. Part II describes my research findings on how the adoption of a new law that retained a largely fault-based system of divorce grounds, while instituting equitable property distribution and authorizing rehabilitative alimony, af-

⁶ Between 1960 and 1978 the divorce rate climbed from 23 to 90 per 1000 married persons. SAR A. LEVITAN & RICHARD S. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY* 28-29 (1981). See also ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 26-27 (1981). During the 1980s, however, the divorce rate appears to have leveled off. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1990* 86 (Table 126) [hereinafter *STATISTICAL ABSTRACT*] (showing slight decline in divorce rate between 1981 and 1986).

⁷ Samuel H. Preston, *Estimating the Proportion of American Marriages that End in Divorce*, 3 *SOC. METHODS & RES.* 435, 457 (1975).

⁸ *Id.* See also HUGH CARTER & PAUL C. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 394 (rev. ed. 1976).

⁹ In 1987 female-headed families accounted for 52% of Americans living below the poverty line. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *CURRENT POPULATION REPORTS, CONSUMER INCOME, MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1987* 28-29 (1988) (Table 16). While female-headed families accounted for only about 21% of all families with children, they represented 60% of all such families that fell below the poverty line. *Id.* at 36-37 (Table 19).

fectured divorce outcomes.¹⁰ Part III discusses the policy implications of the research findings and makes proposals for legislative change.

I. ALIMONY AND PROPERTY DIVISION RULES IN HISTORICAL PERSPECTIVE

A. *The Development of the Alimony Entitlement*

The alimony concept derives from the practices of English ecclesiastical courts. These courts were only empowered to award divorces from bed and board, which authorized husband and wife to live separately but did not dissolve the marriage bond; when they required the husband to pay alimony they were simply requiring him to continue to fulfill his marital support obligation.¹¹ Such a remedy was not available in every case, however. A divorce from bed and board was only available upon a showing that one spouse was guilty of adultery, cruelty, or other proscribed offenses.¹² Even the wife who had established such grounds might not obtain alimony if her husband had not profited from property she had brought into the marriage.¹³ The early alimony entitlement thus appears to have rested primarily on a theory of unjust enrichment.

When nineteenth century American legislatures enacted laws providing for absolute divorce,¹⁴ they adopted the alimony concept and, like the ecclesiastical courts, restricted its availability to wives who were not at fault in causing the dissolution of the marriage. Wives had a continuing entitlement to marital

¹⁰ At the time of the reform, divorce was available on any of four fault-based grounds: abandonment for one or more years, cruel and inhuman treatment that "so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant," confinement of the defendant in prison for three or more years, and adultery. N.Y. DOM. REL. LAW § 170 (McKinney 1988). The only basis for a divorce apart from the fault grounds was a one year separation either pursuant to a judgment of separation (which itself required establishing one of the grounds for divorce or showing nonsupport) or pursuant to a written separation agreement resolving issues of custody and financial obligation. N.Y. DOM. REL. LAW § 170(5)-(6) (McKinney 1988). The same grounds remain in effect today.

¹¹ For a description of the practices of the English ecclesiastical courts, see JOHN EEKELAAR & MAVIS MACLEAN, *MAINTENANCE AFTER DIVORCE* 4-8 (1986).

¹² *Id.* at 5-6.

¹³ *Id.* at 6 (citing POYNTER, *LAW OF MARRIAGE AND DIVORCE* 259 (1824)).

¹⁴ For historical accounts of the development of American divorce law, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 181-84, 430-40 (1973); LYNNE C. HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* (1980).

support, it was believed, only if the husband was the guilty spouse.¹⁵

When a wife was awarded alimony during this period, she was entitled to support until her death or remarriage.¹⁶ In determining the size of the award, courts looked primarily to the wife's needs and the husband's station in life. These were not, however, the only factors considered. The degree of fault exhibited by the husband was also taken into account, as well as any financial contribution the wife may have made to the marriage. Thus need, status, fault, and contribution to the marital estate each played a role in determining the alimony award.¹⁷

B. *Equitable Property Distribution: A Remedy For Inadequate Alimony*

While the alimony entitlement theoretically offered ample economic protection to the "blameless" divorced woman, in reality it often failed to do economic justice even for women in this group. Sometimes, for example, a husband was simply unable to pay alimony that adequately compensated a wife for property she had brought into the marriage. In such cases of obvious injustice courts sometimes looked beyond title "to unscramble the ownership of property, giving to each spouse what . . . [was] equitably his."¹⁸ As time went by, some courts began to employ property distribution for broader remedial purposes and gave a wife property that she had not brought into the marriage to make up for a husband's inability or unwillingness to pay adequate alimony. In making such awards, courts typically looked to the same factors—need, the marital standard of living, contribution, and fault—that they utilized in setting an alimony award. From this beginning the modern concept of equitable property distribution developed.¹⁹

¹⁵ For a discussion of the history and development of the alimony concept in American law, see HOMER H. CLARK, *LAW OF DOMESTIC RELATIONS* 420-27 (1st ed. 1968) [hereinafter CLARK, (1st ed.)].

¹⁶ See HOMER H. CLARK, *LAW OF DOMESTIC RELATIONS* 650 (2d ed. 1987).

¹⁷ For a discussion of the factors traditionally governing alimony awards, see CLARK (1st ed.), *supra* note 15, at 441-47.

¹⁸ *Id.* at 450. See also JACOB, *supra* note 1, at 111-13.

¹⁹ The first state to adopt equitable distribution legislation was apparently Kansas, which in 1889 enacted a statute providing for the "just and reasonable" division of property "acquired by the parties jointly during their marriage." Section 4756, 1889 Kan. Sess. Laws 1568, reprinted in Elizabeth A. Cheadle, Comment, *The Development of*

The concept of equitable distribution was a departure from common law principles in that it permitted a judge to ignore legal title to the property. In this sense equitable distribution is similar to community property,²⁰ under which a spouse without legal title also has rights to marital property. Unlike a community property scheme, however, equitable property distribution applied only at divorce; in an intact marriage, legal title prevailed.²¹ Equitable distribution also aimed at individualized property distribution, based on the equities of the particular case, whereas the traditional community property rules gave each spouse an equal share of marital property.²²

C. *The Shift to Equitable Property Distribution and Its Rationale*

In the first half of the twentieth century equitable property distribution gained acceptance in an increasing number of states. But alimony was still viewed as a divorced wife's primary economic entitlement; property distribution typically played a limited ancillary role.²³

Sharing Principles in Common Law Marital Property States, 28 UCLA L. REV. 1269, 1295 (1981). By 1928 there were some twenty-two states that gave judges discretionary power in regard to property division at divorce. See Harriet S. Daggett, *Division of Property Upon Dissolution of Marriage*, LAW & CONTEMP. PROBS. Spring 1939, at 225, 227 (citing 2 VERNIER, AMERICAN FAMILY LAW SUPP. 60 (1938 Supp.)).

²⁰ For an overview of community property, see WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971); ROBERT L. MENNELL & THOMAS M. BOYKOFF, *COMMUNITY PROPERTY* (1988). American states that utilize community property principles are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. MENNELL & BOYKOFF, *supra*, at 2, 13-17. The Uniform Marital Property Act, adopted in part by the state of Wisconsin, also rests in large part on community property principles. See UNIF. MARITAL PROPERTY ACT, Prefatory Note, 9A U.L.A. 97 (1987).

²¹ See CLARK, (1st ed.), *supra* note 15, at 590-91.

²² The civil law community property system, from which American community property principles are derived, required an equal division of community assets. See MENNELL & BOYKOFF, *supra* note 20, at 6-9; Stephen J. Brake, Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. REV. 761, 763 (1982). Most American community property jurisdictions now permit deviation from an equal division. See Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 523-24 (1990) (Table IV). Deviation was originally introduced to reflect common law fault concepts in divorce law and, more recently, represents an infiltration of equitable distribution concepts. See Cheadle, *supra* note 19, at 1295.

²³ "Most courts gave limited scope to [equitable distribution] statutes, interpreting them merely to protect the interests of a spouse who provided the capital to acquire a

During the 1960s and 1970s, however, property distribution became a focal point of wide-ranging divorce reform.²⁴ Reformers of this period called for the abolition of fault as a precondition to obtaining a divorce and as a factor in economic decisions.²⁵ Moreover, they urged, property should replace alimony as a divorcing wife's primary economic entitlement:

[I]f a system for division of property between husband and wife upon divorce . . . were adopted, and if the family has sufficient property to divide, it would be possible to drastically reduce or eliminate alimony as continued support for an ex-spouse.²⁶

The reasons reformers gave for favoring property division over alimony were numerous. First of all, they noted, alimony was seldom awarded and even more infrequently paid. Surveys consistently showed that no more than a quarter of divorced wives were awarded alimony²⁷ and that even fewer actually re-

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). Additionally, statutes often required judges to transfer property in the guise of an alimony payment. See, e.g., OHIO REV. CODE ANN. § 3105.18 (Anderson Supp. 1967) (allowing an alimony award "in real or personal property . . . payable either in gross or in installments as the court deems equitable") (current version at *id.* § 3105.18 (Anderson 1990)). See also Henry H. Foster & Doris J. Freed, *Marital Property Reform in New York: Partnership of Coequals?*, 8 FAM. L.Q. 169, 170 n.6 (1974).

²⁴ For historical accounts of the divorce reform movement during this period, see HALEM, *supra* note 14, at 233-83; JACOB, *supra* note 1; Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984). Both reporters for the Uniform Marriage and Divorce Act (one of whom was also prominently involved in the movement toward no-fault divorce in California) have also written accounts of the period drawing on their personal recollections. See Kay, *supra* note 1; Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act — And Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43.

²⁵ This position was advocated by the influential report of the California Governor's Commission on the Family and the widely copied Uniform Marriage and Divorce Act. See ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 88-95 (1968) (grounds for divorce); *id.* at 149-50 (alimony); *id.* at 169 (property division); REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 44-48 (1966).

²⁶ CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON THE STATUS OF WOMEN 8-9 (1968) [hereinafter CITIZENS' ADVISORY COUNCIL REPORT]. See also LEVY, *supra* note 25, at 144-47.

²⁷ Reported alimony rates have been consistently low throughout the twentieth century. See, e.g., PAUL H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 127-28 (1959) (reporting that 9.3% of U.S. divorces included provisions for permanent alimony between 1887 and 1906, that alimony/property settlement awards for 13 states ranged from 10.7% (Florida) to 42.2% (Nebraska) around 1939 and from 7.2% (Florida) to 48.4% (Kansas) around 1950, and concluding that "alimony or property settlement awards are now made in about one fourth of the marriages dissolved in the United States"); MAXINE B. VIRTUE,

ceived payments. Alimony critics—including many feminists and women's advocates—also 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.²⁸ With ever increasing numbers of women in the workplace, the notion of lifetime spousal support also began to seem anachronistic. Reformers urged that marriage is a partnership of equals and that the financial aspects of divorce should be remodeled accordingly.²⁹

The logical outcome of an equal partnership marriage model is a community property system without alimony. No state went this far, however, as reformers realized that women were not equals in the marketplace, and that need thus could not be ignored as a factor in divorce decision making.³⁰ Alimony thus was nowhere abolished, although many states enacted new standards that emphasized the use of alimony for transitional, "rehabilitative" purposes to limit its use and duration.³¹ Nor was equal

FAMILY CASES IN COURT: A GROUP OF FOUR COURT STUDIES DEALING WITH JUDICIAL ADMINISTRATION 92 (1956) (alimony requested in only 7% of surveyed 1953 Illinois cases); Youngerman, Report on Divorce Cases in the Middlesex County Probate Court for Justice for Divorced Mothers (August 1972) (unpublished), described in CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 844 (2d ed. 1976) (alimony granted in 20% of surveyed 1972 Massachusetts cases).

²⁸ Although the women's movement was not prominently involved in the early movement to institute no-fault divorce grounds, its views did play an important role in the formulation of property distribution proposals. See LEVY, *supra* note 25, at 164-67 (citing the reasoning of the 1963 REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN and the 1968 TASK FORCE ON FAMILY LAW AND POLICY OF THE CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN in formulating Uniform Marriage and Divorce Act proposals on marital property); LEVY, *supra* note 24, at 56-57 n.51 ("the general proposals of these groups were at the core of the property distribution recommendations of the Reporter").

²⁹ For examples of the literature calling for alimony and property reform based on a partnership model, see CITIZENS' ADVISORY COUNCIL REPORT, *supra* note 26; CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, RECOGNITION OF ECONOMIC CONTRIBUTION OF HOMEMAKERS AND PROTECTION OF CHILDREN IN DIVORCE LAW AND PRACTICE (1974); LEVY, *supra* note 25, at 164-66; ONTARIO LAW REFORM COMMISSION, REPORT OF THE ONTARIO LAW REFORM COMMISSION TO THE ATTORNEY GENERAL FOR ONTARIO ON CERTAIN ASPECTS OF THE PROPOSED DIVORCE LEGISLATION CONTAINED IN BILL C-187 (1968); Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Susan Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

³⁰ See, e.g., LEVY, *supra* note 25, at 146 (urging abolition of alimony except for specialized situations "in which a compelling need may . . . arise").

³¹ The Uniform Marriage and Divorce Act (UMDA), the leading model legislation of

property division widely introduced.³² Instead, reformers generally preferred a more flexible approach that could take account of spousal needs and conduct on an individualized basis.³³

In most states reform efforts thus centered on equitable property distribution as a means of achieving economic equity between divorcing spouses.³⁴ In states that already permitted equitable distribution, legislatures and judges paid increasing attention to determining what assets should be considered marital property³⁵ and elaborating factors to govern its allocation.³⁶ States that did not provide for equitable distribution instituted it, either through judicial decision or legislation.³⁷ Today, no

this era, took the position that property division should be "the primary means of providing for the future financial needs of the spouses." UNIF. MARRIAGE AND DIVORCE ACT Prefatory Note, §308, 9A U.L.A. 147, 149 (1987). Under the UMDA, alimony is not to be awarded unless the spouse seeking maintenance: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." *Id.* § 308, 9A U.L.A. 348 (1987). By 1986, twenty-five states either specifically limited alimony to a stated period or allowed a court to set a time limit on an alimony award by providing as a guideline the time necessary to acquire enough education or training to enable the party seeking maintenance to find appropriate employment. See Fam. L. Rep. Ref. File (BNA) 401:001-453:002 (1991) (summarizing the divorce laws of the fifty states, Puerto Rico and the Virgin Islands).

³² See J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 13.01[2][b] n.9 (1991) (listing states with equal distribution requirement or presumption of equal distribution).

³³ See, e.g., CITIZENS' ADVISORY COUNCIL REPORT, *supra* note 26, at 5 ("divorce courts should be given discretion to determine a different proportion for each spouse, based on factors such as respective contributions . . . each spouse made to the marriage, economic dependency and age of the spouses"); Joan M. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. Rev. 165, 175-76, 178 (1976) (equitable distribution "permits the court the necessary flexibility to adjust the property division according to the actual economic needs of the parties"). See also LEVY, *supra* note 25, at 167 ("time is not yet ripe to insist upon a '50-50' formula").

³⁴ For a discussion of how the indeterminacy of equitable distribution contributed to its political acceptability, see Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 449-50 (1988/89).

³⁵ See generally JOHN D. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* §§ 2.02-3.06 (1989); OLDHAM, *supra* note 32, §§ 7.01-10.03; See also Freed & Walker, *supra* note 22, at 539-41 (describing legal developments on professional degrees and licenses as marital property); *id.* at 541-43 (pensions, IRAs and Keogh accounts); *id.* at 544 (personal injury awards); *id.* at 533-38 (factors in determining property awards).

³⁶ For a description of typical factors, see GREGORY, *supra* note 35, §§ 8-3 to 8-19; OLDHAM, *supra* note 32, § 13.02[1].

³⁷ Analysis of a compilation of state property division laws prepared by the Reporter for the Uniform Marriage and Divorce Act suggests that seventeen states and the Dis-

state retains the traditional common law title system and many community property states permit equitable distribution as well.³⁸

D. *The New Reform Movement*

In recent years the divorce reforms of the 1960s and 1970s have themselves come under attack. Some commentators have argued that the equitable distribution approach gives judges too much discretion, thus producing unpredictable and sometimes arbitrary results.³⁹ Some women's advocates have also contended that equitable distribution is not achieving equity for women. They have claimed that women's contributions as homemakers are typically undervalued and that women would be better off in a community property system in which they are guaranteed half of the marital property.⁴⁰ Inadequate property distributions are accompanied, they have claimed, by inadequate, short-term maintenance awards.⁴¹

trict of Columbia did not permit distribution of property to a spouse other than the titleholder. See Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in CROSSROADS, *supra* note 4, at 12, n.40.

³⁸ Freed & Walker, *supra* note 22, at 523-24 (Table IV). The widespread introduction of equitable distribution principles has, indeed, substantially eroded the traditional distinctions between common law and community property jurisdictions. For a description of the trend toward convergence, see Cheadle, *supra* note 19, at 1306-08.

³⁹ See, e.g., Brake, *supra* note 22, at 788 ("[E]quitable distribution . . . imposes high costs upon both litigants and society in what may be an unproductive search for individualized justice [A] fixed rule system provides a property division method that is inexpensive, predictable, and able to minimize the need for litigation."); Foster & Freed, *supra* note 23, at 190 (equal distribution "more certainly gives each party what he or she is entitled to, whereas extraneous elements (in fact) may influence a court's equitable discretion"); Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555-57 (1984) (equitable distribution is unwieldy and unpredictable).

⁴⁰ See, e.g., WEITZMAN, *supra* note 4, at 108 ("Clearly, equitable distribution standards are not more favorable to wives. Wives are, in fact, likely to fare better under rules that guarantee them an equal share of the marital property."); Fineman, *supra* note 4, at 852-55 (quoting various publications by Wisconsin women's advocates describing inequities of equitable distribution); Lynn Hecht Schafran, *Gender Bias in the Courts*, in WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET 39, 45-47 (Elizabeth A. Mulroy ed., 1988). But see MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 51-52, 175-80 (1991); Suzanne Reynolds, *The Relationship of Property Distribution and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 909-10 (1988) (both arguing in favor of equitable property distribution).

⁴¹ For examples of the literature describing the inadequacies in current spousal maintenance patterns and calling for reform, see, e.g., WEITZMAN, *supra* note 4, at 184-214; Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J.

Recent research on divorce outcomes has contributed to a growing sense that the reforms of the 1960s and 1970s themselves require remediation. Post-divorce income surveys have uniformly shown that women's per capita income⁴² and standard of living⁴³ tend to decline substantially following divorce, while those of men tend to increase. While these income surveys have not attempted to establish that outcomes have changed since the reforms of the 1960s and 1970s, several comparative surveys, in which alimony, child support, and property awards were analyzed before and after divorce reforms, have shown that divorced

FAM. L. 351 (1988-89); Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989).

⁴² See BARBARA BAKER, FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN i (1987) (surveyed divorced wives in Alaska experienced 33% decline in per capita income while men experienced 17% rise); LESLIE J. BRETT ET AL., WOMEN AND CHILDREN BEWARE: THE ECONOMIC CONSEQUENCES OF DIVORCE IN CONNECTICUT 7 (1990) (mean per capita income of surveyed divorced wives in Connecticut fell by an average of 16%, while that of divorced husbands increased by 23%); WEITZMAN, *supra* note 4, at 191-92 (reporting post-divorce per capita income of California research sample by income groups and concluding that "husband is typically permitted to retain two-thirds to three-quarters of that [pre-divorce] total, while the wife (and children) are typically left with no more than one-third"); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 386-88 (1987) (in early 1980s average per capita income of divorced wives in New Haven, Conn. was 69% of pre-divorce per capita median while average per capita income of divorced husbands was 190% of pre-divorce per capita median); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 97-98 (1986) (after divorce, surveyed divorced wives in Vermont experienced 33% drop in per capita income, children 25%, while men experienced a 120% increase).

⁴³ See DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 45-50 (1979) (97% of divorced mothers and children in their custody would have less than lower standard budget income as compared to 10% of divorced fathers, if fathers paid court-ordered support and mother tried to live on support only); WEITZMAN, *supra* note 4, at 337-43 (divorced wives experienced a 73% decline in their standard of living while divorced husbands' standard of living improved 42%); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 488 (1985) (in the first year after divorce, the economic status of divorced wives fell an average of 30%); Robert Hampton, *Marital Disruption: Some Social and Economic Consequences*, in FIVE THOUSAND AMERICAN FAMILIES: PATTERNS OF ECONOMIC PROGRESS 171-74 (James N. Morgan ed., 1975) (47% of divorced husbands were in the top three deciles of income as compared to only 20% of divorced wives); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (recalculation of Weitzman's data suggests that women experienced a 33% decline in their post-divorce standard of living); Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAM. 115 (1984) (in the first year after divorce the economic status of divorced wives fell an average of 30%).

wives and children have generally fared worse under the new regime. In most of the surveyed jurisdictions, research has shown that the likelihood of an alimony award,⁴⁴ the duration of alimony awards,⁴⁵ the amount of alimony and child support,⁴⁶ and the proportion of marital property⁴⁷ awarded women decreased,

⁴⁴ See WEITZMAN, *supra* note 4, at 167 (20% of divorced wives in San Francisco & Los Angeles, Cal. awarded alimony pre-reform (1968) as compared to 15% post-reform (1972)); Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 473 (1981-82) (26% of divorced wives in Cuyahoga County, Ohio awarded alimony before reform (1972) as compared to 18% post-reform (1978)); McLindon, *supra* note 42, at 362 (59% of divorced wives in New Haven, Conn. awarded alimony pre-reform (1970-71) as compared to 30% post-reform (1982-83)); Karen Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, 1 FAM. ADVOC. 10, 12 (1979) (66% of divorced wives in San Diego, Cal. were awarded alimony pre-reform (1968) as compared to 30% post-reform (1976)); Charles E. Welch III & Sharon Price-Bonham, *A Decade of No-Fault Divorce Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411, 415 (1983) (15.4% of divorced wives in Clark County, Ga. awarded alimony pre-reform (1970) as compared to 10.9% post-reform (1980); 9.7% of divorced wives in Spokane County, Wash. awarded alimony pre-reform (1970) as compared to 7% post-reform (1980)). For a comparison of the reports, see Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in CROSSROADS, *supra* note 4, at 91 (Table 3.11).

⁴⁵ See WEITZMAN, *supra* note 4, at 164 (62% of alimony awards in Los Angeles and San Francisco, Cal. permanent pre-reform (1968) as compared to 32% post-reform (1972)); McGraw et al., *supra* note 44, at 474-75 (60% of alimony awards in Cuyahoga County, Ohio permanent pre-reform (1972) as compared to 30% post-reform (1978)); McLindon, *supra* note 42, at 364 (all but one alimony award in New Haven, Conn. permanent pre-reform (1970-71) as compared to 60% post-reform (1982-83)); Seal, *supra* note 44, at 12 (46% of alimony awards in San Diego, Cal. permanent pre-reform (1968) as compared to 37% post-reform (1976)). *But see* Welch & Price-Bonham, *supra* note 44, at 415 (51.4% of alimony awards in Clark County, Ga. permanent pre-reform (1970) as compared to 59.3% post-reform (1980); 37.9% of alimony awards in Spokane County, Wash. permanent pre-reform (1970) as compared to 40% post-reform (1980)). For a comparison of the reports, see Garrison, *supra* note 44, at 91 (Table 3.11).

⁴⁶ GLORIA STERIN ET AL., *DIVORCE AWARDS AND OUTCOMES: A STUDY OF PATTERN AND CHANGE IN CUYAHOGA COUNTY, OHIO 1965-78* 94-95, 132 (1981); McLindon, *supra* note 42, at 369; Seal, *supra* note 44, at 12; Welch & Price-Bonham, *supra* note 44, at 415. For a comparison of the reports, see Garrison, *supra* note 44, at 96 (Table 3.13).

⁴⁷ STERIN ET AL., *supra* note 46, at 112 (Table 6.2) (divorced wives in Cuyahoga County, Ohio received less property post-reform (1972) as compared to pre-reform period (1968) when divorce granted on no-fault ground of mutual agreement between spouses, but not when divorce was granted on fault grounds or on no-fault ground of two years separation); WEITZMAN, *supra* note 4, at 74 (divorced wives received majority of marital property in 86% of San Francisco, Cal. cases and 58% of Los Angeles, Cal. cases pre-reform (1968) as compared to 35% of Los Angeles, Cal. cases and 34% of San Francisco, Cal. cases post-reform (1972)); McLindon, *supra* note 42, at 375 (in three of four income categories in New Haven, Conn., wives received an average of 84% of marital property pre-reform (1970-71) as compared to 57% post-reform (1982-83)); Seal, *supra* note 44, at 12 (24% fewer wives in San Diego, Cal. received marital home, 30% fewer received furniture, 10% fewer received automobile, 27% fewer exclusively awarded other

while the proportion of family debt⁴⁸ women were required to pay increased. The etiology of these changes in divorce outcomes⁴⁹ and their overall importance⁵⁰ remain controversial. So does the content of a new reform program. What standards should govern the determination of alimony awards and the division of marital property? Family law scholars disagree.⁵¹ Even

assets post-reform (1976) than in pre-reform period (1968)); Welch & Price-Bonham, *supra* note 44, at 416 (divorced wives in Spokane County, Wash. received smaller share of marital property post-reform (1980) than in earlier period (1970)). *But see* Welch & Price-Bonham, *supra* note 44, at 416 (divorced wives in Clark County, Ga. not more likely to receive a smaller share of property post-reform (1980) than pre-reform (1970)).

⁴⁸ See Seal, *supra* note 44, at 12 (70% of divorced husbands in San Diego, Cal. assigned joint debts pre-reform (1968) as compared to 42% post-reform (1976)); Welch & Price-Bonham, *supra* note 44, at 416 (divorced wives in Spokane County, Wash. received larger share of marital debts post-reform (1980) than in pre-reform (1970) period); WEITZMAN, *supra* note 4, at 102 (divorced husbands in Los Angeles & San Francisco, Cal. assumed majority of marital debts in 88% of cases pre-reform (1968) as compared to 58% post-reform (1977)). *But see* McLindon, *supra* note 42, at 379 (divorced husbands in New Haven, Conn. had average share of 78% of marital debts pre-reform (1970-71) as compared to 84% post-reform (1982-83)); Welch & Price-Bonham, *supra* note 44, at 416 (divorced wives in Clark County, Ga. received larger share of joint debts post-reform (1980) but smaller share of other liabilities).

⁴⁹ A number of scholars have argued that divorced wives' declining fortunes result from the fact that, with no-fault divorce grounds available, they have lost bargaining power as they can no longer threaten to block a divorce. See, e.g., WEITZMAN, *supra* note 4, at 26-28, 383; Fineman, *supra* note 4, at 801-02; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979); Seal, *supra* note 44, at 11-12. Others have questioned this conclusion. See JACOB, *supra* note 1, at 163-64; Garrison, *supra* note 44, at 100.

⁵⁰ Compare WEITZMAN, *supra* note 4, at 400 (divorce today spells financial catastrophe for women and the children in their custody) with Jed H. Abraham, "The Divorce Revolution" Revisited: A Counter Revolutionary Critique, 9 N. ILL. U. L. REV. 251 (1989) and Herbert Jacob, *Faulting No-Fault*, 1986 A.B.F. RES. J. 773 and Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 A.B.F. RES. J. 759 and Stephen D. Sugarman, *Dividing Financial Interests at Divorce*, in CROSSROADS, *supra* note 4, at 131-35; (all questioning whether women are importantly worse off under no-fault regime as compared to prior fault regime). See also Greg J. Duncan & Saul D. Hoffman, *Economic Consequences of Marital Instability*, in MARTIN DAVID & TIMOTHY SMEEDING, *HORIZONTAL EQUITY, UNCERTAINTY, AND ECONOMIC WELL-BEING* 427, 437 (1985) (reporting that five years after divorce women who remarried had a living standard 25% greater than in the year before their divorce while those who did not remarry had a living standard 94% of that they had enjoyed in the year prior to divorce).

⁵¹ For a range of views on alimony, see, e.g., Ira M. Ellman, *A Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 N. ENG. L. REV. 437 (1988); Jane Ruthesford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Carl E. Schneider, *Rethinking Alimony*, 1991 B.Y.U. L. REV. 197 (1991). For property division, see, e.g., FINEMAN, *supra* note 40, at 36-52, 175-80; Grace G. Blumberg, *Marital Property Treat-*

among women's advocates, no clear consensus has emerged on the merits of equal property distribution as compared to equitable,⁵² or on standards for the determination of alimony awards.⁵³

The debate over reform has suffered from a relative lack of good data on divorce outcomes. While Weitzman's well-publicized research in California provides fairly detailed data on alimony and property distribution, California is not a typical state. The alimony reforms adopted by California are fairly mainstream, but its property rules are atypical: California is a community property jurisdiction (one of only eight),⁵⁴ and mandates equal property distribution at divorce (as do only two other states).⁵⁵ Divorce research in equitable property distribution jurisdictions has produced much less detailed data than Weitzman's.⁵⁶ And even Weitzman's relatively thorough report fails to discuss the determinants of property distribution or the relationship between alimony and property distribution.

My research in New York examined the consequences of a change in the substantive rules governing property and alimony apart from any change in the grounds for divorce. It provides more detailed data on divorce outcomes in an equitable property

ment of Pensions Disability Pay, Worker's Compensation, and Other Wage Substitutes; An Insurance or Replacement Analysis, 33 UCLA L. REV. 1250 (1986); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L. Q. 253 (1989).

⁵² Compare, e.g., FINEMAN, *supra* note 40, at 36-52 (arguing for need-based property distribution) with WEITZMAN, *supra* note 4, at 108 (arguing for equal distribution). One result of the debate has been that women's organizations have lobbied for different property division schemes from one state to the next. For example, in New York and Wisconsin women's groups mainly lobbied for *equal* distribution, while in Pennsylvania they campaigned for *equitable* distribution. See Fineman, *supra* note 4, at 843-71.

⁵³ Compare, e.g., Kay, *supra* note 37, at 32-34 (favoring reimbursement alimony, coupled with alimony based on loss of earning capacity during marriage for all but older homemakers) with Rutheford, *supra* note 51, at 578 (favoring permanent alimony in amount that would equalize post-divorce living standard of spouses).

⁵⁴ See MENNELL & BOYKOFF, *supra* note 20, at 13-17.

⁵⁵ The others are Louisiana and New Mexico. See LA. REV. STAT. ANN. § 9:2801 (West 1991); N.M. STAT. ANN. § 40-4-7 (Michie 1989.) Some other states have adopted, by statute or case law, a presumption favoring equal division. For a listing, see OLDHAM, *supra* note 32, § 13.02 n.9; Freed & Walker, *supra* note 22, at 523 (Table IV).

⁵⁶ Other reports that have examined the allocation of marital property under equitable distribution laws are BAKER, *supra* note 42; BRETT ET AL., *supra* note 42, at 47-50 (marital home); STERIN ET AL., *supra* note 46; McLindon, *supra* note 42; Barbara R. Rowe & Alice M. Morrow, *The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage*, 24 WILLAMETTE L. REV. 463 (1988) (marriages over ten years); Welch & Price-Bonham, *supra* note 44; Wishik, *supra* note 42 (marital home).

distribution state than have previously been available.

II. NEW YORK'S EQUITABLE DISTRIBUTION LAW AND ITS CONSEQUENCES

A. *Divorce in New York: The Adoption of the Equitable Distribution Law*

Prior to the 1980 reform, New York's divorce law was among the most traditional of state divorce regimes. New York was one of a handful of states without any marital property distribution scheme whatsoever;⁵⁷ absent a showing of grounds for the imposition of a constructive trust upon the property, title controlled.⁵⁸ Alimony rules were traditional and fault-based.⁵⁹ Divorce was obtainable only upon a showing of marital fault or upon a comprehensive agreement between the spouses on custody and financial issues coupled with a one-year separation.⁶⁰

The new law brought New York closer to the mainstream by establishing an equitable property distribution rule and introducing the concept of rehabilitative alimony. It did not alter the grounds for divorce, however; New York is one of four remaining states that permit divorce only upon a showing of fault or upon spousal agreement.⁶¹

The new law had been the subject of lengthy debate, negotiation, and compromise. Property distribution had been on the legislative agenda for several years before a bill was finally enacted.⁶² Most women's advocates favored an equal distribution

⁵⁷ In 1978 New York was one of only six states (Florida, Mississippi, New York, South Carolina, Virginia, and West Virginia) that awarded property to the titleholder. See Doris J. Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105 (1979).

⁵⁸ Former N.Y. DOM. REL. LAW § 234 (McKinney 1977).

⁵⁹ Under the former law, a wife who was guilty of misconduct sufficient to justify a divorce was not entitled to either an alimony award or to exclusive occupancy of the marital residence. See former N.Y. DOM. REL. LAW § 236A (McKinney 1986).

⁶⁰ N.Y. DOM. REL. LAW § 170 (McKinney 1986).

⁶¹ *Id.* The others are Arkansas, Mississippi, and Tennessee. See ARK. CODE ANN. § 9-12-301(6), (7)(a) (Michie 1987 & Supp. 1991) (voluntary separation for 18 consecutive months required or involuntary separation for three years where caused by the insanity of one partner); MISS. CODE ANN. § 93-5-2 (1972) (joint petition with separation agreement required); TENN. CODE ANN. § 36-4-101(12) (1991) (separation agreement required if the couple has minor children).

⁶² For historical accounts of the New York equitable distribution law, see Isabel Marcus, *Reflections on the Significance of the Sex Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); Marcus, *supra* note 34, at 438-41; Jessica C.

law,⁶³ while bar organizations generally favored some form of equitable distribution.⁶⁴

The law that ultimately was adopted is a fairly typical equitable distribution statute. It applies only to property acquired during the marriage and additionally excludes gifts (except between spouses), inheritances, and personal injury awards from distribution.⁶⁵ Under the statute, the division of marital property is based on a number of specified factors,⁶⁶ as well as a catch-all "any other factor which the court shall expressly find to be just and proper."⁶⁷ Although the legislation itself is silent

Brynteson, Note, *Recent Developments: Equitable Distribution in New York*, 45 ALB. L. REV. 483, 486-90 (1981).

⁶³ See Marcus, *supra* note 34, at 441; Brynteson, *supra* note 62, at 488-89 n.21.

⁶⁴ See Marcus, *supra* note 34, at 441 nn.266 & 267. See also Julia Perles, *Report of the Ad Hoc Committee Concerning Revisions of the Equitable Distribution Statute*, 17 FAM. L. REV., Oct. 1985, at 21-22 (New York State Bar Association Committee reporting that various bar organizations favored retention of equitable distribution as opposed to a presumption of equal distribution).

⁶⁵ See 1980 N.Y. Laws 434 (codified at N.Y. DOM. REL. LAW § 236B(1)(d) (McKinney 1988)). For a comparison with other state rules on equitable distribution, see Fam. L. Rep. Ref. File (BNA) 400:ii-453:002 (1991).

⁶⁶ At the time the statute was enacted, the court was directed to consider:

- 1) the income and property of each party at the time of marriage and at the time of commencement of the action;
- 2) the duration of the marriage and the age and health of both parties;
- 3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- 4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- 5) any award of maintenance under subdivision six of this part;
- 6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- 7) the liquid or non-liquid character of all marital property;
- 8) the probable future financial circumstances of each party;
- 9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party

1980 N.Y. Laws 436 (codified at former N.Y. DOM. REL. LAW § 236B(5) (McKinney Supp. 1981)). Since the enactment of the statute three additional factors (tax consequences, wasteful dissipation of assets by a spouse, and transfer or encumbrance of a marital asset made in contemplation of a divorce) have been added. N.Y. DOM. REL. LAW § 236B(5) (McKinney 1986). For a comparison with other state standards on equitable distribution, see Fam. L. Rep. Ref. File (BNA) 401-53 (1991).

⁶⁷ 1980 N.Y. Laws 436 (codified at N.Y. DOM. REL. LAW § 236B(5)(d)(13) (McKinney

as to whether marital fault may be considered, the courts quite quickly ruled that fault should play a role in distribution only when egregious.⁶⁸

The new property distribution law was linked with legislative changes in the determination of alimony awards. The legislature specified that any alimony award (renamed maintenance under the legislation) was a factor in determining a property award.⁶⁹ It also introduced consideration of the marital property distribution into the alimony decision,⁷⁰ along with spelling out in more detail than did the previous statute factors for awarding alimony⁷¹ and eliminating fault as a basis for denying it and oc-

1986)).

⁶⁸ *O'Brien v. O'Brien*, 66 N.Y.2d 576, 589-90, 489 N.E.2d 712, 719, 498 N.Y.S.2d 743, 750 (1985); *Blickstein v. Blickstein*, 99 A.D.2d 287, 292, 472 N.Y.S.2d 110, 113-14 (2d Dep't 1984).

⁶⁹ N.Y. DOM. REL. LAW § 236B(5)(d)(5) (McKinney 1986).

⁷⁰ *Id.* § 236B(6)(a)(1).

⁷¹ The prior law provided that "the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the length of the marriage, the ability of the wife to be self-supporting, the circumstances of the case and of the respective parties." Former N.Y. DOM. REL. LAW § 236 (McKinney 1977) The new alimony provisions directed that:

[T]he court may order . . . maintenance to meet the reasonable needs of a party . . . in such amount as justice requires, having regard for the circumstances of the case and of the respective parties. In determining reasonable needs the court shall decide 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 . . . In determining the amount and duration of maintenance the court shall consider:

- (1) the income and property of the respective parties in 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 capacity of the person having need to be self-supporting;
- (4) the period of time and training necessary to enable the person having need to become self-supporting;
- (5) the presence of children of the marriage in the respective homes of the parties;
- (6) the standard of living established during the marriage where practical and relevant;
- (7) the tax consequences to each party;
- (8) contributions and services of the party seeking maintenance as spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (9) the wasteful dissipation of family assets by either spouse and;
- (10) any other factor which the court shall expressly find to be just and proper.

1980 N.Y. Laws 436 (codified at N.Y. DOM. REL. LAW § 236B(6) (McKinney Supp. 1991)).

cupancy of the marital residence.⁷²

Although these changes would not, on their face, appear to disadvantage divorced wives significantly, a legislative memorandum explaining the new statute indicates that an award of maintenance "should rest on the economic basis of reasonable needs and the ability to pay."⁷³ According to the memorandum, permanent maintenance may be necessary "in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and homemaker,"⁷⁴ but the objective of maintenance is to "award the recipient spouse an opportunity to achieve independence."⁷⁵ This language, which has been cited approvingly by the New York Court of Appeals,⁷⁶ suggests that courts should, in general, award maintenance for short-term, "rehabilitative" purposes.

The controversy over property distribution and spousal maintenance has not abated since the law's enactment. The law's impact has been the subject of heated debate,⁷⁷ with some divorce experts claiming that women are getting less than half the marital property and less alimony than before the law's enactment,⁷⁸ and others claiming that women have fared well under the equitable distribution law.⁷⁹ Prior to my research, re-

⁷² Compare former N.Y. DOM. REL. LAW § 236 (McKinney 1977) with former N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1981).

⁷³ 1980 NEW YORK STATE LEGISLATIVE ANNUAL, MEMORANDUM OF ASSEMBLYMAN GORDON W. BURROWS 130.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985).

⁷⁷ In 1985 the New York State Legislature held joint public hearings on the equitable distribution law (see *Joint Public Hearings on New York Equitable Distribution Law* (Dom. Rel. Law § 236) Before the New York State Assembly (Mar. 6 & 15, 1985)) as did the New York State Task Force on Women in the Courts. The Task Force concluded that "[m]any lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership." NEW YORK STATE TASK FORCE ON WOMEN IN THE COURTS, REPORT 121 (1986) [hereinafter TASK FORCE REPORT].

⁷⁸ See, e.g., TASK FORCE REPORT, *supra* note 77, at 98-120 (describing testimony of witnesses at public hearings and results of attorney survey); Harriet N. Cohen & Adria S. Hillman, Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law from January 1981 Through October 1984 3-4, 16-17 (1984) (copy on file with the author) (reporting that "wives generally were being treated as less than full partners at the time of dissolution of the marriage partnership").

⁷⁹ See, e.g., TASK FORCE REPORT, *supra* note 77, at 97-98 & 98 n.160 (describing

views of reported judicial decisions and anecdotal accounts were the only available evidence of how the law had actually affected divorcing couples.

Although concern over the law's impact on alimony awards led the legislature to amend the spousal maintenance rules in 1986,⁸⁰ the basic scheme for property division and alimony that the equitable distribution law established remains in effect today.⁸¹

B. Research Methodology

From the research I hoped to learn how New York's new property division and alimony rules would affect property and alimony awards. In addition to this major issue, I hoped that the research would shed light on several related questions: (1) To what extent would alimony and property awards under the new law be consistent and predictable? (2) What factors, if any, would predict the distribution of property and award of alimony? (3) How would property and alimony awards under the equitable distribution law compare to awards under equal distribution rules?

In order to examine these issues, data were drawn from the

testimony of witnesses at public hearings); *id.* at 109-18 (describing responses of attorney survey respondents); Henry H. Foster, Jr., *A Second Opinion: New York's EDL is Alive and Well and Being Fairly Administered*, 17 FAM. L. REV., Apr. 1985, at 3, 4-5 (criticizing Hillman and Cohen as "deceptive when they manipulate New York cases to fit *a priori* conclusions . . . and . . . unfair in their condemnations of the EDL and New York courts").

⁸⁰ 1986 N.Y. Laws 436-37 (codified at N.Y. DOM. REL. LAW § 236B(6) (McKinney 1986)). The amendments were designed to "inform the trial courts that long-term maintenance awards were to be considered." Myrna Felder, *Courts, Legislature Struggle to Answer Property Questions*, N.Y.L.J., July 19, 1990, at 1, 4. The amendments changed the law in several respects: the "where practical and relevant" limitation on the marital standard of living factor was deleted (N.Y. DOM. REL. LAW § 236B(6)(a)); "the ability of the . . . [applicant] to be self-supporting" was added to the factor requiring the court to consider "the time and training necessary . . . to become self-supporting" (*id.* § 236B(6)(b)(4)); the court was newly required to consider "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" (*id.* § 236B(6)(b)(5)); and a provision explicitly authorizing permanent maintenance was added (*id.* § 236B(6)(c)).

⁸¹ The only major change in the substantive rules governing divorce entitlements has been the enactment of child support guidelines. For a discussion of those guidelines and their possible impact on outcomes under the prior law, see notes 345-50 and accompanying text *infra*.

files of approximately 900 divorces filed in 1978, two years before enactment of the equitable distribution law, and from the files of approximately 900 divorces filed in 1984, four years after the law's passage. In order to determine whether there was regional variation in divorce outcomes, the cases were selected in equal numbers from three diverse counties: New York County (Manhattan), Onondaga County (Syracuse, New York, and its immediate environs), and Westchester County (a largely suburban county within commuter distance of New York City).

In order to test the impact of the type of divorce action upon outcomes, cases were chosen, within each county, on the basis of case category: 100 contested,⁸² 100 consensual,⁸³ and 100 default⁸⁴ divorces were randomly selected from each county for each research year. These proportions do not reflect the actual representation of cases in each category. Overall, somewhat more than 60% of divorce actions in the three research counties fell into the default category, a little more than 20% were consensual, and a little less than 20% were contested.⁸⁵

Cases were sampled in different proportions than their representation in the actual pool of divorces both in order to ensure an adequate number in each category for comparative analysis and because of wide variation in the availability of case information depending on case category. Cases in the default sample typically provided little information on property distribution and, in New York County (where they also were most numerous proportionally), often failed to include information on child support as well. On the other hand, because of a statutory requirement that parties to a contested divorce file affidavits of net worth,⁸⁶ it was possible, for the contested group, to collect com-

⁸² A divorce was considered contested if initiated on fault grounds (N.Y. DOM. REL. LAW § 170 (1)-(4)) and the defendant answered the complaint. The vast majority of contested cases are ultimately settled.

⁸³ A divorce was considered consensual if sought on the basis of a written separation agreement between the parties or judgment of separation coupled with a one-year separation. N.Y. DOM. REL. LAW § 170(5)-(6).

⁸⁴ A divorce was considered default if initiated on fault grounds (N.Y. DOM. REL. LAW § 170(1)-(4)) and the defendant failed to answer.

⁸⁵ There was substantial variation by county in the proportion of cases in each category. See Table 2 *infra*.

⁸⁶ New York's financial reporting requirement applies only to contested divorce actions. See N.Y. DOM. REL. LAW § 236A(2) (McKinney 1986) (actions filed prior to July 1980); N.Y. DOM. REL. LAW § 236B(4) (McKinney 1986) (actions filed after July 1980).

prehensive data, including detailed financial information on spousal income and assets, occupation, education, and health. The consensual case files contained more information than did the files of the default group but considerably less than the contested case files; it was typically impossible to ascertain spousal income or the value of assets owned and transferred.⁸⁷

Because the sample does not contain the same percentage of cases in each category as occur in the divorce population, cases in each category were appropriately weighted when computing statistics for the total divorce population for the research areas. Because the value of the dollar was not constant over the research period, all money figures are reported in constant 1984 dollars.⁸⁸

C. Characteristics of the Research Sites and Sample

The three counties that were selected for the research project were chosen because of their diversity. (See Table 1.) New York County (Manhattan) is the most urban county within the state. It also presents extremes of wealth and poverty, as well as considerable racial and ethnic diversity. Although the per capita income of New York County is comparable to that of wealthy Westchester County,⁸⁹ it also has the lowest median family income⁹⁰ and by far the highest proportion of poor households⁹¹ and poor minor children⁹² of the three research sites. New York County residents are also far more likely to be members of minority groups⁹³ and to have emigrated from another state or

⁸⁷ As the court files yielded few judicial decisions on either spousal maintenance or property distribution, this report will not address judicial decision making under the equitable distribution law. Another statewide sample of judicial decisions, at the trial and appellate level, will be the subject of a subsequent report.

⁸⁸ The multiplier was obtained by dividing the consumer price index for 1978 by the consumer price index for 1984. See STATISTICAL ABSTRACT, *supra* note 6, at 467 (Table 756).

⁸⁹ U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK: 1988 358 [hereinafter 1988 COUNTY AND CITY DATA BOOK]. The figures in Table 1 *infra* are for 1979, the last year for which the Bureau of the Census reported complete income data. In 1985 the per capita income of New York County was \$17,319, while that of Westchester County was \$17,649 and that of Onondaga County was \$11,472.

⁹⁰ U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK: 1983 390 [hereinafter 1983 COUNTY AND CITY DATA BOOK].

⁹¹ *Id.*

⁹² *Id.*

⁹³ 1988 COUNTY AND CITY DATA BOOK, *supra* note 89, at 354.

country⁹⁴ when compared to residents of Onondaga and Westchester counties. The county's urban lifestyle also affects the typical asset pool. Relatively few residents own their own homes⁹⁵ or cars⁹⁶ in comparison to residents of Westchester and Onondaga Counties. The New York County divorce rate is also approximately triple that of the other two research counties.⁹⁷ The differences between Onondaga and Westchester counties are less extreme but still substantial. Westchester County, within commuter distance from New York City, is predominantly suburban. It is also extremely affluent: the median family income of Westchester County residents is not only the second highest in the state, it is among the highest in the nation.⁹⁸ The number of households with annual incomes over \$40,000 is more than triple that of Onondaga County,⁹⁹ and aggregate bank deposits within the county are more than double.¹⁰⁰ Onondaga County, in upstate New York, is home to Syracuse, a mid-sized city, and small rural communities. Thirty-six percent of Onondaga County is still agricultural land, as compared to only three percent in suburban Westchester County.¹⁰¹

⁹⁴ 1983 COUNTY AND CITY DATA BOOK, *supra* note 90, at 383.

⁹⁵ 1988 COUNTY AND CITY DATA BOOK, *supra* note 89, at 358. In the research sample the same pattern was evident. Thirty-three percent of the New York County sample owned a home in 1978; 42% did in 1984. By contrast, 85% owned a home in both years in Onondaga County and 70% in both years in Westchester County. The home ownership rate for the sample was, in all counties, higher than the rate according to the Census data.

⁹⁶ In 1980 in New York County 1.4% of households had two or more automobiles, as compared to 43.2% of Onondaga County households, and 43.4% of Westchester County households. 1988 COUNTY AND CITY DATA BOOK, *supra* note 89, at 358. The Bureau of the Census does not report the rate of ownership for one car. The research sample exhibited a similar pattern: 106 cars were listed by the New York County sample in 1984, as compared to 236 by the Westchester sample and 272 by the Onondaga sample.

⁹⁷ *Id.* at 356. The reported rate at Table 1 *infra* is for 1984.

⁹⁸ The only county in New York with a higher median family income is Nassau County. 1983 COUNTY AND CITY DATA BOOK, *supra* note 90, at 390. Westchester County was ranked 68th of all American counties in median household income in 1979, the last year for which the Bureau of the Census reported such data. *Id.* at lvii.

⁹⁹ *Id.* at 390.

¹⁰⁰ *Id.* at 394 (in 1981 \$8,669,700,000 in Westchester County as compared to \$3,278,100,000 in Onondaga County).

¹⁰¹ *Id.* at 395.

TABLE 1
RESEARCH COUNTIES BY SELECTED POPULATION
CHARACTERISTICS*

Population Characteristic	New York County	Onondaga County	Westchester County
Per capita income	\$10,776	\$ 7,286	\$10,603
Median family income	\$16,326	\$18,174	\$27,278
% households with income < \$10,000	38	27	20
% children living in poverty	41	14	10
% households with income > \$40,000	12	8	22
% pop. minority	29	9	16
% pop. born in state	45	77	68
% pop. owning home	8	62	52
% land rural	0	36	3
Divorce rate (per 1000 pop.)	11	3	4

*All information in this chart is derived from U.S. Census data. All money figures are in \$1979.

There is also a widespread perception in New York that legal culture is distinctively different in upstate areas like Onondaga County and downstate. Upstate New York is believed to be more conservative and traditional than New York City, with suburban areas like Westchester falling somewhere in between. In regard to politics, there is some truth to the assertion. New York City is solidly Democratic; nonurban upstate areas typically vote Republican.¹⁰²

Do these differences affect the divorce process? Some distinctive differences among the three locales did emerge. (See Table 2.) The length of time necessary to process a contested case was, in each research year, at least a third greater in Westchester and New York counties than in Onondaga County.¹⁰³ The allocation of divorces among the three case categories also varied markedly; contested cases, for example, were ten times as numerous in Onondaga County as in New York County. Similarly,

¹⁰² For example, in the 1980 presidential election 62% of Manhattan voters chose the Democratic ticket, while 51% of Onondaga and 54% of Westchester voters chose the Republican ticket. *Id.* at 394.

¹⁰³ It was 38% higher in 1978 and 33% higher in 1984.

the rate of pro se representation was considerably higher in New York County than in Westchester County;¹⁰⁴ in 1984, cases where both parties were represented by counsel were more than four times as numerous in Westchester as in New York County. The proportion of cases in which the wife was the plaintiff varied less dramatically.¹⁰⁵

TABLE 2
THE DIVORCE PROCESS BY COUNTY

	New York County		Onondaga County		Westchester County		Combined Counties	
	1978	1984	1978	1984	1978	1984	1978	1984
Avg. duration contested case (years)	1.3	1.5	.8	1.0	1.3	1.5	1.1	1.3
<i>Pro se</i> rate (wives)*	26	25	—	—	15	14	—	—
<i>Pro se</i> rate (husbands)*	31	31	—	—	26	33	—	—
% cases both parties represented by counsel	24	11	—	—	54	47	—	—
% divorces contested	5	3	22	33	14	16	14	17
% divorces consensual	19	6	22	27	27	25	23	19
% divorces default	75	92	55	40	59	60	63	64
% wife plaintiff**	53	57	76	72	69	71	66	67

*Based on weighted data for each case category within each county.

**In fault-based (contested and default) samples.

—This information was not available for this county. See note 105 *supra*.

The sample also shows some significant regional differences. (See Table 3.) In both research years the New York County

¹⁰⁴ Information on the type of representation was missing from a high proportion of Onondaga default files in both research years, making conclusions difficult.

¹⁰⁵ In all three counties husbands were more likely to be plaintiffs in default cases (40%) than in contested cases (29%) in 1978. By 1984 this difference had evaporated. Husbands were plaintiffs in 33% of the cases in both categories.

In both years in all counties the most frequent fault allegation was cruel and inhuman treatment (58% in 1978, 56% in 1984), with abandonment in second place (35% in 1978, 41% in 1984). For both years, however, an allegation of abandonment was far more likely in default cases; among the defaults, abandonment and cruelty allegations were about equal (48% abandonment 1978, 50% 1984).

sample had the lowest average marital duration and the smallest number of children. The Onondaga County sample consistently was the youngest and had the most children.

TABLE 3
SELECTED CHARACTERISTICS OF DIVORCE
POPULATION,* BY YEAR AND COUNTY

	New York County		Onondaga County		Westchester County		Combined Counties	
	1978	1984	1978	1984	1978	1984	1978	1984
Avg. marital duration (years)	9.8	8.9	11.3	10.3	12.3	11.4	11.1	10.2
Avg. number minor children	.7	.6	1.6	1.3	1.2	1.0	1.2	1.0
% with minor children	39	33	71	66	53	52	58	50

*Based on weighted data for each case category within each county.

Family incomes for the contested category (the only group for which such information was available) also varied by county. (See Table 4.) In 1984 the average family income for the New York County contested sample was more than double that of Onondaga County, with Westchester in the middle.¹⁰⁶ The number of high status professionals among husbands in the New York County sample was also approximately triple that of the other two counties; the number of wives with high status employment was also greater.¹⁰⁷

¹⁰⁶ Average family incomes for the 1984 contested sample were \$79,800 (New York County), \$36,700 (Onondaga County), and \$56,700 (Westchester County). The high New York County average reflects a small number of cases with extremely high incomes; median family income was actually lower in New York County than in Westchester County. See Table 4 *infra*.

¹⁰⁷ To some extent this is a reflection of the relatively high proportion of the New York County population that is college educated. According to 1980 Census data, 33.2% of the residents of New York County had sixteen or more years of education, as compared to 19.4% in Onondaga County and 28% in Westchester County. 1983 COUNTY AND CITY DATA BOOK *supra* note 90, at 388.

TABLE 4
SELECTED POPULATION CHARACTERISTICS
OF CONTESTED CASE SAMPLE
BY YEAR AND COUNTY

	New York County		Onondaga County		Westchester County		All Contested Cases	
	1978	1984	1978	1984	1978	1984	1978	1984
Avg. age husband (years)	41.3	43.6	38.4	36.8	41.4	42.3	40.4	40.9
Avg. age wife (years)	37.7	39.8	35.8	35.0	38.3	39.6	37.3	38.1
Median husband income (\$1000s)	31.6	29.6	28.8	24.7	34.8	30.6	30.6	28.3
Median wife income (\$1000s)	11.6	6.9	8.0	9.8	5.8	13.8	8.5	10.2
Median family income (\$1000s)	48.1	39.9	37.4	33.4	41.6	43.5	40.2	39.5
% wives employed	59	62	66	74	66	80	64	73
% husband high status occupation ¹⁰⁸	10	30	1	12	6	11	5	18
% wives high status occupation ¹⁰⁸	2	5	0	3	0	1	0	3
% wives homemaker	26	22	30	22	32	18	30	21
% husbands college or more educ.	—	51	—	18	—	50	—	37
% wives college or more educ.	—	39	—	14	—	37	—	30

All money figures are in \$1984.

—Educational information was not required by the net worth affidavits in use in 1978.

Population characteristics also varied quite dramatically by case category. (See Table 5.) The average marital duration for couples in the default sample was consistently lower than that of the couples in the contested and consensual categories. In 1984, 58% of contested and 52% of consensual cases involved marriages of ten or more years; only 33% of default cases did. Couples in the default sample also had fewer children than their

¹⁰⁸ The following occupations were classified as high status: architects, business executives, dentists, engineers, government officials and managers, lawyers, military officers, physicians, professors, and scientists.

counterparts in the contested and consensual groups.

TABLE 5
SELECTED CHARACTERISTICS OF SAMPLE,
BY YEAR AND CASE TYPE

	Contested		Consensual		Default		Complete Sample	
	1978	1984	1978	1984	1978	1984	1978	1984
Avg. marital duration (years)	13.3	12.7	11.1	11.8	9.7	8.6	11.7	11.1
Avg. number minor children	1.6	1.3	1.2	1.1	1.2	1.0	1.3	1.1
% with minor children	76	70	64	58	51	42	60	56

Both the sample and the total pool of divorcing couples within the three research counties had a relatively long average marital duration and more children than national samples of divorced couples described in Census data.¹⁰⁹ But the sample's average marital duration and family size were relatively close to those reported for other divorce samples in the Northeast.¹¹⁰ The contested sample also appears to be older¹¹¹ and thus wealthier¹¹² than the national population of divorcing couples and to have relatively high incomes when compared to Census

¹⁰⁹ STATISTICAL ABSTRACT, *supra* note 6, at 88 (Table 131) (reporting national median marital duration at first divorce of 6.9 years in 1984; average of .92 children involved in each divorce action).

¹¹⁰ See Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 265 (1988) (median marital duration at divorce of 9.5 years in Maryland in 1984 and 9.4 years in 1985); McLindon, *supra* note 42, at 357 (11.8 year average marital duration; average of 1.3 children per divorce in surveyed New Haven, Conn. population in 1980); Wishik, *supra* note 42, at 83 (10.6 year average marital duration in several surveyed Vermont counties in 1982). California researchers have reported a much lower average marital duration. See Seal, *supra* note 44, at 11-12 (reporting average marital duration among divorcing couples in San Diego, Cal., of 6.1 years).

¹¹¹ See Table 4 *supra*. Nationally, the median age of men divorced in 1978 was 32.0 years; of women 29.7 years. The median age of men divorced in 1984 was 34.3 years; women 31.7 years. STATISTICAL ABSTRACT, *supra* note 6, at 88 (Table 131).

¹¹² Individual net worth is correlated with age, (see U.S. BUREAU OF THE CENSUS, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1984 3-4 (1986) (Current Population Reports, Series P-70, No. 7) [hereinafter HOUSEHOLD NET WORTH]), as is the value of marital property.

Bureau samples for each research county¹¹³ and married couple households nationally.¹¹⁴ In both years the gap between husbands' and wives' average earnings was also somewhat larger than the earnings gap of married couples generally.¹¹⁵

Although most population characteristics of the sample remained fairly stable over the research period, the later sample had a shorter average marital duration, fewer children, and a higher rate of employment among women. Because of the higher rate of employment among women, and a slight decline in husbands' earnings when inflation was taken into account, women's earnings also made up a slightly higher percentage of total family income in the post-equitable distribution period.¹¹⁶ These trends, with the exception of marital duration and the decline in the value of husbands' earnings, are consistent with national patterns¹¹⁷ and those reported by other divorce researchers over the same time period.¹¹⁸

¹¹³ The Census Bureau reports that, in 1979, median household income was \$13,904 in New York County; \$17,574 in Onondaga County, and \$22,725 in Westchester County. 1988 CITY AND COUNTY DATA BOOK, *supra* note 89, at 358.

¹¹⁴ STATISTICAL ABSTRACT, *supra* note 6, at 445 (Table 718) (married couple households where the husband was the householder had median income of \$34,782 in 1988).

¹¹⁵ In 1978 sample husbands' average income was \$50,681, while sample wives' average income was \$14,472. In 1984, sample husbands' average income was \$45,475 while sample wives' average income was \$15,130. For married couples nationally, in 1981, husbands' mean earnings were \$20,866 while wives' mean earnings were \$8598. STATISTICAL ABSTRACT, *supra* note 6, at 455 (Table 736).

¹¹⁶ Wives' earnings accounted for an average of 21% of family income in 1978 and 24% in 1984 when inflation was taken into account. *Id.*

¹¹⁷ *Id.* at 88 (Table 131) (reporting decline in average number of children per divorce from 1.01 in 1978 to .92 in 1984); *id.* at 385 (Tables 636 & 637) (reporting increase in percentage of married women in labor force between 1975 (44.5%) and 1985 (54.3%)); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, AMERICAN FAMILIES AND LIVING ARRANGEMENTS 15 (Current Population Reports Series P-23, No. 104) (1980) (reporting that proportion of married couple income earned by the wife rose from 20% to 26% between 1960 and 1978); STATISTICAL ABSTRACT, *supra* note 6, at 455 (Table 736) (reporting increase in mean earnings of husbands and wives in constant dollars between 1981 and 1987); U.S. Dep't of Commerce, Bureau of the Census, March 1991 Current Population Survey (unpublished worktables 1991) (proportion of married couple income earned by wife in 1991 was 33.5%).

¹¹⁸ See McLindon, *supra* note 42, at 357-58 (reporting smaller number of children per marriage and higher women's employment rate but longer average marital duration for 1980s divorce sample in New Haven, Conn. than for 1970s sample).

D. *The Impact of the Equitable Distribution Law*

1. The Divorce Process

The change in the law was not associated with any major changes in case processing. The percentage of husbands and wives with lawyers did not increase. The likelihood that a case would be contested increased markedly only in Onondaga County; indeed, in New York County the rate of contested cases declined by almost half over the research period. It was impossible to ascertain from the case files whether these regional variations are due to differing local practice norms in relation to the equitable distribution law or to other factors.

The average duration of a contested divorce action did go up slightly over the survey period, from 1.3 to 1.5 years. This change was consistent across the three research counties. It was impossible to ascertain whether this tendency toward increased case processing time increased legal fees as well, as information on legal fees in the case files was too incomplete to make any meaningful analysis.¹¹⁹

The contested group in the post-equitable distribution period also included a substantially higher number of high-status professionals than in the earlier research period. In 1978 only 5% of husbands in this case category described their jobs as professional or managerial. In 1984, 18% did so. The greatest change was in New York County, where three times as many husbands described their employment as professional or managerial in the post-equitable distribution period as did previously. There were similar, although more modest, changes in the employment status of wives. The reasons for this shift are unclear.

2. Property Distribution

It was generally expected that the equitable distribution law would increase the share of assets that divorced wives typically received. This result was anticipated for several reasons. The law expanded the pool of property available for distribution by permitting judges to disregard legal title to an asset.¹²⁰ Moreover, courts in other equitable distribution jurisdictions had begun to

¹¹⁹ Anecdotal evidence suggests that legal fees have risen. See note 328 *infra*.

¹²⁰ 1980 N.Y. Laws 434, 436 (codified at N.Y. DOM. REL. LAW § 236(B)(1)(c), (5)(c)-(d) (McKinney 1986)).

expand the definition of property to include nontransferable assets like pensions;¹²¹ such developments were possible in New York as well. The new equitable distribution law also explicitly required the court to consider contributions as a homemaker and parent in asset distribution,¹²² as well as each spouse's future expectations and a variety of other need-based factors.¹²³ This emphasis on need and nonmonetary contributions was also expected to benefit women.

Population surveys support this expectation. With respect to need, among white married couples aged 25 to 64, three out of four husbands earn more than their wives; in half of these marriages the wife's wage is less than two-thirds that of her husband.¹²⁴ Even when both spouses are the same age and have the same education, the odds that the wife will earn more than her husband are three to one.¹²⁵ With respect to contribution, husbands, by virtue of their larger incomes, have typically contributed more dollars to the marriage. But when nonmonetary contributions as a parent and homemaker are taken into account as the equitable distribution law mandated,¹²⁶ surveys reveal that married women today contribute at least as many hours of work to the household as their husbands;¹²⁷ although women work

¹²¹ See, e.g., *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976) (en banc) (holding that nonvested pension constituted marital property subject to division). Some of the cases on pension benefits are collected in Charles C. Marvel, Annotation, *Pension or Retirement Benefits As Subject to Award or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176 (1979).

Other nontransferable assets that have been the subject of litigation under equitable distribution laws include professional degrees and licenses, disability benefits, celebrity goodwill, worker's compensation benefits, and personal injury claims. For a discussion of judicial treatment of these assets under equitable distribution laws, see generally OLDHAM, *supra* note 32, at §§ 7-87 to -93, 8-3 to -31.

¹²² 1980 N.Y. Laws 436 (codified at N.Y. DOM. REL. LAW § 236B(5)(d)(6) (McKinney 1986)).

¹²³ 1980 N.Y. Laws 436 (codified at N.Y. DOM. REL. LAW § 236B(5)(d)(1)-(5) (McKinney 1986)).

¹²⁴ VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 52 (1988).

¹²⁵ *Id.*

¹²⁶ N.Y. DOM. REL. LAW § 236B(6)(a)(8) (McKinney 1986).

¹²⁷ See FUCHS, *supra* note 124, at 78 (Table 5.1); LEVITAN & BELOUS, *supra* note 6, at 100. Moreover, as women's labor force participation rate has increased, their hours of work in the home have not declined proportionately. In 1960 women worked 91% of the hours worked by men. By 1986 they worked 104% of the hours worked by men. The change was particularly great for married couples. On average, wives increased their total workload by 4 hours per week while husbands decreased theirs by 2.5 hours. FUCHS, *supra* note 124, at 80.

fewer hours outside the home than do men, the number of hours they spend on housework and childcare makes up for the difference.¹²⁸

Did the equitable distribution law benefit divorced wives as reformers anticipated it would? The reformers' assumptions were certainly accurate with respect to need and nonmonetary contributions. The average income of husbands in the contested group was approximately three times that of wives¹²⁹ and income potential was similarly skewed; 18% of husbands had high-status managerial or professional jobs, while only 3% of wives held similar positions. Wives also assumed the role of custodial parent in at least eight out of ten cases.¹³⁰ But some of the other assumptions upon which reformers relied proved to be highly flawed.

a. *Who Owns the Property?*

The drafters of the equitable distribution law assumed that husbands owned more property than wives and that a rule permitting legal title to be disregarded would thus significantly expand the pool of assets available for distribution.¹³¹ Sample couples bear out the first part of this assumption: husbands did own more property than wives. (See Table 6.)

Overall, in both research years, 30% of listed assets were owned jointly.¹³² Among the 70% that were solely owned, husbands were owners more frequently than wives, although the wife's percentage did increase over the research period.¹³³

¹²⁸ For studies of women's disproportionate share of homemaking responsibilities, see PATRICIA A. ROOS, *GENDER AND WORK: A COMPARATIVE ANALYSIS OF INDUSTRIAL SOCIETIES* 16-29 (1985); GRAHAM L. STAINES & JOSEPH H. PLECK, *THE IMPACT OF WORK SCHEDULES ON THE FAMILY* 63 (1983). See also LEVITAN & BELOUS, *supra* note 6, at 100 (men spend less than 3 hours per week on housework as compared to 18 hours per week for women).

¹²⁹ In 1984 husbands' average income was \$45,475 while that of wives was \$15,130.

¹³⁰ See Table 52 *infra*.

¹³¹ See, e.g., Alan D. Scheinkman, 1981 Practice Commentary, N.Y. DOM. REL. LAW § 236B ("the title concept worked a great hardship on a spouse (typically the wife) whose mate accumulated property during the marriage and held title in his or her name alone").

¹³² The likelihood of joint ownership varied fairly dramatically among case categories, however. In 1984 only 25% of listed assets were jointly owned in the contested group, as compared to 54% in the consensual group. (Sixty-five percent of the listed assets in default cases were joint, but listings were rare for this category.)

¹³³ In 1978 husbands were listed as owners of 43% of all assets, compared to 26%

The likelihood of husband, wife, or joint ownership varied dramatically by asset type. (See Table 6.) Husbands were more likely than wives to report owning assets in most categories: cars, pensions, businesses, real estate, nonliquid assets, and liquid assets other than bank accounts were all owned disproportionately by husbands.¹³⁴ Listed jewelry, not surprisingly, was disproportionately owned by wives. Listed bank accounts were owned by husbands and wives in almost equal numbers. The marital home and household goods and furniture were most typically held in joint ownership.

TABLE 6
ASSET OWNERSHIP, BY ASSET TYPE,
YEAR, AND CASE CATEGORY¹³⁵

Asset Type	Case Category				All Listed Assets	
	Contested		Consensual		1978	1984
	1978	1984	1978	1984		
AUTOMOBILES	(n=365)	(n=408)	(n=88)	(n=126)	(n=476)	(n=566)
Husband	65	56	47	40	61	51
Wife	32	36	18	29	28	34
Joint	2	9	35	31	10	16
BUSINESS ASSETS	(n=67)	(n=75)	*	*	(n=71)	(n=88)
Husband	94	77			92	76
Wife	1	13			1	12
Joint	4	9			7	11
HOUSEHOLD GOODS & FURNITURE	(n=272)	(n=293)	(n=66)	(n=84)	(n=356)	(n=391)
Husband	19	14	—	1	15	11
Wife	19	18	—	1	15	14
Joint	61	69	100	98	70	75

(continued)

for wives; in 1984 husbands were listed as owners of 39% of all assets, compared to 30% for wives. The likelihood of husband or wife ownership was not markedly different between case categories. In 1984, in the contested group, husbands were 23% more likely than wives to own any asset (42.2% husband ownership, 32.7% wife ownership); in the consensual group, husbands were 29% more likely to own property than wives (26.5% husband ownership, 18.8% wife ownership).

¹³⁴ This was true both when assets were counted individually, and when they were counted by category. Table 6 shows asset ownership counting each listed asset individually; thus if a spouse reported owning three cars, each was included. It is highly probable that, particularly for the consensual group, the listed assets do not include all of the couple's assets. See note 167 *infra*.

¹³⁵ There were insufficient listings in the default category for independent analysis.

JEWELRY	(n=65)	(n=99)	*	*	(n=70)	(n=104)
Husband	20	22			20	22
Wife	80	67			80	67
Joint	—	11			—	11
LIQUID ASSETS						
Bank Accounts	(n=623)	(n=664)	(n=101)	(n=86)	(n=745)	(n=731)
Husband	43	41	18	29	39	41
Wife	42	44	17	26	38	43
Joint	15	15	45	45	22	20
Other	(n=220)	(n=245)	(n=32)	(n=36)	(n=262)	(n=278)
Husband	62	47	34	44	58	47
Wife	25	40	16	14	23	37
Joint	14	11	44	42	19	16
NONLIQUID ASSETS						
Pensions	(n=39)	(n=77)	*	*	(n=40)	(n=92)
Husband	82	78			83	78
Wife	19	22			18	22
Joint	—	—			—	—
Other	(n=96)	(n=142)	*	*	(n=103)	(n=165)
Husband	66	51			65	50
Wife	26	38			27	39
Joint	8	11			8	10
MARITAL HOME	(n=171)	(n=184)	(n=173)	(n=172)	(n=392)	(n=399)
Husband	12	10	5	5	8	7
Wife	4	5	3	3	4	4
Joint	84	85	92	92	88	89
OTHER REAL						
ESTATE	(n=93)	(n=118)	*	(n=38)	(n=126)	(n=165)
Husband	38	47		11	30	38
Wife	10	14		13	11	15
Joint	53	38		76	58	48
OTHER ASSETS	(n=172)	(n=219)	(n=63)	(n=82)	(n=244)	(n=306)
Husband	59	43	21	17	49	36
Wife	23	22	5	10	17	18
Joint	18	35	75	73	34	46
ALL ASSETS	(n=1983)	(n=2524)	(n=532)	(n=692)	(n=2890)	(n=3284)
Husband	48	42	21	27	43	39
Wife	29	33	14	19	26	30
Joint	22	25	64	54	30	30
MARITAL DEBTS	(n=872)	(n=993)	(n=147)	(n=183)	(n=1059)	(n=1217)
Husband	50	44	16	25	44	40
Wife	28	32	17	20	26	30
Joint	22	24	67	55	31	31

*There were insufficient listings in this asset category for analysis.

Percentages may not add to 100 due to rounding.

At least among the contested sample (the only group for whom asset valuations were typically available), husbands also

tended to own more valuable property.¹³⁶ (See Table 7.) Husbands thus owned, on average, a significantly larger proportion of a couple's total asset value than did wives.¹³⁷

TABLE 7

MEDIAN VALUE (\$1984) OF INDIVIDUALLY OWNED ASSETS
AND DEBTS IN 1984 CONTESTED CASE SAMPLE, BY
GENDER OF SPOUSE

Asset Type	Wife		Owner Husband	
	Median Value	(n)	Median Value	(n)
Automobiles	\$ 2,400	(125)	\$ 2,000	(185)
Business Assets	\$10,000	(7)	\$39,700	(33)
Household Goods	\$ 2,500	(48)	\$ 2,394	(34)
Jewelry	\$ 2,000	(58)	\$ 1,100	(21)
Liquid Assets				
Bank Accounts	\$ 499	(268)	\$ 500	(251)
Other	\$ 4,419	(75)	\$ 4,750	(96)
Nonliquid Assets				
Pensions	\$ 6,600	(6)	\$20,390	(23)
Other	\$ 3,000	(54)	\$ 4,462	(63)
Real Estate	\$40,000	(25)	\$25,000	(59)
Other Assets	\$ 4,000	(40)	\$ 2,300	(65)
All Individual Assets	\$ 1,700	(315)	\$ 2,500	(315)
All Individual Debts	\$ 2,759	(77)	\$ 7,500	(76)
Individual Assets/ Total Family Assets	7%		11%	
Individual Net Worth	\$ 124	(315)	\$ 50	(315)
Total Family Net Worth	1%		9%	

But percentages do not tell the whole story. The actual dollar difference between the median value of reported husband and wife owned property in 1984 was only \$800. Even in 1978, where the spread was greater, it was less than \$2000. Further-

¹³⁶ In 1978 the mean value of assets individually owned by the husband was \$160,627 while the mean value of assets individually owned by the wife was \$10,036. In 1984 the mean value of assets individually owned by the husband was \$152,308, while the mean value of assets individually owned by the wife was \$23,638. If zero valuations are eliminated, the differences are even more striking. For husbands in the contested sample who declared solely owned property, the median value of that property was \$7696 in 1978 (n=237) and \$8000 in 1984 (n=223); for wives in the contested sample who declared solely owned property, the median value of that property was \$3256 in 1978 (n=207) and \$4662 in 1984.

¹³⁷ In 1978 the differential was much greater than in 1984. Compare Appendix Table 1 and Table 7.

more, husbands also had larger debts than did wives. Although a substantial number of couples in both research years declared no individual debts, among those couples who did, the median value of husband's unsecured debts was approximately double that of wives in 1978,¹³⁸ and approximately triple that of wives in 1984.¹³⁹ This tendency for husbands to have larger debts eroded, to some extent, their property advantage. In 1984 the median individual net worth (assets minus debts) of wives was thus slightly higher than that of husbands.

The relatively small differential between the median net worth of husbands and wives in the sample population reflects, in part, the pattern of asset ownership among the group. The types of property most commonly declared were, with one exception, not those disproportionately owned by husbands. (Compare Tables 6 and 15.) In both the contested and consensual case categories,¹⁴⁰ couples were most likely to declare a marital residence, household furniture, a bank account, and a car. Except for cars, none of these were assets disproportionately owned by husbands. Assets that husbands did own disproportionately were declared relatively infrequently. For example, in 1984 husbands and wives declared as assets 614 cars, 437 collections of household furniture, and 800 bank accounts or cash.¹⁴¹ By contrast, only 96 pensions and 88 businesses were declared by couples during that year.¹⁴²

The most important point to be drawn from the asset and net worth valuations, however, is the relative scarcity of valuable, individually owned assets. Less than half of the surveyed husbands owned property worth as much as \$2500 even in the relatively wealthy contested sample; only about a third of the group owned property worth \$10,000.¹⁴³ Indeed, more than half

¹³⁸ See *id.* The median value of joint debts was \$2720 (n=105).

¹³⁹ In 1984, among couples in the contested case sample who declared debts, the median value of joint debts was \$3264 (n=108).

¹⁴⁰ Information on marital assets was too frequently lacking in the default cases to permit meaningful analysis.

¹⁴¹ In 1978, 524 cars, 468 collections of household furniture, and 770 bank accounts or cash were listed by couples in the sample.

¹⁴² In 1978 even fewer pensions (43) and businesses (71) were listed by sample couples.

¹⁴³ In 1978, 35% of husbands owned property worth \$10,000 or more; in 1984, 33% did. Among wives, in 1978, 18% owned property worth \$10,000 or more; in 1984, 25% did so.

of husbands had individual net worth of less than \$50. For this group, the equitable distribution law's promise of expanding the pool of assets by ignoring title was simply chimerical.

b. *How Much Are Their Assets Worth?*

A second assumption implicit in the expectation that equitable distribution would benefit divorced wives is that the typical divorcing couple has enough property—owned individually or jointly—so that its distribution could make a significant difference in the economic well-being of each spouse. Was this assumption correct?

Because asset valuations typically were not provided by couples in the consensual or default case samples, values could only be determined for the contested group. As this group listed relatively high incomes in comparison to Census income figures for the overall population of the research counties,¹⁴⁴ it is likely that these couples had more assets, and more valuable assets, than the average divorcing couple in that county. Even for this relatively wealthy group, however, the median value of listed assets was only \$32,717 in 1984.¹⁴⁵ Their median net worth (assets minus debts) was \$23,591.¹⁴⁶ A substantial number of sample couples, indeed, had *negative* net worth (their debts exceeded the value of their assets). (See Table 8.)

¹⁴⁴ See note 89 & Table 1 *supra*.

¹⁴⁵ In 1978 the median gross value of declared assets was \$39,005; the mean value was \$218,282. The median net value of declared assets was \$33,723; the mean value was \$201,965.

¹⁴⁶ The pattern was similar in 1978. See Appendix Table 1.

TABLE 8
VALUE (\$1984) OF ASSETS REPORTED BY 1984 CONTESTED
CASE SAMPLE

Property Value	Gross Market Value of Assets		Net Worth (Including Debts)	
	%	Cumulative % (n=315)	%	Cumulative % (n=315)
(Negative value)			(18)	(18)
\$0-\$4999	22	22	13	31
\$5000-\$9999	7	29	6	37
\$10,000-\$19,999	11	39	9	46
\$20,000-\$29,999	9	48	9	55
\$30,000-\$39,999	6	53	4	58
\$40,000-\$49,999	6	60	4	63
\$50,000-\$99,999	16	75	14	77
\$100,000-\$199,999	9	84	6	83
\$200,000-\$299,999	6	89	7	90
\$300,000+	11	100	11	100
Cumulative percentages may not add correctly due to rounding.				
Median		\$ 32,717		\$ 23,591
Mean		\$239,244		\$215,616

These values are higher than those reported by Weitzman for her sample of divorcing couples in California, but they are highly consistent with McLindon's New Haven, Connecticut, divorce sample, which had a similar average marital duration. (See Table 9.)

TABLE 9
MEDIAN VALUE OF DIVORCING COUPLES' ASSETS (\$1984),
BY RESEARCH SITE

Research Site	Median Gross Value	Median Net Worth Value
Anchorage, Alaska ¹⁴⁷	\$142,550	\$ 72,000
Los Angeles & San Francisco, California ¹⁴⁸	\$ 21,756	\$ 16,132
New Haven, Connecticut ¹⁴⁹	\$ 32,891	\$ 23,922
New York/Onondaga/Westchester, New York	\$ 32,717	\$ 23,591
All U.S. married couples ¹⁵⁰	—	\$ 50,116

c. How Much Property Is Unavailable for Distribution?

How many of these assets were unavailable for distribution because they were acquired before the marriage or through gift or inheritance and thus would be classified as separate property? In 1984,¹⁵¹ 37% of the contested sample (the only group for which separate property information was typically available) listed at least one item of separate property. This is a considerably higher rate of separate property ownership than that reported by Weitzman in California.¹⁵² The types of property most frequently claimed as separate were bank accounts or other liquid assets. Fully 40% of assets declared as separate fell into one of these two categories. Cars accounted for another 15% of the total.

The median value of total separate property for those couples who reported it was \$8050.¹⁵³ Among those couples where at least one spouse claimed separate property, the value

¹⁴⁷ BAKER, *supra* note 42, at 5 (Table 4).

¹⁴⁸ WEITZMAN, *supra* note 4, at 56 (median gross asset value \$14,700, median net asset value \$10,900 in 1977-78; figures in the table have been converted to \$1984).

¹⁴⁹ McLindon, *supra* note 42, at 381 (median gross asset value \$30,455, median net worth \$22,150 in 1982-83; figures in the table have been converted to \$1984).

¹⁵⁰ HOUSEHOLD NET WORTH, *supra* note 112, at 6 (Table 1).

¹⁵¹ In 1978 this information was typically not provided.

¹⁵² WEITZMAN, *supra* note 4, at 55 (less than 14% of sample listed assets claimed as separate).

¹⁵³ The mean total value was \$40,421.

of that property represented an average of 26% of the value of all listed property.¹⁵⁴ These couples also tended to be wealthier than the average sample couple.¹⁵⁵

Wives were somewhat more likely than husbands to claim separate property. In 1984 wives owned 60% of the assets claimed as separate property. The mean value of property claimed by wives as separate was also slightly higher than that claimed by husbands,¹⁵⁶ although the median value was only half of that for husbands. (See Table 10.)

TABLE 10

OWNERSHIP AND VALUE (\$1984) OF SEPARATELY OWNED ASSETS IN 1984 CONTESTED SAMPLE, BY ASSET TYPE

Asset Type	Percentage Owned by Each Spouse and Median Value				
	(n)	Wife		Husband	
Automobiles	(40)	52%	\$ 1,000	48%	\$ 3,175
Liquid Assets					
Bank accounts	(55)	66%	\$ 715	34%	\$ 595
Other	(53)	65%	\$ 4,531	35%	\$ 6,909
Nonliquid Assets	(14)	50%	\$ 6,543	50%	\$12,000
Real Estate	(26)	46%	\$52,800	54%	\$23,000
Other Assets	(76)	61%	\$ 2,500	39%	\$ 1,900
ALL SEPARATE ASSETS	(265)	60%	\$ 2,500	40%	\$ 4,325

Although the difference was not statistically significant, couples married less than five years were somewhat more likely to claim that at least one item of property was separate. Fifty-two percent of this group so claimed, as compared to 35% for the rest of the sample.¹⁵⁷ The average ratio of separate to total property (value of separate property divided by total property value) for this group was also more than double that for the rest of the sample. (See Table 11.)

¹⁵⁴ The median value was 12%.

¹⁵⁵ The median value of their marital property was \$53,033 and the mean value \$412,990.

¹⁵⁶ The mean value of separate property reported by wives was \$18,693 (n=133); the mean value of separate property reported by husbands was \$16,985 (n=81).

¹⁵⁷ Separate property was claimed by 32% of couples married between five and ten years (n=71); 32% of couples married between ten and fifteen years (n=68); 33% of couples married between fifteen and twenty years (n=51); and 40% of couples married more than twenty years (n=78).

TABLE 11
AVERAGE RATIO OF SEPARATE PROPERTY TO TOTAL
PROPERTY IN 1984 CONTESTED SAMPLE (COUPLES
DECLARING SEPARATE PROPERTY),
BY MARITAL DURATION

Marital Duration	(n)	Average Ratio Separate Property/All Property
0-5 years	(44)	21%
5-9 years	(71)	10%
10-14 years	(68)	10%
15-19 years	(51)	7%
20+ years	(78)	8%

d. *What Is the Value of Marital Property?*

After the elimination of separate property, how much was left to divide? As Table 12 shows, not much. The gross value of marital property for the 1984 contested case sample was \$26,400; the median net worth (marital assets minus marital debts) \$23,591.

TABLE 12
VALUE (\$1984) OF MARITAL PROPERTY REPORTED BY 1984
CONTESTED CASE SAMPLE

Property Value	Gross Value		Net Worth	
	%	Cumulative %	%	Cumulative %
(Negative value)			(22)	(22)
\$0-\$4999	23	23	14	35
\$5000-\$9999	10	34	6	41
\$10,000-\$19,999	11	44	10	51
\$20,000-\$29,999	9	53	8	59
\$30,000-\$39,999	6	59	4	63
\$40,000-\$49,999	5	64	5	68
\$50,000-\$99,999	14	78	12	80
\$100,000-\$199,999	8	86	7	87
\$200,000-\$299,999	5	91	4	92
\$300,000+	10	100	8	100
Cumulative percentages may not add correctly due to rounding.				
Median		\$ 26,400		\$ 18,266
Mean		\$224,231		\$200,602

As one would expect, the value of marital property increased with marital duration.¹⁵⁸ The median net asset value of couples married twenty or more years was more than fifteen times greater than that of couples married less than five years. (See Table 13.)

TABLE 13

MEDIAN VALUE (\$1984) OF MARITAL PROPERTY IN 1984
CONTESTED CASE SAMPLE, BY MARITAL DURATION

Length of Marriage	(n)	Gross Value	Net Value
0-5 years	(44)	\$11,522	\$ 2,885
5-9 years	(71)	\$12,962	\$ 4,500
10-14 years	(68)	\$27,220	\$19,540
15-19 years	(51)	\$44,449	\$35,449
20+ years	(79)	\$57,869	\$52,969

The value of marital property was also strongly correlated with family income.¹⁵⁹ (See Table 14.) Families with a yearly income under \$25,000 had a median net asset value of less than \$2000, while those with a yearly income in excess of \$75,000 had a median net asset value of more than \$200,000.

TABLE 14

MEDIAN VALUE (\$1984) OF MARITAL PROPERTY IN 1984
CONTESTED CASE SAMPLE, BY FAMILY INCOME (\$1984)

Yearly Family Income	(n)	Median Income (In Group)	Gross Assets (Median)	Net Assets (Median)
Less than \$25,000	(41)	\$ 19,500	\$ 6,195	\$ 1,791
\$25,000-\$49,999	(103)	\$ 36,816	\$ 6,000	\$ 22,425
\$50,000-\$74,999	(28)	\$ 55,190	\$ 81,735	\$ 73,021
\$75,000+	(33)	\$100,000	\$362,981	\$245,995

At the lowest income level, yearly income typically exceeded median net worth by a substantial margin. The hypothetical median couple in this group could earn the entire value of their net

¹⁵⁸ The relationship was statistically significant. Pearson's $R = .1294$; $p = .011$. Similar patterns have been reported by other divorce researchers. See WEITZMAN, *supra* note 4, at 58; Rowe & Morrow, *supra* note 56, at 470.

¹⁵⁹ The relationship was statistically significant. Pearson's $R = .7437$; $p = .000$. Similar patterns have been reported elsewhere. See BAKER, *supra* note 42, at 7; HOUSEHOLD NET WORTH, *supra* note 112, at 5 (Table G); WEITZMAN, *supra* note 4, at 59-60.

worth in about a month and a half. At the upper end of the income scale, by contrast, net worth typically exceeded yearly income. In this group, it would take two and a half years to earn the value of median net worth. The median family income for the entire contested case sample was \$39,464; for this group it would take about seven months to earn median net worth. These figures, strikingly similar to those Weitzman reports for her California divorce sample,¹⁶⁰ point up both the relative scarcity of valuable marital property among divorcing couples and the low value of property in relation to income.

e. *What Types of Assets Do Divorcing Couples Own?*

The typical divorcing couple's assets are not simply small in relation to their income; much of their net worth represents assets that are not liquid and thus difficult to utilize for future consumption needs. (See Table 15.) The only types of assets that were reported by more than half of the 1984 contested case sample were automobiles, household goods and furniture, and the marital residence.¹⁶¹ Income-producing assets such as a business or real estate, or liquid assets other than a bank account were infrequently listed.

¹⁶⁰ WEITZMAN, *supra* note 4, at 59-60. See also HOUSEHOLD NET WORTH, *supra* note 112, at 5 (Table G) (showing similar relationship between household net worth and monthly income).

¹⁶¹ The figures for 1978 were fairly comparable. See Appendix Table 3.

TABLE 15
OWNERSHIP AND MEDIAN VALUE (\$1984) OF ASSETS
REPORTED, BY 1984 CONTESTED CASE SAMPLE

Asset Type	% Owning	Median Value*
Automobiles	79	\$ 3,250
Business Assets	18	\$29,750
Household Goods & Furniture	83	\$ 4,000
Jewelry	24	\$ 2,000
Liquid Assets		
Bank Accounts	82	\$ 1,288
Other	37	\$ 5,419
Nonliquid Assets		
Pensions	20	\$13,801
Other	30	\$ 5,088
Marital Home	60	\$39,000
Other Real Estate	25	\$36,500
Other Assets	39	\$ 4,000
Debts	82	\$ 6,670

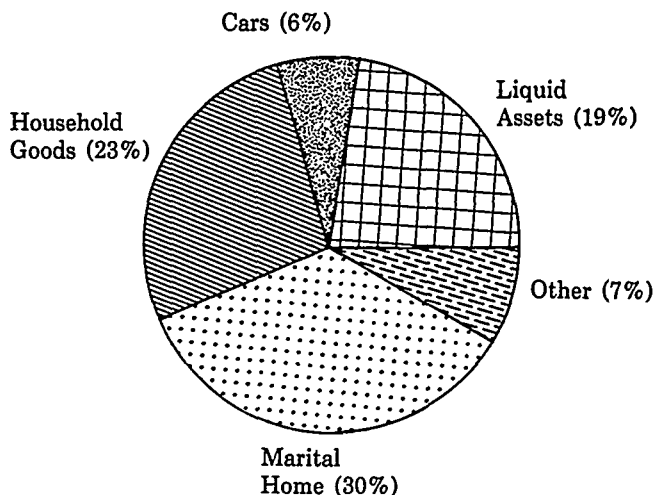
*Excluding zero valuations.

For most of the couples in the contested sample, the marital home was by far the most important asset: not only did 60% of the sample list a marital residence as an asset, but the median value of the marital residence exceeded that of any other.¹⁶² This can be seen more graphically in Figure 1, which shows the distribution of asset value by asset type. For the 1984 contested sample, the value of the marital home represented an average of 30% of a couple's total asset value. Indeed, if those couples who did not own a home are eliminated from the analysis, the marital home represented an average of 61% of total asset value. If the value of the average couple's car and household furniture is added to that of the marital home, these assets represent fully 59% of overall marital property value. Liquid assets—bank accounts, stocks, and bonds—by contrast comprise only 19% of

¹⁶² The importance of the marital residence as a component of overall asset values has also been noted by other divorce researchers. See BAKER, *supra* note 42, at 6; WERTZMAN, *supra* note 4, at 61-62; McLindon, *supra* note 42, at 375-76; Rowe & Morrow, *supra* note 56, at 470 (Table 2).

the total.

FIGURE 1
PERCENTAGE DISTRIBUTION OF ASSET VALUES
IN 1984 CONTESTED CASE SAMPLE



Asset value distribution patterns could not be constructed for the consensual and default samples¹⁶³ given the relative infrequency of asset valuations in these files. But as the asset ownership pattern¹⁶⁴ and valuations¹⁶⁵ for the contested group generally follow those reported by other divorce researchers,¹⁶⁶ there

¹⁶³ For the reported asset ownership rates for the consensual case sample, see Appendix Table 4. Assets were too infrequently reported in the default group to permit analysis.

¹⁶⁴ For a comparison of the reported asset ownership rates for the contested sample with those reported by other divorce researchers, see Appendix Table 5.

¹⁶⁵ For a comparison of median asset values in the 1984 contested case sample with the values reported by other divorce researchers and the U.S. Census Bureau for married couples nationally, see Appendix Table 6.

¹⁶⁶ One difference is worth noting. The reported asset ownership rates for the contested sample are higher than those described by most other divorce researchers, while those of the consensual sample are, for most categories, lower. Does this mean that the contested group owned more property than the consensual group, or simply that they reported more? The differential appears to represent both the relative wealth of the contested sample, and underreporting on the part of the consensual group. Weitzman has noted the tendency of couples with relatively insubstantial assets to distribute them privately without recording them on court documents. WEITZMAN, *supra* note 4, at 63-64. The lack of an asset reporting requirement would tend to exacerbate this tendency among the consensual group. That group's low reported ownership rate for some asset

is no reason to presume a markedly different distribution in these other case categories.

Analysis of the property ownership pattern for sample couples thus reveals that some of the assumptions behind the equitable property distribution law were highly flawed. Although the average value of property individually owned by husbands was greater than that individually owned by wives, most divorcing husbands did not own significant individual assets. Indeed, most sample couples did not have significant marital assets in any form of ownership, and a relatively high proportion of their meager marital property represented the value of nonliquid property.

The scarcity of marital property, and the tendency for it to be concentrated in nonliquid assets, suggest that a change in property distribution rules would, for many divorcing couples, fail to make any significant change in their economic well-being. If a couple's marital property is worth only \$26,400—the median value for couples in the 1984 contested sample—getting two-thirds of the property instead of one-third produces a dollar increase of less than \$9000. When one considers that much of that marital property represents assets like furniture and a car which, for most, cannot readily be sold and converted into capital, it is apparent that no property distribution scheme could provide a real cushion for the transitional period following divorce.

For the relatively small group of divorcing couples with substantial assets, the change in property distribution rules, could, of course, make a significant difference. The next section describes the changes in property distribution that did occur after the new law.

categories where one would expect nearly universal ownership—notably household goods and furniture—also suggests underreporting. See Appendix Table 4 For the contested group, however, the reported asset ownership rates approximate or exceed those reported by Weitzman on the basis of interview data. While we cannot be sure that this group has reported all assets, the evidence suggests relatively good compliance with the reporting requirement.

E. *The Distribution of Assets and Debts*

1. Methodological Issues In Property and Debt Division Analysis

What impact did the law have on the distribution of marital assets and debts? It is important to state at the outset that this is an easier question to ask than to answer. Because the consensual and default case files typically did not contain asset valuations, percentage distributions of marital property to husband and wife could not be calculated except for the contested group. The most detailed information on property distribution in this report is thus confined to the contested case sample, the group that, given its relative wealth, had the most at stake.

Even here, many of the case files contained substantial amounts of missing data, which made overall percentages difficult to compute. Two important asset categories (pensions and spousal businesses) lacked reliable valuations more often than not. In another important asset category, household goods and furniture, asset valuations were often suspect; because of the range of possible valuation approaches, husband and wife valuations sometimes deviated from each other by substantial margins.¹⁶⁷ Assets listed in one or another spouse's net worth statement were not necessarily listed again in the stipulation of settlement or judicial decree. Or, conversely, property listed in the settlement or decree—without valuation—might not be listed in the initial net worth statements. As a result of these varying information problems, most of even the contested cases contained one or more items of missing or suspect information.

To eliminate all cases except those with complete information would have reduced the sample size to the point that more complex analysis of the property data to determine the effect of characteristics such as marital duration or income on distribution would have been largely precluded. In order to enlarge the sample size sufficiently to permit more detailed analysis, distributional percentages for property and net worth were therefore tabulated both for cases in the contested sample with complete information on assets and debts (the A Group) and for cases

¹⁶⁷ Given the range of possible valuation approaches—market value, replacement cost, and acquisition cost—it is not hard to see why such major discrepancies would turn up.

with complete distributional data for at least 90% of the known pool of assets and/or debts, and no more than one missing valuation (the *B* Group).¹⁶⁸ Both of these case subsets appear to be fairly representative of the contested sample as a whole.¹⁶⁹ Moreover, while a percentage distribution for the *B* group could only be approximated, overall trends for the *A* and *B* groups were quite consistent. The distribution of marital property and debt for the combined *A* and *B* groups was also analyzed using a variety of assumptions regarding missing data; results varied little.¹⁷⁰ I have thus used the combined case sets (described as the Valid Group) for most of the property division analysis.

The problem of incomplete information was compounded by the fact that percentage distribution often gave a misleading impression of case outcome. Consider the couple with more debts than assets. In such a case of negative net worth, percentage distribution generally conveys an impression that is the opposite of distributional consequences. Suppose, for example, that a couple has \$10,000 in debts and \$7000 in assets and that wife receives \$5000 in debts and \$4000 in assets, while husband receives \$5000 in debts and \$3000 in assets. While wife has actually fared better than husband, the percentages tell a different tale: wife has received 33% of net worth ($-\$1000/-\3000), husband 67% ($-\$2000/-\3000). Because of this problem, cases involving negative net worth were eliminated from most analyses of net worth distribution. Even when net worth is positive, the percentages can convey an impression quite different than the dollar reality when net worth is small. Consider, for example, a couple with \$1000 in assets and \$900 in liabilities where wife receives the assets and husband gets the debts. On a percentage basis, wife has received 1000% of net worth ($\$1000/\100) while husband has received -900% ($-900/100$); the dollar gap however, is only

¹⁶⁸ Cases with a missing valuation for the marital home, other real property, a business, or a pension were additionally excluded, given the relatively high mean and median value for assets in these categories.

¹⁶⁹ For a comparison of the *A* group, *B* group, and complete contested sample by selected variables, see Appendix Tables 9 & 10.

¹⁷⁰ For a demonstration of how differing assumptions would alter the overall results with respect to the distribution of net worth and the marital estate, see Appendix Tables 7 & 8. All distributional data reported in the text that includes the *B* group was computed on the basis of the following protocols: any debts or assets with missing valuations were excluded from the analysis; debts or assets with missing distributions were assumed to be distributed equally to each spouse.

\$1900. In order to avoid giving undue weight to cases like this where a net worth percentage produces extreme values, and in order to bring the negative net worth cases back into the analysis, the distribution of property and debt was also analyzed by adding debts to assets and calculating each spouse's share of this pool on a 100 point scale.¹⁷¹ (For lack of a common term describing such a distribution, I have described it here as the distribution of the marital estate.) Using this approach, the spouse who received all the assets and no debt would get 100% of the pool; the spouse who received all of the debts and no assets 0%.¹⁷² This approach creates a more uniform measurement by narrowing the percentage range through the elimination of negative percentages and those in excess of 100%. While it is less intuitive than looking at net worth distribution, it may convey better information. For most of the property division analysis, information on net worth distribution is provided in the text and information on marital estate distribution is provided in the Appendix and footnotes.

2. The Overall Distribution of Assets and Debts

Overall, there was little change in the percentage distribution of marital property after the passage of the equitable distribution law. (See Table 16.) In neither the group of cases with complete asset information nor the Valid Group was there any statistically significant shift in property distribution. Both groups did evidence an increase in the number of cases where approximately equal division occurred, which appears to reflect a decrease in the number of cases in which the husband received the majority of the assets.

¹⁷¹ I am indebted to Professor Neil Cohen for suggesting this approach.

¹⁷² Using this approach for the first example in the text, wife receives 53% of the marital estate $((\$-1000 + \$10,000)/\$17,000)$, while husband receives 47% $((\$-2000 + \$10,000)/\$17,000)$.

TABLE 16

DISTRIBUTION OF MARITAL ASSETS IN THE CONTESTED
CASE SAMPLE (COUPLES WITH MARITAL ASSETS), BY
YEAR AND CASE GROUP

Case Group	1978 %	1984 %	Difference
Cases with complete asset information	(n=84)	(n=68)	
Majority to wife	41	49	+ 8
Relatively equal	11	19	+ 8
Majority to husband	49	32	-17
Median % to wife	45	59	+14
Average % to wife	49	58	+ 9
Wife received 50% or more	49	60	+11
Valid Group	(n=140)	(n=130)	
Majority to wife	39	40	+ 1
Relatively equal	16	26	+10
Majority to husband	45	34	-11
Median % to wife	50	51	+ 1
Average % to wife	49	51	+ 2
Wife received 50% or more	51	52	+ 1

Majority = More than 60%

Relatively equal = Between 40% and 60%

The same pattern was apparent in the distribution of debts. (See Table 17.) Although there was an increase in relatively equal debt distribution, which appears to reflect a decrease in the number of cases where the husband received the majority of the debts, the wife's average and median debt share remained remarkably constant. No shifts were statistically significant.

TABLE 17
DISTRIBUTION OF NET UNSECURED DEBT IN THE
CONTESTED CASE SAMPLE (COUPLES WITH UNSECURED
DEBT), BY YEAR AND CASE GROUP

Case Group	1978 %	1984 %	Difference
Cases with complete debt information	(n=177)	(n=158)	
Majority to wife	27	26	- 1
Relatively equal	6	13	+ 7
Majority to husband	67	61	- 6
Median % to wife	8	10	+ 2
Average % to wife	33	34	+ 1
Wife received 50% or more	31	31	+ 0
Valid Group	(n=113)	(n=106)	
Majority to wife	23	24	+ 1
Relatively equal	8	15	+ 7
Majority to husband	69	61	- 8
Median % to wife	7	9	+ 2
Average % to wife	31	31	+ 0
Wife received 50% or more	29	31	+ 2

Majority = More than 60%

Relatively equal = Between 40% and 60%

When the distribution of both debts and assets was considered, the same general tendencies held constant: for those sample couples with positive net worth,¹⁷³ there was an increase in the number of relatively equal division cases and a decrease in the number of cases in which the husband received the majority. Again, no changes demonstrated statistical significance. (See Table 18.)

¹⁷³ Couples with negative net worth were excluded from this portion of the analysis because a percentage distribution has the opposite meaning than it does in the positive net worth cases (i.e., getting 100% of the "worth" would mean getting all of the debts) and thus is not directly comparable.

TABLE 18

DISTRIBUTION OF NET WORTH IN THE CONTESTED CASE
SAMPLE (COUPLES WITH POSITIVE NET WORTH), BY YEAR
AND CASE GROUP

Case Group	1978 %	1984 %	Difference
Cases with complete asset & debt information	(n=60)	(n=44)	
Majority to wife	48	50	+ 2
Relatively equal	8	16	+ 8
Majority to husband	43	34	- 9
Median % to wife	55	62	+ 7
Average % to wife	59	56	- 3
Wife received 50% or more	52	61	+ 9
Valid Group	(n=120)	(n=104)	
Majority to wife	46	45	- 1
Relatively equal	12	19	+ 7
Majority to husband	43	37	- 6
Median % to wife	56	54	- 2
Average % to wife	56	55	- 1
Wife received 50% or more	53	57	+ 4

Majority = More than 60%

Relatively equal = Between 40% and 60%

Average = Trimmed mean (most extreme 5% of cases eliminated)¹⁷⁴

The distribution of the marital estate exhibits similar tendencies: there was a trend toward approximately equal division, which appears to primarily represent a decrease in the number of cases in which the husband received a majority, and relative constancy in the wife's median and average share. (See Table 19.) No shifts were statistically significant.

¹⁷⁴ The trimmed mean is reported because the mean was strongly skewed by a few extreme cases. These extremes were most common in the net worth division percentages when one spouse assumed most of the debts while the other received most of the assets; while the dollar differential was generally modest, the percentage differential was often extreme.

TABLE 19
DISTRIBUTION OF THE MARITAL ESTATE (THE SUM OF
ASSETS PLUS DEBTS) IN THE CONTESTED CASE SAMPLE,
BY YEAR AND CASE GROUP

Case Group	1978 %	1984 %	Difference
Cases with complete asset & debt information	(n=76)	(n=55)	
Majority to wife	50	46	- 4
Relatively equal	15	31	+16
Majority to husband	36	24	-12
Median % to wife	60	58	- 2
Average % to wife	56	56	+ 0
Wife received 50% or more	55	66	+11
Valid Group	(n=141)	(n=134)	
Majority to wife	47	44	- 3
Relatively equal	19	28	+ 9
Majority to husband	34	28	-12
Median % to wife	57	58	+ 1
Average % to wife	55	55	+ 0
Wife received 50% or more	56	63	+ 7

Majority = More than 60%

Relatively equal = Between 40% and 60%

One notable fact about these results is their failure to support the popular myth that women typically receive less than half of the couple's net worth. The sample wives' median and average shares of net worth were at least 50% both before and after passage of the equitable distribution law; in both time periods, more than half of the sample wives received at least 50% of net worth. The average share of marital property received by women in the research population was, indeed, markedly similar to that reported by Weitzman for Los Angeles and San Francisco, California, an equal division jurisdiction.¹⁷⁸ It is lower than the average share reported by some researchers in other equitable distribution jurisdictions. (See Table 20.)

¹⁷⁸ Weitzman reports that sample divorced wives received an average of 62% of the marital property in San Francisco and 51% in Los Angeles in 1972. She does not report the distribution of net worth. WERTZMAN, *supra* note 4, at 74.

TABLE 20
AVERAGE PERCENTAGE DISTRIBUTION OF NET WORTH
TO DIVORCED WIVES, BY RESEARCH SITE

Research Site	Average Percentage of Net Worth to Divorced Wives
Anchorage, Alaska (1984-85) ¹⁷⁶	
Divorces by dissolution	29%
Divorces by traditional divorce procedure	50%
New Haven, Connecticut (1982-83) ¹⁷⁷	68%
New York/Onondaga/Westchester Counties, New York (1984) (contested cases)	55%
Cuyahoga County, Ohio (1978) ¹⁷⁸	
Divorces on fault grounds	77%
Divorces on basis of separation agreement	61%
Three Urban Counties, Oregon (1982) ¹⁷⁹ (marriages of ten or more years)	
When home owned	50%
When home not owned	64%

The other notable fact about the overall results is their constancy. While the equitable distribution law was associated with an increased tendency toward equal division, the overall picture, for the surveyed contested group, did not change significantly after passage of the new law.

As it was impossible to calculate overall distributional percentages for the consensual and default cases, we cannot be sure that the pattern for the contested category applies to these groups as well. But the distribution of specific assets and debts listed by the research population does suggest a fairly similar pattern. (See Table 21.)

¹⁷⁶ BAKER, *supra* note 42, at 8.

¹⁷⁷ McLindon, *supra* note 42, at 383.

¹⁷⁸ STERIN ET AL., *supra* note 46, at 112.

¹⁷⁹ Rowe & Morrow, *supra* note 56, at 475.

TABLE 21
PERCENTAGE DISTRIBUTION OF ASSETS TO SAMPLE
WIVES, BY YEAR AND ASSET TYPE

Asset Type Percentage Distribution to Wife	1978	1984	Difference
Automobiles	(n=507)	(n=599)	
50%	1	1	
51% - 99%	0	0	
100%	<u>44</u>	<u>47</u>	
	45	48*	+3
Business Interests	(n=50)	(n=70)	
50%	2	4	
51% - 99%	0	0	
100%	<u>10</u>	<u>16</u>	
	12*	20	+8
Household Goods & Furniture) ¹⁸⁰	(n=240)	(n=209)	
50%	10	7	
51% - 99%	0	0	
100%	<u>57</u>	<u>63</u>	
	67	70	+3
Jewelry	(n=71)	(n=97)	
50%	0	0	
51% - 99%	0	0	
100%	<u>77</u>	<u>77</u>	
	77	77	+0
Liquid Assets:			
Bank Accounts	(n=686)	(n=722)	
50%	9	7	
51% - 99%	1	1	
100%	<u>44</u>	<u>48</u>	
	54	56	+2
Other	(n=273)	(n=267)	
50%	15	7	
51% - 99%	0	0	
100%	<u>27</u>	<u>41</u>	
	42	48	+6

(continued)

¹⁸⁰ There were large amounts of missing data in this category. In 174 instances in 1978 and 206 in 1984, couples listed household furniture but failed to indicate how it was divided.

Nonliquid Assets:

	(n=41)	(n=85)	
Pensions			
50%	0	11	
51% - 99%	0	1	
100%	<u>15</u>	<u>19</u>	
	15	31*	+16
Other	(n=99)	(n=159)	
50%	2	6	
51% - 99%	0	1	
100%	<u>24</u>	<u>49</u>	
	26	56	+30
Marital Residence	(n=288)	(n=304)	
50%	24	22	
51% - 99%	4	7	
100%	<u>47</u>	<u>43</u>	
	75	72	-3
Other Real Estate	(n=116)	(n=160)	
50%	14	10	
51% - 99%	1	0	
100%	<u>22</u>	<u>30</u>	
	37	40	+3
Other Assets	(n=207)	(n=231)	
50%	5	5	
51% - 99%	0	1	
100%	<u>30</u>	<u>39</u>	
	35	45	+10

* Some proportion of awards in this category were to children. ¹⁸¹

In all asset categories except jewelry, where no change occurred, the percentage of cases in which the wife received a 50% or greater share increased. In most asset categories, however, the increases were trivial and statistically insignificant. In only two, pensions and other nonliquid assets, was the difference greater than ten percentage points and assets in these categories were not typically owned by couples in the sample.

The trend toward wives receiving 50% or more of listed assets was also offset to some extent by an increased tendency for wives to shoulder 50% or more of listed debts. Overall, sample wives were 18% more likely to shoulder 50% or more of a specified debt in 1984 than they were in 1978. (See Table 22.) The tendency for wives to obtain somewhat more property was thus

¹⁸¹ In 1978, 8% of business interests were awarded to children. In 1984, 1% of automobiles and 1% of pensions were awarded to children.

counterbalanced to some extent by an increased tendency to shoulder more debt.

TABLE 22
PERCENTAGE DISTRIBUTION OF DEBTS TO SAMPLE
WIVES, BY YEAR AND DEBT TYPE

Debt Type	1978	1984	Difference
Bank Loans	(n=234)	(n=219)	
50%	6	5	
51% - 99%	0	0	
100%	<u>26</u>	<u>24</u>	
	32	29	-3
Credit Card Debts	(n=256)	(n=431)	
50%	4	4	
51% - 99%	0	1	
100%	<u>32</u>	<u>44</u>	
	36	49	+13
Other Bills	(n=198)	(n=141)	
50%	7	13	
51% - 99%	1	1	
100%	<u>31</u>	<u>26</u>	
	39	40	+1
Other Loans & Debts	(n=388)	(n=441)	
50%	8	5	
51% - 99%	0	0	
100%	<u>22</u>	<u>30</u>	
	30	35	+5
All Debts	(n=1076)	(n=1232)	
50%	6	6	
51% - 99%	0	0	
100%	<u>27</u>	<u>33</u>	
	33	39	+6

In overall terms, the data suggest that the equitable distribution law had no more than a modest impact on the percentage distribution of marital property and debt.

Nor did the equitable distribution law produce any dollar gain for sample wives. In constant 1984 dollars, the median value of net worth received by wives in the contested sample actually declined over the research period from \$8880 in 1978 to \$7500 in 1984. While the average value of the wife's net award

did increase substantially¹⁸² this difference is largely due to a few atypical cases. In 1978, 75% of wives in the contested sample received a net award of less than \$34,416; in 1984, 75% of wives in the contested sample received a net award of less than \$37,504.

3. The Distribution of Some Specific Assets: A Closer Look

Continuity tended to prevail over change with respect to the distribution of specific assets as well as in overall distributional patterns.

a. *The Marital Home*

In both 1978 and 1984 approximately two-thirds of sample couples owned a home.¹⁸³ In both research years the home was jointly owned in 88% of all cases. Average equity for the contested sample¹⁸⁴ was \$61,665 in 1978 and \$83,968 in 1984.¹⁸⁵

Change in the disposition of the family home, whether rented or owned, was fairly modest between the two research years. Among renters, wives were slightly more likely to keep the family home in 1984 than they were earlier, but the change was not statistically significant. (See Table 23.) This overall picture masks some considerable disparities between counties and between case categories, however. In 1984, for example, the likelihood of a wife receiving the rented home ranged from 69% in the Westchester contested sample to 36% in the Onondaga consensual sample. Overall, the likelihood of an award of a rental home to a wife declined in consensual cases and increased in contested cases. Awards to husbands and the vacancy rate correspondingly declined in contested cases and increased in consensual cases.

¹⁸² The average was \$29,183 in 1978 and \$84,537 in 1984.

¹⁸³ Sixty-four percent of couples in the consensual and contested samples reported owning their homes in 1978 as compared to 68% of this group in 1984. Because of the large amount of missing data in the default files, the proportion of home owners could not be determined for this group.

¹⁸⁴ Equity could not be determined for the consensual or default cases.

¹⁸⁵ The average masks substantial differences between counties. For both years equities were lowest in Onondaga County (\$35,198 in 1978, \$26,346 in 1984) and highest in New York County (\$135,768 in 1978, \$223,420 in 1984).

TABLE 23
DISTRIBUTION OF MARITAL HOME (WHEN RENTED),
BY CASE TYPE¹⁸⁶ AND YEAR

Distribution	Contested		Consensual		Complete Sample*	
	1978	1984	1978	1984	1978	1984
	%	%	%	%	%	%
To Wife	46	64	56	48	52	57
To Husband	29	18	29	33	29	24
Vacated	25	18	15	19	19	19

*Includes listings from default category.

Among home owners, husbands were slightly more likely to retain occupancy¹⁸⁷ of the marital home under the new regime as compared to the old one, but once again the difference was statistically insignificant. (See Table 24.) The increase in husband ownership has come largely at the expense of occupancy orders on behalf of wives, which declined by 50% over the research period. On the other hand, the increase in husband ownership was largely offset by cash settlements with wives. Thus, generally speaking, the modest shift in the distribution of the marital home that occurred between 1978 and 1984 seems to be one in which wives lost occupancy but gained money instead.¹⁸⁸

¹⁸⁶ Information on the disposition of a rental home was typically lacking in default cases.

¹⁸⁷ Occupancy of the marital home includes situations in which a spouse obtains sole title, with or without paying a cash/settlement to the other spouse, and situations in which ownership remains constant and a spouse is granted the right to live in the marital home until some future contingency (e.g., the emancipation of the children) occur.

¹⁸⁸ The overall changes in ownership and occupancy patterns were not completely consistent across case categories, however. Although the probability of husbands receiving ownership or occupancy increased across all categories, the probability of wives receiving ownership was not constant. In the contested sample, wives were actually more likely to receive outright ownership in 1984 (36%) than in 1978 (30%). The reason for this difference is that the decline in occupancy awards was much more dramatic in the contested (21% in 1978 to 8% in 1984) than in the consensual (16% in 1978 to 14% in 1984) cases, and within the contested category wives as well as husbands benefited from the shift.

TABLE 24
DISTRIBUTION OF MARITAL HOME (WHEN OWNED),
BY CASE TYPE¹⁸⁹ AND YEAR

Distribution	Contested		Consensual		Complete Sample*	
	1978 (n=175) %	1984 (n=188) %	1978 (n=184) %	1984 (n=180) %	1978 (n=407) %	1984 (n=413) %
Title to W w/o payment to H	29	29	29	23	30	29
Title to W with payment to H	4	4	3	3	3	4
Occupancy to W	20	9	15	11	18	9
TOTAL OCCUPANCY TO WIFE	53	42	47	37	51	42
Title to H w/o payment to W	14	18	14	13	14	16
Title to H with payment to W	7	11	5	15	5	12
Occupancy to H	3	3	1	3	2	3
TOTAL OCCUPANCY TO HUSBAND	24	32	20	31	21	31
Current Sale	23	21	34	31	27	26

*Includes listings in the default category.

The decline in occupancy awards was not matched by any increase in the probability that the home would be sold.¹⁹⁰ Nor, when the home was sold, was there any decline in the proportion of the net proceeds received by sample wives.¹⁹¹ In terms of equity distribution there was, similarly, almost no discernible change. In 1978 sample wives received an average of 63% of the home equity; in 1984 they received an average of 61%.

¹⁸⁹ Information on the disposition of the marital home was provided too infrequently in the default category to permit independent analysis.

¹⁹⁰ Although sales did increase in the default category (from 18% in 1978 to 27% in 1984), the number of cases is too small for meaningful analysis.

¹⁹¹ In 1978 wives received less than 50% of the proceeds of a current sale in 6% of the cases, exactly 50% in 73% of the cases, and more than half in 20% of the cases; in 1984, they received less than 50% in 8% of the cases, exactly half in 72% of the cases, and more than half in 20% of the cases.

Despite the overall lack of dramatic change over the research period in regard to the disposition of the marital home, long-married wives were adversely affected to a surprising degree. (See Table 25.) Although marital duration was a significant positive predictor of the marital home's disposition in both research years,¹⁹² wives married twenty or more years suffered a large, and statistically significant, decline in the likelihood of receiving the home. The decline in awards to these wives is largely accounted for by a corresponding increase in awards to husbands.¹⁹³ The direction of change was consistent across case categories, although it was more pronounced in the consensual and default cases than in those that were contested.¹⁹⁴

TABLE 25

PERCENTAGES OF WIVES AWARDED OCCUPANCY OR OWNERSHIP OF MARITAL HOME (WHEN OWNED), BY YEAR AND LENGTH OF MARRIAGE

Length of Marriage	1978		1984		Difference
	%	(n)	%	(n)	
Under 5 years	23	(39)	27	(44)	+ 4
5-9 years	40	(85)	34	(88)	- 6
10-14 years	52	(92)	38	(89)	-14*
15-19 years	61	(80)	55	(78)	- 6
20+ years	64	(118)	50	(112)	-14*
Total Sample	52	(414)	43	(411)	- 9

*p <.05

The relationship between custody and disposition of the marital home varied less substantially over the survey period. An award of custody was a significant predictor of the disposition of the marital home in both research years.¹⁹⁵ Occupancy

¹⁹² In 1978 chi-square=27.042 D.F.=4; p=.0000. In 1984 chi-square=15.05364 D.F.=4; p=.0046.

¹⁹³ Sales of the marital home increased by only 2% among couples married 20 or more years.

¹⁹⁴ In contested cases the likelihood of wives married 20 or more years obtaining the home declined from 63% to 59%. In the consensual category it declined from 59% to 39%, and among defaults it declined from 54% to 40%. Given the relatively small number of default cases with complete information on disposition of the marital home and marital duration (n=40 1978, n=32 1984), the default data does not permit definitive conclusions.

¹⁹⁵ In 1978 chi-square=35.41387 D.F.=4; p=.0000. In 1984 chi-square=28.99461 D.F.=4; p=.0000.

awards did not vary significantly over the research period when custody was taken into account.¹⁹⁶

b. *Pensions*

Pensions were never distributed to the spouse without title prior to the equitable distribution law, but as a result of judicial interpretation of the new statute,¹⁹⁷ they now may be. As husbands are far more likely to own a pension than wives,¹⁹⁸ the possibility of transfer is a significant advantage to women.

In the post-equitable distribution period, only 14% of sample wives received half or more of a husband's pension, however. The wife's average share of a husband's pension was only 10%. Among the contested sample, for whom the value of pension interests was available, the average value of pension interests received by wives did almost triple, from \$4653 in 1978 to \$11,679 in 1984. But the average value of pension interests received by husbands also went up, from \$31,013 to \$61,741. While these averages are based on very small samples, they suggest that wives were still not receiving anything close to an equal share of pension interests.

c. *Businesses*

Another asset category that the equitable distribution law might have significantly affected is business assets. Like pensions, businesses are typically held individually rather than jointly and in the contested sample, where ownership information was most frequently available, husbands individually owned the family business in 88% of the 1978 cases and 80% of the 1984 cases. Despite the possibilities inherent in the equitable distribution law for wives to receive a share of a business, this

¹⁹⁶ In 1978, 62% of wives with sole custody (n=266) obtained occupancy of the marital home (when owned) as compared to 35% of wives without sole custody (n=150). In 1984, 55% of wives with sole custody obtained occupancy (n=219) as compared to 32% of wives without sole custody. Husbands were also more likely to obtain occupancy when they had sole custody (64% in 1978 (n=12), 78% in 1984 (n=23)) than were husbands without sole custody (21% in 1978, 30% in 1984). Sale of the marital residence (20% in 1984) was also somewhat less likely when there were minor children.

¹⁹⁷ See, e.g., *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984) (vested pension is marital property).

¹⁹⁸ Eighty-three percent of listed pensions were owned by husbands in 1978, as were 78% in 1984.

did not occur. In both years wives received no share of a family business 78% of the time.¹⁹⁹ This result occurred despite an increase in the number of businesses recorded.²⁰⁰ The average value of business interests received by wives in the contested sample did increase, however.²⁰¹

4. Typical Asset Distribution Patterns: What Kind of Assets Do Wives Receive?

The relative lack of change in the disposition of assets by category meant that the "asset package" which wives typically received remained relatively consistent over the research period. In both research years, the assets that wives were most likely to receive were the marital home and household goods and furniture. (See Table 21.) This distributional pattern is extremely similar to that reported by Weitzman in California, an equal distribution jurisdiction.²⁰²

For the contested sample, it was possible to perform a more detailed analysis of the composition of the award to divorced wives. (See Figure 2.) In both research years the value of distributed equity in the marital home and household goods and furniture made up at least 40% of the wife's average award. When couples who did not own the marital home were excluded, the wife's award was even more heavily affected by that asset. In 1984, among homeowners, the wife's share of the marital home comprised an average of 50% of the value of her net award.²⁰³

¹⁹⁹ Although the proportion of cases in which wives received 50% or more of a business went up by eight percentage points in 1984, the difference is accounted for by a decline in awards to children.

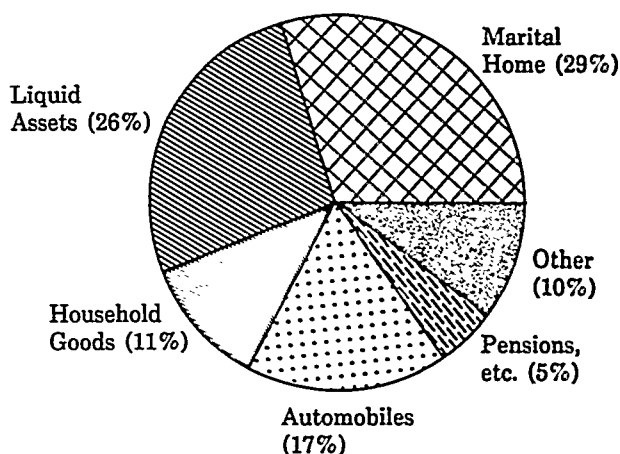
²⁰⁰ Seventy-one businesses were listed by couples in the sample in 1978 as compared to 88 in 1984.

²⁰¹ In 1978 the average value of business interests received by wives in the contested case sample was \$29,322 (n=7); in 1984 it was \$53,822 (n=10).

²⁰² See WEITZMAN, *supra* note 4, at 98 (reporting that wife received a "majority" of assets in the following percentages of cases: automobiles 44%, businesses 20%, household furniture 93%, liquid assets 76%, marital residence 81%, marital debts 42%. As Weitzman defines majority as more than 40%, exact comparisons are impossible).

²⁰³ In the 1984 Valid Group. In 1978 the percentage for this group was 61%.

FIGURE 2
COMPOSITION OF PROPERTY AWARDED TO WIVES
IN 1984 CONTESTED CASE SAMPLE (VALID
GROUP), BY ASSET TYPE



F. *Winners and Losers: Variation and Its Rationality*

While the equitable distribution law thus appears to have achieved little change in property distribution, these overall similarities could mask some significant changes among groups, or some changes in the variability of awards.

One issue is whether percentage distributions tended to centralize to a greater extent. Analysis of the frequency of different percentage distributions shows that the distributional pattern did move slightly toward an equal distributional norm, but that, overall, the range of variation did not change substantially.²⁰⁴ In both research years less than a third of sample couples divided their assets and debts relatively equally (between 40% and 60%). Moreover, approximately the same percentage of wives received less than 30% of the marital estate as received 80% or more. (See Table 26.) The same pattern is evident in the distribution of marital net worth.²⁰⁵ The equitable distribution law was simply not associated with any marked decrease in the vari-

²⁰⁴ In 1978 variance for the distribution of the overall marital estate for the Valid Group equaled .0940, kurtosis equaled -.9237. In 1984 these figures were quite similar: variance equaled .0942, kurtosis -.7780.

²⁰⁵ See Appendix Table 11.

ability of awards. The only other equitable distribution research reporting the proportion of relatively equal distributions describes a similar pattern; slightly less than a quarter of that sample divided their property relatively equally.²⁰⁶

This variability in property distribution contrasts with the pattern reported recently by a scholar who analyzed a substantial group of judicial decisions on property division under equitable distribution statutes in six states.²⁰⁷ She found that courts seldom deviated from an equal division except in extraordinary cases, which usually involved a spouse in poor health.²⁰⁸ When deviation did occur it was generally minimal, involving a sixty/fifty distribution.²⁰⁹ It thus appears that judges are far more inclined toward equal division than are litigants who settle their cases themselves.

TABLE 26
DISTRIBUTION OF THE MARITAL ESTATE (VALUE OF
ASSETS PLUS DEBTS) IN CONTESTED CASE SAMPLE
(VALID GROUP), BY YEAR

Wife's Percentage	1978		1984	
	%	cumulative % (n=141)	%	cumulative % (n=134)
Less than 10%	13%	13%	13%	13%
10% - 19%	4%	17%	6%	19%
20% - 29%	5%	22%	1%	20%
30% - 39%	12%	34%	8%	28%
40% - 49%	10%	44%	10%	37%
50% - 59%	9%	53%	19%	56%
60% - 69%	14%	67%	14%	70%
70% - 79%	9%	75%	8%	78%
80% - 89%	10%	85%	8%	85%
90% +	15%	100%	15%	100%

Cumulative percentages may not add correctly due to rounding.

The fact that the distribution of marital property is highly variable need not necessarily mean that it is unpredictable or

²⁰⁶ See Rowe & Morrow, *supra* note 56, at 475 (23% of the sample divided property so that each spouse received between 40% and 59%).

²⁰⁷ Reynolds, *supra* note 40, at 844-66 (evaluating 138 judicial opinions).

²⁰⁸ *Id.* at 854-55.

²⁰⁹ *Id.* at 855.

irrational, of course. The central notion behind equitable distribution is individualized determination. New York's equitable distribution law, like most, suggests that the size of each spouse's property award should reflect his or her individual circumstances: the spouse's needs, as measured by income, income potential, age, health, and assumption of the role of custodial parent; the spouse's contributions to the marriage, as measured by marital duration, contribution as both a wage earner and as a spouse, parent, and homemaker; and the spouse's future expectations, as measured by the couple's past standard of living and the loss of future inheritance and retirement prospects.²¹⁰

Given the range of factors an asset award might reflect, it is possible that the variability in distribution results from legitimate individualized tailoring. This section examines the relationship of several factors that might influence the size of an award—marital duration, custody, employment status, income, an award of alimony—to determine whether the equitable distribution law was associated with a significant change in the pattern of award decision making, and whether these factors can explain some of the variability in asset distribution.

1. The Relationship Between Marital Duration and Property Distribution

One factor that might play a significant role in determining the distribution of property and debt is marital duration. In a marriage of long duration, it is likely that a wife's contributions as a homemaker and parent will be substantial and thus offset a lower monetary contribution to marital property. A preliminary issue, of course, is the extent to which marital duration influenced the size of a wife's property award before equitable distribution. Were wives in long marriages more likely to receive a larger share of the marital property then? Table 27 shows that, in 1978, sample wives in longer marriages were awarded a higher median share and were more likely to receive half or more of the net marital property than their counterparts married for short periods of time. This tendency was not, however, strong enough to be statistically significant.²¹¹

²¹⁰ N.Y. DOM. REL. LAW § 236B(5)(d) (McKinney 1986).

²¹¹ Marital duration was not significantly correlated with the wife's net property percentage. Pearson's $R = -.0032$; $p = .486$. The correlation between marital duration and

The tendency of long-married wives to receive a greater share of marital property than wives in short marriages dissipated after the equitable distribution law's enactment. In 1984, sample wives married for less than ten years were actually more likely to receive half of the net marital property than those married twenty or more years.²¹² The distribution of the overall marital estate (assets plus debts) evidenced a similar pattern.²¹³ The enactment of the equitable distribution law thus was not associated with any increase in the percentage of net marital property awarded to long-married wives; the group that benefited was wives in marriages of less than ten years.

TABLE 27
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND MARITAL DURATION

Marital Duration	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
0-9 years	44%	34%	56% (39)	66%	73%	71% (35)
10-19 years	48%	59%	59% (44)	47%	48%	51% (47)
20+ years	61%	65%	57% (43)	61%	54%	59% (33)

2. The Relationship Between Custody and Property Distribution

The larger net property percentages registered by wives in shorter marriages during the post-equitable distribution period does not appear to reflect increased deference to the needs of a custodial parent. In 1978, although the relationship was not statistically significant, sample wives with sole custody obtained higher median and average percentages of net worth than their counterparts without minor children or those whose husbands

the wife's percentage of the marital estate (the sum of assets plus debts) was also statistically insignificant. Pearson's $R = .0245$; $p = .387$.

²¹² The correlation between marital duration and the wife's net property percentage was still statistically insignificant. Pearson's $R = -.1201$; $p = .113$. The relationship between marital duration and the wife's percentage of the marital estate (the sum of assets plus debts) also remained insignificant. Pearson's $R = -.0756$; $p = .194$.

²¹³ See Appendix Table 10.

obtained custody.²¹⁴ In the later research period, the median percentage of the group with sole custody and the group without minor children was almost identical.²¹⁵ (See Table 28.)

TABLE 28
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND CUSTODY STATUS

Custody Status	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
Wife sole custody	61%	67%	72% (69)	61%	59%	70% (51)
Husband custody*	42%	45%	56% (12)	25%	59%	5% (12)
No minor children	41%	25%	45% (39)	61%	57%	53% (41)

*Includes joint or split custody.

3. Need and Contribution: The Relationship Between Employment Status, Spousal Income, Alimony, and Property Distribution

Employment status, income, and alimony are related factors that might also significantly influence property distribution, although the role they might play is ambiguous. The wife who is employed and has a high income evidences little need, but has likely made a major monetary contribution to the acquisition of marital property. The wife who is unemployed or has a low income evidences need, but likely has made a less significant monetary contribution. An award of alimony similarly signifies need and thus might signal a larger net worth percentage based on that factor or a lower one based on the fact of receiving alimony.

The intent of the drafters of the equitable distribution law

²¹⁴ Pearson's $R=.103$; $p=.117$. The relationship between custody and the wife's percentage of the marital estate (sum of assets plus debts) was also positive and approached statistical significance. Pearson's $R=.1286$; $p=.064$.

²¹⁵ Both the correlation between custody and the wife's net property percentage (Pearson's $R=.0925$; $p=.175$) and the wife's percentage of the marital estate (the sum of assets plus debts) (Pearson's $R=.0013$; $p=.494$) remained positive but statistically insignificant.

was not ambiguous, however: the new law was intended both to recognize nonmonetary contributions to the marriage and to permit consideration of need.²¹⁶ This suggests that unemployed wives and those with low incomes would benefit from the equitable distribution law. Did they?

Before the equitable distribution law, among couples in the contested case sample, employed wives received a slightly higher average and median percentage of net marital property than their unemployed counterparts.²¹⁷ After the change in property distribution rules, the median percentage and proportion of unemployed wives receiving at least 50% of net marital property did increase; surveyed unemployed wives now had a higher median share than those who were employed.²¹⁸ But that increase was not statistically significant. (See Table 29.) Nor, in either time period, was employment status significantly correlated with the wife's net worth percentage.

TABLE 29
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND WIFE'S EMPLOYMENT STATUS

Wife's Employment Status	Wife's Percentage Share					
	1978			1984		
	%Receiving 50%+	Median %	Mean (n) %	%Receiving 50%+	Median %	Mean (n) %
Employed	56%	58%	62% (68)	56%	54%	68% (64)
Unemployed	50%	50%	56% (34)	68%	65%	60% (28)

The results were similar when the wife's income was taken into account. (See Table 30.) Before equitable distribution, sample wives in the highest income group had a slightly higher median and mean net property percentage than did those in the lowest income group;²¹⁹ after equitable distribution this was no

²¹⁶ See N.Y. DOM. REL. LAW § 236B(5)(d) (McKinney 1986).

²¹⁷ Both the correlation between the wife's employment and her percentage of net marital property (Pearson's $R=.0545$; $p=.293$) and between the wife's employment and her percentage of the marital estate (the sum of assets plus debts) (Pearson's $R=.1049$; $p=.130$) were slightly positive but statistically insignificant.

²¹⁸ The correlation between the wife's employment and her net property percentage was now slightly negative but still statistically insignificant. Pearson's $R=-.0797$; $p=.225$. The correlation between wife's employment and distribution of the marital estate (assets plus debts) was also insignificant. Pearson's $R=.0324$; $p=.364$.

²¹⁹ Both the correlation between the wife's income and her percentage of net marital

longer true. But the difference was not significant, nor was the wife's income significantly correlated with her net worth percentage in either time period.²²⁰

TABLE 30
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND WIFE'S INCOME (\$1984)

Wife's Income	Wife's Percentage Share					
	1978			1984		
	%Receiving 50%+	Median %	Mean (n) %	%Receiving 50%+	Median %	Mean (n) %
0-\$10,000	51%	51%	58% (57)	56%	58%	85% (41)
\$10,000- \$19,999	67%	68%	71% (30)	63%	61%	79% (35)
\$20,000+	56%	64%	68% (16)	64%	54%	49% (14)

Nor was the equitable distribution law correlated with any significant changes in property distribution based on the husband's income. (See Table 31.) In the earlier period, sample wives of higher income husbands tended to obtain a higher percentage share of net marital property than their counterparts married to low-income husbands.²²¹ In the post-equitable distribution period this relationship was no longer apparent,²²² but in neither time period was the property distribution significantly related to the husband's income.

property (Pearson's $R=.0599$; $p=.274$) and between the wife's income and her percentage share of the marital estate (assets plus debts) (Pearson's $R=-.0967$; $p=.147$) were statistically insignificant.

²²⁰ Both the correlation between wife's income and her net property percentage (Pearson's $R=-.0138$; $p=.449$) and between the wife's income and her percentage of the marital estate (the sum of assets plus debts) (Pearson's $R=.0919$; $p=.161$) remained statistically insignificant.

²²¹ The correlation between husband's income and the wife's net property percentage was positive, but escaped statistical significance. Pearson's $R=.1485$; $p=.070$. The relationship between the husband's income and the wife's percentage of the marital estate (the sum of assets plus debts) was also insignificant. Pearson's $R=.0919$; $p=.161$.

²²² The correlation between husband's income and the wife's net property percentage was now slightly negative but still statistically insignificant. Pearson's $R=-.0572$; $p=.311$. The relationship between the husband's income and the wife's percentage of the marital estate (the sum of assets plus debts) was also insignificant. Pearson's $R=-.1007$; $p=.156$.

TABLE 31
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND HUSBAND'S INCOME (\$1984)

Husband's Income	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
0-\$20,000	39%	30%	54% (28)	42%	37%	32% (19)
\$20,000-						
\$39,999	50%	50%	60% (40)	53%	53%	105% (34)
\$40,000+	50%	53%	59% (32)	46%	42%	54% (24)

Both husband and wife income, taken alone, are weak indicators of a spouse's needs or monetary contributions, however. A more accurate measure is the ratio between the wife's and husband's income, which takes into account the relative earning potential of both spouses. Before equitable distribution, sample wives with higher income ratios tended to receive a larger percentage of net marital property than their low ratio counterparts.²²³ (See Table 32.) The only exception to this pattern was wives whose incomes represented less than 10% of total family income. This suggests, again, that monetary contributions were accorded greater weight than need in property distribution during this period, except in the most extreme cases. After equitable distribution this tendency was less clear.²²⁴ Moreover, declines in the mean and median net property percentage were registered both by the group with the highest income ratio (those who had contributed the most monetarily), and the group with the lowest income ratio (the neediest).

²²³ The correlation between the ratio of wife's income/family income and her net property percentage was positive and almost statistically significant. Pearson's $R = .1656$; $p = .064$. The correlation between the ratio of wife's income/family income and her percentage of the marital estate (the sum of assets plus debts) was insignificant, however. Pearson's $R = .0511$; $p = .306$.

²²⁴ The correlation between the ratio of the wife's income/family income and her net property percentage was no longer positive but still statistically insignificant. Pearson's $R = -.0394$; $p = .379$. The correlation between the ratio of the wife's income/family income and her percentage of the marital estate (the sum of assets plus debts) was positive, however, and approached statistical significance. Pearson's $R = .1534$; $p = .078$.

TABLE 32
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND INCOME RATIO
(WIFE'S INCOME/FAMILY INCOME)

Income Ratio	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
0%-9%	53%	64%	60% (40)	48%	42%	46% (23)
10%-29%	41%	44%	54% (22)	47%	50%	150% (19)
30%-49%	56%	54%	64% (16)	64%	55%	55% (14)
50% +	63%	78%	105% (8)	50%	49%	52% (8)

While this result is not susceptible to any obvious interpretation,²²⁵ one possible explanation would take into account the receipt of an alimony award. Particularly as the equitable distribution law explicitly suggests linkage between the two, it is possible that tradeoffs in property for alimony, and vice versa, occurred more frequently under the new regime. Table 33 shows, however, that at least among the contested sample, alimony/property bargains do not appear to have been struck more frequently after equitable distribution than before the law went into effect. The group that was awarded alimony in the post-equitable distribution research year had a higher mean and mean net worth percentage than did the group of wives who were not awarded alimony. This result deviates from the earlier pattern, where the two groups were awarded comparable shares of net marital property. In neither year, however, was the award of alimony a statistically significant predictor of the wife's net property award.²²⁶

²²⁵ Given the small size of the sample and the range of variation in outcomes, it may simply be due to chance.

²²⁶ In 1978 both the correlation between alimony and the wife's net property percentage (Pearson's $R = -.0083$; $p = .464$) and between alimony and the wife's percentage of the marital estate (the sum of assets plus debts) (Pearson's $R = -.0738$; $p = .192$) were statistically insignificant. In 1984 the correlation between alimony and the wife's net property percentage was positive (Pearson's $R = .1252$) and approached statistical significance ($p = .102$). The correlation between alimony and the wife's percentage of the marital estate (Pearson's $R = .0580$) was not statistically significant, however ($p = .253$).

TABLE 33
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND ALIMONY STATUS

Alimony Status	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
Alimony	52%	54%	61% (60)	64%	68%	97% (36)
No Alimony	53%	56%	62% (60)	53%	52%	59% (68)

The tendency for sample wives who were unemployed, low income, or who were awarded alimony to receive a larger share of net marital property in the post-equitable distribution period than before suggests that need-based factors were given greater weight in property distribution than in the pre-equitable distribution period. But this tendency was slight and not statistically significant; moreover, those wives with the lowest incomes in relation to their husbands received smaller mean and median awards in the post-equitable distribution period than in the earlier research period. Overall it does not appear that the equitable distribution law was associated with any major change in property distribution based on need.

4. Other Factors: Fault, Net Worth

While the equitable distribution law was not correlated with any significant change in property distribution based on spousal need or monetary contribution, the law does appear to have had a more substantial impact in reducing the consequences of a fault judgment. In the earlier period, a judgment against the wife alone was negatively, and significantly, correlated with the size of her net property percentage.²²⁷ In the later period, a judgment against the wife alone was neither a significant predictor of her net property percentage, nor was it negatively correlated with the size of the wife's percentage share of net marital property.²²⁸ (See Table 34.)

²²⁷ In 1978 a judgment against the wife was negatively, and significantly, correlated with her net property percentage (Pearson's $R = -.1688$; $p = .033$) and her percentage of the marital estate (the sum of assets plus debts) (Pearson's $R = -.2016$; $p = .008$).

²²⁸ In 1984 a judgment against the wife was positively correlated with her net marital property percentage (Pearson's $R = .1922$; $p = .025$) although not with her percentage

TABLE 34
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND MARITAL FAULT JUDGMENT

Divorce Judgment Against	Wife's Percentage Share					
	1978			1984		
	%Receiving 50%+	Median %	Mean (n) %	%Receiving 50%+	Median %	Mean (n) %
Husband	60%	63%	66% (84)	62%	59%	60% (76)
Wife	47%	47%	70% (19)	37%	0%	63% (19)
Both	24%	17%	30% (17)	56%	50%	187% (9)

One other factor—the value of the couple's net marital property—was significantly, and negatively, correlated with the size of the wife's net property percentage in the pre-equitable distribution period.²²⁹ Although the relationship escaped statistical significance in 1984,²³⁰ the wife's percentage share still showed some tendency to fall as the couple's net worth increased. In both research years, the mean percentage award to sample wives in the lowest positive net worth category was approximately double the mean percentage award in the highest net worth category. (See Table 35.)

of the marital estate (the sum of assets plus debts) (Pearson's $R = -.1167$; $p = .090$).

²²⁹ In 1978 the correlation between the wife's net marital property percentage and net worth was negative and significant (Pearson's $R = -.2020$; $p = .013$) as was the correlation between net worth and the wife's percentage of the marital estate (the sum of assets plus debts) (Pearson's $R = -.2831$; $p = .000$). The likelihood of the wife obtaining at least 50% of the net marital property was also significantly related to net worth. Chi-square=17.56238 D.F.=5; $p = .0035$.

²³⁰ In 1984 both the correlation between the wife's net marital property percentage and net worth (Pearson's $R = -.0461$; $p = .321$) and between the wife's percentage of the marital estate and net worth (Pearson's $R = -.0817$; $p = .174$) were statistically insignificant. The likelihood of a wife obtaining at least 50% of the net marital property was significantly related to net worth, however. Chi-square=17.69153 D.F.=5; $p = .0034$.

TABLE 35
DISTRIBUTION OF NET MARITAL PROPERTY
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND NET WORTH (\$1984)

Net Worth	Wife's Percentage Share					
	1978			1984		
	%Receiving 50% +	Median %	Mean (n) %	%Receiving 50% +	Median %	Mean (n) %
Negative	24%	0%	— (21)	20%	0%	— (30)
0-\$9999	50%	53%	71% (36)	65%	100%	141% (23)
\$10,000- \$39,999	62%	67%	67% (29)	60%	60%	56% (25)
\$40,000- \$99,999	69%	67%	62% (16)	67%	56%	60% (24)
\$100,000- \$149,999	65%	70%	70% (17)	44%	42%	42% (9)
\$150,000+	23%	34%	33% (22)	39%	42%	42% (23)

In other words, as marital net worth grew large enough to make an appreciable difference, women tended to get less. This tendency, which has also been reported by another researcher,²³¹ helps to explain the widespread perception that women receive less than half of the marital assets: in the cases that are likely to receive publicity, they often do.

5. Summary

Overall, the changes in property distribution associated with the equitable distribution law were modest. The new law was correlated with a slightly greater tendency toward relatively equal division. The role of fault in determining the property distribution also appears to have been curtailed. But the law failed to make any major impact on the variability of property awards. Outcomes were highly variable under the new law and not significantly correlated with factors, such as marital duration or income, that might expectedly produce disparate results.²³² The promise of individualized equity under the statute thus does not appear to have been realized.

²³¹ See McLindon, *supra* note 42, at 382 (Table 22).

²³² The tendency for equitable property distribution decisions to lack significant predictive relationships with variables such as those described in this section has been reported by other divorce researchers. See Rowe & Morrow, *supra* note 56, at 475 (only significant predictor of property award was whether couple owned marital home).

G. *The Impact of the Law on Alimony and Child Support*

1. The Frequency and Duration of Alimony Awards

In contrast to the relative stability in property distribution before and after the equitable distribution law, dramatic change in the frequency and duration of alimony awards occurred after the passage of the new law. Over the research period, the proportion of cases in which alimony was awarded in the three research counties declined by fully 43%.²³³ This decline was statistically significant,²³⁴ and occurred consistently in all case categories and counties.²³⁵ (See Table 36.)

TABLE 36

PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY YEAR AND CASE CATEGORY

Case Category	1978 (n=926)	1984 (n=946)	Difference
Contested	45	30	-15***
Consensual	38	23	-15***
Default	9	6	- 3
Total Sample	32	21	-11***
Total Divorce Pop.⊕	21	12	- 9

⊕ Based on weighted data for each case category within each county.

*** p < .001.

An even more dramatic change occurred in the duration of alimony awards. (See Table 37.) In 1978 approximately four out of five alimony awards were permanent. In 1984 about half that

²³³ Because the sample is not an accurate representation of the total population of divorcing couples in the research counties, the number of alimony awards in each case category within each county were appropriately weighted to create percentages applicable to the total population.

²³⁴ Chi-square=39.25454 D.F.=2; p=.0000.

²³⁵ In 1978, 27% of divorced wives in the New York County sample, 31% of those in the Onondaga County sample, and 39% of those in the Westchester County sample were awarded alimony. In 1984, 21% of divorced wives in the New York County sample, 16% of those in the Onondaga County sample, and 21% of those in the Westchester County sample were awarded alimony. When the number of alimony awards in each case category within each county was appropriately weighted to create a percentage applicable to the total divorce population of the county, it appeared that the percentage of divorced wives awarded alimony declined from 11% to 4% in New York County, from 24% to 15% in Onondaga County, and from 29% to 18% in Westchester County over the research period.

number were; the majority of awards were for a limited duration. The change was, again, statistically significant²³⁶ and consistent across case categories and across counties.²³⁷

TABLE 37
PERCENTAGES OF SAMPLE ALIMONY AWARDS THAT
WERE PERMANENT, BY YEAR AND CASE CATEGORY

Case Category	1978 (n=289)	1984 (n=186)	Difference
Contested	75	31	-44***
Consensual	81	44	-37***
Default	82	41	-41**
Total Sample	78	37	-41***
Total Divorce Pop.⊕	81	41	-40

⊕ Based on weighted data for each case category within each county.

** p < .01

*** p < .001

The average duration of nonpermanent awards did not vary substantially over the research period, however. In 1978 the average was 4.5 years; in 1984 it was 4.7 years.²³⁸

These striking changes in the frequency and duration of alimony awards should not be surprising. The legislative memorandum explaining the new statute indeed declared that the objective of the new alimony standards was to "award the recipient spouse an opportunity to achieve independence"²³⁹ and suggested that permanent maintenance should be restricted to long-married wives and those who are unemployed or have sacrificed

²³⁶ Chi-square=79.50405 D.F.=1; p=.0000.

²³⁷ In New York County the percentage of permanent awards declined from 68% to 30% of the total. In Onondaga County permanent awards declined from 87% to 45% of the total. In Westchester County permanent awards declined from 78% to 38% of the total.

²³⁸ The averages did vary substantially by county and case category. In the Onondaga County sample, for example, during both research years the average duration of a time-limited alimony award was much higher in consensual (8.1 years 1978, 7.7 years 1984) than in contested cases (3.8 years 1978, 3.8 years 1984). By contrast, in the New York County sample, awards in consensual cases averaged 2.8 years in 1978 and 5.9 years in 1984; awards in contested cases averaged 5.0 years in 1978, 3.8 years in 1984. In the Westchester County sample, awards in consensual cases averaged 6.7 years in 1978 and 5.7 years in 1984; awards in contested cases averaged 5.3 years in 1978 and 5.4 years in 1984.

²³⁹ 1980 NEW YORK STATE LEGISLATIVE ANNUAL, *supra* note 73, at 130.

career opportunities to serve as a parent and homemaker.²⁴⁰ Several other researchers have also reported similar results following the adoption of new alimony rules emphasizing the use of maintenance for rehabilitative purposes in other states.²⁴¹

While the change is not surprising, it is controversial. Commentators in New York²⁴² and across the nation²⁴³ have suggested that the new alimony norms are being unfairly applied in inappropriate cases. The next section describes the data relating to this issue.

2. Who Gets Alimony: The Relationship Between Marital Duration, Employment, Income, Custody, and Alimony Awards

The new rules, some have claimed, are not only being applied to wives who can achieve meaningful independence, but also to those who, as a result of long-term marriage and minimal participation in the paid labor market, have dubious earning capacity.²⁴⁴ A preliminary issue, of course, is how such wives fared under the previous regime; even before the passage of the equitable distribution law, only 21% of divorced wives within the three research counties were awarded alimony. Who received an alimony award under the old rules? Were alimony awards predictable or inconsistent? How have the new rules altered the prior patterns? This section examines the effect of marital duration, employment, income, and custody on the award of alimony before and after passage of the new law.

a. Marital Duration

Marital duration was, in both research years, a significant predictor of an alimony award.²⁴⁵ Wives married for twenty or

²⁴⁰ *Id.*

²⁴¹ See note 42 *supra*.

²⁴² See, e.g., TASK FORCE REPORT, *supra* note 77; Harriet N. Cohen & Adria S. Hillman, *New York Courts Have Not Recognized Women as Equal Marriage Partners*, 5 EQUITABLE DISTRIBUTION REP. 93 (1985).

²⁴³ See, e.g., WEITZMAN, *supra* note 4, at 388-91; Goldfarb, *supra* note 41; Krauskopf, *supra* note 41.

²⁴⁴ See, e.g., Cohen & Hillman, *supra* note 78, at 14.

²⁴⁵ In 1978, Pearson's $R=.3166$; $p=.0000$. In 1984, Pearson's $R=.2125$; $p=.0006$. For the 1984 contested sample, however, marital duration was not a significant predictor of alimony. Pearson's $R=.04964$; $p=.1907$. A similar relationship between marital dura-

more years were, in both time periods, more than three times as likely to receive an alimony award as their counterparts married for fewer than five years. But the greatest impact of the decline in alimony awards also fell on long-married wives.²⁴⁶ (See Table 38.) In 1978, 54% of sample wives married twenty or more years received an alimony award, while in 1984 only 34% did. The decline for wives married less than five years, by contrast, was much smaller.²⁴⁷

TABLE 38
PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY,
BY YEAR AND MARITAL DURATION

Length of Marriage	1978		1984		Difference
	%	(n)	%	(n)	
0 - 4 years	14	(188)	11	(231)	- 3%
5 - 9 years	26	(246)	17	(231)	- 9%*
10 -14 years	37	(160)	24	(176)	-13%*
15 -19 years	43	(128)	28	(127)	-15%**
20+ years	54	(184)	34	(179)	-20%**

* $p < .05$

** $p < .01$

Nor was the movement toward durational maintenance confined to wives in short marriages. In 1984, among wives married for twenty or more years who were awarded alimony, more than half were awarded alimony for a time-limited period. (See Table 39.)

tion and the likelihood of an alimony award has been reported by other divorce researchers. See STERIN ET AL., *supra* note 46, at 140; WEITZMAN, *supra* note 4, at 169; McLindon, *supra* note 42, at 363; Rowe & Morrow, *supra* note 56, at 476; Wishik, *supra* note 42, at 88 (Table 4).

²⁴⁶ The decline was statistically significant. Chi-square=10.82680 D.F.=1; $p=.0010$. The decreased tendency for longer-married wives to be awarded alimony was present in all case categories, although it was greatest in the contested group. Here 70% of wives married twenty or more years were awarded alimony in 1978 as compared to only 36% in 1984. The change was also constant across all counties.

²⁴⁷ Nor was the decline for this group statistically significant.

TABLE 39
PERCENTAGES OF SAMPLE ALIMONY AWARDS THAT
WERE PERMANENT,
BY YEAR AND MARITAL DURATION

Length of Marriage	Percentage of Awards Permanent				Difference
	1978		1984		
	%	(n)	%	(n)	
0 - 4 years	48%	(23)	11%	(18)	-37*
5 - 9 years	74%	(61)	36%	(36)	-38***
10 -14 years	80%	(53)	32%	(41)	-48***
15 -19 years	86%	(51)	28%	(29)	-58***
20+ years	84%	(97)	53%	(58)	-37***

* $p < .05$

*** $p < .001$

Moreover, the decline in permanent awards was just as great for the long-married group as for wives married for less than five years.

b. *Wife's Employment and Income*

In both research years, unemployed wives were significantly more likely to receive an alimony award than their employed counterparts.²⁴⁸ (See Table 40.) But higher levels of employment among wives in the later research period does not account for the decline in alimony awards. In the contested case sample (the only group for which employment information was available), wives' employment did increase by nine percentage points over the research period. If the earlier relation between alimony and employment held constant, one would expect alimony awards to decline by three percentage points.²⁴⁹ But awards within the contested group instead declined by three times that amount.²⁵⁰

²⁴⁸ For the 1978 contested sample, chi-square=16.411385 D.F.=1; $p=.0001$. For the 1984 contested sample, chi-square=15.80078 D.F.=1; $p=.0001$. A similar relationship between the wife's employment and the likelihood of an alimony award has been reported by other divorce researchers. See WEITZMAN, *supra* note 4, at 177; McLindon, *supra* note 42, at 363.

²⁴⁹ In 1978, for wives with available employment information, 37% of those employed (63/169) and 64% of those unemployed (61/95) received alimony, or 47% (124/264) of the total. If the same percentages applied in 1984, one would anticipate that 37% of those employed (77/208) and 64% of those unemployed (51/79) would receive alimony, for an overall alimony rate of 44% (128/287).

²⁵⁰ From 45% of the contested group in 1978 to 30% in 1984.

Moreover, awards to the unemployed and employed groups fell by approximately the same amount between the two research years, although the decline for the unemployed group escaped statistical significance.²⁵¹

TABLE 40
PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE
AWARDED ALIMONY,
BY YEAR AND EMPLOYMENT STATUS

Employment Status	1978		1984		Difference
	%	(n)	%	(n)	
Employed	37	(169)	26	(208)	-11*
Unemployed	64	(95)	52	(79)	-12

* $p < .05$

When one looks at awards to wives specifically described as housewives or homemakers the same pattern is apparent. Seventy-one percent of these wives were awarded alimony in 1978, as compared to 59% in 1984. Unemployed wives married ten or more years also suffered a loss in the likelihood of an alimony award greater than that of their employed counterparts and employed wives married less than ten years. (See Table 41.)

TABLE 41
PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE
AWARDED ALIMONY, BY MARITAL DURATION,
EMPLOYMENT STATUS, AND YEAR

Marital Duration and Employment Status	1978		1984		Difference
	%	(n)	%	(n)	
Unemployed wives married \geq 10 years	67%	(61)	49%	(47)	-18
Unemployed wives married $<$ 10 years	56%	(34)	50%	(32)	- 6
Employed wives married \geq 10 years	40%	(115)	27%	(132)	-13*
Employed wives married $<$ 10 years	30%	(54)	21%	(73)	- 9

* $p < .05$

²⁵¹ For employed wives, chi-square= 6.20315 D.F.=1; $p=.0128$. For unemployed wives, chi-square=2.80620 D.F.=1; $p=.0939$.

These unemployed, long-married wives also increasingly received time-limited maintenance under the new regime. In 1978, 81% of alimony awards to wives in this group were permanent; in 1984, only 32% were permanent.²⁵²

c. Spousal Income

The decline in alimony awards also affected wives at all income levels. Although, in both research years, the wife's income was a highly significant predictor of alimony,²⁵³ for the contested case sample (the only group with income information) the decline in awards was not confined to the high income group. Although sample wives earning less than \$10,000 per year suffered the smallest decline in alimony awards, the loss for wives earning between \$10,000 and \$20,000 was slightly higher than that for their higher income counterparts. (See Table 42.)

TABLE 42

PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE
AWARDED ALIMONY, BY YEAR AND WIFE'S INCOME (\$1984)

Wife's Income	1978		1984		Difference
	%	(n)	%	(n)	
\$0 - \$9,999	61	(150)	47	(135)	- 14*
\$10,000 - \$19,999	33	(86)	17	(94)	- 16*
\$20,000+	15	(34)	9	(47)	- 6

* $p < .05$

In both research years, the likelihood of an alimony award to a wife in the contested case sample was also strongly affected

²⁵² In 1978, 74% of awards to employed wives married for ten years or more were permanent; for unemployed wives married less than ten years, 63% were permanent; for employed wives married less than ten years, 75% were permanent.

In 1984, 31% of awards to employed wives married for ten or more years were permanent; for unemployed wives married less than ten years, 38% were permanent; for employed wives married less than ten years, 13% were permanent.

²⁵³ In 1978, Pearson's $R = -.2734$; $p = .000$. In 1984, Pearson's $R = -.3725$; $p = .000$. A similar relationship between the wife's income and an alimony award has been documented by other divorce researchers. See WEITZMAN, *supra* note 4, at 179 (38% of sample wives in Los Angeles and San Francisco, Cal. earning less than \$10,000 obtained alimony, as compared to 20% of those earning \$10,000 or more); Bell, *supra* note 110, at 294, 296 (only 12% of wives in contested divorce sample earning \$20,000 or more obtained an alimony award, as compared to 48% for the entire contested sample); Rowe & Morrow, *supra* note 56, at 477 (66% of wives earning less than \$10,000 awarded alimony, as compared to 31% of wives earning more than \$10,000).

by her husband's income.²⁵⁴ (See Table 43.) Wives of husbands in the high income group were, in both time periods, significantly more likely to be awarded alimony than their counterparts married to low-income husbands.²⁵⁵ The impact of the decline in awards was felt relatively equally, however, across all income groups.

TABLE 43
PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE
AWARDED ALIMONY, BY YEAR AND HUSBAND'S INCOME
(\$1984)

Husband's Income	1978		1984		Difference
	%	(n)	%	(n)	
\$0 - \$19,999	33	(61)	20	(66)	- 13%
\$20,000 - \$39,999	44	(108)	30	(108)	- 14%*
\$40,000+	61	(83)	51	(61)	- 11%

* $p < .05$

When husband and wife income are compared, it is clear that, in both research years, the more of the family income a wife contributed, the lower her chances of an alimony award. (See Figure 44.) The wife's percentage of family income was a highly significant predictor of alimony in both time periods.²⁵⁶

²⁵⁴ In 1978, Pearson's $R = .1696$; $p = .003$. In 1984, Pearson's $R = .1077$; $p = .003$.

²⁵⁵ A similar pattern has been reported by other divorce researchers. See WEITZMAN, *supra* note 4, at 179 (15% of sample wives whose husbands earned less than \$20,000 received an alimony award as compared to 62% of those with husbands earning \$30,000 or more); Bell, *supra* note 110, at 294 (15% of wives in contested case sample whose husbands earned less than \$20,000 received an alimony award as compared to 76% of those with husbands earning \$40,000 or more); Rowe & Morrow, *supra* note 56, at 477 (Table 8) (28% of sample wives whose husbands earned less than \$20,000 were awarded alimony as compared to 59% of wives whose husbands earned between \$20,000 and \$29,000).

²⁵⁶ In 1978, Pearson's $R = -.3853$; $p = .000$. In 1984, Pearson's $R = -.4510$; $p = .000$. A similar pattern has been reported by other divorce researchers. See STERIN ET AL., *supra* note 46, at 140-41; McLindon, *supra* note 42, at 363-64.

TABLE 44

PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE
AWARDED ALIMONY, BY YEAR AND WIFE'S INCOME
PERCENTAGE (WIFE'S INCOME/FAMILY INCOME)

Wife's Income/ Family Income	1978		1984		Difference
	%	(n)	%	(n)	
Less than 10%	68%	(101)	58%	(76)	- 10
10% - 29%	46%	(52)	31%	(49)	- 15
30% - 49%	24%	(59)	12%	(57)	- 12
50% +	21%	(19)	4%	(23)	- 17

This relationship became more pronounced over the research period. In the 1984 contested case sample, a wife contributing less than 10% of the family income was almost fifteen times more likely to be awarded alimony than a wife contributing 50% or more of the family income. Although the absolute difference in the likelihood of an alimony award over the research period was approximately the same for each group (between 12 and 17 points), in percentage terms, the wives who had contributed the most to family income were most affected. Awards to wives in this group, who contributed 50% or more of the family income, declined by fully 81%.

d. *Child Custody*

Wives with custody of minor children were, in both research years, significantly more likely to obtain alimony than were wives without custody.²⁵⁷ The decline in alimony awards also affected the group with custody as much as the group without. (See Table 45.)

²⁵⁷ In 1978, chi-square=30.69749 D.F.=1; p=.0000. In 1984, chi-square=13.155560 D.F.=2; p=.0014.

TABLE 45
PERCENTAGES OF SAMPLE WIVES AWARDED ALIMONY, BY
YEAR AND CUSTODY STATUS

Custody Status ⊕	1978		1984		Difference
	%	(n)	%	(n)	
Wife with sole custody	39	(471)	25	(378)	- 14***
Wife without custody	19	(337)	13	(409)	- 6*

⊕ Cases involving split or joint physical custody are excluded. Wife without custody category includes cases where there were no minor children and cases with husband custody.

* $p < .05$

*** $p < .001$

3. Variation in Alimony Decision Making and its Rationality

In both research years, the most important predictor of an alimony award was the wife's family income percentage.²⁵⁸ Other variables that significantly predicted an alimony award in both years were the wife's employment status and income (which, not surprisingly, were highly correlated with her family income percentage), the husband's income, marital duration, custody, the case category, whether the wife was awarded occupancy of the marital home, and the type of legal representation in the case.²⁵⁹ With the exception of case category and legal representation, each of these factors relates to spousal need or contribution and thus is rationally related to the decision to award alimony. Under no alimony regime would we expect a wife whose income exceeds that of her husband in a short, childless marriage to be awarded alimony. Under any alimony regime we would expect an older homemaker in a lengthy marriage whose husband has ample income to receive an alimony award. To some extent, then, alimony awards followed predictable, rational patterns.

²⁵⁸ See Appendix Table 21.

²⁵⁹ For the correlations between all of these variables and an alimony award, by year, see Appendix Table 21. For some variables the correlation table includes only the contested case sample as the information was unavailable for the other case categories. For the 1978 contested and default sample, a divorce judgment against the wife was also significant, negative predictor of an alimony award (Pearson's $R = -.1587$; $p = .003$). For the contested group, the wife's age, the couples' net worth, and the wife's percentage of the marital estate (the sum of assets plus debts) were also significant predictors in 1978. The significance of these correlations disappeared in the later research period.

But while most of the factors that predicted an alimony award were rational ones, there still appeared to be a considerable amount of inexplicable variance in alimony decision making. For example, in 1984, 45% of wives in the contested case sample whose incomes represented 20% of family income or less were not awarded alimony. Is there a rational explanation for this result? Marital duration was not significantly correlated with an award of alimony in this group; indeed, among this group, the average marital duration of those wives who were not awarded alimony was identical to that of wives who were awarded alimony. Nor were the wife's income, the husband's income, the wife's age, custody, the size of the child support award, or the amount of net marital property received by the wife significantly correlated with an alimony award in this group. (See Table 46.) There are, in short, no obvious reasons why some wives with very low incomes in relation to those of their husbands were awarded alimony, and some were not.

The effect of the decision to award alimony can be clearly seen, however, in the circumstances of the group after divorce. Wives who were awarded alimony had an average post-divorce per capita income that was three times as high as that of their counterparts who were not awarded alimony.

TABLE 46
CHARACTERISTICS OF COUPLES IN 1984 CONTESTED CASE
SAMPLE WHERE WIFE'S INCOME WAS NO MORE THAN 20%
OF FAMILY INCOME, BY ALIMONY DECISION

	Awarded Alimony (n=46)	Not Awarded Alimony (n=38)
BEFORE DIVORCE		
Average Age (years)		
Husband	40.6	42.2
Wife	38.7	38.6
Average Income (\$ per year)		
Husband	\$68,489	\$74,087
Wife	\$ 2,479	\$ 4,336
Per Capita	\$25,052	\$22,850
Average Marital Duration (years)	15.2	15.2
Average Net Worth	\$25,868	\$27,435
AFTER DIVORCE		
Average Child Support		
Award (\$ per month)	\$ 514	\$ 378
Wife's Median Net Property Award	\$14,510	\$ 5,330
Average Per Capita Income		
Husband's Household	\$47,306	\$50,634
Wife's Household	\$13,258	\$ 4,367

The same pattern prevailed with respect to the permanency of awards. Overall, in both research years, wives in longer marriages were significantly more likely to be awarded permanent alimony than were wives in shorter marriages.²⁶⁰ But, in 1984, 55% of alimony awards to wives married for twenty or more years were not permanent. The average age, income, and family income percentages of the wives in this long-married group who were awarded durational maintenance were not, however, markedly different than those of the group who were awarded permanent maintenance.²⁶¹ Nor were the wife's age, income, family income percentage, custody, or the husband's income significantly related to the decision to award permanent as opposed to dura-

²⁶⁰ In 1978, Pearson's $R=.1468$; $p=.045$. 1984, Pearson's $R=.2344$, $p=.012$.

²⁶¹ Among wives in the contested case sample married for twenty or more years who received permanent maintenance, the wife's average income was \$5757, the husband's average income was \$52,679, the average wife's income percentage was 12% and the average wife's age was 46.5 years. Among wives in this group who received durational maintenance, the wife's average income was \$7458, the husband's average income was \$77,358, the average wife's income percentage was 11%, and the average wife's age was 44.4 years.

tional maintenance among the entire 1984 contested case sample.²⁶² (See Table 47.)

TABLE 47
CHARACTERISTICS OF COUPLES IN 1984 CONTESTED CASE
SAMPLE, BY ALIMONY DECISION

	Alimony Decision		
	None n=217	Durational n=60	Permanent n=27
Average Age (years)			
Husband	41.0	39.2	43.6
Wife	37.9	38.0	40.3
Average Income (\$ per year)			
Husband	\$39,270	\$58,501	\$54,515
Wife	\$13,926	\$ 5,621	\$ 4,255
Wife's Income %	31%	12%	9%
Average Marital Duration (years)	13.8	13.8	18.2

Although the chance of receiving an alimony award did not significantly vary by county within the sample, when the cases were weighted by category to approximate the actual category proportions in each county, the chances of an alimony award were markedly different. When the sample was so weighted, only 4% of divorced wives in New York County received an alimony award in 1984, as compared to 15% in Onondaga County and 18% in Westchester County. Alimony decision making also appeared to vary regionally to some extent. For example, in 1984, marital duration was a highly significant predictor of alimony in Onondaga and Westchester counties,²⁶³ but not in New York County.²⁶⁴ Indeed, the only factors that were significant predictors of alimony in New York County during 1984 were the wife's income²⁶⁵ and her family income percentage.²⁶⁶ Nor is there any obvious reason why, in 1984, only 30% of sample ali-

²⁶² In 1978 husband's income (Pearson's $R=.1802$; $p=.025$) and custody (Pearson's $R=.1801$; $p=.018$) were significantly correlated with the decision to award permanent as opposed to durational maintenance. In 1984 neither the wife's income, husband's income, wife's family income percentage, wife's age, or custody were significantly correlated with the decision to award permanent as opposed to durational maintenance.

²⁶³ In Onondaga County, Pearson's $R=.2350$; $p=.000$. In Westchester County, Pearson's $R=.1857$; $p=.002$.

²⁶⁴ Pearson's $R=.0728$; $p=.149$.

²⁶⁵ Pearson's $R=-.4001$; $p=.002$.

²⁶⁶ Pearson's $R=.4473$; $p=.000$.

mony awards in New York County were permanent as compared to 45% of those in Onondaga County.

Variation in alimony decision making was also marked, and significant, when case type was taken into account. In 1984 fully five times as many alimony awards were made within the contested case category as within the default category. Although the average marital duration for the default group was also lower than that of the contested or consensual group, the difference prevailed even for wives in lengthy marriages; among wives married for twenty or more years in the 1984 sample, 63% of those in the contested group were awarded alimony as compared to only 20% of the default group. We know nothing, of course, about the incomes of couples in the default sample, and it is highly likely that differences in income levels account for some of this variation. But it is hard to believe that a difference of this magnitude would result from that factor alone.

Another factor that may partially explain the varying levels of alimony awards by case category is legal representation. In both research years, whether the parties were represented by counsel was another, highly significant predictor of an alimony award.²⁶⁷ In 1984, for example, 30% of wives were awarded alimony when both parties were represented by counsel, while not one alimony award was made when neither party was represented by counsel. (See Table 48.) Given the much lower rate of legal representation among the default sample,²⁶⁸ it is possible that the lower alimony rate for this group reflects legal representation more than case type.²⁶⁹

²⁶⁷ In 1978 $\chi^2=63.60809$ D.F.=3; $p=.0000$. In 1984 $\chi^2=68.68281$ D.F.=6; $p=.0000$.

²⁶⁸ In 1984, for cases with information about legal representation, both spouses were represented by counsel in 97% of cases in the contested sample ($n=261$), 75% of cases in the consensual sample ($n=255$), and 19% of cases in the default sample ($n=249$). In 1978 both spouses were represented by counsel in 98% of the contested sample ($n=279$), 74% of the consensual sample ($n=272$), and 24% of the default sample ($n=215$). Case type was significantly correlated with the type of legal representation in both research years ($p=.0000$).

²⁶⁹ Legal representation is also likely to be affected by income and asset levels. For example, in both research years legal representation was positively correlated with home ownership (in 1978 Pearson's $R=.0774$; in 1984 Pearson's $R=.0971$), and the amount of combined alimony and child support (in 1978 Pearson's $R=.2591$; in 1984 Pearson's $R=.2549$). The latter relationship was statistically significant in both years ($p=.000$). Given the lack of information on income and asset values in the consensual and default files, it is impossible to determine how heavily legal representation was influenced by

TABLE 48
SAMPLE ALIMONY AWARDS, BY YEAR AND LEGAL
REPRESENTATION

Legal Representation	1978		1984	
	% Awarded Alimony	(n)	% Awarded Alimony	(n)
Both represented	44%	(524)	30%	(492)
Husband represented	14%	(66)	6%	(70)
Wife represented	19%	(126)	7%	(150)
Neither represented	6%	(50)	0%	(53)

In sum, while there were some significant, rational predictors of alimony for the sample population, alimony decision making cannot be completely explained on the basis of those factors. An older, long-married wife whose income is low in relation to that of her husband is the best candidate for alimony, but many wives with all of these characteristics still fail to obtain an alimony award. A permanent award is, again, more likely in a long marriage, but is by no means guaranteed. Moreover, the likelihood of an award is strongly correlated with the type of divorce action and the couple's representation by legal counsel, factors that may bear no relationship to the appropriateness of an alimony award. Alimony decision making appears to be partly rational, but to rest as well on factors that are inexplicable from the information at hand.

4. The Value of Alimony and Child Support

a. *The Value of Alimony Awards*

The average alimony award declined slightly in each research county between 1978 and 1984. (See Table 49.) Even when zero awards were included, the drop in the average award for the weighted sample (which approximates the actual divorcing population in the three research counties) was modest. This relative constancy in the value of alimony awards contrasts with what appears to be a more substantial decline in the value of alimony nationally.²⁷⁰ For both years the alimony averages varied sub-

these factors.

²⁷⁰ Census data and other time-series studies have uniformly reported declining alimony awards. Between 1979 and 1986 the mean alimony payment received by Census Bureau respondents declined from \$4701 to \$3733 in constant 1985 dollars, a 21% drop. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY:1985

stantially among categories and counties, however.²⁷¹

TABLE 49
AVERAGE ALIMONY AWARDS (\$1984 PER MONTH),
BY YEAR AND CASE CATEGORY

Case Category	1978 \$ per month (n)	1984 \$ per month (n)	% Change
Contested	\$ 917 (141)	\$ 779 (98)	-15%
Consensual	\$ 741 (121)	\$ 986 (72)	+33%
Default	\$ 685 (29)	\$ 640 (22)	- 7%
ALL ALIMONY AWARDS			
Total sample	\$ 824 (291)	\$ 841 (192)	+ 7%
Total divorce pop.⊕	\$ 652	606	- 7%
ALL SAMPLE CASES			
Total sample	\$ 276 (923)	\$ 171 (948)	-38%**
Total divorce pop.⊕	\$ 101	\$ 93	- 8%

⊕ Based on weighted data for each case category within each county.

** $p < .01$

In neither time period was the value of the alimony award frequently enhanced through provision for payment of specified expenses, except for continuation of medical insurance coverage. In 1984, 54% of alimony awards required the obligor to maintain medical insurance for a spouse.²⁷² But only sixteen alimony awards (8%) included provisions for the payment of other specified expenses.²⁷³ Provisions for increases in the award based on the cost of living or on increases in the obligor's salary were also extremely rare. In the post-equitable distribution period, wives were also increasingly required to shoulder their own attorneys' fees. Seventy-two percent of cases in which counsel fees were allocated required the wife to pay her own fees, as compared to

6 (Current Population Reports Series P-23, No. 154) (1989). Local time-series studies also show declines, although more modest ones. See STERIN ET AL., *supra* note 46, at 94-95, 132; McLindon, *supra* note 42, at 369; Welch & Price-Bonham, *supra* note 44, at 415. For a comparison of the declines in alimony awards reported in these time-series studies, see Garrison, *supra* note 44, at 96 (Table 3.13).

²⁷¹ In 1978 the averages were: \$1303 in New York County, \$885 in Westchester County, and \$493 in Onondaga County. In 1984, the averages were: \$1170 in New York County, \$801 in Westchester County, and \$464 in Onondaga County.

²⁷² In 1978, 42% of alimony awards required the obligor to maintain medical insurance coverage for his or her spouse.

²⁷³ In 1978, 24 awards (8%) had such provisions. In both years the most frequently mentioned payments were for uninsured medical expenses.

53% in the earlier period.²⁷⁴

b. *The Value of Child Support Awards*

Although the value of the average alimony award did not decline substantially over the research period, the value of the average child support award declined by 25%. The inclusion of implicit child support²⁷⁵ did not appreciably raise the average in either time period.²⁷⁶ The decline was also consistent across case categories (see Table 50) and counties (see Table 51).

²⁷⁴ In 1984 (n=661), 16% required payment of the wife's counsel fees by the husband; 12% required joint payment. In 1978 (n=653), 34% required payment of the wife's counsel fees by the husband; 13% required joint payment.

²⁷⁵ Payments denominated spousal maintenance were considered to be implicit child support whenever their termination was explicitly tied to an emancipation event, such as reaching the age of majority.

The incentive to mislabel child support as alimony derives from the Supreme Court's decision in *Commissioner v. Lester*, 366 U.S. 299 (1961), which held that spouses could denominate payments intended for the benefit of children as alimony and claim the alimony deduction. For an example of tax-planning strategy under the *Lester* principle, see JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 689 (1978). The *Lester* decision was overturned by Congress in the domestic relations tax reform provisions of the Deficit Reduction Act of 1984, codified at I.R.C. § 71(a)(2)(A) (1984). This may have reduced the incentive to mislabel in some of the 1984 cases.

²⁷⁶ With such implicit child support included, the overall averages were \$562 in 1978 and \$450 in 1984. Even among the contested cases, where such implicit awards were most frequent, the 1978 average was raised by only \$16, and the 1984 average by only \$2 when such awards were included.

TABLE 50
AVERAGE CHILD SUPPORT AWARDS (\$1984 PER
MONTH), BY YEAR AND CASE CATEGORY

Case Category	1978 (n=475)	1984 (n=410)	% Change
Contested	(n=211)	(n=196)	
per family	\$526	\$382	- 27%**
per child	\$290	\$239	- 17%*
Consensual	(n=198)	(n=164)	
per family	\$492	\$394	- 20%
per child	\$267	\$206	- 23%*
Default	(n= 66)	(n= 50)	
per family	\$458	\$293	- 36%*
per child	\$273	\$216	- 21%*
TOTAL SAMPLE	(n=475)	(n=410)	
per family	\$502	\$376	- 25%***
per child	\$273	\$216	- 21%**

* p < .05

** p < .01

*** p < .001

TABLE 51
AVERAGE CHILD SUPPORT AWARDS (\$1984 PER MONTH),
BY YEAR AND COUNTY

County	1978	1984	% Change
Onondaga	(n=202)	(n=181)	
per family	\$425	\$278	- 35%
per child	\$212	\$148	- 30%
Westchester	(n=163)	(n=136)	
per family	\$548	\$427	- 22%
per child	\$293	\$245	- 16%
TOTAL DIVORCE POP.⊕ (Onondaga and Westchester only) ²⁷⁷			
per family	480	342	- 29**
per child	248	190	- 23**

⊕ Based on weighted data for each case category for each county.

** p < .01

In neither research year was the value of child support frequently enhanced through provision for other specified expenses,

²⁷⁷ An average could not be computed for the 1984 New York County sample because the default case sample in that year included only five cases with complete information on child support. For most of the default cases in that year involving minor children, it was unclear whether there was an existing Family Court order on child support, or whether the lack of data indicated a zero award. Default cases also made up the vast majority of divorces in New York County during that year.

except the continuation of medical insurance coverage for the children, which was mandated in more than half of the cases involving the custody of minor children in both research years.²⁷⁸ A provision for college expenses was included in roughly a quarter of the cases.²⁷⁹ Explicit provisions for other expenses (such as private school, camp, childcare, or uninsured medical expenses), were extremely rare in both years,²⁸⁰ as were provisions for automatic increases in the level of child support, based on the cost of living or obligor's salary.²⁸¹

In both research years the obligor's income was the best predictor of the size of the child support award, and the combined alimony and child support award.²⁸² The recipient's income, on the other hand, was not significantly correlated with the size of the child support award in either research year and was significantly correlated with the combined award in only the later research period.²⁸³

Other significant predictors of the value of child support and alimony were the case category²⁸⁴ and whether the parties had legal representation.²⁸⁵ In 1984, for example, the average

²⁷⁸ In 1978, 58% of sample cases with provisions for the custody or support of minor children ($n=538$) required that one or both parents pay medical insurance premiums. Of those cases where such was required ($n=310$), 88% required the father to make the payments. In 1984, 64% of sample cases with provisions for the custody or support of minor children ($n=519$) required one or both parents to pay medical insurance premiums. Of those cases where such was required ($n=301$), 78% required the father to make the payments.

²⁷⁹ In 1978, 20% of cases involving the custody of minor children contained provisions for the payment of college expenses. Seventy-five percent of those payment provisions required payment by the father, the rest called for joint payment. In 1984, 31% of these cases contained college expense provisions. 44% required payment by the father, 2% by the mother, and 54% called for joint payment.

²⁸⁰ Provisions for child care expenses were found in 7% of 1984 cases and 3% of 1978 cases.

²⁸¹ Only 23 cases contained such a provision in 1984 as compared to 18 in 1978.

²⁸² In 1978, for child support, Pearson's $R=.6298$; $p=.000$; for combined alimony and child support, Pearson's $R=.5192$; $p=.000$. In 1984, for child support, Pearson's $R=.4216$; $p=.000$; for combined alimony and child support, Pearson's $R=.6099$; $p=.000$.

²⁸³ In 1984, for child support, Pearson's $R=.0040$; $p=.480$. For combined alimony and child support, Pearson's $R=-.1919$; $p=.001$.

²⁸⁴ In 1978, Pearson's $R=.2892$; $p=.000$. In 1984, Pearson's $R=.2252$; $p=.000$. In neither year was casetype a significant predictor of the size of the child support award alone.

²⁸⁵ In 1978, for the child support award, Pearson's $R=.1471$; $p=.002$. For the combined alimony and child support award, Pearson's $R=.2625$; $p=.000$. In 1984 the child support award alone was not significantly correlated with legal representation, but was

combined award was \$721 per month when both parties were represented by counsel as compared to \$269 when only one party was represented.²⁸⁶ Another group of researchers has recently reported that child support awards in three states were similarly correlated with legal representation.²⁸⁷

The declining levels of child support over the research period are consistent with those reported on a national basis in Census data²⁸⁸ and in local surveys.²⁸⁹ As there was no alteration in the standards relating to child support under the 1980 equitable distribution law, the explanation for the decline cannot be found there, however. Nor, indeed, is an explanation readily apparent from the research data.

The decreases in child support awards cannot be explained, for example, by changes in custody outcomes. Overall trends in regard to the custody of minor children were quite modest with one exception: provisions for joint legal custody rose dramatically. (See Table 52.) Moreover, child support awards when the mother had sole custody declined by approximately the same amount as did child support awards overall.²⁹⁰

for the combined alimony and child support award, Pearson's $R = .2546$; $p = .000$.

²⁸⁶ To some extent the difference in average awards may reflect the fact that, when both parties are represented by counsel, it is likely that the family has a higher income and more assets than when both parties are not represented. See note 270 *supra*. But see Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 340-41 (1991) (Table 10) (reporting significant correlation between child support award and legal representation at all income levels.).

²⁸⁷ *Id.* at 340-41 (Table 10).

²⁸⁸ See 1985 CHILD SUPPORT AND ALIMONY CENSUS REPORT, *supra* note 270, at 4 (reporting decline in mean child support payment received by survey respondents from \$2966 in 1979 to \$2215 in 1985, in \$1985, a 25% drop).

²⁸⁹ See STERIN ET AL., *supra* note 46, at 94-95, 132; McLindon, *supra* note 42, at 361, 369; Seal, *supra* note 44, at 12. But see Welch & Price-Bonham, *supra* note 44, at 415 (reporting small increase in level of child support in Spokane County, Wash. between 1970 and 1980). For a comparison of these reports, see Garrison, *supra* note 44, at 96 (Table 3.13).

²⁹⁰ The average child support award when the mother had sole custody declined by 23% (from \$541 in 1978 to \$412 in 1984), which was significant at the .001 confidence level.

TABLE 52
CUSTODY DECISIONS, BY YEAR

	Physical Custody		Legal Custody	
	1978 (n=538)	1984 (n=467)	1978 (n=532)	1984 (n=466)
Wife sole custody	88	82	71	53
Husband sole custody	5	9	4	5
Split custody	4	4	3	1
Joint custody	3	5	22	42

Nor does the loss in the value of child support appear to result simply from the smaller families of the later sample. Although the average number of minor children did decline over the research period from 1.3 to 1.1 minor children per couple, the decline in the level of support per minor child was almost as great as the per family loss.

c. Child Support and Alimony in Relation to Income

While the falling levels of child support that occurred over the research period are thus not readily explicable, the decline represented not only a dollar loss, but also a drop in the proportion of the noncustodial parent's income paid in support. In 1978, noncustodial parents in the contested case sample (the only group for whom such percentages could be calculated) paid an average of 22% of their gross income in child support; 1984, the average support percentage for this group was 18%.

In both years, noncustodial parents in higher income brackets paid a smaller fraction of their income in child support than did their low income counterparts. The inclusion of alimony payments eroded this difference to some extent. (See Table 53.) But noncustodial parents earning more than \$40,000 per year nonetheless paid, in both research years, a somewhat smaller fraction of their gross income in combined alimony and child support than did their low income counterparts. Indeed, the value of the obligor's income was a significant, negative, predictor of size of the child support percentage in both research years and, in 1984, of the combined alimony and child support per-

centage as well.²⁹¹ The increased frequency of short-term alimony awards in 1984 might also increase this gap over time, as a greater percentage of the high income parent's payments was made in the form of alimony. This tendency for higher income parents to pay less has also been noted in other jurisdictions.²⁹²

TABLE 53
PERCENTAGE OF OBLIGOR'S GROSS INCOME PAID IN
ALIMONY AND CHILD SUPPORT (CONTESTED CASE
SAMPLE), BY YEAR AND OBLIGOR'S INCOME (\$1984)

Noncustodial Parent's Income	1978		1984	
	cs%/comb.%	(n)	cs%/comb.%	(n)
\$0 - \$19,999	30/37%	(36)	22/25%	(45)
\$20,000 - \$39,999	20/28%	(78)	18/22%	(66)
\$40,000+	15/26%	(54)	11/20%	(26)
TOTAL SAMPLE	21/29%	(168)	18/23%	(137)

Cases with joint or split custody and no child support award excluded.

Another predictor of the value of child support and alimony in relation to obligor income was the recipient's income. In both research years the recipient's income was negatively correlated with the child support and combined alimony and child support percentages; in 1984 both correlations were significant.²⁹³ (See Table 54.)

²⁹¹ For the relationship between the obligor's income and the child support percentage in 1978, Pearson's $R = -.1588$; $p = .020$. In 1984 Pearson's $R = -.2874$; $p = .000$. For the relationship between the obligor's income and the combined percentage in 1984, Pearson's $R = -.1791$; $p = .020$. In 1978 the correlation was negative ($-.0956$) but not statistically significant ($p = .109$).

²⁹² See, e.g., WEITZMAN, *supra* note 4, at 462-69 (California); McLindon, *supra* note 42, at 371-72 (Connecticut). Thoennes et al., *supra* note 286, at 336 (Table 6) (reporting that sample cases from Colorado and Hawaii conformed to this pattern while sample cases from Illinois did not).

²⁹³ In 1984, for the relationship between the child support percentage and the recipient's income, Pearson's $R = -.1777$; $p = .026$. For the same relationship in 1978, Pearson's $R = -.1056$; $p = .093$. In 1984, for the relationship between the combined alimony and child support percentage and the recipient's income, Pearson's $R = -.2559$; $p = .002$. For the same relationship in 1978, Pearson's $R = -.1156$; $p = .073$.

TABLE 54
PERCENTAGE OF OBLIGOR'S GROSS INCOME PAID IN
ALIMONY AND CHILD SUPPORT
(CONTESTED CASE SAMPLE),
BY YEAR AND RECIPIENT'S INCOME (\$1984)

Recipient's Income	1978		1984	
	cs%/comb%	(n)	cs%/comb%	(n)
\$0 - \$9,999	23/34%	(98)	19/26%	(62)
\$10,000 - \$19,999	19/22%	(38)	22/24%	(40)
\$20,000+	14/21%	(23)	11/15%	(19)

Cases with joint or split custody and no child support award excluded.

In neither year, however, was the ratio of recipient to family income—the best measure of the parents' comparative income potential—a significant predictor of the combined income percentage.²⁹⁴

The averages also fail to reveal the considerable variation in the support percentage, even among families with the same number of children and similar income ratios. For example, in 1984, among families with one child where the wife obtained sole custody and the wife's income percentage was between 10% and 19%, the combined support percentage ranged from 0% to 27%.

While the adoption of child support guidelines may have reduced such variation in the level of child support,²⁹⁵ it could not have any effect on the level of alimony, where awards also tended to be highly variable. In 1984, among couples with no minor children where the wife's income percentage was 10% or less, the alimony percentage ranged from 0% (for cases in which

²⁹⁴ The recipient's income percentage was a significant predictor of the child support percentage alone. In 1978 Pearson's $R = .2026$; $p = .005$. As the size of the recipient's income in relation to family income increased, so did the value of the child support award in relation to the obligor's income. This counterintuitive correlation probably results from the smaller likelihood of an alimony award as the recipient's income increases.

²⁹⁵ Child support guidelines establishing a presumption of support as a fixed percentage of the obligor's gross income were adopted by the New York legislature in 1989. Ch. 567, §§ 6, 7, 1989 N.Y. Laws 1096, 1098-99 (codified at N.Y. DOM. REL. LAW § 240.1-b (McKinney Supp. 1991)). Some researchers have recently reported that the adoption of child support guidelines reduced the variability of child support awards in some states. See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. Rev. 209, 232-33 (1991) (summarizing reports); Thoennes et. al., *supra* note 286, at 339-40 (Table 7) (describing research results in three states).

no alimony was awarded) to 36% of the obligor's income.²⁹⁶

d. *The Effect of Income Transfers on Post-Divorce per Capita Income*

It has been widely reported that divorce is a financial catastrophe for women and the children in their custody. Researchers have generally found that the per capita income of divorced wives and children in their custody declines by about a third following divorce, while that of husbands actually improves.²⁹⁷ An examination of post-divorce per capita income for the contested sample revealed a similar pattern in New York. (See Table 55.) In both research years, divorced wives and children in their custody emerged from the divorce with an average per capita income approximately two-thirds that which they had enjoyed prior to the divorce, while the per capita income of husbands rose by a substantial margin.

TABLE 55

AVERAGE PER CAPITA INCOME (\$1984) BEFORE AND AFTER DIVORCE AMONG FAMILIES IN CONTESTED CASE SAMPLE, BY YEAR

Average Per Capita Income	1978		1984	
	\$ per year	(n)	\$ per year	(n)
Predivorce Family	\$19,138	(231)	\$19,380	(205)
Postdivorce:				
Husband	\$38,875	(238)	\$33,860	(221)
Avg. pct. of per capita predivorce income	215%		182%	(196)
Wife	\$10,956	(258)	\$11,210	(262)
Avg pct. of per capita predivorce income	68%	(219)	68%	(196)

These changes in post-divorce per capita income are roughly comparable to those reported by most other researchers. (See

²⁹⁶ Marital duration does not explain the variation within this group. While marital duration was significantly correlated with the alimony percentage for contested cases in 1978 (Pearson's $R = .2939$, $p = .000$), in 1984, both for the cases in this group ($n = 15$) and the contested sample, the relationship was not statistically significant.

²⁹⁷ See note 42 *supra*.

Table 56.)

TABLE 56
POST-DIVORCE PER CAPITA INCOME OF DIVORCED
HUSBANDS AND WIVES, BY RESEARCH SITE

Research Site	Husband (Average % Change)	Wife (Average % Change)
Anchorage, Alaska ²⁹⁸	+ 17%	- 33%
New Haven, Connecticut ²⁹⁹	+ 90%	- 31%
Los Angeles & San Francisco, California ³⁰⁰	—	- 21%
Five Counties, Vermont ³⁰¹	+ 120%	- 33%
New York/Onondaga/ Westchester, New York	+ 82%	- 32%

These changes were not felt uniformly across the sample, however. In both research years, the ratio of a woman's pre- and post-divorce per capita income was strongly correlated with her husband's income,³⁰² her own income,³⁰³ and the ratio of wife to family income.³⁰⁴ Wives of high income husbands suffered an average loss in per capita income more than seven times greater than that of their counterparts married to husbands in the lowest income bracket.³⁰⁵ (See Table 57.)

²⁹⁸ BAKER, *supra* note 42, at 19.

²⁹⁹ McLindon, *supra* note 42, at 392.

³⁰⁰ Hoffman & Duncan, *What are the Economic Consequences of Divorce?*, *supra* note 43, at 643 (utilizing data contained in WEITZMAN, *supra* note 4, at Tables 27 and 28). Weitzman does not provide average changes in per capita income for her sample as a whole, but describes them instead by income groups. See WEITZMAN, *supra* note 4, at 328-33. Husbands in every income category had a median per capita income at least 100% that of the predivorce household. *Id.*

³⁰¹ Wishik, *supra* note 42, at 98.

³⁰² In 1978 Pearson's $R = -.2286$; $p = .000$. In 1984 Pearson's $R = -.2319$; $p = .001$.

³⁰³ In 1978 Pearson's $R = .2961$; $p = .000$. In 1984 Pearson's $R = .4427$; $p = .000$.

³⁰⁴ In 1978 Pearson's $R = .6015$; $p = .000$. In 1984 Pearson's $R = .7164$; $p = .000$.

³⁰⁵ Other researchers have reported that the per capita income of divorced wives tends to decline more as family income increases. See BAKER, *supra* note 42, at 20; WEITZMAN, *supra* note 4, at 334.

TABLE 57
AVERAGE PERCENTAGE DIFFERENCE IN WIVES' PER
CAPITA INCOME (BEFORE AND AFTER DIVORCE) IN
CONTESTED CASE SAMPLE, BY YEAR AND HUSBAND'S
INCOME (\$1984)

Husband's Income	1978		1984	
	% Difference (n)		% Difference (n)	
\$0 - \$19,999	- 4%	(50)	- 7%	(52)
\$20,000 - \$39,999	-34%	(98)	-37%	(93)
\$40,000+	-49%	(71)	-52%	(51)

Wives in the lowest income bracket themselves suffered a loss in per capita income at least double that of their counterparts in the highest income bracket; indeed, in 1984, wives in the highest income bracket actually enjoyed a slight increase in their per capita income post-divorce. (See Table 58.)

TABLE 58
AVERAGE PERCENTAGE DIFFERENCE IN WIVES' PER
CAPITA INCOME (BEFORE AND AFTER DIVORCE) IN
CONTESTED CASE SAMPLE, BY YEAR AND WIFE'S INCOME
(\$1984)

Wife's Income	1978		1984	
	% Difference (n)		% Difference (n)	
\$0 - \$9,999	- 43%	(131)	- 57%	(101)
\$10,000 - \$19,999	- 14%	(61)	- 12%	(66)
\$20,000+	- 20%	(27)	+ 5%	(29)

The largest losses in per capita income were registered by low income wives with high income husbands. In 1984 wives in the lowest income bracket married to husbands in the two highest income brackets saw their per capita income plummet to less than half its pre-divorce level, while wives in the highest income bracket married to husbands in the lowest actually saw their per capita income increase by 77%. (See Tables 59 and 60.)

TABLE 59

AVERAGE PERCENTAGE DIFFERENCE IN WIVES' PER CAPITA INCOME (BEFORE AND AFTER DIVORCE) IN 1984 CONTESTED CASE SAMPLE, BY HUSBAND'S INCOME AND WIFE'S INCOME (\$1984)

Wife's Income	\$0-\$19,999		Husband's Income \$20,000-\$39,999		\$40,000+	
	% Difference	(n)	% Difference	(n)	% Difference	(n)
\$0 - \$9999	- 48%	(25)	- 66%	(47)	- 66%	(29)
\$10,000 - \$19,999	+ 11%	(19)	- 20%	(38)	- 22%	(9)
\$20,000+	+ 77%	(8)	- 3%	(8)	- 34%	(13)

This pattern held constant over the research period, although the range of variation was somewhat greater in the later research year.

TABLE 60

AVERAGE PERCENTAGE DIFFERENCE IN WIVES' PER CAPITA INCOME (BEFORE AND AFTER DIVORCE) IN 1978 CONTESTED CASE SAMPLE, BY HUSBAND'S INCOME AND WIFE'S INCOME (\$1984)

Wife's Income	\$0-\$19,999		Husband's Income \$20,000-\$39,999		\$40,000+	
	% Difference	(n)	% Difference	(n)	% Difference	(n)
\$0 - \$9999	- 17%	(27)	- 45%	(57)	- 55%	(47)
\$10,000 - \$19,999	+ 11%	(19)	- 20%	(31)	- 41%	(11)
\$20,000+	+ 14%	(4)	- 18%	(10)	- 33%	(13)

Given the availability of income for transfer and the high level of relative need among low income wives married to high income husbands, the extremity of their losses in per capita income is surprising. What these large scale losses in per capita income evidence is the fact that a wife's income was, for the sample population, a far more important factor than alimony or child support in determining her post-divorce standard of living; in neither time period were receipt of an alimony award or the value of the child support award significant predictors of a wife's post-divorce per capita income. Indeed, in 1984, the receipt of an alimony award and an award of custody to the wife were both negatively correlated with the wife's post-divorce percentage of

pre-divorce per capita income.³⁰⁶ During that year, those wives who were awarded alimony experienced a greater reduction in their post-divorce per capita income than did those who received no alimony.³⁰⁷ Similarly, those awarded child support experienced a greater decline (-42%) than did those whose husbands assumed custody (-14%) or who had no minor children (-24%).³⁰⁸ Neither the wife's age nor marital duration, on the other hand, were significant predictors of the wife's post-divorce percentage of pre-divorce per capita income in either time period.

III. WHAT THE DATA MEAN: DIRECTIONS FOR DIVORCE REFORM

What conclusions emerge from this picture of divorce in New York, before and after adoption of a new divorce regime establishing equitable division of marital property and instituting a new "rehabilitative" alimony norm?

One conclusion suggested by the New York experience is that diminished alimony prospects do not hinge upon loss of the ability to block a divorce, a theory that has been widely utilized to explain divorced wives' lost alimony prospects in states that adopted no-fault divorce reforms. New York has not adopted no-fault divorce except based on mutual consent. The ability of wives to block a divorce thus remains intact, but it failed to prevent diminished alimony prospects markedly similar to those that have been noted in no-fault divorce jurisdictions. The rules governing post-divorce entitlements appear to be more important determinants of divorce outcomes than do divorce

³⁰⁶ For the relationship between an award of alimony and the wife's percentage of pre-divorce per capita income post-divorce, in 1984 Pearson's $R = -.1070$; $p = .068$; in 1978 Pearson's $R = .0509$; $p = .227$. For the relationship between the wife's percentage of pre-divorce per capita income post-divorce and a custody award, in 1984 Pearson's $R = -.1200$; $p = .047$; in 1978 Pearson's $R = -.1592$; $p = .009$.

³⁰⁷ The group awarded alimony ($n = 64$) suffered a drop of 40% in per capita income, while those who were not awarded alimony ($n = 130$) suffered a drop of 30%. In 1978 this pattern was reversed. Wives awarded alimony experienced an average loss in per capita income of 30% ($n = 105$), while those who were not awarded alimony experienced an average per capita income loss of 35% ($n = 111$).

³⁰⁸ The differences were similar in 1978. Wives with custody of minor children experienced a 39% drop in per capita income ($n = 149$); those whose husbands obtained custody experienced a 10% increase in their per capita income ($n = 9$); those without minor children experienced a 22% drop in per capita income ($n = 58$).

grounds.³⁰⁹ Legislatures that wish to improve the financial position of divorced wives would thus be ill-advised to eliminate unilateral no-fault divorce or impose substantial waiting periods; revision of the rules governing entitlements appears far more likely to produce the desired results.³¹⁰

The New York experience also strongly suggests, however, that even revision of the rules governing substantive entitlements will not produce the desired results unless that revision rests on an accurate understanding of current outcomes and provides clear guidance to judges and litigants about expected results. Property division, where the New York law was intended to have its most significant impact, does not appear to have been affected in any major way. The likelihood and duration of alimony awards was, however, markedly reduced. While this result was, to some extent, an expectable one given the establishment of an alimony regime emphasizing rehabilitative goals, the extent of the change and the impact of the new rules on long-married and low income wives appears to have been an unintended consequence of the new law. The decline in the dollar value of child support, and in the proportion of obligor income paid in child support and alimony, associated with the new law were also unintended consequences of the legal reform; it is not clear, indeed, whether the equitable distribution law bears any direct responsibility for these declines given the lack of any change in the rules governing child support, and the existence of a similar pattern in other jurisdictions over the same time period. The question today, of course, is whether these results of reform, intended and unintended, are acceptable. If they are not, the rules must be revised so that acceptable results can be achieved.

Whether the results are acceptable depends on what we intend the law to accomplish: we need to decide what we want before we can evaluate what we have. I do not here pretend to plumb the rich theoretical literature on the goals and limitations of divorce law that has emerged in recent years;³¹¹ I do wish to outline some goals that I believe divorce law can achieve, and

³⁰⁹ This issue is explored at length in Garrison, *supra* note 44.

³¹⁰ See *id.* at 100-01.

³¹¹ For a representative range of views, see, e.g., Ellman, *supra* note 51; Rhode & Minow, *supra* note 4; Rutheford, *supra* note 51; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Singer, *supra* note 41; Sugarman, *supra* note 50.

which enjoy, in my view, fairly widespread social consensus. These goals inform the discussion that follows.

First, divorce law should, to the extent possible, protect children from harm occasioned by the dissolution of their families. There can be little question today that divorce poses major risks, psychological as well as economic, to children of all ages.³¹² That children's standard of living plummets following divorce, while that of the noncustodial parent frequently improves, is an inexcusable failing of divorce law. Divorce law must prefer the needs and interests of children to those of their fathers and mothers. It must provide standards that meaningfully effectuate parental support obligations, and ensure that children enjoy a standard of living commensurate with that of both parents. As Professor Glendon has succinctly put it, when children are involved in a divorce, a "children first" principle should govern.³¹³

Second, divorce law should distribute the economic burden of divorce so as to protect wives who have been economically disadvantaged by long-term reliance on the marital relationship. Divorce law should not, of course, be seen as a primary strategy for correcting women's lack of economic equality. Even though women's weaker economic position results in part from conflicts between career and family,³¹⁴ marriage neither bears primary responsibility for the problem, nor is divorce law capable of providing a cure. On the other hand, divorce law should protect the justifiable expectations of marriage partners that are based on marital commitment and day-to-day sharing. While marriage may not be responsible for women's economic problems—occupational segregation and lower wages afflict women no matter what their marital status³¹⁵—the marital relationship does insulate women from the full effect of their economic disadvantage

³¹² See generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989); JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); *Children and Divorce: Developmental and Clinical Issues*, 12 J. DIVORCE 1 (1988).

³¹³ See GLENDON, *supra* note 1, at 94.

³¹⁴ See generally FUCHS, *supra* note 124, at 4, 58-74; Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

³¹⁵ See, e.g., FUCHS, *supra* note 124, at 32-44; LEVITAN & BELOUS, *supra* note 6, at 93-98; WOMEN EMPLOYED INSTITUTE, *OCCUPATIONAL SEGREGATION* (1988); Jerry A. Jacobs, *Long-Term Trends in Occupation Segregation by Sex*, 95 AM. J. SOC. 160 (1989).

and thus encourages its persistence. Moreover, the childrearing activities that play a significant role in women's economic disadvantage provide substantial benefits to the marital family. Divorce law thus must strike a fair balance: it cannot serve as a panacea for curing the feminization of poverty, but it can and should protect divorced wives whose economic disadvantage has been reinforced by the marital relationship.³¹⁶

Third, divorce law should produce relatively consistent, predictable results in which like cases receive like treatment. Given the insubstantial resources of the typical divorcing couple, predictable, consistent results must also be achievable without a major investment in legal assistance; a significant number of husbands and wives do not have legal representation at divorce and can ill afford to obtain it.³¹⁷ Meeting these goals requires that divorce law be clear and simple. Clear rules simplify and streamline the negotiation and settlement process, decreasing the tendency for cases to be litigated and lowering legal fees.³¹⁸ Vague rules produce disparate results and tend to create a sense among litigants that the divorce process is arbitrary and unfair.³¹⁹ Vague rules also tend to favor the litigant with greater resources, who has better access to legal counsel and can afford to "wait it out."³²⁰

The remainder of this section describes the deficiencies of outcomes under New York's equitable distribution law in light of these goals and makes recommendations for change. Almost all of the legal changes that I suggest have been made before by others, often more fully than the scope of this article permits.

³¹⁶ For a similar view, see, e.g., Rhode & Minow, *supra* note 4, at 193-94.

³¹⁷ The rate of legal representation for couples in my sample (see Table 2, *supra*) is generally consistent with that reported by other divorce researchers. See Thoenes et al., *supra* note 286, at 342 (Table 11) (in 1986-87, 23% of mothers and 48% of fathers unrepresented in Colorado sample, 27% of mothers and 51% of fathers unrepresented in Hawaii sample, and 8% of mothers and 30% of fathers unrepresented in Illinois sample).

³¹⁸ For research on the impact of indeterminate rules on divorce bargaining, see Howard S. Erlanger, et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC. REV. 585, 598-99 (1987); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986).

³¹⁹ See, e.g., GLENDON, *supra* note 1, at 96 ("far too many divorce litigants feel that the outcomes of cases are simply arbitrary, or dependent on the luck of the judicial draw, or systematically biased").

³²⁰ See Mnookin & Kornhauser, *supra* note 49, at 971-77; Erlanger, et al., *supra* note 318, at 592-94; Sarat & Felstiner, *supra* note 318, at 99-108.

My purpose here is not to develop a complete theory of divorce entitlements or a detailed statutory program, but simply to outline how current divorce outcomes plot a direction for divorce reform.

A. *Property Division*

The debate over property division today invariably assumes the propriety of dividing property acquired during marriage, without regard to title, when the marital relationship is dissolved. The proposition that marriage is a partnership of equals, which typically results in equivalent, if different, contributions by husband and wife, enjoys widespread acceptance.³²¹ There are few who would argue for a return to a title-based property regime.

The debate over property distribution thus typically focuses on two questions: what is property, and equal versus equitable distribution.³²² One conclusion that strongly emerges from my research is that, to the average couple, both of these questions are of little practical relevance. Given the scanty property available for distribution, neither the characterization of assets nor the property regime will have much impact on their well-being after divorce. This conclusion is not novel. The scarcity of marital property was first reported in 1956 in Goode's pioneering study of divorce in Detroit, Michigan. Forty percent of the divorcing couples he surveyed had no property beyond household possessions and only 18% had property worth \$4000 or more.³²³ The lack of property typically available for division has been rediscovered by several researchers more recently in a wide variety of locations.³²⁴ My research has not uncovered anything new here. What it has revealed for the first time is the lack of valuable property among the relatively wealthy. Even among the Westchester County contested sample, whose family incomes averaged close to \$50,000 per year and who come from one of the wealthiest counties in the nation, median net worth was only

³²¹ See, e.g., Blumberg, *supra* note 51; Krauskopf, *supra* note 51.

³²² See generally FINEMAN, *supra* note 40, at 1-78, 175-80. Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

³²³ WILLIAM J. GOODE, *AFTER DIVORCE* 217 (1956).

³²⁴ See, e.g., BAKER, *supra* note 42; WEITZMAN, *supra* note 4; McLindon, *supra* note 42.

\$44,219.

The general scarcity of marital property is exacerbated by its relative nonliquidity. Most divorcing couples do not own businesses, real estate, or substantial stock and bond portfolios. Nor do they own professional degrees or licenses, celebrity status, or business goodwill. The characterization of such assets as marital property or individual entitlement, interesting though it may be theoretically, will make little difference to Mr. and Mrs. Average, who own household goods, a car, and possibly a house.

Current distribution patterns tend to exacerbate the liquidity problem for divorced wives. In the typical property division, the wife's share tends to be concentrated in household furnishings and the marital home, which is probably subject to a substantial mortgage obligation. Wives typically receive the lion's share of these assets, but seldom receive the majority of business assets, real estate (which has income earning potential), or even the pension, which probably represents the bulk of the couple's retirement savings.

A primary focus on property division as a divorce entitlement also creates pressure to give each spouse his or her share now. This is a particular problem when the asset is the family home and the custodial parent needs to live there with the couple's minor children. It is thus not surprising that deferred sale of the family home declined over the research period. In 1984 deferred sale occurred in only 10% of the cases in which a home was at issue, as compared to 18% in the earlier research period. Researchers in California, Connecticut, and Vermont have also reported sale of the family home with increasing frequency, even when there are minor children and the family home would provide housing that is affordable.³²⁵ Such sales appear to occur most typically when there are insufficient assets for the custodial parent to trade for the home.³²⁶ Courts have the power to defer distribution in such a case and insulate the children against the further trauma of a new home, neighborhood, and school—as well as potentially higher housing costs—but this result does not always occur.

These facts—the scarcity of marital property, its frequent

³²⁵ See WEITZMAN, *supra* note 4, at 79-84 (California); McLindon, *supra* note 42, at 376-78 (Connecticut); Wishik, *supra* note 42, at 91 (Vermont).

³²⁶ See WEITZMAN, *supra* note 4, at 80-81.

nonliquidity, and the undesirability of current distribution in many cases—suggest that property distribution should not be viewed as a primary vehicle for achieving an equitable distribution of the hardships occasioned by divorce. This is not to say that the rules relating to property division are unimportant. But for the typical divorcing couple, no property division rule will make a substantial difference in economic well-being after divorce; divorce law must take account of that fact.

The drafters of the equitable distribution law did not take account of the scarcity of marital property; they simply assumed that wives would get more property to make up for less alimony. It is now time to correct the imbalance by placing renewed emphasis on income and its post-divorce distribution.

The evidence also suggests that the equitable distribution law's aim of producing individualized equity determinations has been a failure, leading instead to inconsistent and unpredictable outcomes. While the law has been associated with a trend toward equal division of a couple's net worth, that trend is modest. The range of variation continues to be great and highly unpredictable.

The range of variation is particularly troubling given my finding that the wife's average share of net marital property tends to decline as the couple's net worth increases. This phenomenon helps to explain why many women's advocates today believe that an equal division rule would benefit divorced wives: where there is enough property to make something of a difference, they may be lucky to get as much as half. This pattern is troubling for several reasons. First, for couples with substantial assets, marital property typically has a much lower value in relation to the husband's income than it does to the wife's. For example, among couples in the 1984 contested case sample with net worth exceeding \$150,000, the average income of husbands was more than ten times that of wives.³²⁷ Many wives in this group are genuinely needy in comparison to their husbands. This is the group that a property distribution law could help, and which it appears to be failing. Moreover, the value of the marital property is not a factor that should be relevant to property division under the equitable distribution law. But the law's

³²⁷ The average income of husbands (n=38) was \$127,053, while that of wives (n=38) was \$11,573. The average ratio of wife income to family income was 13%.

indeterminacy makes this kind of result possible.

Another problem with the law's emphasis on individualized determination is its cost. After the passage of the equitable distribution law, the length of the average contested proceeding increased. While we do not have hard data on counsel fees before and after equitable distribution, anecdotal evidence suggests that they have risen.³²⁸ We also know that lack of full legal representation was significantly linked with a smaller chance of being awarded alimony and with an alimony/child support award of lower value. The equitable distribution law's goal of individualized equity determinations thus appears, in retrospect, to have achieved no more than expensive unpredictability. It is time to end the charade.

How, then, should the property distribution features of the equitable distribution law be revised? The obvious alternative to equitable distribution is equal. This approach has the merits of simplicity and predictability. But an equal division rule also has disadvantages. Such a rule may create even more pressure for immediate asset distribution than does the current equitable distribution regime.³²⁹ Moreover, for couples with highly disproportionate incomes and little to divide, it is unclear that an equal division norm fairly distributes the burden of divorce.³³⁰ This is a particular problem when minor children are involved and the family assets are largely composed of home equity and furniture.

I thus believe that a new property division scheme should combine features of equitable and equal distribution. Equitable distribution concepts should apply when a couple's net worth is

³²⁸ See, e.g., Cynthia Cooper, *State's Lawyers Differ Over Law's Success in First Ten Years*, N.Y.L.J., July 19, 1990, at 1 (reporting that the expense of divorce cases is one of the most frequent criticisms of the equitable distribution law); Katherine Bauton, *Women & Divorce: How the New Law Works Against Them*, N.Y. MAG., Oct. 1984, at 34, 35, 36 (based on anecdotal accounts, cost of contesting a divorce has "skyrocketed" since passage of the equitable distribution law). The New York State Task Force on Women in the Courts has also reported that "[e]conomically dependent wives are put at an additional disadvantage because many judges fail to award attorneys' fees adequate to enable effective representation or experts' fees adequate to value the marital assets." TASK FORCE REPORT, *supra* note 77, at 122.

³²⁹ See, e.g., WEITZMAN, *supra* note 4, at 79-80 (reporting that equal division requirement encouraged forced sale of family residence).

³³⁰ For similar views, see, e.g., FINEMAN, *supra* note 40, at 175-80, Reynolds, *supra* note 40, at 909-10.

negative and when their assets are of relatively low value—worth less, say, than \$15,000. Wives now frequently keep the lion's share of these assets, a reflection of their greater need in relation to that of their husbands. For assets in this value range, which in most cases will be composed substantially of household goods and a car, a need-based allocation seems to distribute more fairly the burden of divorce than does an equal division norm.³³¹ In order to avoid the indeterminacy of equitable division, need should be the only factor governing division at this asset level, however, and it should be measured objectively by comparing spousal incomes and expenses.

For larger marital estates, a presumption of equal division should apply. When a couple has substantial assets it would often be inequitable to use need as the sole basis of distribution; equal division more fairly balances need with spousal contribution. A presumption also provides an established norm while permitting deviation to accommodate the unusual case where equal division would be inequitable. It must be kept in mind, however, that an equal division presumption will not benefit the average divorced wife, who already receives at least 50% of the couple's meager assets. An equal division presumption will primarily benefit wives in the relatively uncommon case where there are substantial marital assets. The reason for such a presumption is thus not to ensure that women get a larger share of the marital property; under this approach many will receive less. It is to ensure more uniform, predictable, and less costly determinations.

An equal distribution norm should also exempt from immediate distribution the family home and household goods when there are minor children and it is economically feasible for the children and their custodial parent to remain in the home.³³² In-

³³¹ California has taken a similar approach to cases of negative net worth. When marital debts exceed assets, equal division is not mandated. CAL. CIV. CODE § 4800(c)(2) (West Supp. 1991).

³³² Based on the recommendations of a state task force established to evaluate Weitzman's recommendations for legal change, the California legislature adopted a rule similar in intent although far more discretionary in its approach. Ch. 729, § 1, 1988 Cal. Stat. 1661, 1662 (codified at CAL. CIV. CODE § 4700.10 (West Supp. 1991)). The statute requires the trial court, upon request of a party having sole or joint physical custody of a child, to determine whether it is economically feasible to consider ordering deferred sale of the family home. If the court finds that such an order is economically feasible, it must consider a list of ten factors in exercising its discretion to grant or deny such an order.

deed, I would not support an equal division presumption that did not include such an exemption. Children's needs must come first and must be taken seriously.

The new rules should also govern spousal property entitlements during marriage. If we seriously believe that the marital relationship creates marital property, that principle should apply during marriage as well as at divorce.³³³ The current emphasis on entitlement at divorce provides almost no protection for a spouse whose partner is dissipating marital assets and who wants to remain married. Even if such a spouse ultimately seeks a divorce, the remaining property may be insufficient to compensate for that which was irretrievably lost, and valuation of the lost property may be difficult or impossible. A marital property regime should protect the married as well as the divorced.

B. *Alimony and Child Support*

Given the scarcity of marital property, it is clear that alimony and child support should be the primary means of equitably allocating the burden of divorce. But in contrast to the property division debate, where the propriety of division is invariably assumed, there is little consensus on the appropriate theoretical basis for an alimony award. The traditional rationale for alimony was, of course, a variant of that for damages based on breach of contract.³³⁴ The husband had a duty to support the wife during the marriage; if he breached the marital contract, he was required to pay damages in the amount of that obligation until the wife remarried. The alimony obligation thus was theoretically measured by expectancy—what the wife could anticipate in view of the marital standard of living. The “modern” approach to alimony—one reflected in the new alimony rules established by the equitable distribution law—views alimony primarily as a need-based remedy.

As dissatisfaction with this need-based approach has

For a compilation of other state laws regarding deferred sale of the marital residence when there are minor children, see FINAL REPORT OF THE CALIFORNIA SENATE TASK FORCE ON FAMILY EQUITY 30-33 (June 1, 1987) [hereinafter CALIFORNIA SENATE TASK FORCE REPORT].

³³³ The Uniform Marital Property Act was designed to accomplish this goal in states that did not utilize community property principles. The Act has thus far not been widely adopted, however.

³³⁴ See note 15 and accompanying text *supra*.

mounted, legal commentators have searched for a new theory of alimony. Almost all have eschewed the traditional model and that based on need. They have instead emphasized the twin goals of encouraging marital sharing and providing compensation to a spouse who has made an "investment" in a failed marriage.³³⁵ The remedies proposed to embody these ideals differ in significant respects, however.³³⁶

In contrast to the lack of consensus on a theory to govern alimony determinations, there is widespread agreement on appropriate outcomes in at least some typical cases. Public³³⁷ and judicial opinion polls³³⁸ evidence a surprising amount of unanimity. Most respondents support permanent alimony for wives in long marriages whose economic disadvantage has been occasioned, at least in part, by childrearing and homemaking activities.³³⁹ Most believe that no alimony is required when the mar-

³³⁵ See, e.g., Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); Ellman, *supra* note 51; Goldfarb, *supra* note 41; Krauskopf, *supra* note 51; Rutheford, *supra* note 51.

³³⁶ Several of the commentators propose that alimony properly derives from detrimental reliance on the marriage relationship, but they do not agree on the types of detriment which should be compensable. Moreover, some commentators use detriment type rationales, in whole or in part, to support expectancy based recovery. Expectancy based recovery harks back, of course, to the traditional theory of alimony, but modern commentators tend to eliminate the fault aspect of the traditional theory and to instead emphasize economic equity. See, e.g., Ellman, *supra* note 51 (arguing that alimony should be awarded when spouse makes marital investment resulting in postmarriage reduction in earning capacity, in amount equal to lost earning capacity, as long as decision is financially rational and results in increased marital income or is based on child care needs); Goldfarb, *supra* note 41 (proposing equalization of post-divorce living standards); Krauskopf, *supra* note 51 (arguing that alimony should entail a division of enhanced earning capacity as well as compensation for diminished earning capacity).

³³⁷ See WEITZMAN, *supra* note 4, at 150-63 (survey of divorced men and women).

³³⁸ Judicial surveys have typically asked judges to decide the same hypothetical cases. See WEITZMAN, *supra* note 4, at 194-204 (survey of California judges); J. Milligan, 14 OHIO PRACTICE FAM. LAW, § 4659.1 (1988 Supp.), described in Krauskopf, *supra* note 51, at 275-76 (survey of Ohio judges); The Economic Consequences of a Dissolution, N.J. Judge Workshop, N.J. S. Ct. Fam. Practice Division Retreat (1990) (on file in author's office) (survey of New Jersey judges).

³³⁹ See WEITZMAN, *supra* note 4, at 152, 154-56 (interviews with divorced men and women); *id.*, at 198-201 (responses of California judges to hypothetical case involving homemaker wife in 27-year marriage; all predicted an alimony award, 63% predicted a permanent award); Krauskopf, *supra* note 51, at 275-76 (responses of Ohio judges to hypothetical case involving a 27-year marriage; two-thirds of judges predicted permanent alimony; total amounts payable ranged from \$1800 to \$19,000); N.J. Judge Workshop, *supra* note 338 (responses of New Jersey judges to hypothetical case involving 31-year wealthy marriage where wife had no employment history; all but one (27 of 28) awarded wife permanent alimony; three awarded rehabilitative alimony in addition to permanent

riage is childless and short, or when husband and wife have relatively equal incomes.³⁴⁰ Most support short-term alimony when the wife is economically disadvantaged and wants further training to enhance her income.³⁴¹ It is thus no accident that short-term alimony awards have become more frequent. Except for the woman who has been economically disadvantaged by long-term childcare and homemaking responsibilities, the concept of durational alimony enjoys widespread support.

It is ironic that the equitable distribution law has diminished the alimony prospects of long-married, economically disadvantaged wives—the consensus case for long-term alimony—more than those of any other group. While wives in long marriages with low incomes are still the most likely to be awarded alimony, a significant number of these women are not. Moreover, under the new alimony standard, the greater the length of the marriage, the greater the decline in the likelihood of an alimony award. Even for unemployed wives, the likelihood of receiving an alimony award declined markedly. While later amendments to the statute³⁴² were designed to enhance the alimony prospects of these long-married, economically disadvantaged wives, the amendments are highly discretionary and vague, making meaningful change doubtful.

Moreover, the equitable distribution law failed to alleviate the variability of alimony decision making and pervasive disparities in how the burden of divorce is allocated. Under the new law divorced wives and children continued to experience a dramatic drop in their per capita income while that of husbands improved.³⁴³

The indeterminacy of the equitable distribution law's alimony standard has undoubtedly contributed to these results by failing to provide clear guidance to judges³⁴⁴ and litigants on

maintenance).

³⁴⁰ See WEITZMAN, *supra* note 4, at 152 (interviews with divorced men and women); GLAMOUR, July 1981, at 21 (readers' poll).

³⁴¹ WEITZMAN, *supra* note 4, at 152, 157-58 (interviews with divorced men and women).

³⁴² See note 80 *supra* for a description of the amendments.

³⁴³ See Table 55 *supra* and accompanying text.

³⁴⁴ Little research has been done on alimony decision making by judges. One survey examined a large sample of cases in Orange County, Fla. decided between 1971 and 1974. The authors of the study attempted to develop a "predictive model," taking into account factors such as needs, income, etc. They reported that: "Few discernible trends appeared

when alimony is appropriate, when it should be permanent, and the size of the award. The variability of results is particularly troubling given my finding that the likelihood of an alimony award varied significantly depending on the type of divorce action and the type of legal representation. Alimony outcomes should not depend on access to counsel, when the neediest are least likely to enjoy legal representation. As with the property division standard, the costs of individualized determination appear to outweigh its advantages. More definite standards are required.

Some corrective measures have already been taken for families with minor children. Pursuant to federal requirement, all states, including New York, now must make child support orders under statutory guidelines.³⁴⁵ These guidelines may significantly improve the consistency and predictability of child support awards.³⁴⁶ It remains to be seen, however, to what extent such guidelines provide an adequate corrective for the pervasive disparities in the standard of living of children and their noncustodial parent which I found, and which have been reported by other researchers. The New York child support guidelines, for example, establish a presumption in favor of a combined alimony and child support award, when there are two minor children, equal to 25% of the obligor's gross income.³⁴⁷ This is less than the average percentage of gross income awarded in combined support within the 1978 contested case sample, and virtually identical to the average combined percentage for the 1984 contested case sample, where major disparities in the post-divorce standard of living of children and their noncustodial parent were frequent. To be sure, these new guidelines also mandate the allocation of child care costs and uninsured medical expenses in accordance with the parents' ability to pay;³⁴⁸ these expenses were rarely allocated under the prior regime. But it is

to exist in relation to each judge and alimony and consequently no model was developed." Kenneth R. White & Thomas Stone, *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75, 80 (1976).

³⁴⁵ Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 17 (codified at 42 U.S.C. § 667 (West Supp. 1991)).

³⁴⁶ Some researchers have reported that child support guidelines have reduced the variability of child support awards in some states. See note 295 *supra*.

³⁴⁷ N.Y. DOM. REL. LAW § 240.1-b(b)(3)(ii) (McKinney Supp. 1991).

³⁴⁸ *Id.* § 240.1-b(c)(4)-(6).

not clear that New York courts are following these provisions of the new child support law.³⁴⁹ Nor is it clear that the new support guidelines go far enough to ensure that children enjoy a standard of living equivalent to that of their parents.³⁵⁰

Given these concerns, I believe that a revised alimony and child support rule should have several features. First, it should mandate child support in an amount that would equalize the post-divorce standard of living of the children and their custodial parent, with that of the noncustodial parent. This approach would give concrete meaning to a "children first" principle. It also has the merit of obviating the need for alimony in cases involving minor children, except in the occasional case where alimony is appropriate for purposes of restitution or to enhance the custodial parent's income potential.³⁵¹ This is desirable in order to focus settlement negotiations and court proceedings where they belong—on the children—and because there is some evidence which suggests that obligors are more willing to shoulder obligations to their children than to their former spouse.³⁵²

Second, a revised alimony and child support law should establish a presumption in favor of permanent alimony for the long-married spouse who cannot otherwise maintain the marital standard of living. There is broad support for the proposition that women whose economic disadvantage has been enhanced by their familial responsibilities and reliance on the continuity of

³⁴⁹ A 1990 survey of child support awards under the new guidelines reports that a provision for payment of any extras was included in only 42% of the sample cases. When such extra payments were required, they were typically limited to uninsured medical expenses. Eighty-three percent of sample cases that required such payments in excess of the bare child support award required the obligor to pay some portion of uninsured medical expenses while only 10% required payment of child care expenses. New York State Office of Court Administration, 1990 Report of the Chief Administrator of the Courts Pursuant to Judiciary Law Section 216(5) as Required by Child Support Standards Act (Tables 3 & 4) (undated) (on file in author's office). It is not even clear whether New York courts are providing support equal to the basic child support obligation under the new statute. The 1990 survey reports only mean child support for varying numbers of children for various obligor income ranges. But for some of those ranges, the mean represents a lower percentage of obligor income than the statute presumes appropriate even for obligors at the very bottom of that income range. *Id.* (Table 1).

³⁵⁰ For a similar critique of current child support guidelines, see Rhode & Minow, *supra* note 4, at 207.

³⁵¹ Ironically, a similar suggestion was made by the Reporter for the Uniform Marital Property Act. See LEVY, *supra* note 25, at 145.

³⁵² See Gwynn David, et al., *Divorce: Who Supports the Family?*, 13 FAM. LAW 217, 223 (1983).

marital commitment are entitled to long-term support, and it is in such a case that an alimony award is most likely. A presumption in favor of permanent alimony for this group would establish an alimony norm and improve the consistency of outcomes, while nonetheless permitting deviation where appropriate.

Third, a revised alimony law should establish a presumption against alimony, except for purposes of restitution, when the marriage is short and childless and when the income and earning capacity of the spouses are relatively equal. These are cases in which alimony is rarely awarded, and in which there is substantial consensus that it should not be. There is no obvious reason why an alimony rule should not say so, again on the basis of a presumption that permits deviation where appropriate.

For cases that do not fit any of these categories, and in which there is also considerably less consensus on the appropriate role of alimony, a more discretionary standard may be necessary. One possible approach in such cases would entail guidelines that provide weights for various contribution and need factors. The guidelines approach, which has already been utilized to improve the consistency of child support awards,³⁵³ would permit consideration of a broad range of factors while nonetheless establishing clear norms. Another possible approach is that employed under the Uniform Probate Code for computation of a surviving spouse's share of a decedent's estate, which relies on marital duration.³⁵⁴ An alimony rule might, for example, establish a presumption in favor of alimony for a period equal to the duration of the marriage when a spouse cannot maintain the marital standard of living. This approach is predictable and would not necessitate elaborate proof of spousal contribution and income potential that require access to legal counsel. Moreover, because it posits an alimony obligation that expands in direct relation to the duration of marital commitment and contribution, it seems relatively fair.

Finally, a revised alimony law should specify a method of

³⁵³ See note 295 *supra*.

³⁵⁴ UNIF. PROB. CODE § 2-201(a) (1990). The Uniform Probate Code provision derives from John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987). The Langbein-Waggoner proposal was incorporated in the Uniform Probate Code in 1990. A similar model in the divorce context has also been outlined by Stephen Sugarman. See Sugarman, *supra* note 50, at 160-63.

computing the amount of the alimony award. Because the marital standard of living is the basis of marital support expectations, this traditional measure seems most appropriate. It will not, of course, always be possible for both spouses to maintain their former standard of living. Indeed, in the typical case it is likely that the burden of dual households will require, if that burden is equally apportioned, a significant diminution in the standard of living of both. If it is not possible for both spouses to maintain the marital standard of living, the alimony obligation should then serve the purpose of equalizing the post-divorce standard of living.³⁵⁵

CONCLUSION

The story of New York's equitable distribution law is one of how good intentions, uninformed by an awareness of current outcomes and codified in vague and uncertain directives, will produce confused, inconsistent, and unexpected results. The law was predicated on the assumption that divorced wives would benefit from a property distribution law because husbands owned the valuable property and wives thus failed to get more than a small property share at divorce. For the typical divorcing couple, both of these assumptions were erroneous: the average husband's individual net worth was scarcely more than that of his wife, and the typical wife already received half of the couple's meager assets. The property distribution provisions of the new statute thus failed to provide major benefits to divorced wives. The alimony provisions of the new statute, which in vague terms authorized short-term "rehabilitative" alimony, had a major impact on divorced wives, however. But the dominant impact did not fall on wives who were the intended candidates for short-term alimony. Homemakers, the unemployed, and wives in long marriages—all described in the statute's legislative history as cases that should be treated as exceptions to the new, rehabilitative norm—saw their alimony prospects decline as much, or more, than the alimony prospects of others. The statute's ambiguous language not only permitted this result, but produced widespread variation in case outcomes as well. Like cases did not

³⁵⁵ For a similar approach to alimony computation, see CALIFORNIA SENATE TASK FORCE REPORT, *supra* note 332, at 42-53 (for marriages of long duration); Goldfarb, *supra* note 41.

receive like treatment.

We cannot expect a divorce law to resolve every social ill. Divorce law will not cure the problem of women's economic inequality, or reverse the current trend toward increased numbers of children living in poverty. Divorce law can, however, produce consistent, predictable results which ensure children a standard of living commensurate with that of both parents and which reflect contemporary notions of marital sharing and fairness. We should settle for nothing less.

APPENDIX

APPENDIX TABLE 1

MEDIAN VALUE (\$1984) OF INDIVIDUALLY OWNED ASSETS
AND DEBTS IN 1978 CONTESTED CASE SAMPLE, BY
GENDER OF SPOUSE

Asset Type	Owned By			
	Wife Median Value	(n)	Husband Median Value	(n)
Automobiles	\$ 2,160	(110)	\$ 2,240	(215)
Business Assets	\$ 8,800	(1)	\$16,000	(47)
Household Goods	\$ 1,600	(49)	\$ 2,320	(52)
Jewelry	\$ 2,400	(49)	\$ 480	(13)
Liquid Assets				
Bank Accounts	\$ 400	(253)	\$ 640	(265)
Other	\$ 1,840	(51)	\$ 4,800	(113)
Nonliquid Assets				
Pensions	\$ 3,200	(5)	\$18,474	(21)
Other	\$ 824	(25)	\$ 1,216	(64)
Real Estate	\$18,933	(15)	\$24,936	(47)
Other Assets	\$ 1,520	(32)	\$ 2,915	(77)
All Individual Assets	\$ 1,440	(301)	\$ 4,834	(301)
All Individual Debts	\$ 2,800	(63)	\$ 7,360	(64)
Individual Assets/ Total Family Assets	3%		20%	
Individual Net Worth	\$ 320	(301)	\$ 1,552	(301)
Individual Net Worth/ Total Family Net Worth	1%		13%	

APPENDIX TABLE 2
VALUE (\$1984) OF MARITAL PROPERTY REPORTED
BY COUPLES IN 1978 CONTESTED CASE SAMPLE

Property Value	%	Gross Value Cumulative %	%	Net Worth Cumulative %
(Negative value)			(12)	(12)
\$0 - \$4999	15	15	13	25
\$5000-\$9999	8	23	7	32
\$10,000-\$19,999	11	35	8	40
\$20,000-\$29,999	9	44	8	48
\$30,000-\$39,999	7	51	8	56
\$40,000-\$49,999	5	56	5	61
\$50,000-\$99,999	18	73	14	75
\$100,000-\$199,999	14	87	14	88
\$200,000-\$299,999	4	91	4	93
\$300,000+	9	100	7	100
Median		\$ 39,611		\$ 34,070
Mean		\$126,601		\$108,960

APPENDIX TABLE 3
OWNERSHIP AND MEDIAN VALUE (\$1984) OF ASSETS
REPORTED BY 1978 CONTESTED CASE SAMPLE, BY ASSET
TYPE

Asset Type	% Owning	Median Value
Automobiles	79	\$ 2,225
Business Assets	14	\$ 9,950
Household Furniture	87	\$ 3,000
Jewelry	20	\$ 1,500
Liquid assets		
Bank accounts	84	\$ 1,200
Other	40	\$ 4,600
Nonliquid assets		
Pensions	11	\$ 9,000
Other	25	\$ 850
Marital Residence	61	\$27,000
Other Real Estate	25	\$20,000
Other Assets	36	\$ 1,925
Spousal Debts	82	\$ 3,650

APPENDIX TABLE 4
PERCENTAGES OF DIVORCING COUPLES
IN CONSENSUAL CASE SAMPLE REPORTING ASSET
OWNERSHIP, BY ASSET TYPE AND YEAR

Asset Type	1978	1984
Automobiles	25	34
Businesses	2	4
Household Goods & Furniture	40	34
Jewelry	1	2
Liquid Assets		
Bank Accounts	19	21
Other	9	11
Nonliquid Assets		
Pensions	2	4
Other	3	5
Marital Home	57	60
Other Real Estate	6	10
Other Assets	27	28
Debts	27	28

APPENDIX TABLE 5
PERCENTAGES OF DIVORCING COUPLES REPORTING
ASSET OWNERSHIP, BY ASSET TYPE AND RESEARCH
LOCATION

Asset Type	AL ¹	CA ²	NY [*]	OH ³
Automobiles	59	71	79	27
Business Assets	9	11	18	—
Household Goods & Furniture	72	89	83	49
Liquid Assets	48	61	85	13
Marital Residence	76	46	60	26
Other Real Estate	30	11	25	—
Pensions				
Husband	54	24	15	25
Wife	33	11	5	2

* As reported by 1984 contested case sample.

— Data on this asset was not provided for this research location.

¹ BAKER, *supra* note 42, at 6.

² WEITZMAN, *supra* note 4, at 62.

³ STERIN ET AL., *supra* note 46, at 105.

APPENDIX TABLE 6
 MEDIAN VALUE (\$1984) OF DIVORCING COUPLES' ASSETS,
 BY RESEARCH LOCATION

Asset Type	AL ⁴	CA ⁵	NY*
Automobiles	5,000	4,800	3,250
Businesses	30,000	47,840	29,750
Household Furnishings	5,000	4,800	4,000
Liquid Assets	6,250	2,880	1,393
Marital Residence	40,000	52,640	39,000
Other Real Estate	23,000	79,840	36,500
Husband Pension	27,000	4,800	20,390
Wife Pension	7,500	8,000	6,600
Other Assets	12,000	4,800	4,000
Marital Debts	—	4,800	6,670

* As reported by 1984 contested case sample.

— Data on this asset type was not reported.

⁴ BAKER, *supra* note 42, at 6.

⁵ WEITZMAN, *supra* note 4, at 62 (Weitzman's values, in \$1978, have been converted to \$1984 in the table).

APPENDIX TABLE 7

**DISTRIBUTION OF NET MARITAL ASSETS, FOR COUPLES IN
CONTESTED CASE SAMPLE WITH POSITIVE NET WORTH
(VALID GROUP) BY YEAR AND DISTRIBUTIONAL
ASSUMPTION, FOR ASSETS AND DEBTS WITH UNKNOWN
DISTRIBUTION**

	1978 %					1984 %				
	ASSUMPTION (see below)					ASSUMPTION (see below)				
	0	1	2	3	4	0	1	2	3	4
	(n=120)					(n=104)				
Majority to wife	47	46	46	47	48	38	42	45	46	48
Approximately equal	12*	12	13	13	14	26*	21	19	19	17
Majority to husband	42	43	41	40	38	37	37	36	35	35
Median % to wife	53	53	57	58	59	52	54	55	56	56
Average % to wife	55	55	57	58	58	50	53	54	55	54
50% or more to wife	52	52	53	54	56	54	57	57	59	60

Majority = More than 60%

Approximately equal = 40% to 60%

Average = Trimmed mean (most extreme 5% of cases eliminated)

ASSUMPTION 0 = Wife receives 0% of any asset with unknown distribution and 0% of any asset with unknown valuation; wife receives 100% of any debt with unknown distribution and 100% of any debt with unknown valuation. Value of assets and debts with unknown valuation set at median value for that type.

ASSUMPTION 1 = Wife receives 0% of any asset with unknown distribution, 100% of any debt with unknown distribution. Assets and debts with unknown valuation omitted from analysis.

ASSUMPTION 2 = Wife receives 60% of any asset with unknown distribution, 33% of debt with unknown distribution. Assets and debts with unknown valuation omitted from analysis.

ASSUMPTION 3 = Wife receives 100% of any asset with unknown distribution, 0% of debt with unknown distribution. Assets and debts with unknown valuation omitted from analysis.

ASSUMPTION 4 = Wife receives 100% of any asset with unknown distribution and 100% of any asset with unknown value; 0% of any debt with unknown distribution, 0% of any debt with unknown value. Value of assets or debts with unknown value fixed at median value for that type.

* The difference between the 1978 and 1984 figures was significant at the .05 confidence level or better.

APPENDIX TABLE 8

DISTRIBUTION OF MARITAL ESTATE (THE SUM OF DEBTS
AND ASSETS) IN CONTESTED CASE SAMPLE (VALID
GROUP), BY YEAR AND DISTRIBUTIONAL ASSUMPTION,
FOR ASSETS AND DEBTS WITH UNKNOWN DISTRIBUTION

	1978 %					1984 %				
	ASSUMPTION (see below)									
	0	1	2	3	4	0	1	2	3	4
	(n=141)					(n=134)				
Majority to wife	47	47	47	48	48	36	43	43	46	48
Approximately equal	17*	18	19*	21	20	35*	29	33*	28	28
Majority to husband	36	35	34	31	32	29	28	24	26	25
Median % to wife	55	56	58	58	59	52	57	57	58	59
Average % to wife	53	54	54	55	56	51	54	54	56	56
50% or more to wife	53	55	57	57	59	57	63	63	64	67

Majority = More than 60%

Approximately equal = 40% to 59%

ASSUMPTION 0 = Wife receives 0% of any asset with unknown distribution and 0% of any asset with unknown valuation; wife receives 100% of any debt with unknown distribution and 100% of any debt with unknown valuation. Value of assets and debts with unknown valuation set at median value for that type.

ASSUMPTION 1 = Wife receives 0% of any asset with unknown distribution, 100% of any debt with unknown distribution. Assets and debts with unknown valuation omitted from analysis.

ASSUMPTION 2 = Wife receives 60% of any asset with unknown distribution or value; 33% of any debt with unknown distribution or value. Assets and debts with unknown valuation valued at median value for that type.

ASSUMPTION 3 = Wife receives 100% of any asset with unknown distribution, 0% of any debt with unknown distribution. Assets and debts with unknown valuation omitted from analysis.

ASSUMPTION 4 = Wife receives 100% of any asset with unknown distribution and 100% of any asset with unknown value; 0% of any debt with unknown distribution, 0% of any debt with unknown value. Value of assets or debts with unknown value fixed at median value for that type.

* The difference between the 1978 and 1984 figures was significant at the .05 confidence level or better.

APPENDIX TABLE 9
COMPARISON OF 1984 A GROUP, B GROUP, AND
CONTESTED CASE SAMPLE BY SELECTED CASE
CHARACTERISTICS

Case Characteristic	A Group* Mean/Median (n)	B Group** Mean/Median (n)	Contested Group Mean/Median (n)
Marital duration (years)	12.9/11.3 (55)	14.6/13.3 (126)	14.2/13.1 (303)
Wife's age (years)	37.8/38.0 (53)	39.0/38.5 (126)	38.1/37.0 (305)
Husband's age (years)	40.3/41.0 (52)	41.6/40.0 (126)	40.8/40.0 (305)
Husband's income (\$1000's)	31/25 (38)	42.8/28.3 (83)	45/28 (235)
Wife's income (\$1000's)	12.0/10.5 (45)	11.4/10.4 (83)	11.3/10.2 (276)
Wife's income/ Family income (%)	30/30 (30)	27/25 (83)	24/24 (205)
Alimony +			
Child support (\$ per month)	334 /100 (54)	492 /215 (129)	494 /258 (305)
Net worth (\$1000's)	37.0/12.9 (55)	188 /30.6 (83)	200 /18.3 (315)
% of wives employed	72% (46)	73% (118)	72% (286)
% of husbands employed	90% (52)	91% (125)	93% (295)
% of wives awarded alimony	26% (55)	31% (134)	30% (315)
% of wives awarded custody	50% (54)	51% (129)	56% (299)

* A group = Cases with complete information on property & debts

** B group = Cases with complete information on property & debts plus cases with no more than one missing valuation and complete dispositional information on at least 90% of marital estate (the sum of assets plus debts).

APPENDIX TABLE 10
COMPARISON OF 1978 A GROUP, B GROUP, AND
CONTESTED CASE SAMPLE, BY SELECTED CASE
CHARACTERISTICS

Case Characteristic	A Group* Mean/Median (n)	B Group** Mean/Median (n)	Contested Group Mean/Median (n)
Marital duration (years)	14.7/13.9 - (74)	15.7/15.0 (139)	14.5/12.9 (299)
Wife's age (years)	37.6/35.0 (72)	38.5/37.0 (133)	37.2/36.0 (292)
Husband's age (years)	41.1/40.0 (73)	41.9/41.0 (133)	40.3/39.0 (295)
Husband's income (\$1000's)	27/16 (38)	29.0/18.6 (83)	31.0/19.1 (235)
Wife's income (\$1000's)	5.6/4.2 (62)	5.5/3.0 (90)	6.2/5.3 (270)
Wife's income/ Family income (%)	23/11 (51)	20/11 (90)	21/17 (231)
Alimony + Child support (\$ per month)	684 /275 (76)	736 /480 (141)	794 /517 (300)
Net Worth (\$1000's)	37.9/3.2 (76)	66.5/20.8 (141)	68.0/21.3 (301)
% of wives employed	66% (62)	65% (117)	64% (265)
% of husbands employed	83% (65)	87% (126)	91% (273)
% of wives awarded alimony	46% (76)	48% (141)	46% (301)
% of wives awarded custody	60% (72)	64% (132)	66% (284)

* A group = Cases with complete information on property & debts

** B group = Cases with complete information on property & debts plus cases with no more than one missing valuation and complete dispositional information on at least 90% of marital estate (the sum of assets plus debts).

APPENDIX TABLE 11

PERCENTAGE DISTRIBUTION OF NET WORTH IN
CONTESTED CASE SAMPLE (CASES WITH POSITIVE NET
WORTH), BY YEAR

Wife's Percentage	1978		1984	
	%	Cumulative % (n=128)	%	Cumulative % (n=116)
Less than 10%	20%	20%	23%	23%
10% - 19%	6%	26%	5%	28%
20% - 29%	4%	30%	3%	31%
30% - 39%	12%	42%	4%	35%
40% - 49%	6%	48%	8%	44%
50% - 59%	7%	55%	10%	54%
60% - 69%	7%	62%	10%	64%
70% - 79%	6%	68%	6%	70%
80% - 89%	4%	72%	5%	75%
90% +	27%	100%	25%	25%

APPENDIX TABLE 12

DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND MARITAL DURATION

Marital Duration	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
0 - 9 years	47%	47%	51% (45)	74%	70%	64% (46)
10 - 19 years	57%	55%	53% (49)	50%	46%	51% (50)
20+ years	62%	64%	56% (45)	64%	55%	56% (37)

APPENDIX TABLE 13
DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND CUSTODY STATUS

Custody Status	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
Wife sole custody	66%	65%	61% (84)	67%	59%	60% (66)
Husband custody*	39%	42%	44% (13)	40%	37%	35% (15)
No minor children	43%	46%	45% (44)	64%	57%	54% (53)

*Includes joint or split custody

APPENDIX TABLE 14
DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND WIFE'S EMPLOYMENT STATUS

Employment Status	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
Employed	58%	57%	58% (76)	63%	58%	57% (86)
Unemployed	56%	59%	51% (41)	69%	58%	55% (32)

APPENDIX TABLE 15
DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND WIFE'S INCOME (\$1984)

Wife's Income	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
\$0 - \$10,000	55%	59%	55% (65)	60%	56%	54% (52)
\$10,000- \$19,999	65%	65%	62% (37)	70%	60%	62% (43)
\$20,000 +	56%	55%	53% (18)	65%	55%	51% (20)

APPENDIX TABLE 16
DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND HUSBAND'S INCOME (\$1984)

Husband's Income	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
\$0 - \$20,000	51%	55%	52% (35)	58%	57%	53% (31)
\$20,000- \$39,999	52%	52%	51% (48)	60%	54%	52% (45)
\$40,000 +	54%	58%	55% (35)	52%	59%	50% (27)

APPENDIX TABLE 17

DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND INCOME RATIO (WIFE'S INCOME/FAMILY
INCOME)

Wife's Income Ratio	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
0% - 9%	58%	61%	55% (45)	52%	48%	52% (27)
10% - 29%	46%	48%	52% (24)	62%	62%	58% (26)
30% - 49%	57%	53%	57% (21)	63%	54%	53% (19)
50% +	64%	70%	58% (11)	67%	72%	64% (15)

APPENDIX TABLE 18

DISTRIBUTION OF THE MARITAL ESTATE
(THE SUM OF ASSETS PLUS DEBTS)
IN CONTESTED CASE SAMPLE (VALID GROUP),
BY YEAR AND ALIMONY STATUS

Alimony Status	Wife's Percentage Share					
	%Receiving 50% +	1978 Median %	Mean (n) %	%Receiving 50% +	1984 Median %	Mean (n) %
Alimony	56%	57%	52% (68)	64%	59%	58% (42)
No Alimony	56%	56%	57% (73)	62%	56%	54% (92)

APPENDIX TABLE 19

DISTRIBUTION OF THE MARITAL ESTATE (THE SUM
OF ASSETS PLUS DEBTS) IN CONTESTED CASE
SAMPLE (VALID GROUP), BY YEAR AND MARITAL FAULT

Divorce Judgment Against	Wife's Percentage Share					
	%Receiving 50%+	1978 Median %	Mean (n) %	%Receiving 50%+	1984 Median %	Mean (n) %
Husband	62%	60%	59% (94)	65%	58%	58% (90)
Wife	54%	56%	52% (24)	61%	60%	48% (33)
Both	35%	35%	42% (23)	55%	50%	52% (11)

APPENDIX TABLE 20

DISTRIBUTION OF THE MARITAL ESTATE (THE SUM
OF ASSETS PLUS DEBTS) IN CONTESTED CASE
SAMPLE (VALID GROUP), BY YEAR AND NET WORTH
(\$1984)

Net Worth	Wife's Percentage Share					
	%Receiving 50%+	1978 Median %	Mean (n) %	%Receiving 50%+	1984 Median %	Mean (n) %
(Negative)	(76%)	65%	60% (21)	(83%)	(71%)	70% (30)
\$0-\$9999	50%	53%	71% (36)	65%	64%	58% (23)
\$10,000-\$39,999	62%	65%	60% (29)	60%	58%	50% (25)
\$40,000-\$99,999	69%	63%	61% (16)	67%	55%	53% (24)
\$100,000-\$149,999	65%	58%	62% (17)	44%	45%	43% (9)
\$150,000+	23%	38%	33% (22)	39%	42%	43% (23)

APPENDIX TABLE 21
ALIMONY CORRELATIONS, BY YEAR

Variable	Pearson's R= (n) p=	
	1978	1984
Fault Judgment Against Wife	-.1587 (599) p=.003	.0021 (652) p=.479
Income Husband	.1696 (252) p=.003	.1077 (235) p=.050
Wife	-.2734 (248) p=.000	-.3725 (258) p=.000
Wife's Income Percentage	-.3853 (231) p=.000	-.4510 (205) p=.000
Legal Representation	.2762 (756) p=.000	.2708 (759) p=.000
Marital Duration	.3166 (906) p=.000	.2125 (937) p=.000
Marital Property Home Ownership	.0989 (651) p=.006	-.0257 (651) p=.263
Award of Home Occupancy to Wife	.0808 (416) p=.050	.0921 (414) p=.031
Net Worth	.1097 (301) p=.000	-.0340 (315) p=.274
Wife's Percentage of Marital Estate	-.1038 (301) p=.036	-.0862 (312) p=.064
Spousal Age Husband	.2384 (295) p=.000	-.0220 (305) p=.351
Wife	.2748 (292) p=.000	.0371 (305) p=.259