THE RELATIONSHIP OF PROPERTY DIVISION AND ALIMONY: THE DIVISION OF PROPERTY TO ADDRESS NEED

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Suzanne Reynolds*

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\section*{Introduction}

This Article explores the relationship of property division and alimony in addressing the need for spousal support at divorce. The facts of the following hypothetical help set the stage for the inquiry. Assume that Marsha and Joe, married for seventeen years, contemplate separation and divorce. They have two children, ages twelve and nine. Their financial circumstances are better than those of the average divorcing couple.\textsuperscript{1} Because of good fortune and an austere family budget, they

\footnote{1. \textit{See infra} notes 342-45 and accompanying text.}
have accumulated a more than modest amount of real and personal property. Moreover, Joe earns $50,000 per year in an upper-level management position. Marsha has interrupted her work outside the home for significant time periods and now earns $14,000 per year in a part-time position as a computer programmer. The couple agree that Marsha will have custody of the children, and they reach a figure on child support.

Like most couples, Joe and Marsha try to execute a separation agreement to settle the economic consequences of their divorce. In this case, since the couple have agreed on child support, their chief economic concerns are their arrangements concerning property division and spousal support. Like all couples negotiating a separation agreement, Marsha and Joe "bargain in the shadow" of their state's law on property division and alimony.

There are two reasons Marsha might expect an unequal division of property in her favor. First, because of their relative incomes, divorce will have a greater financial impact on Marsha than on Joe. Therefore, to soften the economic impact of divorce, Marsha might expect to receive a larger portion of the marital assets. Second, most state statutes on property division authorize the use of property division to alleviate postdivorce need. Marsha, in reliance on the statute, might expect that her financial circumstances, as compared to Joe's, would lead a court to divide available property unequally in her favor.

Despite the logic of her position, she is likely to be disappointed. Even if her state's property statute authorizes the division of property to alleviate need, experience indicates that Marsha should probably expect, at best, only an equal division of the property available for distribution. Although alimony likewise is available in most states, Marsha probably should expect either a modest, short-term alimony award or no award at all. Despite the economic disparity between the two, this sketch outlines the shadow in which these parties are most likely to bargain.

In the hypothetical, divorce leaves Marsha in greater financial distress than Joe, and in this respect, the hypothetical is realistic. Numerous studies report that divorce leaves the wife at a severe economic disadvantage and explain the coining of the phrase "the feminization of poverty." Across the country, various groups are studying the economic straits of

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2. For the development of this phrase, see Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).
3. See infra note 70.
4. See infra notes 168-69 and accompanying text.
5. See infra note 79 for studies on alimony. See infra Section II for property division in states whose statutes authorize its use to address need.
divorced women and the children for whom they usually retain primary custodial responsibility.\(^7\) The need for these studies follows decades of divorce reform that sought to make divorce operate more fairly.\(^8\) The goal of alleviating the injustices wrought by a narrow concept of marital property partially motivated this reform.\(^9\) Despite the reformers’ success in expanding the concept of marital property,\(^10\) the aftermath of reform has left women and children as a new class of victims.

This Article focuses on property division at divorce and explores the role it should have played in averting economic inequality at divorce. In particular, the Article examines the relationship between property division and alimony in accommodating postdivorce spousal need. If one of the functions of property division is to address need, then property division shares a common function with alimony. If property division and alimony share the function of addressing need by providing postdivorce support, then the presence of both kinds of statutes poses a question in instances in which there is both available property and postdivorce income: should the court try to address the need with an unequal division of property, an alimony award, or some combination of the two?

In Part I, the Article reviews the development of equitable distribution statutes in separate property states.\(^11\) This review links the divorce reform movement to the incorporation of need factors into equitable distribution statutes. Part II focuses on six states that incorporate need factors into their property division statutes. This Part analyzes selected cases from those states and categorizes the results according to each court’s treatment of the need factors. Additionally, in Part II, the Article synthesizes the results to suggest some explanations for the underutilization of the need factors in property division statutes. In Part III, the Article offers some recommendations to focus courts’ attention on need in decisions concerning property division. Other recommendations in Part III require legislative action to redress the inattention to need. This Article concludes that explanations for the underutilization of the need factors imply that perhaps the central impediment to implementing

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7. For statistics on which spouse retains custody, *see infra* note 369 and accompanying text.
8. *See infra* note 42.
9. *See infra* note 44.
10. *See infra* notes 191-222 and accompanying text for a discussion of the success of contribution in classifying property as marital at the cost of diverting attention from need in distributing the available property.
11. In separate property states, each spouse owns the property titled in his or her name. In community property states, the marital unit owns at least the assets acquired during the marriage by the efforts of one or both spouses. *See* W. McClanahan, *Community Property in the United States*, §§ 2.36-2.39, at 45-54 (1982). This Article traces the impact of reform on the treatment of need factors in equitable distribution states. To a greater degree than the separate property states, the community property states included need factors in their property division statutes before the divorce reform of the 1960’s. Therefore, the study concentrates on the equitable distribution statutes of separate property states, specifically, Arkansas, Connecticut, Montana, New York, North Carolina and Wisconsin. *See infra* notes 83-93 and accompanying text.
the relationship between property division and alimony is a lack of consensus on what constitutes “need.”

I. THE INCORPORATION OF NEED FACTORS INTO EQUITABLE DISTRIBUTION STATUTES: DEVELOPMENT OF THE PHILOSOPHY OF PROPERTY DIVISION TO ADDRESS NEED

A. History of the Use of Factors Addressing Need: The Role of Property Division in Divorce Reform

In the wake of divorce reform, almost all separate property states have enacted statutes that give their respective courts the power to divide property at divorce.⁰¹₂ All of these states also have provided for the awarding of alimony or maintenance at divorce.⁰¹³ Though the distinction has never been clean,⁰¹⁴ these states, like community property states, historically have recognized a difference in the function of property division and alimony. Alleviating postdivorce need was not a central function of property division. In separate property states, courts awarded property at divorce to “unscramble” and sever the property relationship between the parties. Property awards at divorce in community property states distributed the property owned by the marital unit.⁰¹⁶ On the other hand, courts in both separate and community property states awarded alimony for support of entitled spouses.⁰¹⁷ The statutes on which these

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13. For a tabulation of alimony statutes, see Freed and Walker, Family Law in the Fifty States: An Overview, 20 Fam. L.Q. 439, 494-95 (1987) [hereinafter 1987 Overview]. Many states now use the word “maintenance” rather than “alimony” to refer to postdivorce spousal support. See, e.g., N.Y. Dom. Rel. Law § 236 Pt. B (6) (McKinney 1986). This Article uses the word “alimony” unless referring to a specific statute that uses the word “maintenance.”

14. For examples of alimony statutes, see infra note 73.

15. See infra notes 21-29 and accompanying text.

16. In the earlier version of his treatise, Professor Clark distinguished the tasks at divorce in separate and community property states by describing the process of “unscrambling” ownership interests in the separate property states and “dividing” the community in the community property states. See H. Clark, The Law of Domestic Relations in the United States 450 (1968).

17. For an explanation of the distinction between property division and alimony, see 2 H. Clark, The Law of Domestic Relations in the United States 179-80 (2d ed. 1987).
alimony awards were based suggested a number of justifications for the awards, but the dominant justification was to accommodate economic need. Alimony statutes reflected this goal by directing the court to consider factors like a spouse’s age, health, and ability to earn income.

Until the enactment of equitable distribution statutes, the departure from the historic distinction between property division and alimony in separate property states occurred gradually. Early in the history of divorce provisions in separate property states, some of these jurisdictions authorized the division of property to effectuate an award of alimony. In this way, the separate property states recognized that property division might accomplish one goal of alimony by supporting a needy spouse. Some of this recognition was statutory. Other separate property states developed common law principles that in effect used an award of property to support a needy spouse and ameliorate the harshness of the lack of adequate property provisions.

Community property states also gradually recognized the ability of property division to address need. If property division merely divided assets at divorce, a property division statute would include only historical factors of the marriage. If only alimony provided for support, only an

18. Professor Judith Areen found that the factors listed in the alimony statutes reflected five goals: to punish for fault in the marital breakup; to accommodate need; to maintain the status of the recipient spouse; to rehabilitate; and to recognize contributions to the marriage. J. Areen, Cases and Materials on Family Law 593-95 (2d ed. 1985).

19. The observation of one commentator, for example, underscores the dominance of this function of alimony. In his work on community property law, Mr. McClanahan justified the existence of alimony in community property states by the recognition that the division of the marital property could not satisfy economic need. Almost all of the community property states also enacted alimony statutes. W. McClanahan, Community Property Law in the United States, § 12:3, at 526 (1982).

20. See, e.g., infra note 294 for the Connecticut alimony statute.


22. Id. at 1283-84, 1303-05.

23. For specific examples that developed later, see, for example, Ohio’s statute, which even in its current form treats both alimony and the distribution of property under the topic of alimony. Ohio Rev. Code Ann. § 3105.18 (Anderson Supp. 1987).

Three commentators describe the use of property division as support in Massachusetts before the enactment of equitable distribution provisions. See Inker, Walsh, and Percocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 11 Fam. L.Q. 59, 64-65 (1977).


25. Certain of the separate property states developed well-defined common law doctrines for circumventing title theory. See J. J. McCahey, Valuation and Distribution of Marital Property § 3.07, at 3-35 (1985), for a description of resulting trust, special equities, and foregone career opportunities as techniques to avoid the lack of statutory authority to divide property.

26. In community property states, the marital unit acquires property. Divorce presents the occasion to determine what property belongs to the marriage and to divide it. If that were all that a statute sought to accomplish, a court need only determine the property, total its value, and award each spouse a portion. To accomplish this narrow function of property division, only factors concerning the history of the marriage, such as length of marriage; contributions during the marriage, both financial and non-financial;
alimony statute would include factors concerning a spouse's need. The statutes of most of the community property states, however, always empowered their courts to address need at divorce when dividing property. Instead of considering only length of the marriage and contributions to and dissipation of assets, these statutes also directed courts to consider "the conditions in which [the parties] will be left." Unlike the separate property states, the occasion for using property to address need was the division of the property of the marital unit. By directing courts to consider future need in dividing the community's property, however, the community property states, like the separate property states, recognized the use of property to support a needy spouse.

The divorce reform movement of the 1960's, although largely focused on the elimination of fault, sought to promote the role of property divi-

and dissipation of the assets of the marriage, would be relevant. By reviewing these factors, a court can determine how much and for how long each spouse had helped acquire the assets available for division. A court can determine, conversely, whether, and if so, to what extent, either spouse had dissipated the assets. The future needs of the spouses would have nothing to do with this determination if a community property state viewed property division this narrowly.

27. See Fineman, Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, 1983 Wis. L. Rev. 789, 809-10, for a description of the factors on apportionment included in the Uniform Marriage and Divorce Act (the "UMDA") as factors reflecting either an "historical assessment of the conduct and characteristics of the marital relationship" or "the need concept." Id. at 809. In an analysis of the North Carolina statute, Professor Sharp characterizes the discretionary factors as need and condition factors, compensatory factors, and distributional factors. Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina, 65 N.C.L. Rev. 195, 250-54 (1987).

28. A summary of community property statutes in 1931 reported that most of these states provided for a "just" division of the community property at divorce. See 2 C. Vernier, American Family Laws § 96, at 215-23 (1932).

29. See id. at 220 (summarizing the Nevada statute).

30. The pernicious role that fault had played in the process of divorce probably made its elimination a top priority of most reformers. Professor Weitzman describes early reform efforts in L. Weitzman, Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 16-26 (1985). In 1966, the Commissioners on Uniform State Laws appointed a committee that began work on what eventually became the UMDA. One of the coreporters on the first committee was Professor Robert Levy. At an early stage, Professor Levy identified elimination of fault as a central theme of divorce reform. See R. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis 10 (1967). Since the use of fault grounds had led to widespread collusion and perjury, the elimination of fault naturally headed many reformers' lists. See Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 4 (1987).

Another important goal of reform was to make the laws regulating divorce gender-neutral. The memorandum supporting the 1980 legislation in New York reflects this goal: "Purpose of Bill: The bill has basically two purposes: First: to eliminate unconstitutional sex distinctions in child and spousal support statutes by amending related statutes primarily in the domestic relations law and family court act." Memorandum in Support of Legislation, New York State Assembly (1980) reprinted in Foster, Commentary on Equitable Distribution, 26 N.Y.L. Sch. L. Rev. 1, 83-84 (1981) [hereinafter Memorandum in Support of Legislation].

Other goals of divorce reform are treated infra notes 42-53 and accompanying text.
cision laws to address postdivorce need. The reformers' preference for property division instead of alimony to address postdivorce need centered on one feature: the different treatment accorded property division and alimony in divorce litigation. In many states, courts have the statutory power to modify an award of alimony on proof of a substantial change of circumstances since the original award.\(^{31}\) If, for example, the need for support increases significantly, the court has the power to increase the award. A property award, on the other hand, rarely is modifiable.\(^{32}\) At times, this wooden distinction between property and alimony awards ignores a functional identity between the two.\(^{33}\) When property awards function as support, the need to modify the property award may arise.\(^{34}\) Nevertheless, commentators involved in the reform movement apparently assumed that property awards would remain nonmodifiable and extolled the virtues of property division as the superior means of making economic adjustments at divorce largely on the basis of its nonmodifiability.\(^{35}\)

31. 2 H. Clark, supra note 17, at 272-73.
32. Id. at 455-56.
33. In the earlier edition of his hornbook, Professor Clark described the problem:
The distinction between payments of alimony and of property with respect to the courts' power to modify would make sense if the division of property were in fact just that. None of the policy reasons favoring modification apply to a division of property. It should be final when made if it seeks only to give each spouse what is equitably or legally his. The distinction is fictional, however, in those states where the division of property serves the same function as alimony, and where the same criteria are used in dividing the property as are used in establishing the level of alimony. If both types of payment serve the same purpose, both should be modifiable. A fortiori lump sum alimony payable in installments should be modifiable.
34. Reform left property to perform the support function of alimony without any provisions for modifiability. See infra notes 335-40 and accompanying text. On at least two occasions, however, an appellate judge in New York, applying the state's equitable distribution statute, recognized that an award under its equitable distribution statute might be modifiable. In O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), the New York Court of Appeals held that a medical license could be marital property that could form the basis of a distributive award. Id. at 586-88, 489 N.E.2d at 717-18, 498 N.Y.S.2d at 748-49. Justice Meyer noted in his concurring opinion that the distributive award in that case should be subject to revision if the predictions about the husband's earnings on which the award was based proved inaccurate. Id. at 592, 489 N.E.2d at 720-21, 498 N.Y.S.2d at 751-52 (Meyer, J., concurring).
Also, in Wenzel v. Wenzel, 122 Misc. 2d 1001, 472 N.Y.S.2d 830 (1984), the husband was incarcerated as the result of a conviction for the attempted murder of his wife. The court awarded all of the marital property to the wife, including the pension earned through the husband's employment. Id. at 1006-11, 472 N.Y.S.2d at 835-38. The court provided that the husband could apply for a modification of the distribution of the pension upon his release from prison. Id. at 1006, 472 N.Y.S.2d at 835. Both of these cases acknowledge, at least in theory, the modifiability of property awards in equitable distribution.
35. E.g., Rheinstein, Division of Marital Property, 12 Williamette L.J. 413 (1976):
The amalgamation of alimony and property settlement has been promoted by the desire to constitute divorce so that it brings about a final and definite termi-
The virtues of nonmodifiability have long been recognized.\textsuperscript{36} Nonmodifiability brings finality at least to one aspect of the relationship, and ending a source of controversy between the ex-spouses is certainly a legitimate goal.\textsuperscript{37} Moreover, for psychological reasons, reformers have favored procedures that end as much contact between the parties as possible in order to cut the emotional ties and leave the parties free to form other, more enduring relationships. This goal of finality has obvious financial implications as well. Because property awards traditionally have been nonmodifiable, each spouse knows his or her financial circumstances in relation to the property distribution. Confident that those arrangements are not subject to change, each spouse may make financial plans, plans that might include assuming new family commitments.\textsuperscript{38}

Considerations of judicial economy also figure into the preference for property awards and the failure to recognize that there might be occasions when such awards ought to be modifiable.\textsuperscript{39} The judiciary commonly complains that family law litigation absorbs too much time.\textsuperscript{40} Others, however, point to inequities resulting from speedy, final resolutions to argue that such time investments are necessary.\textsuperscript{41}

In addition to promoting property division to address need, reformers sought to ensure that at divorce both spouses would share in the assets of

\textsuperscript{36} E.g., Bacon v. Bacon, 43 Wis. 197, 209 (1877) (because division of estate "is essentially a complete and permanent provision, in lieu of the transitory provision of alimony, the statute makes it final by withholding the power of revision over it").

\textsuperscript{37} See Rheinstein, \textit{supra} note 35, at 433.

\textsuperscript{38} See id.

\textsuperscript{39} See id. Professor Levy identified another legitimate objective: trying to eliminate opportunities for the parties to harass each other. See R. Levy, \textit{supra} note 30, at 159-60.

\textsuperscript{40} At least one judge, however, has chastized the judiciary for begrudging family litigation the time it consumes:

One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field—the break up of a marriage with its resulting trauma and troublesome fiscal aftermath. . . . The wheels of justice will not come to a screeching halt if 2 years hence another 15 minutes of valuable court time is consumed [sic] in bringing the court up to date on the fiscal condition of the parties [to the case].


\textsuperscript{41} Professor Weitzman has concluded that the obsession with speedy resolutions has led to the forced sales of marital residences when the circumstances obviously warranted the postponing of the sale out of consideration for the need of a custodial parent to continue to reside there with the children. L. Weitzman, \textit{supra} note 30, at 369.
the marriage.42 In separate property states, title largely controlled the disposition of property at divorce.43 Property laws often ignored the contributions made by the nonnuptial spouse, frequently the wife not employed outside the home or employed at a lesser income.44 If the nonfinancial contributions of the wife were recognized in the acquisition of property, too often it was only by the grace of the income-earner who titled the property jointly.45 The traditional housewife had been a frequent and tragic victim of the separate property regime when the income-earning husband titled the property accumulated during the marriage only in his name.46 Therefore, the reformers urged that contribution as a homemaker be included as a discretionary factor in the division of property.47 In this way, the reformers strove to make clear that nonfinancial contribution was just as important to the marriage as financial contribution.

Another relevant, but less central, theme of the reformers was the re-

42. As early as 1963, a presidential commission urged that:

[...]


43. See supra note 12 for recognition of inroads into title theory. See also infra note 69 for recognition of the varied development of these inroads in several states.

44. An infamous case illustrating the inequities of the former system is Fischer v. Wirth, 38 A.D.2d 611, 326 N.Y.S.2d 308 (3d Dep't 1971). In that case, the wife used her earnings for family expenses while the husband used his earnings to accumulate real and personal property in his name only. The court found that the wife had no equitable claim on this property. Id. at 611-612, 326 N.Y.S.2d at 310-11. At the divorce, the court held that the wife had no legal claim to the savings or to the house. Id. For other references to the inequities, see Report of the Task Force on Family Law and Policy to the Citizens' Advisory Council on the Status of Women (1968) [hereinafter Report of the Task Force]; R. Levy, supra note 30, at 165-66. In 1963, an earlier commission recommended that legislatures change property rules. See American Women, supra note 42 at 47; see also Glendon, Matrimonial Property: A Comparative Study of Law and Social Change, 49 Tul. L. Rev. 21, 22 (1974) (reports early movements for legislative reform of separate property inequitites).


46. A fascinating account of the divorce reform movement appears in Fineman, supra note 27. Professor Fineman, however, posits that reform's focus on the traditional housewife resulted in legislation that failed to address the circumstances of other victims of divorce. Id. at 853-67.

47. For example, the Uniform Marriage and Divorce Act's provisions on property division recognize homemaker contribution as a factor to consider in the division of property. See infra note 60 and accompanying text. For the history of the alternative provisions on the division of property, see infra note 396.
definition of alimony.48 In light of postreform experience,49 it is interesting to keep in mind just what the new legislation did with regard to alimony. The most significant statement about alimony made by the reformers was the introduction of the concept that alimony could be both rehabilitative and temporary.50 With the introduction of rehabilitative, temporary alimony,51 the reformers acknowledged the goal of two self-sufficient spouses upon dissolution. Actual self-sufficiency was not the case in the majority of dissolving marriages.52 Rather, the available statistics demonstrated the continuing economic disparities between men and women and the greater needs of women caused by career sacrifices and childcare responsibilities. Self-sufficiency, then, was more useful as a goal than as a reflection of the actual economic position of men and women at divorce.53 Nevertheless, the legitimacy of self-sufficiency, at least as a goal, resulted in the addition of the concepts of temporary, rehabilitative alimony.

B. Treatment of Property Under the Uniform Marriage and Divorce Act: Property Division as the Functional Equivalent of Alimony

In the 1960’s, the divorce reform movement led both the community property and separate property states to continue to blur the historic distinction between property division and alimony by recognizing more explicitly the role of property division to provide support.54 Motivated in

48. See generally R. Levy, supra note 30, at 140-64.
49. See infra note 55.
50. For example, the Uniform Marriage and Divorce Act provides:

The maintenance order shall be in amounts and for periods of time the court deems just . . . after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including . . . his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; [and]

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment . . .

51. Certainly in some states the concept of temporary alimony was a new one. See, e.g., Foster, Commentary on Equitable Distribution, 26 N.Y.L. Sch. L. Rev. 1, 6 (1981).
52. See infra notes 364-72 and accompanying text.
53. See infra notes 364-72 and accompanying text.
54. See 2 H. Clark, supra note 17, at 181-82; R. Levy, supra note 30, at 167-69 (expressing Professor Levy’s concurrence in this observation as he drafted the working manuscript for the UMDA).

As Professor Rheinstein has pointed out, the availability of a lump sum award of alimony further blurs the distinction between property and alimony awards. Rheinstein, supra note 35, at 424. The courts, for example, can redistribute property while purporting to make an award of alimony. Id.

This problem of distinguishing between awards of property and alimony has plagued the interpretation of agreements dividing property and recognizing alimony. See, e.g., Note, Alimony and Property Settlement Provisions Distinguished in Illinois, 44 Ill. L. Rev. 382, 383 (1949).
part by inadequate alimony awards, the drafters of the Uniform Marriage and Divorce Act (the "UMDA") continued this blurring process. Professor Robert Levy, the author of the monograph that preceded the drafting of the UMDA, suggested that the discretionary factors for property division should encourage judges to use property to accommodate need. The legislation that took shape both encourages


There was by no means a consensus, however, on the reasons why the Commissioners included need factors in § 307. Some reformers believed that traditional alimony had outlived its usefulness. E.g., R. Levy, supra note 30, at 140-47. For these people, reform of property division was justified for reasons other than as a substitute for alimony. At least one commentator posited that the inclusion of the need factors reflects an outdated reference to fault grounds for divorce and that equal distribution of property without regard to future need should accompany the advent of no-fault divorce. McKnight, Family Law, 29 Sw. L.J. 67, 80 & nn.104-06 (1975) (citing McKnight & Raggio, Family Law, Annual Survey of Texas Law, 25 Sw. L.J. 34 (1972)). But see infra notes 357-61 and accompanying text (criticizing the linking of no-fault divorce and economic responsibility after divorce).

56. 9A U.L.A. at 147 (1973). For a history of the committee appointed by the Commissioners on Uniform State Laws and of the Uniform Marriage and Divorce Act, see Foster, Divorce Reform and the Uniform Act, 18 S.D.L. Rev. 572 (1973).

Some furor attended the drafting of the UMDA. For a history of the controversy, see Zuckman, The ABA Family Law Section v. The NCCUSL: Alienation, Separation and Forced Reconciliation over the Uniform Marriage and Divorce Act, 24 Cath. U.L. Rev. 61 (1974). Heaping opprobrium on the Act, Professor Foster gave it a "made in California" label and charged that the Act relied on sociological materials to the exclusion of legal analysis. Foster, supra, at 576.

57. R. Levy, supra note 30, at 169. One indication of the completeness of this blurring process appears in the Table of Contents of the Preliminary Analysis. See id. at ii. The Table lists alimony and property considerations under the single heading, "Property Arrangements." Id. Likewise, the Commissioners in their note on the final version refer to agreements that treat both property and maintenance as "property settlement agreements." Unif. Marriage & Div. Act § 306 comment, 9A U.L.A. 217 (1973). This nomenclature ignores the historic distinction between separation agreements and property settlements. The phrase "separation agreement" historically refers to an agreement that provided for future support, while "property settlement" provided for the disposition of property. Sharp, Divorce and the Third Party: Spousal Support, Private Agreements, and the State, 59 N.C.L. Rev. 819, 826 (1981). By entitling an agreement on either topic "property settlement," the commissioners reflected in yet another way the amalgamation of property and alimony.

58. See R. Levy, supra note 30, at 167.
the use of property provision to provide support and promotes property division as superior to alimony to accomplish this task.

1. Recognition of the Use of Property Division as Support

The reformers urged courts to use property division for support in a number of ways. First, the drafters of the UMDA incorporated numerous need-related factors to guide judges in division of the available property at divorce. For example, section 307(a) of Alternative A of the UMDA lists numerous factors to guide judicial discretion in making the apportionment of property:

the duration of the marriage, any prior marriage of either party, any antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

Almost all of these factors look to the postdivorce economic future of the spouses rather than to the history of the marriage. By focusing on the future circumstances of the parties, the drafters demonstrated their desire to accommodate need through the apportionment of property.

The drafters also indicated that property was to perform a support function by including similar factors in the property division and maintenance statutes. The factors listed in section 307 that focus on the prospective needs of the parties are strikingly similar to those factors listed in section 308 as appropriate to the determination of the proper amount

59. See, e.g., Krauskopf, A Theory for “Just” Division of Marital Property in Missouri, 41 Mo. L. Rev. 165, 175-76 (1976) (urging the Missouri judiciary to consider future need as it divides property).

60. Unif. Marriage & Div. Act § 307(a) Alternative A, 9A U.L.A. 238-39 (1973). Alternative A of § 307(a) recommends that all property of the spouses, not just the property acquired during the marriage, be distributed at divorce: “[i]n a proceeding for dissolution of a marriage . . . the court . . . shall . . . finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired . . . .” Unif. Marriage & Div. Act § 307(a) Alternative A, 9A U.L.A. 238 (1973). In other words, Alternative A provides for the division of all the property owned at divorce, not just the acquests of the marriage. See W. McClanahan, supra note 19, § 14.2, at 623-25. The term “acquests” refers to property acquired by either spouse by onerous title or for a consideration. Id. at § 2.28, at 39. The term includes property acquired during the marriage except property acquired by gift, bequest, devise, or descent. Id. at 622 n.5. The term “nonacquests,” then, refers to property either acquired before the marriage or acquired during the marriage, but only by gift, bequest, devise, or descent.

For a discussion of the all-property versus acquests controversy, see infra notes 396-98 and accompanying text.

of maintenance. This overlap indicates that courts may address future need either by property division or by an award of maintenance.

2. Superiority of Property Division over Alimony for Support

The drafters of the UMDA not only encouraged the use of property division for support but also promoted it as superior to alimony for accomplishing this task. The strongest indicator of the UMDA's preference for the division of property lies in the explanation of the relationship between the property division and maintenance provisions. As the Commissioners wrote, "[t]he dual intention of this section [on maintenance] and Section 307 [on distribution of property] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance." 64

The final version of the UMDA underscores this expressed preference for property division over maintenance by placing the provision for property division before the provision for maintenance. In addition, the provision on maintenance directs that, procedurally, the division of property precede any award of maintenance. A court should not order maintenance until it determines that "the spouse seeking maintenance . . .

62. The discretionary factors in § 308 provide for the consideration of the following factors:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
(3) the standard of living established during the marriage;
(4) the duration of the marriage;
(5) the age and the physical and emotional condition of the spouse seeking maintenance; and
(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Unif. Marriage & Div. Act § 308(b), 9A U.L.A. 348 (1973); see also supra text accompanying note 61 (containing excerpt from § 307(a)).

63. The drafters of the UMDA were not the only reformers urging the replacement of alimony with property division. For example, as early as 1968, the Task Force on Family Law & Policy acknowledged the desirability of eliminating alimony when the dissolving family had sufficient property to substitute. Report of the Task Force, supra note 44, at 8. Other reformers recognized that "[t]he economic consequences of divorce depend in large measure upon the marital property system adopted by a particular state." Foster & Freed, Marital Property and the Chancellor's Foot, 10 Fam. L. Q. 55, 57 (1976).

The shape of divorce reform in the United States also had foreign counterparts. For example, the blurring of alimony and property occurred in Great Britain as well. One commentator welcomed the Matrimonial Proceedings and Property Act of 1970, which reformed legislation in Great Britain, in part because it "further [eroded] the distinction between provisions of income and adjustment of property" and recognized the link between maintenance and property. Miller, Maintenance and Property, 87 L.Q. Rev. 66, 85 (1971).


lacks sufficient property to provide for his reasonable needs."

In sum, the UMDA drafters adopted factors like those used in alimony statutes as guides to the division of property and directed the reviewing court to accomplish the purposes of alimony using property division before turning to the more traditional means. The message of reform could not have been clearer: property division should perform a support function and is superior to alimony for this task. Property should take over the function of alimony when sufficient property exists. The future needs of an economically dependent spouse should figure foremost in decisions about the division of property, not only in decisions about alimony.

C. Recognition in Equitable Distribution Statutes

The reform movement and the influence of the UMDA led separate property states to enact equitable distribution statutes that do not perpetuate this historic distinction between property division and alimony. These statutes usually list factors to guide the court in dividing the available property. Of the forty equitable distribution statutes in separate property states and the District of Columbia, twenty-eight include factors that take into account not only the acquisition of the property but also the needs of the spouses.

67. Although the UMDA has been adopted in only eight states, it has undeniably influenced other states. Professor Glendon credits the UMDA for the concept of marital property, Glendon, supra note 44, at 33-34, a concept that appears in most of the equitable distribution statutes of the separate property states. See infra note 84. For an example of the influence of the UMDA on a state that did not adopt it, compare Unif. Marriage & Div. Act § 307 Alternative B, 9A U.L.A. 239 (1973), with Me. Rev. Stat. Ann. tit. 19, § 722-A (1981).
68. Some community property states likewise have statutes that authorize the equitable distribution of property at divorce. Because of the different history of separate and community property states in including need factors in these statutes, supra text accompanying notes 21-66, however, this Article focuses only on selected separate property states.
69. In some separate property states, the enactment of these statutes was the first authorization for any award of property at divorce other than the recognition of legal or equitable title. For example, as Professor Sharp points out in an analysis of the North Carolina statute and cases, North Carolina law reflected pure title theory probably more clearly than any other state. Sharp, supra note 27, at 196-97. In other states, the passage of equitable distribution statutes did not work so dramatic a change. Cf. Scheible, Marital Property in Tennessee: An Evolution, Not a Revolution, 15 Mem. St. U.L. Rev. 475, 553 (1983); Note, Property Distribution Upon Dissolution of Marriage: Florida's Need for an Equitable Distribution Statute, 8 Nova L.J. 71, 72 (1983). In all the separate property states, equitable distribution statutes encompassed the most significant property interests attaching by virtue of the marriage. Professor Prager characterizes the enactment of statutes with the property division schemes of the UMDA as the recognition of a "sharing-based" philosophy of marital property. Prager, Sharing Principles and the Future of Marital Property Law, 25 UCLA L. Rev. 1, 2-4 (1977).
These statutes address need by requiring consideration of factors such as age, health, station, occupation, amount and sources of income, vocational skills, and the like.\textsuperscript{71} While these statutes also include non-need factors, primarily contribution, as appropriate to the property division, they emphasize the need factors.\textsuperscript{72} Moreover, many of these statutes, such as the UMDA, promote property division as superior to alimony for support by directing that property division precede and supplant the alimony award wherever possible.\textsuperscript{73} In many of the states that do not ad-

\begin{itemize}
\item[\textsuperscript{71}] These factors will be referred to in this Article as the need factors.
\item[\textsuperscript{72}] See infra note 84.
\item[\textsuperscript{73}] For example, the Montana property legislation provides that “[i]n making apportionment, the court shall consider . . . whether the apportionment is in lieu of or in addition to maintenance.” Mont. Code Ann. § 40-4-202 (1) (1987). The maintenance statute provides that “the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance . . . lacks sufficient property to provide for his reasonable needs.” Mont. Code Ann. § 40-4-203(1)(a) (1987). Likewise, the Connecticut alimony statute directs the court to consider “the award, if any, which the court may make pursuant to [the property division statute].” Conn. Gen. Stat. Ann. § 46b-82 (West 1986).
\end{itemize}

The New York maintenance statute directs the court considering maintenance to pay attention to “whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs” and to “the income and property of the respective parties including marital property distributed pursuant to [the property division statute].” N.Y. Dom. Rel. Law § 236 Pt. B(6) (McKinney 1986). The memorandum from Governor Hugh L. Carey regarding the New York legislation recognizes this preference for property division. In it, Governor Carey observed that the legislation directed that “[u]pon a marriage's dissolution, property accumulated during the marriage should be distributed in a manner which reflects the individual needs and circumstances of the parties.” Memorandum Filed with Assembly Bill Number 6200-A, at 608, Executive Chamber, State of New York (June 22, 1980). This observation explicitly recognizes the use of property to address need. Other material accompanying the legislation, however, contains observations that subtly undercut this use of property. In the supporting memorandum, for example, the drafters observed that “[u]pon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and the ability to pay.” Memorandum in Support of Legislation, supra note 30, at 11. This isolation of the functions of property division and maintenance undermines the recognition of their functional identity. See infra notes 267-69 and accompanying text.

The influence of this preference for property division to satisfy need also appears proce-
dress statutorily the interplay of property and alimony, case law has partially filled the void and directs the same outcome. These responses to reform suggest widespread concurrence in the notion that property division should support needy spouses and that property division is preferable to alimony in performing this function. Neither the drafters of the UMDA nor other reformers detailed how property division would provide support, but the inclusion of need factors in property division statutes certainly underscored that it should.

The enactment in separate property states of property division statutes containing need factors should have lessened postdivorce need. Divorce reform, however, has left this goal unfulfilled. Despite the number of separate property states that have statutes that direct their courts to consider need in dividing property, courts appear unwilling to use these discretionary factors. Instead, the traditional distinction between property division and alimony persists. By ignoring the factors relating to need, courts continue to unscramble ownership in property division and address need, if at all, only through awards of alimony. Indeed, a durally in the statutes of some states that direct the court to award property without regard to alimony and to consider in a subsequent proceeding whether the property award warrants a change in the prior alimony award. The North Carolina statute, for example, directs the court to make the equitable distribution of property "without regard to alimony . . . . After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated . . . ." N.C. Gen. Stat. § 50-20(f) (1987). Subsection (f) lends support to the use of property to accomplish all the economic goals of the state; the property award determines the existence and extent of the alimony award. This provision has been interpreted to mean that the court must divide property without regard to alimony, reevaluating the alimony award, if necessary, in light of the distribution of property, McIntosh v. McIntosh, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985), and that if the court is considering a motion for both alimony and property distribution, the court must first divide the property. Talent v. Talent, 76 N.C. App. 545, 556, 334 S.E.2d 256, 263 (1985).

74. For example, in O’Brien v. O’Brien, 66 N.Y.2d 576, 584-86, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985), the court recognized that the purpose of equitable distribution is to eliminate economic dependence. In this way, the court recognized property’s support function. See also Spadaro v. New York City Police Dept. Pension Serv., 115 Misc. 2d 494, 497, 454 N.Y.S.2d 374, 376 (1982) (like New Jersey’s statute, New York’s statute recognizes that the division of assets is preferable to maintenance).

75. The inclusion of the need factors has prompted one observer to describe the accommodation of future needs as a primary goal in many equitable distribution states. Golden, supra note 12, § 8.20, at 368. Also, in Professor Foster’s explication of the new act, he predicted that factors focusing on need—duration of marriage, age, and health—would be dominant factors in long marriages or marriages involving the elderly or disabled. See Foster, supra note 51, at 34. Experience has not borne out this prediction on the division of property.

76. See infra notes 292-300 and accompanying text.

77. See infra note 144 for cases from this study in which the disposition left one of the parties, usually the wife, in need.

78. See infra notes 267-69 and accompanying text.

79. Alimony awards probably have never been as significant in numbers of recipients or amount received as the public has perceived them to be. See generally Weitzman & Dixon, supra note 55. For some explanations for the myth, see B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law: Causes and Remedies 693
number of studies conclude that whether by inadequate property or alimony awards, courts are failing to address need. With the recognition of growing postdivorce need in mind, this Article examines the use of the need factors in dividing property in selected separate property states.

II. STUDY OF THE NEED FACTORS IN PROPERTY DIVISION STATUTES: THE CONTINUED DISTINCTION OF PROPERTY DIVISION AND ALIMONY

A. Equitable Distribution Statutes Most Clearly Reflecting Need Factors

The first step in this study was selecting states on which to focus. In order to evaluate the use of the need factors contained in property division statutes, the study narrowed the field to those states that include the most factors addressing postdivorce need in their property division statutes. A comparison found eighteen states similar in their depth of attention to need, or to the postdivorce circumstances of the spouses. These

(1975). Nevertheless, studies of alimony reveal declining awards. For example, Professor Weitzman’s study of divorce in California revealed a decline in alimony from 20% to 15% in the short period from 1968 to 1972. L. Weitzman, supra note 30, at 167. No-fault divorce went into effect in California in 1970. Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3323-25. These numbers assume even more significance when one realizes that there has also been a shift from permanent awards to transitional awards. By 1977, two-thirds of the alimony awards in the study were transitional, limited awards. The average duration of these awards was only two years. L. Weitzman, supra note 30, at 164-65. The group of people that experienced the most decline in alimony awards after no-fault legislation was divorcing mothers with custody of preschool children. Id. at 186.

This pattern has repeated itself in every study. An earlier study had reported an even greater drop in another county in California—50% between 1968 and 1976. Seal, A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California, 1 Fam. Advoc. No. 4, 10, 11-12 (1979). Across the country, a study in Vermont reported a decline in alimony awards so that between 1982 and 1983, only 7% of divorced persons received alimony awards. Wishik, Economics Of Divorce: An Exploratory Study, 20 Fam. L.Q. 79, 85 (1986). Only 2% of those divorced persons received awards of unlimited duration. Id. Likewise, in the Midwest, another study reported that alimony awards in Ohio declined from 20% in 1965 to 16% in 1978. McGraw, Sterin & Davis, A Case Study in Divorce Law Reform and Its Aftermath, 20 J. Fam. L. 443, 473 (1981-82). The authors of this study, however, did not find a causal relationship between no-fault divorce and declining alimony awards. Id. at 473.

See, e.g., McGraw, Sterin & Davis, supra note 79, at 476 (study in Ohio); McLindon, Separate But Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351, 404-05 (1987) (study in New Haven, Connecticut); Seal, supra note 79, at 13 (earlier study of the effect of no-fault legislation in California); Wishik, supra note 79, at 100 (study in Vermont). See generally L. Weitzman, supra note 30, at 323-56 (comprehensive study focusing on California records but with clear national implications).

See also, e.g., Weitzman, supra note 80, at 167 (study in California). The study found a decline in alimony awards from 20% in 1968 to 15% in 1972. Id. This decline was attributed to the introduction of no-fault divorce and the shift from permanent to transitional awards.

80. See, e.g., McGraw, Sterin & Davis, supra note 79, at 476 (study in Ohio); McLindon, Separate But Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351, 404-05 (1987) (study in New Haven, Connecticut); Seal, supra note 79, at 13 (earlier study of the effect of no-fault legislation in California); Wishik, supra note 79, at 100 (study in Vermont). See generally L. Weitzman, supra note 30, at 323-56 (comprehensive study focusing on California records but with clear national implications).

81. For a discussion of statutory factors that address need, see infra note 84. For a list of the statutes of the twenty-eight jurisdictions that recognize need as appropriate to decisions on dividing property at divorce, see supra note 70. From those twenty-eight jurisdictions, the following jurisdictions paid the most statutory attention to need in their property division statutes: Arkansas, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, and Wisconsin.
eighteen states listed in their property division statutes all the factors traditionally appearing in alimony statutes—factors like age, health, income—as bases for dividing property.\(^\text{82}\)

The study further narrowed the universe of eighteen states to derive a manageable sample.\(^\text{83}\) The study focused on six of these eighteen states—Arkansas, Connecticut, Montana, New York, North Carolina, and Wisconsin\(^\text{84}\)—for several reasons. Three of these states—Arkansas, North Carolina, and Wisconsin—are equitable distribution states

\(^{82}\) See infra note 84.

\(^{83}\) Because of the enormity of the task of conducting a comprehensive study of the relevant case law in eighteen states, the focus of this study had to be narrowed. The six states in the study were chosen, in part, because each has a body of case law that is comprehensive but not so vast as to preclude a study of all relevant cases. The author believes that this and other criteria, see text accompanying notes 84-93, used to select the six states make the chosen sample a representative one.

\(^{84}\) The following are the relevant portions of the property division statutes from the six states in this study. The need factors are highlighted:

**Arkansas**

(A) At the time a divorce decree is entered:

(1) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (1) the length of the marriage; (2) age, health, and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and (9) the federal income tax consequences of the Court's division of property. When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties and such basis and reasons should be recited in the order entered in said matter.


**Connecticut**

In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.


**Montana**

In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit.


**New York**
In determining an equitable disposition of property under paragraph c, the court shall consider:

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


North Carolina

There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

1. The income, property, and liabilities of each party at the time the division of property is to become effective;
2. Any obligation for support arising out of a prior marriage;
3. The duration of the marriage and the age and physical and mental health of both parties;
4. The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
5. The expectation of nonvested pension, retirement, or other deferred compensation rights, which is separate property;
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, or lack thereof, as a spouse, parent, wage earner or homemaker;
7. Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
8. Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
9. The liquid or nonliquid character of all marital property;
10. The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
11. The tax consequences to each party;
that follow a statutory presumption of equal division. These states

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.


**Wisconsin**

The court shall presume that all . . . property [other than acquests] is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:

(1) The length of the marriage.
(2) The property brought to the marriage by each party.
(2r) Whether one of the parties has substantial assets not subject to division by the court.
(3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
(4) The age and physical and emotional health of the parties.
(5) The contribution by one party to the education, training or increased earning power of the other.
(6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
(7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.
(8) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
(10) The tax consequences to each party.
(11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
(12) Such other factors as the court may in each individual case determine to be relevant.


85. The Arkansas statute provides: "All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable . . . . When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally . . . ." Ark. Stat. Ann. § 34-1214(A)(1) (Cum. Supp. 1985).

The North Carolina statute provides: "There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c) (1987).

The Wisconsin statute provides:

Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the
were chosen in part to form a basis for comparison of the effect of a presumption of equal distribution with the effect of authority to make an equitable distribution of property.

A number of factors figured into the selection of the other three states. Montana adopted the UMDA in 1976 and therefore provides a comparison of several years' experience under the UMDA with more recent enactments of nonUMDA jurisdictions. The study included a UMDA state not only because the legislative commentary on the UMDA is complete, but also because the UMDA most clearly articulates the legislative philosophy behind the relationship between division of property and alimony. New York, because of the numbers of cases reaching the courts of that state, provides a useful basis to assess the use of the need factors under a more recent enactment. Finally, Connecticut remains one of the few states that considers traditional marital fault as a basis for making the property determination. This feature of Connecticut's statute urged its inclusion.

The property statutes from these six states include as many factors relating to future need as those of any state. By including factors such as age, health, and income, these states show as much concern that property division alleviate postdivorce economic burdens as that shown by the statutes of any state. Therefore, one would expect to find in these states as much use of property division to accommodate postdivorce need as in any state with a property division statute.

Because the statutes of these states, like the other twelve states fully incorporating need factors into their property division statutes, reflect a concern for postdivorce need, one would expect to find awards in these states deviating from equal divisions of property in favor of the more

court may divest the party of such property in a fair and equitable manner. The

court shall presume that all other property is to be divided equally between the


Wisconsin's statute explicitly authorizes the court to consider the discretionary factors in deciding whether to alter the equal division. See supra note 84. Even without explicit statutory authorization, however, the courts use the discretionary factors in equal division states to decide whether to honor the presumption. See, e.g., Smith v. Smith, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985); see also Sharp, supra note 27, at 245.


87. See supra notes 54-59 and accompanying text.


89. The Connecticut statute allows the court in making the property division to consider "the causes for the annulment, dissolution of the marriage or legal separation." Conn. Gen. Stat. Ann. § 46b-81(c) (West 1986). For a tabulation of statutes and references to fault in property division, see 1987 Overview, supra note 13, at 483.


needy spouse. After all, the primary legislative reason to opt for equitable, rather than equal, division is to reserve discretion to divide the property unequally in the face of meritorious facts. Indeed, some of the lobbyists for equitable division argued that the most compelling facts justifying unequal division of property were the disparate economic positions of men and women at divorce and the greater need of women.\footnote{For example, the Task Force on Family Law and Policy recommended equitable, instead of equal, distribution in its 1968 report based, in part, on the greater need of women at divorce. \textit{Report of the Task Force}, supra note 44, at 5-6. Acknowledging the recommendation of the Task Force, the drafters of the UMDA recommended equitable distribution, with Professor R. Levy noting that, "[i]t seems clear that the time is not yet ripe to insist upon a 50-50 formula." \textit{R. Levy, supra} note 30, at 167.} The legislatures of the states in this study opted for equitable, as opposed to equal, distribution.\footnote{Likewise, some of the women's groups in Pennsylvania that lobbied for equitable distribution considered that equitable distribution would enable wives to receive property awards of greater than half the property available for distribution when warranted. \textit{Freed & Foster, Divorce in the Fifty States: An Overview}, 14 Fam. L.Q. 229, 230 (1981).} Just as important, these states recognized need as a factor to be weighed when dividing the property. For all these reasons, one would expect to find deviations from equal divisions to address need as much in these states as in any of the eighteen states that fully address need in their property division statutes.

B. \textit{Cases Construed Under these Statutes}

With the sample group thus defined, the study then canvassed the reported cases of the six states\footnote{The six states in the study opted for equitable distribution. Three of the states—Arkansas, North Carolina, and Wisconsin—however, enacted presumptions of equal division. \textit{See supra} note 85. All six states, however, recognized need as appropriate to consider in deciding how to divide the property. \textit{See supra} note 84. Therefore, equal presumption states should deviate from equal division just as states without the presumption, simply on fewer occasions.} and examined selected cases to determine

\textit{Moreover, several features of appealed cases make focus on these cases a more efficient measure of the use of the need factors. First, if courts are using the need factors, that use should appear among appealed cases because they tend to involve more assets than are involved in the average divorce. \textit{Id}. When a court is faced with the difficult task of dividing few assets, it is troubling but perhaps not surprising to find that the court does not analyze carefully whether the division comports with the philosophy embodied in the property division statute. \textit{Id}. When property holdings are scarce, judges may be more likely to conclude that there is little the award can do to alleviate need and therefore do not even make the attempt. Accordingly, courts trying to divide meager holdings might rely on equal divisions or other formulas without analyzing the various goals of the property division statute. \textit{See}, e.g., \textit{Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis}, 61 N.C.L. Rev. 247, 271 (1983) (warning that a narrow...}
how the need factors fared in states that gave the most statutory attention to need in property division. The study included 138 cases and fifty-five cumulative years of experience with the need factors in the six states of this study. For statistical purposes, the study defined three categories of cases according to their dispositions of property: cases in which either the lower or reviewing court addressed need and relied

classification of property available for distribution thwarted some of the legislative goals behind equitable distribution statutes). Because the appealed cases involve more assets, however, one legitimately can have higher expectations of judicial respect for the statutory policy.

A second reason that use of the need factors should surface among the appealed cases, if at all, involves the nature of the facts of appealed cases. The appealed cases involve contested suits in which at least one of the parties thinks that the facts are compelling enough to warrant reversal. Since the facts tend to be unusual, one can legitimately expect to find more dispositions departing from the norm among the appealed cases. For both these reasons—the greater assets involved and the unusual facts of the cases—one should find a higher instance of courts heeding the statutory directives in the appealed cases, rather than in cases stipulated or otherwise not appealed. One would expect the inattention to be even greater among stipulated cases or cases with insufficient property or with factors too commonplace to warrant an appeal.

As the results of this study show, however, courts pay little attention to need, even among the appealed cases. Moreover, as this study shows, the reviewing courts provide little encouragement to use these discretionary factors. See infra note 144. Therefore, there is no reason to believe that the lower courts will start to use the need factors without some impetus—either in the form of legislative action or direction from the reviewing courts. See infra notes 410, 411 and accompanying text.

95. Several criteria guided the selection of cases for this part of the study. The study examined reported cases and analyzed attention to need as demonstrated by the lower court and recorded in the reviewing court's opinion, or as reflected only by the reviewing court's analysis. For this part of the study, the tabulations include only those cases in which the division of property was in issue. This factor excluded cases in which the only issues were the classification or valuation of the property.

Another factor that excluded a number of cases was the requirement that the case report sufficient facts to enable a determination of whether the parties had disparate financial circumstances. Since one tabulation involved the conclusion that the division left one of the parties in need, the study analyzed a case for use in these tabulations only if the reported case recited sufficient facts to draw a conclusion.


97. The study determined the categories by the disposition in the reported case. A number of these cases involved remands by the reviewing court. They nevertheless were included as long as the reason for the remand did not involve an issue that questioned the propriety of the proportionate division of property.

98. The study defines "addressing need" as either (1) affirming an unequal division of the available property or an award of nonacquests in favor of the economically weaker spouse; (2) reversing or modifying an award of greater than one-half the available property for the economically stronger spouse; (3) or reversing or modifying an equal division
primarily on one or more of the need factors;\footnote{99} cases in which the lower or reviewing court addressed need but relied primarily on other factors;\footnote{100} and cases in which the disposition left a party in need.\footnote{101} The following sections analyze the cases in these categories and confirm the

of property so as to favor the economically weaker spouse. For a definition of the term 
"acquests," see supra note 60.

This definition of "addressing need" warrants several explanations. The study relies on 
the court's determination of property available for distribution to categorize a division as 
equal or unequal. For example, if the court categorized property as nonmarital even 
though part of the property debt was reduced with marital funds, that property is not 
"available" property for the purposes of this study. See, e.g., Bagwell v. Bagwell, 282 

Also, for the purposes of these tabulations, the study defines an equal division of property 
as an award of 41%-59% of the available property. An unequal division of property, 
then, was an award of 60% or greater of the available property. Other studies likewise 
define equal and unequal divisions of property. See, e.g., Wishk, supra note 79, at 90.

For a number of reasons, the study does not include a delayed sale of the marital home 
as a disposition "addressing need." First, the study treats the relationship of property 
division and alimony and therefore focuses on spousal need in the division of property. A 
delayed sale of the marital home is almost always justified because of the needs of chil-
Second, the delayed sale of the home recognizes only the right of possession and in that 
sense is not a division of property. See id., 463 N.Y.S.2d at 479 (holding that home is to 
be divided when the youngest child reaches 21). Moreover, the instances of delayed sale 
of the home were not frequent enough to be statistically significant.

99. In assessing reliance on the need factors, the study includes cases in which the 
reviewing court noted the lower court's reliance on these factors and those in which the 
reviewing court independently referred to those factors. See infra note 103.

100. In assessing the failure to rely on the need factors, the study includes those cases 
in which the reviewing court failed to note the lower court's reliance on these factors or 
failed to make its own reference to those factors. See infra note 129.

101. The conclusion that the property division left one party in need involved a 
number of considerations. For example, the study found a spouse "in need" if, from the 
reported facts, there appeared to be a significant difference between the financial circum-
cstances of the two. See, e.g., Leo v. Leo, 197 Conn. 1, 7, 495 A.2d 704, 708 (1985) (court 
recognized the disparity in incomes between the husband and wife); Benjamin v. Benja-
min, 189 Mont. 158, 159, 615 P.2d 218, 219 (1980) (facts revealed husband's earnings 
were twice those of wife). The spouse with fewer economic resources was considered 
the spouse in need. In most cases, the source of the conclusion was the difference in the 
postdivorce earnings of the two. The study looks at the kind of work in which each 
spouse was engaged during the marriage and at the time of divorce to draw conclusions 
about disparities between incomes. For example, in Oster v. Oster, 186 Mont. 160, 606 
P.2d 1075 (1980), the husband ran a family farm, and the wife had been a homemaker 
and had cared for the children. See 606 P.2d at 1076. In addition, at least according to 
his evidence, the wife had also assisted in some of the duties on the farm. The order at 
divorce enabled the husband to retain the ranch, paying the wife 9.135\% of the value of 
the marital assets. See 606 P.2d at 1077. The study concluded that the wife was left in 
need because the facts indicated that she had not developed any skills during the mar-
riage.

The conclusion that one spouse was left in need does not take into account any award 
of alimony. Any attempt to address the disparity through alimony is irrelevant to this 
thesis. Part of the thesis of this Article is that divorce reform promoted property division 
as the preferable method of making economic adjustments at divorce. See supra notes 30, 
31-41, 42-53 and accompanying text. The surveyed states, by including need-based fac-
tors in their property division statutes, reflect this philosophy. See supra notes 67-80 and 
accompanying text. Therefore, the study's conclusion that one spouse was left in need by
hypothesis that courts have failed to use property division to address postdivorce need, despite legislative indication to do so.

1. Cases Reflecting a Reliance on the Need Factors in Property Division

The first category contains cases that addressed need and revealed a reliance, at least in part, on need factors to support the disposition. In these cases, the need of one of the spouses, rather than contribution or some other non-need factor, supported the disposition. As the presence of cases in this category reveals, some courts on occasion do address need by relying on one or more of the relevant discretionary factors. The study’s most significant tabulation, however, is the number of these cases. In only thirty-four of the one-hundred-thirty-eight surveyed cases did the lower or reviewing court address need and make its disposition on that basis. Moreover, one state—Montana—accounted for twenty-one of

the property division rests on the fact that a court did not address the economic disparity by an award of property.

Another consideration is important in this tabulation. The cases in which one spouse was left in need are not necessarily cases in which the lower and reviewing courts inappropriately failed to accommodate the economic disparity. For instance, in a few cases, the division appeared to rest almost exclusively on the short duration of the marriage. In some of these cases, perhaps even with greater attention to need the court would have divided the property in the same way. However, since the study examines the inattention to the need factors, it includes all cases in which one party appears to have greater need which the division of property failed to address.

102. See supra notes 98-99.

103. In the following cases the courts addressed need and based their decisions on one or more of the need factors:


these cases, while the other thirteen are distributed among the remaining five states.

In twenty-nine of these cases, the reviewing court merely affirmed an award addressing need on the basis of the need factors. The reviewing court rarely reversed a lower court in order to make a division based on the need factors. Only five of those cases included in this category involved a reviewing court reversing or modifying the decision of the lower court because of inadequate attention to these discretionary factors. Four of the cases come from Montana; the other, from Connecticut. In only one of those five cases did the disposition by the reviewing court indicate that the revised award should grant more than half the available property to the more needy spouse. In this case, from Montana, the appellate court remanded to the trial court and, in effect, ordered an unequal division of property for the wife after noting the disparity between the wife’s and husband’s abilities to earn income.

In light of the number of equitable distribution cases reaching the ap-


Id. at 1024.
pellate courts in these six states, the figures are telling.110 The factors relating to need—age, health, income, vocational skills, and the like—figured in dispositions that addressed need in only thirty-four cases of the hundreds of cases in each of these states. These numbers confirm that courts are not using property division to address disparities between the spouses that leave them in unequal financial positions at divorce.

a. Circumstances for Recognition of Need

Even more significant than the numbers are the circumstances in which the reviewing courts found it appropriate to refer to the factors relating to need.111 Analysis of the cases reveals that a simple disparity in the economic circumstances of the two parties rarely suffices for a property disposition that recognizes that disparity.112 Unless the disparity is the product of extraordinary circumstances, the courts appear reluctant to base an award of greater than half the property or an award of nonmarital property on need.

Most often, the reviewing court highlighted the poor health of the spouse receiving the greater award of property.113 In Arkansas' only appellate case in which the court relied on one of the need factors, the court approved an unequal division for a blind husband, indicating his greater need.114 Among the three North Carolina cases fitting this category, two involved wives in poor health—one with chronic ill health115 and the other with multiple sclerosis.116 In both of these states, the statutes contain a presumption of equal division.117 The message these decisions

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110. The study revealed that over one thousand equitable distribution cases reached the reviewing courts in these states since their adoption of equitable distribution statutes.
111. Again, the cases reviewed here include those in which the reviewing court relied on the lower court's references and those in which the reviewing court referred to various factors independently of the lower court's analysis.
114. Cantrell v. Cantrell, 10 Ark. App. 357, 664 S.W.2d 493, 494 (1984). The court also noted the wife's lack of contributions. Id. at 495.

The appealed cases in North Carolina may not provide a clear picture of the current
send to the lower courts about the relevance of need is that usually only extraordinary circumstances involving health warrant a departure from an equal division of property.\textsuperscript{118}

Another circumstance that results in unequal divisions is misconduct connected with the litigation. For instance, that a husband has been uncooperative in the litigation, on occasion, has justified an award of greater than half the available property to the wife in need.\textsuperscript{119} In some of these cases, however, need alone could have justified the dispositions.\textsuperscript{120}

b. \textit{Other Characteristics: Only Slight Deviation from Equal Division}

Cases addressing need and basing a property division award primarily on one of the need factors prompt a few other observations. The decisions reviewing unequal divisions of property often include so few facts that it is impossible to determine how unequal the division was. When the reviewing court's opinion does set out the proportions, however, the facts reveal that the deviation from an equal division is slight and merely symbolic—usually from a fifty-fifty division to a sixty-forty division.\textsuperscript{121} The cases also reveal that when the award deviates dramatically from an equal division, there was usually some explanation for the award other than postdissolution need.\textsuperscript{122}

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appellate philosophy on which occasions require departure from an equal division in favor of the more needy spouse. Many of the cases involve a remand with instructions to the trial court to support more explicitly the unequal division. See infra note 173. The North Carolina courts' struggle to develop a cohesive philosophy of equitable distribution is due, in part, to the sudden change equitable distribution worked in North Carolina divorce practice. See Sharp, supra note 27, at 196-97. In one recent North Carolina case, the court suggested that custody of a minor child alone might support an unequal division of property. Patterson v. Patterson, 81 N.C. App. 255, 260, 343 S.E.2d 595, 599 (1986). This statement may reflect a greater willingness to depart from an equal division than earlier cases demonstrate.

118. Professor Fineman concludes that the focus on equality may mean that "only the greatly disadvantaged—the polar model of the victim—will have a chance at deviation" from an equal division. Fineman, supra note 27, at 840.


120. In one Montana case in which the court found the husband evasive, the appellate court justified the unequal award by observing not only the need of the wife but the gambling of the husband. In re Marriage of King, 700 P.2d 591, 593 (Mont. 1985).

121. See, e.g., Lupo v. Lupo, 197 Mont. 290, 642 P.2d 1056, 1057 (1982) (60\% - 40\% division in favor of wife; wife in poor health); Harris v. Harris, 84 N.C. App. 353, 352 S.E.2d 807, 875 (1987) (60\% - 40\% division; disparate incomes); Haugan v. Haugan, 117 Wis. 2d 200, 220, 343 N.W.2d 796, 806 (1984) (slightly unequal for wife with debts to husband). Probably in most of the cases, the record would establish that there was insufficient property to compensate fully for postdissolution need: no matter how unequally the court divided the property, the more needy spouse would continue to have need. See infra notes 342-47 and accompanying text.

122. See, e.g., Karr v. Karr, 628 P.2d 267 (Mont. 1981) (affirming trial court award of bulk of available property to wife based on finding that husband was evasive and untrustworthy), cert. denied, 455 U.S. 1016 (1982); Nunnally v. Nunnally, 625 P.2d 1159 (Mont. 1981) (awarding bulk of estate to wife who had owned much property before the marriage, though had put it in joint names); Erdheim v. Erdheim, 119 A.D.2d 623, 501
\end{flushleft}
c. Absence of Theoretical Basis

One other observation about the cases using the need factors is in order. The cases in this category justify the division of property based on the need of one of the spouses by referring to one or more of the factors like age, health, income, or vocational skills. The analysis in these cases, however, rarely relates the goal of addressing need to the philosophy behind property division.123 Instead, the court merely acknowledges the need, and usually some other factor, in making the disposition.124

This failure to explain the relationship between addressing need and dividing property at divorce contrasts dramatically with the analyses in other cases. When non-need factors, such as contribution, are the basis for the unequal division, it is common to find the courts explaining at some length the relationship between contribution and division of property at divorce.125 In these cases, the analysis commonly refers to the partnership theory underlying equitable distribution126 or to the recogni-

N.Y.S.2d 77 (approving trial court’s award to wife of 60% of available property plus marital residence based on findings that husband was uncooperative and was depressing his income), appeal denied, 68 N.Y.2d 608, 498 N.E.2d 433, 506 N.Y.S.2d 1032 (1986).

Again, only in Montana do the reported cases reveal a significantly unequal disposition justified predominantly on need. See, e.g., Hecht v. Hecht, 199 Mont. 363, 649 P.2d 1257 (1982) (disposition of 75% of available property to wife in light of great disparity in incomes and foregone career opportunities).

123. In states other than Montana, opinions only occasionally refer to the philosophy linking property division and the accommodation of need. For example, in Coffey v. Coffey, 119 A.D.2d 620, 623, 501 N.Y.S.2d 74, 77 (1986), an appellate court modified an equal division with directions to award the husband more of the property. The facts of the case imply that the husband, who had custody of the four children, had greater need. See id. at 621, 501 N.Y.S.2d at 76. In justifying its disposition, the court, quoting Governor Carey’s memorandum, noted that equitable distribution does not require an equal division but a division that addresses the needs of the parties. Id. at 622, 501 N.Y.S.2d at 77.

Among the Montana cases one finds more than an occasional explanation of the relationship of property division and postdivorce need. For example, in Vance v. Vance, 204 Mont. 267, 664 P.2d 907 (1983), the husband contested an award to the wife of some premarital property. The court upheld the disposition explaining that marriage was more than a business relationship and that property awards needed to compensate women for the disadvantage they faced in the “amounts and sources of income.” 664 P.2d at 912. See also In re Marriage of Laster, 197 Mont. 470, 480, 643 P.2d 597, 603 (1982) (pension deemed marital property, and marital property substituted for maintenance); Nunnally v. Nunnally, 625 P.2d 1159, 1162 (Mont. 1981) (greater need of wife justified property division that obviated need for maintenance).


tion of the value of the homemaker's services.\textsuperscript{127}

In contrast, in cases which need supports the award, the analyses offer no explanation that links addressing need to any theory of equitable distribution. Such judicial reticence, especially in light of the numerous references to the relationship between contribution and property division, subtly instructs the lower courts that no such relationship exists. This lesson, in turn, helps perpetuate the failure to address postdissolution need through the division of property.

2. Cases Addressing Need with Primary Reliance on Some Other Factor

In the second category of cases, the courts appear to address need by relying primarily on a factor other than one of the need factors—most often, on contribution—to justify the disposition. This category, therefore, includes only those cases in which the reported facts reveal (1) parties in disparate financial circumstances and (2) a disposition that appeared to address that disparity.\textsuperscript{128}

Only twenty-eight cases qualified for this category.\textsuperscript{129} They reflected a financial disparity between the parties and a disposition that appears to address this disparity, such as an award of more than half the property to the more needy spouse, but relied primarily on a factor other than one of the need factors to explain this result. Two states, Connecticut and Mon-


\textsuperscript{128} See supra notes 98-99.

\textsuperscript{129} The twenty-eight cases in this category include: Arkansas: Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701 (1981); Pennybaker v. Pennybaker, 14 Ark. App. 251, 687 S.W.2d 524 (1985).


tana, account for eighteen of the cases, while the other ten are distributed among the remaining four states.

a. *Reversing or Modifying an Award for an Economically Stronger Spouse*

One way these cases appear to address the financial disparity between the parties is by reversing or modifying an award of more than half the available property to the less needy spouse.\(^{130}\) In a number of cases, even though one of the spouses was more needy than the other, the courts took this action with little or no acknowledgement of the parties' circumstances.\(^{131}\) Unlike the cases in the first category, the cases in this category largely ignore need, relying instead on some other factor. To illustrate, when the facts presented a wife without earnings and a husband with an annual income of $82,000, the Arkansas Supreme Court justified its reversal of the lower court's award denying the wife any part of a trust or pension plan by noting only the wife's contribution as homemaker, not her need.\(^{132}\) The facts of the case and the need factors in the Arkansas statute presented the occasion for the court to acknowledge need in its disposition. Instead, the court, in its reversal, relied on the wife’s contribution.

b. *Reversing Equal Divisions*

Cases reversing equal divisions of property also appear to have addressed the financial disparity between the parties. Unlike the cases in the first category, however, the courts here relied not on need, but primarily on a non-need factor.\(^{133}\) Even when the facts in the cases revealed a special need by one of the parties, the courts were reluctant to name the

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\(^{132}\) Bachman v. Bachman, 274 Ark. 23, 28, 621 S.W.2d 701, 704 (1981). Certainly the wife's contribution may have entitled her to an award greater than what she received from the trial court. The point is, however, that courts appear reluctant to use need in order to justify an unequal disposition.

\(^{133}\) *See*, *e.g.*, Kutanozovski v. Kutanozovski, 109 A.D.2d 822, 486 N.Y.S.2d 338 (1985), *vacated on other grounds*, 120 A.D.2d 571, 502 N.Y.S.2d 218 (1986); *see also infra* notes 140-43 (Connecticut cases using fault to justify unequal divisions in favor of the wife when need appeared to be a sufficient explanation).
apparent need as the basis for their decisions. For example, even when one spouse clearly had greater need because of custodial responsibilities and health problems, the court seized on the source of the assets and on contribution to avoid basing its decision on the spouse's apparent need.

\[\text{c. Affirming Unequal Divisions or Awards of Nonacquests for the Economically Weaker Spouse}\]

Finally, some of the cases appear to address the financial disparity between the parties by affirming unequal divisions of property for the economically weaker spouse or by awarding that party some available nonacquests. In these cases the courts also relied on non-need factors, even though need was apparent. To illustrate, even in a case in which the wife was sixty-seven and unemployable, the rationale for the unequal division in her favor was not her need but her contribution as a homemaker and as an assistant in the family business. Similarly, in those states with statutory authority to award nonacquests to the nontitled spouse, appellate courts often avoided discussions of apparent need in


138. Four of the states in the study statutorily recognize the division of nonacquests. The Arkansas statute provides that

\[\text{[all . . . property [other than marital property] shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subparagraph (A) above, in which event the court must state in}\]
affirming the decision to award some of this property. The judicial
timidity to acknowledge that greater need was the occasion for these
awards fails to educate the trial court on the legislative mandate to ac-
commodate need through property division.

The cases from Connecticut in this category deserve special men-
tion. Connecticut is the only state in the study that authorizes the
writing its basis and reasons for not returning the property to the party who
owned it at the time of the marriage.

the court to “assign to either husband or wife all or any part of the estate of the other.”
court “shall... finally equitably apportion between the parties the property and assets
belonging to either or both, however and whenever acquired...” Mont. Code Ann.
§ 40-4-202(1) (1987). The statute directs the court to give special considerations in divid-
ing nonacquests:

In dividing property acquired prior to the marriage; property acquired by gift,
bequest, devise, or descent; property acquired in exchange for property acquired
before the marriage or in exchange for property acquired by gift, bequest, de-
vote, or descent; the increased value of property acquired prior to marriage; and
property acquired by a spouse after a decree of legal separation, the court shall
consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;
(b) the extent to which such contributions have facilitated the mainte-
nance of this property; and
(c) whether or not the property division serves as an alternative to main-
tenance arrangements.

Id. at § 40-4-202(1)(a)-(c). Wisconsin likewise provides that all property may be divided,
but provides special considerations for property that is not an acquist of the marriage:

Any property shown to have been acquired by either party prior to or during
the course of the marriage as a gift, bequest, devise or inheritance or to have
been paid for by either party with funds so acquired shall remain the property
of such party and may not be subjected to a property division under this section
except upon a finding that refusal to divide such property will create a hardship
on the other party or on the children of the marriage, and in that event the
court may divest the party of such property in a fair and equitable manner.


139. See, e.g., Pennybaker v. Pennybaker, 14 Ark. App. 251, 253, 687 S.W.2d 524, 526
(1985) (referring to wife's working in business); In re Marriage of Brown, 179 Mont. 417,
419, 587 P.2d 361, 363 (1978) (referring to wife's position as part time ranch hand);
Kaasa v. Kaasa, 181 Mont. 18, 20, 591 P.2d 1110, 1111 (1979) (focusing on wife's low-
paying jobs and lack of vocational training).

140. In the following Connecticut cases, the courts remanded on the issue of property
division but indicated that there was strong reason to find that a greater proportion for
wife was justified. See Bieluch v. Bieluch, 190 Conn. 813, 462 A.2d 1060 (1983); Sweet v.
Sweet, 190 Conn. 657, 462 A.2d 1031 (1983); Barnes v. Barnes, 190 Conn. 491, 460 A.2d
1302 (1983); Kroop v. Kroop, 186 Conn. 211, 440 A.2d 293 (1982); Beede v. Beede, 186
Conn. 191, 440 A.2d 283 (1982); Corbin v. Corbin, 179 Conn. 622, 427 A.2d 432 (1980);
323, 494 A.2d 595 (1985); Szilagyi v. Szilagyi, 3 Conn. App. 25, 484 A.2d 469 (1984);

By combining categories 1 and 2, the study reveals that Connecticut and Montana are
dominant in addressing need. Of Connecticut’s 28 cases included in the study, the dispo-
sitions in 16, approximately 57%, reflected a concern for need; of Montana’s 49 cases, 29,
approximately 50%, reflected such a concern. In contrast, of Arkansas’s 12 cases, the
consideration of fault in the property award. In most of the Connecticut cases approving an unequal division of property in favor of the economically weaker spouse, the reviewing courts note the presence of fault but pay little or no attention to the greater need of one spouse. The opinions rely on some factor other than need—namely, fault—to dispose of the case in a way that makes more property available for the more needy spouse. The numbers of cases from Connecticut fitting this category suggest that courts find fault more persuasive than need as a discretionary factor urging an unequal division of property.

3. Cases Leaving a Spouse in Need

In the categories just examined, the reviewing courts address need either through reliance on the need factors or by relying on factors other than those relating to future need. In many more instances, the court's disposition simply leaves one of the parties—usually the wife—in need. The cases reveal a fairly consistent inattention to the discretionary fac-

disposition in only 3, 25%, reflected a concern for need, and of New York's 36 cases, only 7, approximately 19%, did so.

141. Conn. Gen. Stat. Ann. § 46b-81(c) (West 1986) ("In fixing the nature and value of the property, . . . the court . . . shall consider . . . the causes for the . . . dissolution of the marriage . . . ").


The significance of fault also appears in a comparison of the treatment of need and fault in a New York case. In Blickstein v. Blickstein, 99 A.D.2d 287, 287-94, 472 N.Y.S.2d 110, 111-14 (1984), the court reversed an award premised, in part, on a finding of marital fault. Id. at 294, 472 N.Y.S.2d at 115. The lower court had awarded all of the marital property to the wife because of the marital fault. Id. at 287-89, 472 N.Y.S.2d at 111. The wife, unlike the husband, had few employment prospects. The lower court, anticipating the irrelevance of fault as a matter of law, had authorized a fairly equal division of the marital property in the absence of fault. Id. at 289, 472 N.Y.S.2d at 112. Evidently fault was more compelling than need in moving the trial court to an unequal division.

143. An earlier study drew a related conclusion on the impact of fault on property dispositions in Connecticut. In a 1976 study, the statistics revealed that in Connecticut, where the judge may consider fault, the trial courts ordered the marital home sold at divorce in only 16% of divorces. See Permanent Commission on the Status of Women, State of Connecticut, Marital Dissolution: The Economic Impact on Connecticut Men and Women 19 (1979). By comparison, in a 1977 sampling in California, where the judge may not consider fault in the property disposition, trial courts ordered the marital home sold in about 35% of divorces. L. Weitzman, supra note 30, at 78. If one assumes that postdivorce need is similar in these states, the relevance of fault is the most likely explanation for the different treatment of the marital home.
tors related to need.144

144. Connecticut and Montana reveal the lowest percentages of cases with property dispositions that leave the economically weaker spouse, usually the wife, in need. Only 12 of the 28 Connecticut cases, approximately 43%, and 20 of the 49 Montana cases, approximately 41%, fit this category. In contrast, 9 of the 12 Arkansas cases, 75%, and 29 of the 36 New York cases, approximately 81%, fit this category. Although the numbers are too small to draw any conclusions, 2 of the 6 North Carolina cases, or 33%; and 4 of the 7 Wisconsin cases, approximately 57%, fit this category. Even the lower percentages, however, reveal excessive inattention to the need factors. The citations to all the cases in this category follow.


This inattention is most glaring when the reviewing courts affirmed an unequal division of property in favor of the economically stronger spouse.\textsuperscript{145} Even in the face of severe economic need, reviewing courts have awarded the bulk of the marital property to the stronger spouse.\textsuperscript{146} Too often, a review of the relative contributions of the parties simply overshadowed concern for postdivorce need.\textsuperscript{147}

Due to the frequency of equal divisions of marital property, the neglect of a needy spouse was more common in cases in which the reviewing court approved equal divisions. Instead of remanding for consideration of the need factors and, if appropriate, an unequal division in favor of the spouse in greater need, the reviewing courts routinely approved an equal division of property.\textsuperscript{148}

Alimony for the economically weaker spouse sometimes accompanied

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\textbf{Wisconsin:} Overton v. Overton, 125 Wis. 2d 13, 370 N.W.2d 796 (1985); Bahr v. Bahr, 107 Wis. 2d 72, 318 N.W.2d 391 (1982); Jasper v. Jasper, 107 Wis. 2d 59, 318 N.W.2d 792 (1982); Holbrooke v. Holbrooke, 103 Wis. 2d 327, 309 N.W.2d 343 (1981).\textsuperscript{145}

\textbf{Wisconsin:} See, e.g., Forsgren v. Forsgren, 4 Ark. App. 286, 288, 630 S.W.2d 64, 65 (1982) (holding unequal distribution of marital property within chancellor's discretion will not be disturbed so long as he sets forth reasons for making such an unequal distribution); Ford v. Ford, 272 Ark. 506, 508-09, 616 S.W.2d 3, 4 (1981) (upholding an award to husband of 90% of all property not owned as tenancy in common); Wolk v. Wolk, 191 Conn. 328, 331, 464 A.2d 780, 783 (1983) (referring to wife's fault; alimony to address her greater need); Arvantides v. Arvantides, 64 N.Y.2d 1033, 1034, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59 (1985) (noting wife's lack of contribution to dental practice in awarding her 25% of its value).\textsuperscript{146}

\textbf{Wisconsin:} See, e.g., Forsgren v. Forsgren, 4 Ark. App. 286, 288, 630 S.W.2d 64, 65 (1982) (upholding unequal division for husband by reference to his contribution; wife suffered from drinking problem); Ford v. Ford, 272 Ark. 506, 516, 616 S.W.2d 3, 8 (1981) (awarding 10% of property to wife with mental illness, with heavy focus on husband's contribution).\textsuperscript{147}

\textbf{Wisconsin:} See Forsgren v. Forsgren, 4 Ark. App. 286, 287-88, 630 S.W.2d 64, 65 (1982); Ford v. Ford, 272 Ark. 506, 513-16, 616 S.W.2d 3, 6-7 (1981). This unequal division in favor of the economically stronger spouse is particularly noteworthy in light of Arkansas' presumption of equal division. See supra note 85.

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a property award that ignored need. 149 Usually the awards were temporary. 150 Since, however, divorce reform urged the use of property to perform the support function, an alimony award does not justify inattention to need in the division of property. This study includes, for purposes of these tabulations only, those cases in which there appeared to be sufficient property to permit a property division addressing need. 151 Therefore, the reliance on alimony to address need undermines the inclusion of need factors in the property division statutes and the message of reform to accomplish the alimony function with a division of property.

Some of the New York cases vividly illustrate how courts have ignored the need factors in property division and have recognized need—if at all—through alimony. Like the other property division statutes in the study, the New York statute clearly directs the court to consider the spouses' future need in making the division. 152 Despite this clear mandate, only discussions of alimony reflect a concern for future need. In certain cases, for example, the courts reviewed records revealing the dissolution of a marriage in which the wife suffered from postdivorce need because she had little experience in the work force. 153 Yet, in these cases, the reviewing court either approved an equal division of property, 154 modified an unequal division against the wife to an equal division, 155 or approved an unequal division in favor of the husband. 156 Instead of addressing need through an unequal division of property in favor of the


151. See supra note 98 (defining “addressing need”).

152. The statute directs the court to consider the parties’ income, property, age, health, “probable future financial circumstances,” and “any other factor” which the court finds “just and proper.” N.Y. Dom. Rel. Law § 236 Pt. B(5)(d)(1), (2), (8), (13) (McKinney 1986).


wife, the courts relied on alimony.\textsuperscript{157}

These New York dispositions clearly suggest a reluctance to use property division to accomplish the statutory function of addressing need. The analyses in these cases underscore this reluctance by revealing that the courts consider some factors appropriate to a determination of property division and others appropriate only to a determination of alimony. For example, although property division statutes include need factors like age, health, and income as appropriate to the determination of the division of property, the courts refer only to contribution in discussing the property division portion of the awards.\textsuperscript{158} The courts review the greater need of the wife only in discussions of alimony.\textsuperscript{159} This separation of factors and issues—contribution and property division from need and alimony—suggests that the courts have concluded that need is not an appropriate factor to consider in the division of property. By commenting on need only in relation to alimony awards, the reviewing courts subtly instruct the lower courts that, when dividing property, they too may continue to ignore the discretionary factors addressing future needs.

At times the instruction is not so subtle. On a number of occasions, the analyses have discouraged more expressly the recognition of need through property division. For example, in holding earning capacity to be marital property, the court in \textit{O'Brien v. O'Brien}\textsuperscript{160} justified this recognition of property "not because [of need] . . . but because those assets represent the capital product of what was essentially a partnership."\textsuperscript{161} Need, in other words, is not a factor in property division. On another occasion, the New York appellate court said:

The function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, \textit{not because that share is needed, but}

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\textsuperscript{159} See, e.g., Griffin v. Griffin, 115 A.D.2d 587, 589, 496 N.Y.S.2d 249, 251 (1985) (noting wife's minimal income and husband's $40,000 annual income with greater future earning potential in reviewing maintenance award); Roth v. Roth, 97 A.D.2d 967, 967, 468 N.Y.S.2d 764, 765 (1983) (observing that needs of wife justified temporally unlimited maintenance yet upholding an unequal division of property in favor of the husband).


\textsuperscript{161} \textit{Id.} at 587, 489 N.E.2d at 717-18, 498 N.Y.S.2d at 748 (quoting Wood v. Wood, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 475, 477 (1983)).
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because those assets represent the capital product of what was essentially a partnership entity.\textsuperscript{162}

The New York courts have undermined the use of need factors in the property division statute in other statements as well. For example, one court has stated that "property acquired during the marriage should be equitably distributed upon divorce, and that alimony or maintenance should rest largely on an actual need and ability to pay basis."\textsuperscript{163} Such analysis has diverted attention from the factors that make need appropriate not only in determining alimony, but also in determining a division of property. In conjunction with the phenomenon of decreasing alimony awards,\textsuperscript{164} the diversion of attention from need in the division of property has meant that there may be nothing at dissolution that addresses the circumstances of needy spouses. Indeed, allowing the trial courts routinely to ignore the need factors in property division may have instructed them that the state has abandoned altogether the goal of accommodating postdivorce need.\textsuperscript{165}

III. \textbf{UNDERUTILIZATION OF NEED FACTORS: EXPLANATIONS, CONCERNS, AND RECOMMENDATIONS FOR CHANGE}

A. \textit{Explanations for Underutilization}

The results of the study support the thesis that courts are not relying on the discretionary factors relating to need in making property dispositions. Few cases rely on need to justify the disposition,\textsuperscript{166} and many cases leave one spouse clearly in need.\textsuperscript{167} These numbers demonstrate a reluctance to depend on the need factors, and a synthesis of the cases offers a number of explanations for this underutilization.

1. Preference for Equal Division

Preference for an equal division of property is the most obvious explanation. Various studies confirm that the most common disposition by the trial courts in dividing property is an equal division.\textsuperscript{168} As one would expect, the instances of equal division appear to be higher in states with

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\textsuperscript{164} See supra note 79.

\textsuperscript{165} See infra notes 348-85 and accompanying text.

\textsuperscript{166} See supra note 129, 144.

\textsuperscript{167} See supra note 144.

\textsuperscript{168} E.g., Fineman, supra note 27, at 880 (equal division of property used in the majority of Wisconsin divorce cases); McGraw, supra note 79, at 481 (concluding that more property divisions in Ohio were equal after divorce reform); L. Weitzman, supra note 30, at 70-77 (in California, elimination of fault led to the requirement of equal divisions of property).
The preference for equal division is not confined to states with statutory presumptions. The cases from the other states in the study—Connecticut, Montana, and New York—also reveal, to varying degrees, a

169. E.g., Fineman, supra note 27, at 880. Professor Fineman reported that based on her sampling, judges indicated a deviation from an equal division in only 18% of stipulated cases and 19% of litigated cases. Id. at 880-81 & nn.235-36.

170. Because this study relies only on appealed cases, it does not attempt to draw any conclusions by comparing the numbers of times the cases from the various states divided property equally. The nature of appealed cases skews the instances of unequal divisions of property. See supra note 94. Moreover, there were too few cases from North Carolina and Wisconsin that fit the criteria of this part of the study to make reliable comparisons. Although these reasons limit the utility of this tabulation, the cases reveal the following use of equal divisions: Arkansas - 6 of 12 cases; Connecticut - 2 of 28; Montana - 15 of 49; New York - 12 of 36; North Carolina - 2 of 6; and Wisconsin - 3 of 7.

171. See infra notes 173, 259 and accompanying text.


preference for equal division.\textsuperscript{174} In these states, equal division has become the norm, even without a statutory presumption.

The history of reform helps to explain the preference for equal division of property, even in the face of statutes that direct courts to consider need in dividing the available property. From the early stages of reform, a debate has raged over the superiority of equal versus equitable distribution of property.\textsuperscript{175} The debate has centered on the conflict between the advantages of equal division on the one hand, and the undeniable economic disparity that exists between men and women at divorce on the other.\textsuperscript{176}

The advantages of equal distribution are clear. First and most significant, equal division removes one source of judicial discretion;\textsuperscript{177} the advocates of equal distribution feared that the judiciary might misuse the discretion inherent in equitable distribution.\textsuperscript{178} Second, equal distribution reduces the need to litigate. If, after defining the property available for distribution, a judge has no other option than to decree an equal division, the certainty of the award may avoid the expense of litigating how the property ought to be divided.\textsuperscript{179}

Despite these advantages, the early recommendations issuing from the controversy advocated equitable, rather than equal, distribution.\textsuperscript{180} The

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\item\textsuperscript{174} For example, see Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (1983). Conner cites with approval a piece of the New York statute's legislative history that recognizes a norm of equal division. The memorandum observes that at dissolution, "there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case." \textit{Memorandum in Support of Legislation, supra} note 30; \textit{Conner, 97 A.D.2d} at 96, 468 N.Y.S.2d at 489; see also Carpenter v. Carpenter, 188 Conn. 736, 743, 453 A.2d 1151, 1155 (1982) (upholding fairly equal division in face of disparate circumstances); \textit{In re Marriage of Bell, 713 P.2d} 552, 554-55 (Mont. 1986) (equal division).

A number of other states not included in this study have evinced a preference for equal division by judicial construction. See, e.g., Wanberg v. Wanberg, 664 P.2d 568, 570 (Alaska 1983); Ivanovich v. Ivanovich, 24 Ariz. App. 592, 540 P.2d 718 (1975); \textit{In re Marriage of Freese, 226 N.W.2d} 800 (Iowa 1975); Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976).


\item\textsuperscript{176} For example, Professor Fineman advocates equitable distribution because of economic disparities, but she recognizes the validity of the arguments of the proponents of equal division. Fineman, \textit{supra} note 27, at 820-33; see also infra note 181 (discussing continued economic disparity between husband and wife).

\item\textsuperscript{177} See infra notes 182-90 and accompanying text.


\item\textsuperscript{179} Professor Glendon maintains that lawyers who want to protect large fee awards are the only parties that benefit in a state with equitable, as opposed to equal, division. M. Glendon, \textit{The New Family and the New Property} 66 (1981).

\item\textsuperscript{180} The Task Force of Family Law and Policy rather lukewarmly endorsed equitable, instead of equal, distribution by contrasting the virtues of equal distribution at divorce and at the death of a spouse:
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advocates of equitable distribution focused on one concern. Despite the advantages of equal distribution, one inescapable fact of economic and social life remained: men and women are not equally situated at divorce.\textsuperscript{181} This bit of realism lies at the heart of the recommendation of equitable distribution.

Nevertheless, the choosing of sides in the controversy over equal versus equitable distribution left women’s groups, for the most part, on the side of equal distribution and men’s groups on the side of equitable distribution.\textsuperscript{182} Women’s groups advocated equal distribution because the application of equitable distribution schemes in community property states had worked to the disadvantage of women.\textsuperscript{183} Women often had received less than half the available property under these equitable distribution schemes.\textsuperscript{184} Therefore, women feared that the unbridled

Some task force members believed that a fixed equal division of property upon divorce would not operate fairly in some cases, and that divorce courts should be given discretion to determine a different proportion for each spouse, based on consideration of such factors as the respective contributions (not limited to financial) each spouse made to the marriage, duration of the marriage, economic dependency and age of the spouses. On the other hand, with respect to property division at the death of a spouse, a fixed 50-50 formula would have some advantages. Unlike the case of death, a divorce proceeding is a two-party action with both spouses having an opportunity to show the respective contributions they have made to the marriage. Moreover, if a probate court had to consider and make a determination based on various factors in the marriage of a deceased person, it would delay the settling of estates.

\textit{The Council [on the Status of Women should] bring to the attention of State Commissions and other appropriate organizations the desirability of empowering their courts to make discretionary divisions of the property of the spouses in matrimonial status actions (such as separation, divorce or annulment), it being left to local determination what types of property are to be subject to such division and the criteria which are to govern.}

\textit{Report of the Task Force, supra note 44, at 5-6 (emphasis in original).}

\textsuperscript{181} For example, the Bureau of the Census reports that women still earn only 68\% of the earnings of men. \textit{Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-70, No. 10, Male-Female Differences in Work Experience, Occupation, and Earnings: 1984, Table F, at 4 (1987) [hereinafter Male-Female Differences].} Moreover, the study reported that women were much more likely than men to have interrupted their careers. Forty-seven percent of female workers, as compared to 13\% of male workers, experienced interruptions. The reason most frequently cited for the interruption among women was family responsibilities. \textit{Id. at Table A and B, at 2; see also Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-60, No. 157, Money Income and Poverty Status of Families and Persons in the United States: 1986 (Advance Report) table 11, p. 19 (July, 1987) (average earnings of men - $22,308; of women - $11,811); Women’s Bureau, U.S. Department of Labor, Facts on Women Workers 1 (1982) [hereinafter Facts on Women Workers].}

\textsuperscript{182} In Wisconsin and New York, for example, women’s groups fought vigorously for equal distribution. See Foster, \textit{supra note 51, at 31 (the New York effort)}; Fineman, \textit{supra note 27, at 833-72 (Wisconsin effort)}. In Pennsylvania, on the other hand, women’s groups advocated equitable distribution, while certain men’s groups promoted equal distribution. Freed & Foster, \textit{supra note 92, at 230.}

\textsuperscript{183} \textit{Younger, supra note 175, at 241-44.}

\textsuperscript{184} \textit{Id.; see Weitzman, The Economics of Divorce: Social and Economic Consequences}
discretion of judges hearing equitable distribution actions would leave them with less than half of the property available for division. This distrust of judicial discretion resulted from not only a fear of sex discrimination, but also a fear that in the separate property states, judges subconsciously would adhere to the old formulas that might lead to an unequal division in favor of the party with title and to other dispositions that would not reflect the philosophy of the new legislation.\(^{185}\)

Another important, but somewhat less obvious, conflict that shaped the debate arose between instrumental and symbolic reformers.\(^{186}\) Advocates of equal division strove for gender neutral legislation that did not make any self-perpetuating assumptions about the economic circumstances of men and women at divorce.\(^{187}\) The reformers preferred equal distribution in part because of the positive symbolism involved in presuming that property could be divided equally at divorce without leaving one spouse, the wife, in economic need.\(^{188}\)

The advocates of equitable distribution, on the other hand, lobbied for a system that would enable a judge to recognize, in an award of more than half of the available property, the greater economic need of one spouse at dissolution. To accomplish the reformers’ goal—to make property division the foremost means to accommodate future support

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185. For example, the reformers in Wisconsin feared that the judiciary would continue the common law rule of considering an award of one-third of the property acquired during the marriage as an appropriate starting place in determining an award for the wife. Fineman, supra note 27, at 806. Professor Weitzman in her study of the economic consequences at divorce recited this fear as well. L. Weitzman, supra note 30, at 48.

There is the tacit recognition by Professor Levy that judges, accustomed to separate property systems, might be more comfortable with the equitable distribution statutes. He explained that the drafters of the UMDA opted for equitable distribution in part because equitable division would be viewed as less radical than a mandatory 50%-50% division. R. Levy, supra note 30, at 167.

186. For a discussion of instrumental versus symbolic law reform, see Fineman, supra note 27, at 790-96. For some of her conclusions, see id. at 816-26, 875-80. Other studies have recognized the tension between idealist reform, which urges reform premised on the equality of the groups with which it deals, and realistic reform, which makes compensatory provisions because of the inequality of the subjects. See Marcus, Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York, 42 U. Miami L. Rev. 55, 72 (1987) (discussing “gendered and degendered approaches to law reform”). For a treatment of this tension in the labor context, see McCloud, Feminism’s Idealist Error, 14 N.Y.U. Rev. L. & Soc. Change 277 (1986). For classic works on the topic, see M. Edelman, The Symbolic Uses of Politics (1967); and Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

While noting the symbolism inherent in reform legislation, Professor Kay points out that the no-fault movement in California did not have as one of its stated goals the achievement of equality between men and women. Kay, An Appraisal of California’s No-Fault Divorce Law, 75 Calif. L. Rev. 291, 300-01 (1987). Other reformers, however, used the formal equality of the family law legislation to try to justify the attempt to achieve economic equality in other settings. Id. at 301.

187. See supra note 182.

188. See Fineman, supra note 27, at 790-96.
need—judges would have to be empowered to divide property unequally in favor of spouses in need of support. Indeed, the advocates of equitable, as opposed to equal, distribution referred to the unequal position of men and women at divorce to support their conclusion that the law of divorce needs ways to address this inequality.

2. Dominance of Contribution

The dominance of contribution among the discretionary factors supplies another significant reason for the judicial attention to the need factors. As will be shown, the attention to contribution is related closely to the norm of equal division; together, contribution and equal division have subverted attention from the need factors.

Equitable distribution statutes in separate property states typically list contribution as a factor in deciding how to divide the property. For example, all of the states in this study make some reference to contribution in their property division statutes.

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189. E.g., Fineman, supra note 27, at 886. The women's groups that lobbied for equitable distribution in Pennsylvania, for example, considered that equitable distribution would enable wives to receive property awards of greater than half the property available for distribution. Freed & Foster, supra note 92, at 230; see supra notes 30-47 and accompanying text (discussing the preeminence of property in the reform proposals).

190. See, e.g., Fineman, supra note 27, at 878-80; see also Prager, supra note 69, at 2-5 (concern for equality was focus of reformers). Professor Prager concludes that the emphasis on equality has blinded society to the reality that principles of sharing characterize most marriages. See id. However, Professor Rheinstein, while noting that men and women are not situated equally at divorce, posits in an earlier work that vesting judges with discretion makes "the price of individual justice . . . high." Rheinstein, supra note 35, at 432.

191. See infra notes 210-22 and accompanying text.

192. Freed & Walker, supra note 13, at 486.

193. For example, the Arkansas statute provides that if an equal division is not equitable, the court should consider the "contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker." Ark. Stat. Ann. § 34-1214(A)(1)(6) (Cum. Supp. 1985). In this way, the Arkansas statute explicitly recognizes financial and nonfinancial contributions.

The Connecticut statute directs the court to consider "the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." Conn. Gen. Stat. Ann. § 46b-81(c) (West 1986).

Part of the Montana statute requires the court to "consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit." Mont. Code Ann. § 40-4-202(1) (1987). In dividing nonacquests, the statute provides that "the court shall consider those contributions of the other spouse to the marriage, including: (a) the non monetary contribution of a homemaker; [and] (b) the extent to which such contributions have facilitated the maintenance of this property." Id. at § 40-4-202(1)(a)-(b).

The New York statute directs the court to consider several kinds of contributions:

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

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,
Contribution as a discretionary factor directs the court to consider a spouse’s efforts on behalf of the marriage. Several statutory variations of this concept exist. Some statutory references to contribution link those efforts to the acquisition of the property.\textsuperscript{194} Certainly “efforts” in this context includes financial contribution.\textsuperscript{195} Many statutes, however, also refer to “indirect” contribution and in this way instruct the court to consider nonfinancial efforts as well.\textsuperscript{196} Many statutory references to contribution broaden the concept still further by referring to contribution unrelated to the acquisition of the property.\textsuperscript{197} The Wisconsin statute, for example, directs courts to consider “[t]he contribution of each party to the marriage, giving appropriate economic value to each party’s con-

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\item wage earner and homemaker, and to the career or career potential of the other party.
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North Carolina’s statute also provides for the recognition of several kinds of contributions:

If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

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\item (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, or lack thereof, as a spouse, parent, wage earner or homemaker;
\item (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
\item (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
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The Wisconsin statute also recognizes several kinds of contribution. It provides:

The court shall presume that all [acquests are] to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:

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\item (3) The contribution of each party to the marriage, giving appropriate economic value to each party’s contribution in homemaking and child care services [and]
\item (5) The contribution by one party to the education, training or increased earning power of the other.
\end{itemize}


194. \textit{E.g.}, \textbf{Conn. Gen. Stat. Ann.} § 46b-81(c) (West 1986) (“the contribution . . . in the acquisition, preservation or appreciation in value of their respective estates”).

195. Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701, 703-04 (1981) (doctor earned right in profit-sharing trust by his financial contributions). Part of the impetus for reform was to recognize nonfinancial contribution. See supra notes 42-47 and accompanying text.


tribution in homemaking and child-care services."\textsuperscript{198} No matter how broadly or narrowly a statute uses the term "contribution," contribution has a retrospective focus. For a court to determine the effect of a spouse's contribution on the appropriate division of property, the court must look at the history of the marriage. Unlike the need factors, the discretionary factors related to contribution require, not an assessment of future need, but an historical review of the marriage to determine how to divide the property.\textsuperscript{199}

Although contribution's retrospective focus probably has played a part in diverting attention from the need factors,\textsuperscript{200} the frequent reference to contribution in equitable distribution statutes clearly reflects the success of the reform movement. One of the main goals of reform was to insure that both parties share at divorce in the assets of the marriage.\textsuperscript{201} Because some separate property states did not recognize nonfinancial contribution in the acquisition of title, an expansive concept of contribution in property division statutes was crucial.\textsuperscript{202}

Analysis of the cases, however, suggests that, in one sense, the reformers were too successful in promoting contribution as a discretionary factor.\textsuperscript{203} Contribution dominates the cases and diverts attention from circumstances raising the need factors.\textsuperscript{204} Some cases concentrate on


\textsuperscript{199} See supra note 27.

\textsuperscript{200} See infra notes 205-09 and accompanying text.

\textsuperscript{201} See supra notes 42-47 and accompanying text.

\textsuperscript{202} For example, in White v. White, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985), the North Carolina Supreme Court acknowledged the inequities that title theory had worked on the homemaker, citing Leatherman v. Leatherman, 197 N.C. 618, 256 S.E.2d 793 (1979) (awarding wife who had worked closely in husband's business only her half of the entireties property).

\textsuperscript{203} A statement by the North Carolina Court of Appeals illustrates the dominance of contribution: "As we interpret it, the policy behind [the equitable distribution statute] is basically one of repayment of contribution." Hinton v. Hinton, 70 N.C. App. 665, 669, 321 S.E.2d 161, 163 (1984).


contribution to justify an equal division when other need factors raise the propriety of an unequal division in favor of the party in greater need.\footnote{205} For example, while one court noted the greater need of a wife who had been long from the work force, it referred to her contribution to the marriage to divide the property equally.\footnote{206} Despite the presence of greater need, the court focused on contribution.\footnote{207} The reliance on contribution appears to free judges from addressing the greater need. Other opinions rely on economic contribution to justify an unequal division in favor of the economically stronger spouse.\footnote{208} Again, although other factors in these cases raise need and the propriety of an unequal division in favor of the economically weaker spouse, in case after case the attention to contribution overshadows the concern for need.\footnote{209}

(holding contribution and unique fault justified unequal division for wife who was victim of brutal assault by husband); Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987) (justifying award based on contribution of husband towards wife's education).

Of course, reviewing courts in this study did not consistently promote contribution over need as the dominant consideration in the division of property. See, e.g., McPhee v. McPhee, 186 Conn. 167, 440 A.2d 274 (1982) (trial court clearly emphasized contribution most prominently, and appellate court noted, while commenting on the need of the wife, that the statute did not give any priority to the list of factors); Kowis v. Kowis, 202 Mont. 371, 658 P.2d 1084 (1983) (unequal division of property in favor of unemployed wife proper despite husband's argument of wife's lack of financial contributions); Lewis v. Lewis, 198 Mont. 51, 643 P.2d 604 (1982) (wife's scant earnings suggested to appellate court that trial court had not considered relevant factors). These cases, however, represent exceptions to the rule of suppressing concerns for need in deference to contribution in the division of property.


\footnote{207} Id. at 401, 467 N.Y.S.2d at 228.


\footnote{209} For example, Ford v. Ford, 272 Ark. 506, 616 S.W.2d 3 (1981), involved the dissolution of a marriage in which the wife had spent most of her married life contributing as a homemaker until she began to suffer severe depression. By statute, see Ark. Stat. Ann. § 34-1215 (Cum. Supp. 1985), the trial court divided the entirety property equally. Ford, 272 Ark. 516, 616 S.W.2d at 8. However, even in light of Arkansas's presumption of an equal division, the trial court divided the rest of the property in a ratio of 90% to 10% in favor of the husband. Id. at 516, 616 S.W.2d at 8. In lamenting the unequal disposition against the economically weaker party, the dissent noted that in those instances where women are weaker economically, they fare worse after equitable distribution as long as trial courts continue to balance the factors in the manner balanced in this case. Id. at 519, 616 S.W.2d at 9 (Purtle, J., dissenting). The dissenting justice commented, "[d]ivorced women cannot stand any more progress if this is progress." Id. at 519, 616 S.W.2d at 9 (Purtle, J., dissenting).

Likewise, in Eversman v. Eversman, 4 Conn. App. 611, 496 A.2d 210, appeal denied, 197 Conn. 806, 499 A.2d 57 (1985), the appellate court approved the distribution of 80% of the available property to the husband, 20% to the wife. As the appellate court noted,
The study reveals the dominance of contribution as a discretionary factor, and the relationship of contribution to equal division partially explains this preoccupation. As discussed above, many reformers lobbied vigorously for equal, as opposed to equitable, division of property.\textsuperscript{210} They lobbied also for statutory references to contribution that would recognize that property interests attach by virtue of nonfinancial, as well as financial, contributions.\textsuperscript{211} Nonfinancial contribution deserved recognition in the form of property rights because these efforts were as valuable to the marriage as financial contribution. The law of property division, these proponents argued, should assume that however parties contributed to their marriage was satisfactory to them.\textsuperscript{212} This assumption quite naturally translated into an assumption that the parties made equally valuable contributions to the marriage entitling them to equal shares of the property.

The focus on contribution, then, fed the norm of equal division. Even so, references to contribution appeared in statutes that listed other factors to consider as well—notably, factors relating to need. Nothing about the references to contribution indicated that the court should overlook the other factors. Nevertheless, the presence of contribution as a discretionary factor seems to have encouraged equal divisions in the face of need.

The analysis of a homemaker’s contribution in a Wisconsin case illustrates this treatment. In\textit{ Steinke v. Steinke},\textsuperscript{213} the Supreme Court of Wisconsin noted the presumption of equal division of property and the compatibility of that presumption with recognizing contribution to the marriage.\textsuperscript{214} The court also observed that the traditional homemaker, like the wife in the case at bar, both makes contributions to a marriage and loses ground in the job market.\textsuperscript{215} The presence of contribution and, because of lost ground in the job market, need would seem to recommend an unequal division of property.\textsuperscript{216} Nevertheless, the court observed that

\begin{itemize}
\item the trial court had based its award explicitly only on the greater contributions of the husband, paying nominal attention to the other statutory factors. \textit{Id.} at 615-16, 496 A.2d at 213. Without even commenting upon the implications for the property division, the court simply upheld the property award and relied on the substantial alimony award to address the greater need of the wife. \textit{Id.} at 615-16, 496 A.2d at 212-13; see also Forsgren v. Forsgren, 4 Ark. App. 286, 630 S.W.2d 64 (1982) (noting lower court made unequal distribution of property even though statute provides that marital property is to be divided equally); \textit{infra} notes 270-83 and accompanying text (discussing the reliance on alimony rather than property division to address need).
\item See supra notes 177-79 and accompanying text.
\item See supra notes 42-47 and accompanying text.
\item See, e.g., American Women, supra note 42, at 47 (“each spouse makes a different but equally important contribution [to a marriage]”).
\item 126 Wis. 2d 372, 376 N.W.2d 839 (1985).
\item \textit{Id.} at 308-81, 376 N.W.2d at 843-44.
\item \textit{Id.} at 381, 376 N.W.2d at 844 (citing Jasper v. Jasper, 107 Wis. 2d 59, 68, 318 N.W.2d 792, 797 (1982)).
\item The court in \textit{Steinke} made some allowance for need but only through an award of alimony. See \textit{id.} at 384, 376 N.W.2d at 847. The point, however, remains valid: insofar
\end{itemize}
these facts justified not some accommodation of need, but an equal division.\textsuperscript{217}

In only one setting has contribution failed to result in equal divisions of property: the setting of the two-career marriage. Some observers had predicted that the reformers' focus on homemaker contribution was too narrow and would leave unprotected those women who worked outside the home but at less pay than their husbands.\textsuperscript{218} Several New York cases have confirmed this prediction by abandoning contribution's norm of equal division in the setting of two careers and awarding the greater share of the property to the spouse with more earnings, usually the husband.\textsuperscript{219}

In these cases, the reviewing courts of New York have abandoned the assumption that parties make equal contributions to the marriage.\textsuperscript{220} Rather, at least one appellate court has gone so far as to assume that in the two-career marriage, parties have agreed to share the accumulated assets in proportion only to their \textit{financial} contributions.\textsuperscript{221} This assumption ignores a number of relevant points. First, it ignores the fact that even in a two-career marriage, the parties continue to make a number of contributions—both monetary and nonmonetary—to the marriage. If there is a justification for assuming that parties to a traditional marriage make equal contributions to the marriage, that assumption becomes no less valid when both parties work outside the home. Moreover, the assumption that the parties agree to share the jointly-accumulated property in proportion only to their monetary contributions assumes that each had equal opportunity to earn a certain income. Employment statistics, however, do not justify the assumption that the wife enjoys an

\textsuperscript{217} Steinke, 126 Wis. 2d at 381, 376 N.W.2d at 844.

\textsuperscript{218} See supra note 46.

\textsuperscript{219} Michalek v. Michalek, 114 A.D.2d 655, 656, 494 N.Y.S.2d 487, 488 (1985) (dividing property in proportion to earnings, though short duration of marriage appears also to have been a factor), appeal denied, 69 N.Y.2d 602, 504 N.E.2d 395 (1986); Kobyłack v. Kobyłack, 111 A.D.2d 221, 222-23, 489 N.Y.S.2d 257, 259 (1985) (dividing jointly held property unequally in proportion to the financial contributions of the parties); Bentley v. Knight, 92 A.D.2d 638, 639-40, 459 N.Y.S.2d 935, 937-38 (1983) (dividing the property equally rather than in proportion to earnings of the parties to the two-career marriage but only because the facts included a request by the husband to the wife for the wife to move and to stop working; otherwise, the court would have assumed some kind of agreement to divide property according to their unequal earnings).

\textsuperscript{220} In Jolis v. Jolis, 111 Misc. 2d 965, 446 N.Y.S.2d 138 (1981), aff'd, 98 A.D.2d 692, 470 N.Y.S.2d 584 (1983), for example, the court's disposition assumed equal contributions. The court recognized the wife's abandonment of a successful career to undertake responsibility for a marital home and child rearing as contributions. See id. at 986, 446 N.Y.S.2d at 150. The court also noted the wife's role as a constant source of social companionship for her husband. See id.

\textsuperscript{221} See, e.g., Bentley v. Knight, 92 A.D.2d 638, 639-40, 494 N.Y.S.2d 935, 938 (1983). Professor Prager discusses the sharing principles that might outweigh equality notions in the two-career marriage in Prager, supra note 69, at 6-11.
equal opportunity to earn an equal income. Finally, the decision to divide property in proportion to the unequal financial contributions of the parties ignores the fact that one party is in greater need than the other at divorce. In response to the statutory directives to consider need in dividing property, the spouse with less income should be entitled to more—not less—of the property unless consideration of the other factors warrants a different disposition. Again, in these cases contribution has served to divert attention from need as appropriate to consideration in the division of property.

3. Treatment of Length of Marriage

The preference for equal distribution and the related dominance of contribution as a discretionary factor offer the most obvious explanations for why the courts have slighted the discretionary factors related to need. The treatment received by three other discretionary factors, length of marriage, standard of living, and employability, also helps explain the inattention to need.

All of the six states in the study list length or duration of the marriage as an appropriate factor to consider when dividing the available property. The statutory reference to length of the marriage reflects a concern both for rewarding contribution to the marriage and for addressing need. On the one hand, the listing of length of marriage demonstrates a desire to reward contribution to the marriage since the length of the marriage correlates perfectly with the opportunity for contribution to it. On the other hand, the statutory reference to duration of the marriage also reflects a concern for postdivorce need. For example, in the setting of the traditional housewife marriage, the length of the marriage also represents the length of time from the work force. The longer the marriage, the greater the likely disparity between the economic circumstances of the husband and wife. In this sense, by listing length of marriage as a discretionary factor, the legislature has authorized the court to compensate for that need by an unequal division of property in favor of the more needy spouse.

Because length of marriage as a discretionary factor in property division statutes recognizes both contribution and need, courts may refer to length of marriage to divide property in a way that reflects contribution or in a way that addresses need. In the treatment of length of marriage,

222. See supra note 181 (earnings comparisons between men and women and the greater numbers of job interruptions for women for family reasons). These recent statistics reinforce conclusions drawn in other works. See, e.g., Facts on Women Workers, supra note 181, at 1. At least one researcher in an earlier study found that in the two-earner family, the wife's career usually made the necessary accommodations. See J. Bernard, Women and the Public Interest 191 (1971).

however, analysis of the cases reflects an unwarranted separation: the courts generally define the length of marriage as synonymous with opportunity for contribution only in decisions on how to divide the property and define length of marriage as an indicator of need only in decisions on alimony. This practice, contrary to the statute’s intention, results in courts rarely awarding greater than half the property to the wife on the basis of the length of the marriage, even when long marriage has left her at an economic disadvantage.

4. Treatment of Standard of Living

Like length of marriage, standard of living is a discretionary factor that concerns itself with postdivorce need. Four of the six states in the study list either the phrase “standard of living” or “station in life” or the word “station” among the factors relevant to the property divi-

224. See, e.g., Asbeck v. Asbeck, 116 Wis. 2d 289, 296-97, 342 N.W.2d 750, 754 (1983); see also Neumark v. Neumark, 120 A.D.2d 502, 501 N.Y.S.2d 704 (1986) (long marriage linked to contribution), appeal dismissed, 69 N.Y.2d 899, 507 N.E.2d 1091 (1987). The frequent mention of the short duration of the marriage as a justification for property division illustrates that contribution is the focus when length of marriage is used. In a number of cases in which one party was left in need, at least in comparison to the other party, the appellate courts justified the division by referring to the short duration of the marriage. See, e.g., Cappiello v. Cappiello, 110 A.D.2d 608, 609, 488 N.Y.S.2d 399, 400 (reducing wife’s award from 50% to 25% in part because of the short duration of the marriage), aff’d, 66 N.Y.2d 107, 485 N.E.2d 983, 495 N.Y.S.2d 318 (1985) (per curiam); Duffy v. Duffy, 94 A.D.2d 711, 462 N.Y.S.2d 240 (1983) (equal division modified to 75% to husband, 25% to wife, based, in part, on the short duration of the marriage).


The statutes of neither New York nor North Carolina contain an explicit reference to standard of living. The New York statute, however, refers to related concepts as appropriate to the division, such as “the income and property of each party at the time of marriage,” N.Y. Dom. Rel. Law § 236 Pt. B(5)(d)(1) (McKinney 1986), “the duration of the marriage and the age and health of both parties,” id. at § 236 Pt. B(5)(d)(2), and “the probable future financial circumstances of each party.” Id. at § 236 Pt. B(5)(d)(8). The North Carolina statute refers to “[t]he income, property, and liabilities of each party at the time the division of property is to become effective,” N.C. Gen. Stat. § 50-20(c)(1) (1987), and to “[t]he duration of the marriage and the age and physical and mental health of both parties,” id. at § 50-20(c)(3). Both states allow the court to consider other factors it finds appropriate. See N.Y. Dom. Rel. Law § 236 Pt. B(5)(d)(13) (McKinney 1986); N.C. Gen. Stat. § 50-20(c)(12) (1987).
sion. This statutory language enables the court to use property division to address a standard of living lowered by the dissolution or to address the spouses’ unequal standard of living.\footnote{229} The rhetoric of the cases sometimes acknowledges these statutory factors, explaining that property division should help the spouse try to maintain the marital standard of living.\footnote{230} The results of the cases, however, reveal a reluctance to address standard of living through a property award.\footnote{232} They demonstrate an approval of equal divisions in the face of disparate standards of living\footnote{233} and unequal divisions in favor of the party with the higher standard of living.\footnote{234} The analyses in these cases

\footnote{229. In some of the Montana cases, the court addressed a lowered standard of living through the property division. \textit{E.g.}, \text{Levandowski v. Levandowski}, 630 P.2d 239 (Mont. 1981); \text{Bailey v. Bailey}, 184 Mont. 418, 603 P.2d 259 (1979). Indeed, the Montana Supreme Court has acknowledged that “[t]he Act provides for the coordination of property distribution and maintenance to assure that a spouse without the ability to support herself will be maintained at a similar standard of living.” \text{Levandowski}, 630 P.2d at 242. Occasionally the opinions contain a specific reference to standard of living in discussions of property dispositions. \textit{See, e.g.}, \text{Bailey}, 184 Mont. at 419-20, 603 P.2d at 260 (awarding wife house to maintain standard of living since husband more able to purchase alternative housing). However, discussions of standard of living in the Montana cases, as in the cases of all the states in the study, appear in connection with maintenance more often than with property division. \textit{See infra} note 235.}

\footnote{230. In \text{Liles v. Liles}, 289 Ark. 159, 171-72, 711 S.W.2d 447, 453-54 (1986), the Arkansas Supreme Court upheld an equal division of property by noting that the chancellor had found that the equal division was proper because the parties would enjoy comparable standards of living after divorce. \textit{See also} \text{Hecht v. Hecht}, 199 Mont. 363, 649 P.2d 1257 (1982) (justifying unequal award for wife because, in part, of unequal employment status); \text{Bailey v. Bailey}, 184 Mont. 418, 420, 603 P.2d 259, 260 (1979) (finding wife needed house to maintain standard of living).}

\footnote{231. \textit{See supra} note 229.}

\footnote{232. For example, the Arkansas statute presumes an equal division but directs the court to consider the “station in life of the parties” if it finds an equal division inequitable. \text{Ark. Stat. Ann. § 34-1214(A)} (Cum. Supp. 1985). The appellate courts in \text{Meinholz v. Meinholz}, 283 Ark. 509, 678 S.W.2d 348 (1984), and \text{Lee v. Lee}, 12 Ark. App. 226, 674 S.W.2d 505 (1984), nevertheless approved an equal division despite the wife’s apparently lower station in life.}

\footnote{233. \textit{See, e.g.}, \text{Meinholz v. Meinholz}, 283 Ark. 509, 513-14, 678 S.W.2d 348, 350 (1984); \text{Lee v. Lee}, 12 Ark. App. 226, 228, 674 S.W.2d 505, 506 (1984).}

simply overlook the impact of the disposition on the standard of living. If the opinions treat the standard of living at all, they usually reserve it for discussions of awards of alimony. The message from the reviewing courts seems clear: standard of living is an appropriate consideration in determining alimony but not in dividing property.

The Wisconsin experience is illuminating. The Wisconsin property division statute provides that the court may alter an equal division of the property after considering “the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed

Conn. 806, 499 A.2d 57 (1985); In re Marriage of Hull, 712 P.2d 1317, 1319 (Mont. 1986).


Likewise, the Connecticut statute directs the court to consider “station . . . and needs” of the parties in addition to other factors relating to future needs. Conn. Gen. Stat. Ann. § 46b-81(c) (West 1983). Moreover, the Connecticut statute makes no presumption of an equal division. See id. Nevertheless, the cases reveal the use of alimony, and not property division, to address the lowered standard of living. For example, in Leo v. Leo, 197 Conn. 7, 495 A.2d 704, 708 (1985), the court found alimony appropriate to compensate for the husband's higher earning capacity. The court, while noting the husband's greater capacity, upheld an unequal division of property in favor of the husband. Id. at 8-9, 495 A.2d at 709.

Of the six states, Montana has articulated most clearly that property should perform a support function. Except in connection with standard of living, the opinions also demonstrate a clear preference for property division over maintenance as the means to address the economic consequences of divorce. See, e.g., In re Marriage of Johnsrud, 181 Mont. 544, 549-50, 572 P.2d 902, 905 (1977). Nevertheless, when standard of living is in issue, the analyses often conclude that maintenance, as opposed to a property division, is in order. See, e.g., In re Marriage of Williams, 714 P.2d 548, 550, 552 (Mont. 1986) (affirming unequal division of property for the lawyer-husband against a wife out of the work force; property available but court awarded temporary maintenance); Levandowski v. Levandowski, 630 P.2d 239, 241-42 (Mont. 1981) (affirming an unequal division of property in favor of the husband who had an earning capacity three or four times greater than the wife's, noting the coordination with the maintenance award). Thus, the Supreme Court of Montana also has affirmed equal divisions of property and awards of maintenance.

Too often, the courts reserve their discussions of standard of living for the portion of the opinion dealing with maintenance. For example, in In re Marriage of Herron, 186 Mont. 396, 608 P.2d 97 (1980), a physically disabled wife had custody of four minor children. The court remanded an equal division of property because of the character of the marital property, not because of her need. Id. at 407-08, 608 P.2d at 103. Furthermore, the court noted her fifteen-year absence from the work force and inability to maintain the standard of living of the marriage. Id. at 407, 608 P.2d at 103. This discussion, however, appeared only in the analysis of maintenance, not of property division. Id. at 406-07, 608 P.2d at 103; see also In re Marriage of Hilt, 679 P.2d 783 (Mont. 1984) (holding that inability of the wife to maintain her standard of living justified maintenance award); Balsam v. Balsam, 180 Mont. 129, 589 P.2d 652 (1979) (characterizing wife's lack of income as a maintenance argument).
during the marriage." By authorizing a division of property to accommodate the need for support, the statute illustrates that property, like alimony, performs a support function. Indeed, the Wisconsin cases emphasize the interrelation of property division and alimony. Furthermore, the cases acknowledge that divorce reform expanded the discretion of the trial court in these economic matters. One would therefore expect to find the appellate courts, armed with these guides, approving the use of property to redress a lowered standard of living. Instead of recognizing the support function of property and its use in connection with standard of living, the opinions perpetuate the traditional distinction between property and alimony: property division serves to apportion property according to contribution and alimony serves to provide any necessary support.

As one court reasoned, the property legislation presumes that the husband and wife acquired the property by their joint efforts, justifying the statutory presumption of an equal division. The court found the rationale for alimony, on the other hand, to be need and ability to pay. While the court was right in finding that the property division statute's presumption of equal division is based on acquisition through joint efforts, the court ignored the fact that the statute just as clearly makes greater need relevant to the division. The court's analysis, therefore, undercuts the use of the legislation to adjust the standard of living and thus discourages the trial courts from using property division to alleviate need.

5. Treatment of Employability

The treatment of employability, another discretionary need factor, also helps to explain the inattention to postdivorce need. All of the states in the study include vocation, income, employment, or similar criteria as appropriate considerations in division of property at divorce. The statutes on division of property in Arkansas, Connecticut, and Montana re-

238. Fuerst v. Fuerst, 93 Wis. 2d 121, 132 n.3, 286 N.W.2d 861, 866 n.3 (1979).
240. Id.; see also Trattles v. Trattles, 126 Wis. 2d 219, 228-30, 376 N.W.2d 379, 384 (1985) (discussing standard of living only in maintenance portion of opinion).
Another case, Asbeck v. Asbeck, 116 Wis. 2d 289, 342 N.W.2d 750 (1983), underscores this reliance on alimony to perform the support function in the face of the standard of living language in the property statute. In Asbeck, the court divided equally a substantial estate. The court included premarital property in the division according to its statutory authority. Id. at 292-93, 342 N.W.2d at 752; Wis. Stat. Ann. § 767.255 (West 1981). Almost apologetically, the court noted the husband's retirement and explained why it awarded inherited property instead of alimony. Asbeck, 116 Wis. 2d at 296, 342 N.W.2d at 754. Since the statute makes standard of living relevant to the property disposition, the court need not have apologized for its use of property in lieu of alimony.
fer specifically to employability. The statutes of both New York and North Carolina refer to the income of the parties as an appropriate consideration, and the New York statute also mentions "the probable future financial circumstances of each party." Wisconsin's statute emphasizes future income most prominently of the six by directing the court to consider

[i]the earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

Like standard of living, the reference to employability directs courts to compare the employment capabilities of the two spouses. The less capable spouse has greater need and therefore may merit an award of greater than half of the available property. The propriety of comparing the spouses' employability would need no further support if it were not for the interpretation given the term by some courts.

The listing of discretionary factors in the property division statutes clearly contemplates a comparison of the two spouses in relation to the factor in question. When courts focus on income, for example, they compare the income of the spouses. If one spouse earns less than the other, the results of that comparison may lead to unequal division in favor of the spouse earning the lesser amount. Similarly, the listing of age or health contemplates a comparison of the two spouses in relation to the factor under analysis. The fact that one spouse is older or less healthy than the other may warrant an unequal division of property in favor of the older or less healthy spouse.

The opinions of the reviewing courts, for the most part, however, do not compare the employability of the two spouses. Rather, the definition that emerges from the reviewing cases suggests that employability means ability to be employed at any income, regardless of the other

246. In upholding an unequal division of property, a North Carolina appellate court explained that a single factor could justify an unequal division: "For example, a finding that one party suffered chronic disability arising during the marriage, while the other was young and healthy, might in an appropriate case support a discretionary distribution grossly in favor of the disabled party." Andrews v. Andrews, 79 N.C. App. 228, 235, 338 S.E.2d 809, 814, review denied, 316 N.C. 730, 345 S.E.2d 385 (1986).
247. See the discussion of the use of alimony to balance disparities in income in the Wisconsin cases infra notes 277-79 and accompanying text.
spouse's employability.\textsuperscript{248} For the purpose of dividing property, the courts seem to consider it irrelevant that one spouse is capable of being employed only at a fraction of the income of the other spouse.

This restrictive definition of employability dominates the appellate opinions. For example, in one case, the wife earned $8,000 per year while the husband earned in excess of $60,000. Nevertheless, the court upheld an equal division of property and no alimony award, making no reference to the disparity.\textsuperscript{249} Perhaps even more common, and more pernicious in terms of its impact on property division at divorce,\textsuperscript{250} is the practice of looking at disparities only for the purpose of determining alimony awards, not for the division of property.\textsuperscript{251} In New York opinions that segregate the analyses of property division and alimony, references to disparities between incomes appear only in the review of alimony awards.\textsuperscript{252} This treatment appears in other states as well\textsuperscript{253} and in light of the history of reform is especially anomalous. The reform movement articulated the preference for property division as the means for making the economic adjustments at divorce and deemphasized alimony statutes

\textsuperscript{248} This definition of employability, "capable of being employed at any level," is usually implicit in the cases in this section cited as illustrative. See, e.g., Meinholz v. Meinholz, 283 Ark. 509, 511, 678 S.W.2d 348, 349 (1984) (equal division despite great disparity in incomes); Leo v. Leo, 197 Conn. 1, 7, 495 A.2d 704, 708 (1985) (unequal division of property for husband with higher earning capacity, using alimony to address difference in "employability"). Oddly enough, this restrictive definition appears explicitly in a Connecticut case in which the majority opinion adopted a definition that actually compared the spouses' earning abilities. In McPhee v. McPhee, 186 Conn. 167, 440 A.2d 274 (1982), the Connecticut Supreme Court construed the term in a case involving a wife with a drinking problem who had not been employed during the marriage. The husband had been self-employed for 25 years. 440 A.2d at 275. At the time of the hearing, the wife had secured clerical employment but earned less than half as much as the husband. 440 A.2d at 278. The trial court had made an unequal division in favor of the husband and found their employability roughly equal. 440 A.2d at 278. The appellate court remanded on the division of property and on the alimony award in part for this finding of equal "employability." 440 A.2d at 278-79. However, a concurring justice took the opportunity to note that the trial court had applied the correct definition of employability. 440 A.2d at 280 (Healy, J., concurring). Employability, the justice explained, asks only whether a spouse can be employed and does not contemplate a comparison of employment capabilities. 440 A.2d at 280 (Healy, J., concurring). By this definition, the justice concluded that the spouses were equal in employability since the wife had recently begun entry-level clerical work. Her employment prospects in relation to her husband's were immaterial. 440 A.2d at 280 (Healy, J., concurring).


\textsuperscript{250} See infra notes 267-79 and accompanying text.


\textsuperscript{253} See, e.g., Leo v. Leo, 197 Conn. 1, 7, 495 A.2d 704, 708 (1985); Levandowski v. Levandowski, 630 P.2d 239, 241 (Mont. 1981).
in order to reflect that preference.254 When courts in states like these refer to income disparities only in discussions of alimony, they ignore a significant portion of the legislative history and the statutory directives of their property division statutes.

6. Failure to Implement the Philosophy of the Relationship of Property Division and Alimony

As the above sections demonstrate, several explanations emerge for the underutilization of the need factors.255 The most obvious are the norm of

254. See supra notes 73-75 and accompanying text. Wisconsin in particular developed a preference for maintenance after the enactment of its equitable distribution statute. For examples of theories calling for awards of maintenance, see Steinke v. Steinke, 126 Wis. 2d 372, 386-87, 376 N.W.2d 839, 846-47 (1985); Haugen v. Haugen, 117 Wis. 2d 200, 211-15, 343 N.W.2d 796, 802-04 (1984); Bahr v. Bahr, 107 Wis. 2d 72, 80-83, 318 N.W.2d 391, 396-97 (1982); Roberto v. Brown, 107 Wis. 2d 17, 22, 318 N.W.2d 358, 360 (1982); In re Marriage of Lundberg, 107 Wis. 2d 1, 12, 318 N.W.2d 918, 923 (1982); see also infra notes 277-79 and accompanying text.

The interpretation of employability in connection with property division leads to another observation. In the setting of property division, the cases demonstrate both unrealistic assessments of employment opportunities and the absence of evidence to support the findings based on these opportunities. In one case, the appellate court approved the division of property and denial of alimony based, in part, on a determination that the wife could count on earnings as a harpist for support. Anderson v. Anderson, 191 Conn. 46, 52-54, 463 A.2d 578, 582 (1983). The dissent pointed out that the wife had been inactive as a professional musician for twenty years and that it was unrealistic to think that she could support herself as a musician in a changed musical environment. Id. at 61, 463 A.2d at 586 (Shea, J., dissenting). Equally troubling to the dissent, the majority allowed the trial court to base its conclusion on evidence it characterized as mere speculation. Id.

In contrast, the dissent noted the state justified an award of alimony based on earning capacity only after the presentation of evidence of the specific amount of income that could be earned by the spouse allegedly failing to earn up to his or her capacity. Id. (citing Schmidt v. Schmidt, 180 Conn. 184, 190, 429 A.2d 470, 473 (1980)).

This willingness to speculate about a spouse’s employability is common. In another Connecticut case, the wife argued to the appellate court that the trial court had ignored her lack of employability when it divided equally the marital property and awarded alimony only until the child of the marriage was eighteen and the house was sold. See Carpenter v. Carpenter, 188 Conn. 736, 453 A.2d 1151 (1982). The wife pointed to her absence from the work force for twelve years while she assumed primary child care responsibilities and to her current earnings as a waitress of only $77 per week. Id. at 743, 453 A.2d at 1155. The appellate court merely upheld the discretion of the trial court in weighing the various statutory factors and refused to upset the award. Id. at 744, 453 A.2d at 1155. The fact that a woman has been long from the work force in the care of children seems to have little bearing on employability. See, e.g., Schussler v. Schussler, 109 A.D.2d 875, 877, 487 N.Y.S.2d 67, 70 (1985) (approving an award of only one-half the marital property and substantial but temporary alimony for a woman long out of the work force with primary responsibility for six children), appeal dismissed, 69 N.Y.2d 822, 506 N.E.2d 537, appeal denied, 69 N.Y.2d 612, 511 N.E.2d 87 (1987).

In other cases, even where great disparities in the level of employability would seem apparent, courts have remanded awards of greater than half the property for the spouse with the lesser level of employability, reasoning that the findings were insufficient to justify the award of greater than half to the spouse with the bleaker employment picture. See, e.g., Brown v. Brown, 72 N.C. App. 332, 336, 324 S.E.2d 287, 289-90 (1985); Alexander v. Alexander, 68 N.C. App. 548, 552-53, 315 S.E.2d 772, 775-76 (1984).

255. The explanations offered in the text do not purport to be an exhaustive list. Another explanation for the inattention to need in property division may not be apparent.
equal division and, related to equal division, the dominance of contribution as a discretionary factor. The courts' interpretations of the discretionary factors of length of marriage, standard of living, and employability also help to explain the underutilization of the need factors and the resulting failure to address need through the division of property. Although the preceding explanations are more obvious, another explanation also emerges: courts fail to implement the philosophy of the relationship between property division and alimony.

Divorce reform promoted a simple explanation for the relationship between property division and alimony: property division was to supplant alimony if the divorcing parties had sufficient property to address existing need. Two components figured in this philosophy: first, property division was a method to address postdivorce need and second, property division was preferable to alimony to perform this task. Case law from most of the states in this study reveals that, although these

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In all of the states in this study, the reviewing courts generally defer to the discretion of the trial courts, allowing the trial courts to weigh the factors as they deem best, while acknowledging that the significance of any factor will vary with each case. See, e.g., Hackett v. Hackett, 278 Ark. 82, 84, 643 S.W.2d 560, 561-62 (1982) (refusing to substitute its judgment for chancellor's); Valante v. Valante, 180 Conn. 528, 429 A.2d 964, 966 (1980) (holding must provide only some basis for award); In re Marriage of Anderson, 717 P.2d 11, 14-15 (1986) (relying on merits of case instead of any set formula); White v. White, 312 N.C. 770, 777-78, 324 S.E.2d 829, 833 (1985) (holding appellate court need find only rational basis for how trial court weighed factors). A New York appellate court upheld an unequal division by explaining that the trial court need not analyze each of the statutory factors. See Cappiello v. Cappiello, 110 A.D.2d 608, 488 N.Y.S.2d 399, aff'd, 66 N.Y.2d 107, 485 N.E.2d 983, 495 N.Y.S.2d 318 (1985) (per curiam). Likewise, in reviewing an award, the Wisconsin Supreme Court implied that the trial court did not have to consider all the discretionary factors. See Trattles v. Trattles, 126 Wis. 2d 219, 230, 376 N.W.2d 379, 385 (1985). This deference to the discretion of the court that divided the property prevents the reviewing courts from instructing the trial courts on the use of the need factors.

Moreover, the inattention to need at times may reflect a reluctance to make certain property dispositions for reasons that are peculiar to the state. For example, the Montana Supreme Court has developed a policy of trying to preserve the family ranch intact. Several dispositions illustrate this policy. In In re Sirucek, 712 P.2d 769 (Mont. 1985), the court approved an unequal property division in favor of the husband and a denial of maintenance to the wife. Relying in large measure on the policy of preserving the ranch, the court awarded the entire ranch to the husband. Id. at 775-76. The dissent lamented, "[t]his woman, having worked 12 1/2 years for the good of her husband's estate is told she could work for herself now. I do not see any justice in it." Id. at 776 (Sheehy, J., dissenting). For other examples of the policy of preserving the ranch intact, see In re Marriage of Glass, 697 P.2d 96, 102-03 (Mont. 1985) (allowing husband to make distributive payments over 10-year period to wife with cerebral palsy); Gomke v. Gomke, 627 P.2d 395, 396 (Mont. 1981) (allowing husband to make distributive payments of wife's interest in ranch based on recognition of "economic realities of a predominantly rural state"); and In re Marriage of Jacobson, 183 Mont. 517, 525, 600 P.2d 1183, 1188 (1979) (relying on policy of preserving ranch in authorizing husband's making a distributive payment over thirty years). For the most part, the study did not treat these state-peculiar policies.

256. See supra notes 213-22 and accompanying text.
257. See supra notes 223-54 and accompanying text.
258. See supra notes 54-71 and accompanying text.
states have adopted this philosophy by including need factors in their property division statutes, they have not implemented it. These states, like most of the equitable distribution states, have at least incorporated the idea that property division should accommodate postdivorce need.

To varying degrees, the states in this study also have adopted the second component of the philosophy—the superiority of property division to address need. Some of these states have acknowledged the superiority of property division by statute. Other states recognize in their case law the superiority of property division to provide support.

259. See supra note 84. In the commitment to property to address need, a distinction emerges between the cases of states with and states without a presumption of equal division: the states with the presumption demonstrate less of a commitment to property as support. Although the three states with presumptions of equal division—Arkansas, North Carolina, and Wisconsin—recognize the support function of property division in their statutes, the cases reflect a weak commitment to this idea. The presumptions of equal divisions in these states, again, in varying degrees, are strong. See Day v. Day, 281 Ark. 261, 264, 663 S.W.2d 719, 721 (1984) ("all marital property be distributed equally unless the court finds that division inequitable"); White v. White, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) ("statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made mandatory unless [inequitable]"); cf. Bahr v. Bahr, 107 Wis. 2d 72, 81-82, 318 N.W.2d 391, 397 (1982) (noting maintenance decrees more flexible since they involve no presumption of equality). The presumption of equal division probably restrains the appellate courts from explaining how property is to perform the support function to which the statute refers.

Of the three states without the presumption, Connecticut probably least reflects the theme of property for support. As in Krause v. Krause, 189 Conn. 570, 456 A.2d 1204 (1983), however, the Connecticut court occasionally nods to the flexibility that property division accords the trial court.

The case law also occasionally recognizes that property should address need. The support function of property division appears in those opinions recognizing the interrelationship of property and alimony. In an Arkansas opinion, for example, the appellate court directed that the alimony award last until the property division took effect. Russell v. Russell, 275 Ark. 193, 204-05, 628 S.W.2d 315, 321 (1982). In another case, the court recognized that alimony was appropriate "to balance [the] inequity in the division of property." Stout v. Stout, 4 Ark. App. 266, 272, 630 S.W.2d 53, 56 (1982). Some of the Wisconsin opinions reflect the interrelationship of maintenance and property. See, e.g., Ondrasek v. Ondrasek, 126 Wis. 2d 469, 479, 377 N.W.2d 190, 194-95 (1983); Steinke v. Steinke, 126 Wis. 2d 372, 388-89, 387 N.W.2d 839, 847 (1985); Bahr v. Bahr, 107 Wis. 2d 72, 80, 318 N.W.2d 391, 396 (1982).

In North Carolina, a statute requires the trial court to make the equitable distribution award without regard to alimony. N.C. Gen. Stat. § 50-20(f) (1987). Other North Carolina statutes allow awards of permanent alimony before divorce whereas, until recent amendments, equitable distribution awards had to follow divorce. Id. at §§ 50-16.8 and 50-21(a). Therefore, it is not unusual to find appellate opinions on equitable distribution in isolation from discussions of alimony. Perhaps this isolation helps explain why there is virtually no discussion of need in those portions of opinions dealing with equitable distribution. See, e.g., Patton v. Patton, 78 N.C. App. 247, 253-57, 337 S.E.2d 607, 611-13 (1985) (appellate court's roughly equal division of property slightly favored wife, who was apparently in greater need because of eighteen-year absence from work force, but court did not recite need as a factor), review denied, 316 N.C. 195, 341 S.E.2d 585, rev'd in part, 318 N.C. 404, 448 S.E.2d 593 (1986).

260. See supra note 70.

261. See supra note 73.

262. The opinions of some states in the study reflect the theme more clearly than others. Some opinions in Montana and New York clearly articulate the theme that the
This section shows that most of the states in this study, however, fail to indicate their implementation of this philosophy. This section demonstrates that this failure manifests itself both in the analyses of the cases and in their very dispositions. Further, this section reveals that in light of the focus of the reform movement that led to the adoption of the philosophy, this failure was almost inevitable.

a. Analytical Shortcomings of the Cases

The analyses in the cases reflect the failure to implement the reform philosophy about the relationship of property division and alimony in a number of ways. First, the cases are virtually silent about the relationship of need and property division. Instead, they expound at some length about the philosophy behind equitable distribution and, in particular, about the relationship between contribution and property division.263
courts should use division of property instead of alimony to address need. The seminal case in Montana for this principle is In re Marriage of Johnsrud, 181 Mont. 544, 549-50, 572 P.2d 902, 905 (1977) (remanding for redetermination of the marital estate). Also, in Smith v. Smith, 622 P.2d 1022 (Mont. 1981), the court remanded a case in which the trial court divided the property equally. The supreme court explained that the unequal financial positions of the parties required that the trial court try to "balance the disparity in earnings potential through an equitable apportionment" of property and avoid reliance on an alimony award that would end at the husband's death. Id. at 1024. Several other Montana opinions imply in their treatment of property division and alimony that the courts should award property in lieu of alimony where possible. See, e.g., Creon v. Creon, 195 Mont. 254, 635 P.2d 1308, 1309 (1981); Nunnally v. Nunnally, 625 P.2d 1159, 1161 (Mont. 1981).

In some of the analyses (if not in the results), the New York cases occasionally reflect this preference for property as well. In the celebrated O'Brien case, for example, the New York Court of Appeals defended its expansion of the concept of marital property to include earning potential. See O'Brien v. O'Brien, 66 N.Y.2d 576, 583-89, 489 N.E.2d 712, 715-18, 498 N.Y.S.2d 743, 746-49 (1985). In its opinion, the court noted the superiority of property over alimony to accomplish the economic goals of divorce. See id. at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748-49; see also Spada v. New York City Police Dept. Pension Serv., 115 Misc. 2d 494, 497, 454 N.Y.S.2d 374, 376 (Sup. Ct. 1982) (noting the influence of the New Jersey equitable distribution statute on New York’s statute). In the course of interpreting an agreement on property division, the court observed that both states found property division “socially more desirable than maintenance.” Id. at 497, 454 N.Y.S.2d at 376; see also Rodgers v. Rodgers, 98 A.D.2d 386, 391, 470 N.Y.S.2d 401, 405 (App. Div. 1983) (praising equitable distribution and the court’s “elasticity to mold an appropriate decree because what is fair and just in one circumstance may not be so in another”), appeal dismissed, 62 N.Y.2d 646 (1984). These New York cases are consistent with Professor Foster’s explanation that the new equitable distribution act demonstrate a preference for awards of property rather than maintenance. See Foster, supra note 51, at 40; see also Note, New York’s Equitable Distribution Law: A Sweeping Reform, 47 Brooklyn L. Rev. 67, 124 (1980) (expressing hope that judges would use property to address financial disparities between men and women). Professor Foster, however, predicted that factors focusing on need—duration of marriage, age, and health—would be dominant in long marriages or marriages involving the elderly or disabled. See Foster, supra note 51, at 34. The opinions have not borne out this prediction on the division of property. See supra note 144.

The only state in the study whose courts actually discuss the relationship between need and property division is Montana, the state that has demonstrated the heaviest reliance on the need factors. The Montana Supreme Court has said, in effect, that the property division statute means what it says: property division should address need and it is superior to alimony for the task. Although the other states appear to recognize these themes, the absence of any explanation in the reviewing cases relating need and equitable distribution demonstrates a failure to implement them.

Another way the analyses reflect the failure to implement the philosophy of property division is by the general lack of references to the common functions of property division and alimony—the accommodation of postdivorce need. Rather, these cases perpetuate the historical distinction of property division to sever property rights and alimony to accommodate need. For example, even in a state with a property division statute that contains need factors, one finds an appellate court observing that the "purpose of alimony is to meet one's continuing duty to support . . . while the purpose of property division is to unscramble the ownership of property." Because the reviewing courts continue to label the functions of alimony and property division as distinct, they encourage the lower courts to continue to ignore factors relating to need in their property division decisions. The lesson the reviewing courts teach is that despite the presence of need factors in property division statutes, need is an appropriate consideration only in decisions about alimony.

b. Shortcomings of Property Division Dispositions

The analyses in these cases demonstrate that the division of property simply has not taken over the function of alimony despite occasional statements recognizing in theory that it should. The use of property

right to assets of partnership); Smith v. Smith, 314 N.C. 80, 85-86, 331 S.E.2d 682, 686 (1985) (equitable distribution presumes that parties have contributed equally to marriage); Bahr v. Bahr, 107 Wis. 2d 72, 81, 318 N.W.2d 391, 396-97 (1982) (explaining marriage as partnership).

264. The Montana cases contain occasional references to the relationship of property division and need. In Vance v. Vance, 204 Mont. 267, 664 P.2d 907 (1983), the husband contested an award to the wife of some premarital property. The court upheld the disposition, explaining that marriage was more than a business relationship and that property awards had to compensate for the economic disadvantage women faced. See 664 P.2d at 912; see also In re Marriage of Laster, 197 Mont. 470, 643 P.2d 597, 603 (1982) (pension held to be marital property to substitute for maintenance); Nunnally v. Nunnally, 625 P.2d 1159, 1162 (Mont. 1981) (greater need of wife justified unequal property division which, in turn, obviated need for maintenance).

265. See supra notes 103 and 140.

266. See supra note 262.

267. See supra notes 224-25, 231-35; infra notes 271-74 and accompanying text.


269. Id.

270. See supra notes 259 and 262.
division to address need and its superiority to alimony for this purpose reflects a philosophy that these states have endorsed but not implemented. The most dramatic evidence of this failure to implement comes from the dispositions of the cases. Instead of depicting the substitution of property division for alimony, the appealed cases reflect a continued preference for alimony as the vehicle to address need.

The opinions of every state studied reveal this subtle preference for alimony over property division to accommodate postdivorce need even though the statutes of these states authorize property division for this purpose. For example, appellate courts continue to approve alimony awards even when there appears to be property available for distribution that could at least lessen, if not eliminate, the need for alimony. In Arkansas, where there is a statutory presumption of an equal division of assets, it is common to find the appellate courts upholding equal divisions of property in instances where the trial court also awarded alimony.\textsuperscript{271} If the state were true to the mandate of reform, in some of the cases in which there was sufficient property to alleviate some of the postdivorce need, the court would choose an unequal division of property to provide support.

This reliance on alimony also appears in states without a presumption of equal division. In Connecticut, for example, the appellate courts routinely approve equal divisions of property and large alimony awards when a preference for property division might recommend an unequal division in favor of the spouse receiving alimony.\textsuperscript{272} What is even more striking, however, are the cases in which the alimony-paying spouse received a greater portion of the property than the alimony-receiving spouse.\textsuperscript{273} In these instances the courts surely have abdicated their obligation to address need through property division.\textsuperscript{274}

In some of the states, this preference for alimony appears for reasons peculiar to the state. In New York, for example, the difficulty of valuing professional practices has led, on occasion, to a reliance on alimony in-


\textsuperscript{273} See, e.g., Eversman v. Eversman, 4 Conn. App. 611, 615-16, 496 A.2d 210, 213, appeal denied, 197 Conn. 806, 499 A.2d 57 (1985); Leo v. Leo, 197 Conn. 1, 3, 7, 495 A.2d 704, 706, 708 (1985).

\textsuperscript{274} In addition, some of the opinions in New York also reveal a reluctance to use property to accommodate need and a preference for alimony. See, e.g., McDermott v. McDermott, 123 Misc. 2d 355, 356-57, 474 N.Y.S.2d 221, 222-23 (1984) (roughly equal division of property with substantial maintenance award), modified, 119 A.D.2d 370, 507 N.Y.S.2d 390 (1986); Conteh v. Conteh, 117 Misc. 2d 42, 43-44, 457 N.Y.S.2d 363, 364-65 (1982) (awarding wife rehabilitative maintenance and finding that she would have received a distributive award of property had she not been entitled to maintenance).
stead of property division. Although the difficulty of valuation is a proper factor to consider in making the determination on property division, the absence of any discussion of the competing interest—using property to avoid or eliminate a maintenance award—is significant. The judiciary in Wisconsin has expanded the concept of alimony since its enactment of the equitable distribution statute. The Wisconsin Supreme Court has explained that "maintenance is no longer to be based solely on need" and has authorized its use to reward contributions to enhanced earning capacity. Since its adoption of equitable distribution, the Wisconsin Supreme Court has instructed the trial courts "to begin the maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of total earnings of both parties." This attention to the law of maintenance may not have been necessary had the courts developed the support function of property division.

To varying degrees, the other states in the study likewise have developed the law of alimony in ways that have detracted from the support function of property division. The courts on occasion have refused to classify property as marital property and relied on alimony to compensate for any "inequities." On other occasions, the courts have used alimony to avoid awarding any of a business to the spouse with the lower income. One court has explained that a distributive award of property

277. In re Marriage of Lundberg, 107 Wis. 2d 1, 13, 318 N.W.2d 918, 923 (1982).
280. The cases from Montana reveal fewer instances of promoting maintenance at the expense of a property division. Instead, the Montana Supreme Court clearly has directed the trial courts to use property for support. See supra note 262. Occasionally, however, the supreme court allows deviation from this standard. See, e.g., In re Marriage of Williams, 714 P.2d 548, 558 (Mont. 1986) (upholding unequal division of property in favor of husband despite his greater income potential and her foregone career opportunities, but approving a maintenance award to compensate); In re Marriage of Ziegler, 696 P.2d 983, 985, 987-88 (Mont. 1985) (approving equal division and $1,750 per month maintenance); Green v. Green, 181 Mont. 285, 288-89, 593 P.2d 446, 448-49 (1979) (addressing disparity in earnings with short-term maintenance of $4000 where husband was a doctor and wife a bartender).
281. In Day v. Day, Justice Hickman in his dissent explained that the policy of the Arkansas courts had been to use alimony to redress any inequities in the division of property. 281 Ark. 261, 663 S.W.2d 719, 723 (1984) (Hickman, J., dissenting). Justice Hickman cited Paulsen v. Paulsen, 269 Ark. 523, 601 S.W.2d 873 (1980), as an example. See id., 663 S.W.2d at 723 (Hickman, J., dissenting). In Paulsen, the court classified a military pension as separate property. Paulsen, 269 Ark. at 526, 601 S.W.2d at 875. In Day, the court found that a retirement plan was marital property, which raised doubt about a number of decisions. Day, 281 Ark. at 264-65, 663 S.W.2d at 719, 720-22.
282. See, e.g., Leo v. Leo, 197 Conn. 1, 2-3, 495 A.2d 704, 706 (1985) (awarding wife alimony and giving husband sole interest in the family's share of a business); Hirschfeld v. Hirschfeld, 96 A.D.2d 473, 473, 464 N.Y.S.2d 789, 789 (1983) (remanding to Special Term to reevaluate maintenance in order to avoid making a distributive award based on
is available only if the petitioning spouse is not entitled to alimony. In all of these examples, the focus on alimony indicates a failure to implement reform's preference for property division.

This failure to implement the philosophy of the relationship of property division and alimony helps explain the courts' infrequent use of the need factors to address the greater economic need of one of the parties. When a state has chosen to implement the use of property to supplant alimony, then the fact that divorce has left one spouse in greater need than the other should be enough to justify an unequal division of property. After all, except for those states requiring proof of marital fault as grounds for alimony, greater need usually suffices to justify an alimony

the value of a law practice); see also L. Weitzman, supra note 30, at 97-101 (analyzing dispositions that award family businesses to the husband); supra note 255 (discussing Montana policy of preserving the family ranch intact).

283. See, e.g., Conteh v. Conteh, 117 Misc. 2d 42, 43-44, 457 N.Y.S.2d 363, 364 (1982) (denying wife who borrowed money for husband's medical education a distributive award since she was entitled to rehabilitative maintenance). Decisions like this one, which make an award of property division hinge on the unavailability of alimony, undercut the use of the discretionary factors relating to need.

284. Most states no longer consider marital fault in deciding property or awarding alimony. See 1987 Overview, supra note 13, at 481-93. The propriety or impropriety of awarding alimony in most states, therefore, has no impact on determining the relationship of property division and alimony. Since most states consider only economic misconduct for awards of both property and alimony, evidence of other kinds of marital fault is irrelevant to these economic matters. See, e.g., Mont. Code Ann. §§ 40-4-202(1), 40-4-203(2) (1987) (directing courts to make decisions about property division and maintenance "without regard to marital misconduct"). Moreover, fault does not complicate the relationship of property division and alimony in states like Connecticut that consider marital fault in determinations of both property division and alimony. See Conn. Gen. Stat. Ann. §§ 46b-51(c) and 46b-82 (West 1986).

Marital fault, however, does further complicate the relationship of property division and alimony in states like North Carolina. In North Carolina, the property division statute does not list fault as a consideration. See N.C. Gen. Stat. § 50-20(c) (1987). Furthermore, the North Carolina Supreme Court has construed the statute to bar consideration of marital fault unless that fault can be characterized as economic misconduct. See Smith v. Smith, 314 N.C. 80, 87-88, 331 S.E.2d 682, 687 (1985). On the other hand, grounds for alimony require proof of marital fault. N.C. Gen. Stat. § 50-16.2 (1987).

Since both the property division and alimony statutes authorize the courts to address need, the difference in the relevance of traditional marital fault raises questions that have not been addressed. One difference between property division and alimony could justify making a property division that addresses need without proof of marital fault while continuing to require such proof for an award of alimony. This justification relates to the difference between the usual source of property division and alimony. The source of property division generally is the property that has been acquired during the marriage. Although recognition of nontraditional property interests, like earning capacity, is an exception, courts as a rule divide property that the parties have acquired during the marriage. In contrast, the source of awards of alimony is usually postdivorce income. Because of this difference, one could justifiably conclude that awards of property to address need require fewer grounds than do awards of alimony. This reasoning would reconcile requiring proof of fault in alimony awards to address need and dispensing with that requirement in dividing property.

Finally, the past decade has witnessed a trend away from requiring fault in determining the economic consequences of divorce. See 1987 Overview, supra note 13, at 487. The studies of the aftermath of divorce reform, however, have rekindled interest in fault
award.\textsuperscript{285} For the most part, however, courts have not used the need factors to divide property unequally to address greater need.\textsuperscript{286} Rather, the courts have used the need factors only when certain facts, like serious health problems, exist.\textsuperscript{287} Therefore, despite the intended role of property division statutes, the simple fact that one spouse is in greater economic need remains insufficient to achieve an unequal division of property.

c. Relationship Between the Reform Movement and the Failure to Implement the Philosophy

In some ways, it is not surprising that the equitable distribution states that recognize the use of property for support have not developed a sense of the relationship of property division and alimony. Unlike the attention devoted to the recognition of nonfinancial contribution and the con-

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\textsuperscript{285} See, e.g., R. Eisler, Dissolution: No-Fault Divorce, Marriage, and the Future of Women 20-54 (1977); Friedman, Rights of Passage: Divorce Law in Historical Perspective, 63 Or. L. Rev. 649 (1984); Prager, Shifting Perspectives on Marital Property Law, in Rethinking the Family: Some Feminist Questions 111, 123 (B. Thorne & M. Yalom eds. 1982). This study shows that courts tend to recognize need more readily when fault is also relevant to the determination. See supra notes 140-43 and accompanying text (demonstrating this phenomenon in Connecticut). Similar observations have prompted some to rethink the advisability of retaining traditional fault grounds in making the economic adjustments at divorce. See, e.g., Golden and Taylor, Fault Enforces Accountability, 10 Fam. Advoc. No. 2, 11, 12 (1987). But see Kay, supra note 30, at 68 (reaffirming the commitment to no-fault divorce in determining questions of both status and economic matters).

\textsuperscript{286} As stated above, only the Montana case law clearly acknowledges the use of property to address need. See, e.g., In re Marriage of Glass, 697 P.2d 96, 103 (Mont. 1985) (reciting with approval trial court’s conclusion of law that tied end of maintenance to first receipt of property award); supra notes 262, 264 and accompanying text. The awards themselves show, however, that other courts use property as support even though they may not acknowledge such a use. See, e.g., Russell v. Russell, 275 Ark. 193, 204-05, 628 S.W.2d 315, 321 (1982) (alimony to terminate when house sold in part because proceeds from house would take the place of the support). In Cohen v. Cohen, 104 A.D.2d 841, 844-45, 480 N.Y.S.2d 358, 362 (1984), appeal dismissed, 64 N.Y.2d 773, 475 N.E.2d 457, 485 N.Y.S.2d 990 (1985), a New York appellate court acknowledged the support function of property by linking the sale of the marital home to the wife’s ability to work outside the home. The court noted that the sale of the residence would give the wife a “cushion” until she began to generate income. Id. at 845, 480 N.Y.S.2d at 362. The Wisconsin Supreme Court directly acknowledged the functional identity of property division and maintenance in Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982), remanding that case with directions to the trial court to “consider all of the credible evidence and provide for a fair and equitable financial division of estate and award of maintenance, \textit{whether it be a division of estate or award of maintenance, or both.}” Id. at 23, 318 N.W.2d at 360 (emphasis added). On a number of occasions, the Supreme Court of Wisconsin has explained that property division and alimony are interrelated, so that a change in the property award requires reconsidering the alimony award. See, e.g., Steinke v. Steinke, 126 Wis. 2d 372, 389, 376 N.W.2d 839, 847 (1985); Bahr v. Bahr, 107 Wis. 2d 72, 80, 318 N.W.2d 391, 396 (1982); cf. Dubicki v. Dubicki, 186 Conn. 709, 443 A.2d 1268, 1270-71 & n.2 (1982) (because of trial court’s ambiguity on the point, appellate court had to determine whether award was alimony or property).

\textsuperscript{287} See supra notes 113-18 and accompanying text.
cept of marital property, the reform literature offered little guidance on how to apply the need factors to property division. In addition, by emphasizing the analogy of marriage to a partnership, the reformers fore-shadowed the courts' failure to give property division its intended role in addressing postdivorce need. Finally, the reformers all but ignored two factors that greatly influenced the shape of the present doctrine of property division: the finality of property division awards and the insufficiency of available property.

i. The Effect of Diverted Attention

The reformer's concentration on contribution, a non-need factor, and marital property was appropriate. In some of the separate property states, the recognition of significant property interests at divorce was novel. In fact, the history of equitable distribution in the separate property states illustrates a struggle to break from title concepts to enable the recognition of property interests.

In addition, contribution and marital property, as compared with the need factors, were relatively new concepts in separate property states. The reformers had every reason to believe that judges would know how to apply the need factors to property division. These factors, like age, health, station, and income, were factors that had been common in alimony statutes. The reformers, therefore, reasonably assumed that judges would know that, to the extent the factors were similar, the same considerations appropriate for alimony would be appropriate for property division.

288. See supra notes 42-47 and accompanying text.
289. In retrospect, divorce reform probably paid insufficient attention to alimony as well. For example, the Task Force on Family Law and Policy made a number of specific recommendations regarding property. See generally, Report of the Task Force, supra note 44. In contrast, regarding alimony, the Task Force merely "invite[d] the attention of State Commissions on the Status of Women and other interested groups to the foregoing principles and recommendations with a view to reexamination and appropriate revision of laws pertaining to family support obligations." Id. at 13 (emphasis omitted).
291. See supra note 203 and infra note 306 and accompanying text.
294. For an illustration of the identity of factors for property division and for alimony, compare the relevant Connecticut statutes. The discretionary factors in the property division statute are:
the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

Conn. Gen. Stat. Ann. § 46b-81(c) (West 1986). Similarly, the alimony statute directs the court to consider
the length of the marriage, the causes for the annulment, dissolution of the
The reformers expanded the support function of property division while continuing to recognize the support function of alimony. Despite the changes reform wrought in the concept of alimony, the reform legislation continued to acknowledge that alimony would address need where it existed. In redefining alimony, the reformers recognized the goals of rehabilitation and self-sufficiency. The addition of these principles as goals, however, did not mean the end of permanent alimony where a spouse was incapable of rehabilitation. Nor did the addition of self-sufficiency dictate the end of the marital standard of living as a relevant factor in awarding alimony. In short, alimony continued to exist as a method for addressing postdivorce need, and the need factors in property division statutes were to be applied as alimony factors were applied—to address postdivorce need. The statutes issuing from reform simply recognized that property division, instead of alimony, should accommodate need when need exists. Despite the interpretation of the significance of no-fault divorce on reform legislation, nothing in property division statutes should have led the judiciary to conclude that divorce always means the end of one spouse's responsibility for the other.

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In addition, see New York's recently revised reference to standard of living in its maintenance statute:

Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage.


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295. See supra notes 48-53 and accompanying text.
296. See supra notes 48-53 and accompanying text.
297. For an example of a postreform statute clearly authorizing support in the face of need, see Cal. Civ. Code § 4801(a)(5) (West Supp. 1988), which directs the court to "consider . . . [t]he ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse." Id.
298. For example, the UMDA provides that

if . . . 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 . . . [then the court shall consider relevant factors, including] the standard of living established during the marriage . . .

299. See infra notes 348-80 and accompanying text; see also O'Flarity, Trends in No-Fault—No-Responsibility Divorce, 49 Fla. B.J. 90 (1975) (noting the reduction of alimony awards in the wake of no-fault divorce).
300. As noted above, not all observers of reform conclude that addressing need survived the reformers' efforts. See, e.g., M. Glendon, supra note 179, at 52-57 (finding it only logical that the redefinition of alimony led to the principle of self-reliance after di-
ii. Dominance of Partnership Theory

The dominance of the partnership analogy in explaining the philosophy of equitable distribution appears to be another reason why these states largely have failed to develop any law on the relationship of property division and alimony. Community property states traditionally rely on the analogy of marriage to a business partnership to justify community ownership.\textsuperscript{301} As in the business association, the marital partner, not the parties, own the assets.\textsuperscript{302} Dissolution of the partnership involves distributing those assets. Many separate property states adopting equitable distribution have adopted the partnership analogy as well. For example, of the six states studied, four of them regularly refer to the partnership analogy to explain the concept of marital property.\textsuperscript{303}


In one text, the authors distinguish between a partnership and partnership status and find that a community property system recognizes "a partnership status for each spouse." Babcock, Freeman, Norton & Ross, supra note 79, at 568 & n.9. A true partnership would allow absolute freedom of contract. Id.

\textsuperscript{302} This explanation of community property states assumes that the parties divide only the acquests of the marriage. See supra note 60. Some community property states at divorce divide not only the acquests but all the property presently owned, including property owned before marriage. See, e.g., Tex. Fam. Code Ann. § 3.63 (Vernon Cum. Supp. 1987).

\textsuperscript{303} See Weiman v. Weiman, 188 Conn. 232, 449 A.2d 151, 153 (1982) (indirectly acknowledging the analogy). New York clearly adopts the partnership analogy: "marriage is, among other things, an economic partnership to which both parties contribute as spouse . . . . [U]pon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties." 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). North Carolina's reliance on the analogy likewise is clear. In White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985), the Supreme Court explained that "[e]quitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions." Id. at 774, 324 S.E.2d at 832. The Wisconsin Supreme Court used the partnership analogy to justify its presumption of equal division in Steinke v. Steinke, 126 Wis. 2d 372, 377, 376 N.W.2d 839, 842 (1985). See also Unif. Marriage & Div. Act prefatory note, 9A U.L.A. 149 (1973) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.").
In the first stages of divorce reform, the partnership analogy served a crucial role: it provided a vehicle for the recognition of non-financial contributions. As the North Carolina Supreme Court developed its law of equitable distribution, for example, it turned to the partnership analogy and found that it "entitles the homemaker spouse to a share of the property acquired during the relationship." Perhaps without this model, the concept of marital property would have had a still harder time than it has in supplanting title in the separate property states. Even with the partnership analogy, separate property states have wrestled with theoretical difficulties in recognizing contributions other than financial ones. In recognizing these contributions, the partnership analogy has provided a useful alternative to traditional property theory.

While the partnership analogy has encouraged courts to recognize nonfinancial contributions, it has discouraged courts from implementing the support function of property division. Because the theory underlying a business partnership is not based on need, the partnership analogy partially explains why courts have underutilized the discretionary factors relating to need in dividing property at divorce. In the business partnership, unless provided otherwise, partners share profits equally. During the existence of the business partnership, there is also a presumption of equal management and control. At its dissolution, the accounting is based on capital contributions. In this way, the origins of the contributions, not the partners' need, determine the rights under the partnership. Accordingly, the business partnership focuses attention on the past as the way to determine the rights of the partner at dissolution.

The business partnership's perspective at dissolution, then, is retrospective. In contrast, the need factors, which require an assessment of

304. See, e.g., Sharp, supra note 27, at 198-201 (recognizing both the utility and drawback of the analogy). As urged in a report by a 1963 presidential commission:

Marriage, as a partnership in which [the] spouse makes a different but equally important contribution is increasingly recognized as a reality in this country and is already reflected in the laws of some other countries. During marriage, each spouse should have a legally defined, substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment or death.

American Women, supra note 42, at 69.


308. Id. at § 18(e), 6 U.L.A. 213.

309. Id. at § 18(a), 6 U.L.A. 213.

310. See A. Bromberg, Crane & Bromberg on Partnership § 90, at 506-07 (1968).

311. As Professor Fineman noted, the concepts of equality and partnership "focus the principal lines of inquiry in making such divisions on the past." Fineman, supra note 27, at 838.
future needs, are prospective. If a state relies entirely on the partnership analogy as its rationale for recognizing property interests at divorce, then the retrospective focus of the analogy might divert attention from the need factors.

One state in this study, Montana, which uses the need factors most often, has cautioned against relying on a commercial analogy for marriage. In upholding an award of premarital property to the wife, the Montana Supreme Court chastised the husband for his narrow arguments: "[The husband] would like to have his marriage . . . treated as a business relationship. It was not. Equitable distribution of the assets of a marriage depends upon more than just each party's initial financial contribution to the relationship." The court also referred to some other considerations, such as "occupations, amounts and sources of income, vocational skills, employability, estates, needs and opportunities for future acquisition of capital assets and income," which relate to future needs.

Because the partnership analogy only partially explains the philosophy of equitable distribution, there is nothing inconsistent with a state's use of both the partnership analogy and a property division statute that grants authority to accommodate need. The two have different functions and concerns. The partnership analogy provides a theoretical basis for recognizing nonfinancial contributions while the need factors provide a way to accommodate postdivorce need. The partnership analogy, as explained above, has a retrospective focus, while the need factors show a concern for future need.

In states that rely on the partnership analogy for the recognition of property interests, however, the analogy appears to have overshadowed the purpose underlying the need factors. The New York courts occasionally use the partnership analogy to explain that need is not the basis of equitable distribution. The courts, however, make no attempt to reconcile this conclusion with the statutory presence of the discretionary factors relating to need.

This danger also surfaces in some of the North Carolina appellate

312. See supra notes 103, 129 & 140 and accompanying text.
314. Id.
315. See infra notes 332-34 and accompanying text.
316. For example:
The function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.
cases. In one of the first cases before the North Carolina Supreme Court, the court explained the theory behind the recognition of property interests in terms of the partnership analogy. Following that explanation, it reviewed the discretionary factors and concluded that "[a]ll of the first eleven factors in the statute concern . . . the source, availability, and use by a wife and husband of economic resources during the course of their marriage." Among the first eleven factors are income, property, liabilities, age, and health. Contrary to the court's observation, these factors do not relate to the use of resources during the marriage but to need after the marriage. When the North Carolina court characterized all of the discretionary factors as ones concerning the history of the marriage rather than factors bearing on the future of the parties, it allowed the partnership analogy and its retrospective focus to dominate its analysis.

The partnership analogy has detracted from the discretionary factors relating to need by focusing attention on equality. The reformers were receptive to legislation premised on the assumption of spousal equality. Therefore, the business analogy proved serviceable. The Uniform Partnership Act, for example, which provides for equal sharing of profits, presumes equal contributions. In the marriage setting, the analogy argues for an equal division of the available property.

The reformers, however, never promoted the business partnership as the exact counterpart of the marriage relationship. Indeed, the emphasis in the business partnership on equality is one reason why the business partnership proved inadequate as a complete model. The very inclusion of the need factors demonstrates that the reformers rejected a wholesale adoption of the partnership model. The economic equality of the spouses was still a goal, not a reality. Some reformers relied on the discretionary need factors to achieve this goal because these factors empowered a court to depart from equal division in the face of need.

319. Id. at 86, 331 S.E.2d at 686 (1985) (emphasis added) (footnote omitted). For the first eleven factors, see the North Carolina statute supra note 84.
321. In fact, part of the statute explicitly refers to the circumstances "at the time the division of property is to become effective." Id. at 50-20(c)(1).
322. An outgrowth of the partnership analogy is the theory that marital property represents return on investments. See, e.g., Lawrence v. Lawrence, 75 N.C. App. 592, 595-96, 331 S.E.2d 186, 188 (1985) (citations omitted). Again, the partnership analogy is useful and probably necessary to classify properly certain property as marital. To view property division solely as the occasion at which to realize returns on investments, however, discourages the use of the needs factors.
323. See Weyrauch, supra note 301, at 418-24 (discussing the impact of equality concepts in marriage); see also supra notes 175-90 and accompanying text. See generally Fineman, supra note 27.
325. See supra notes 307-10.
To the extent that property legislation includes considerations relating to need, it departs from the business partnership model and its premise of equality. The business partnership simply has no theoretical counterpart to these factors.\(^{326}\) Nevertheless, partnership theory seems to have focused the courts on equality and blinded them to the recognition of need through property division. One Wisconsin court found that "[a] logical expansion of this partnership concept [is] a presumption of equal division of the marital property."\(^{327}\) In another case explicating the theory of property division, a New York court found that property "provisions appear to function coherently only under the partnership analogy"\(^{328}\) and that maintenance was the exception to the partnership analogy. Yet another New York court found from the fact of a two-career marriage an agreement that the marriage was an "equal financial partnership"\(^{329}\) and ignored the need factors.

Of course, the greatest impact of the equality concept of the partnership model occurs in those states with presumptions of equal division of marital property.\(^{330}\) As the cases in this study show, however, the impact of the equality model is strong in states without the presumption as well.\(^{331}\) In the development of the reform legislation, one point appears lost: while marriage is akin to a business partnership, it is not a business partnership.\(^{332}\) The courts sometimes recognize that the new laws contain "nonpartnership provisions."\(^{333}\) As the New York courts have said

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326. Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (1983), discusses the ways the business partnership is inapposite to the theory of property division:

Absent agreement to the contrary, under the Partnership Law the rule is that, after repayment of whatever property he brought into the partnership, i.e., contributions of capital or advance, a partner is entitled to share equally in the profits and surplus earned through the efforts of all partners with such contributions. The distribution is equal and final. Rehabilitation is unavailable. No partner is entitled to remuneration for services rendered. A partner, therefore, has no claim to the specific performance of services of another partner, nor to damages for their loss, even though he may have sacrificed some of his more lucrative skills in order to advance the interest of the partnership (e.g., by performing administrative chores), thus enabling the other partner to enhance his marketable skills.

Id. at 97-98, 468 N.Y.S.2d at 489-90 (citations omitted). See also Bahr v. Bahr, 107 Wis. 2d 72, 81-82, 318 N.W.2d 391, 396-97 (1982) (marriage is a true partnership, not a business partnership).


330. See supra notes 168-72 and accompanying text.

331. See supra note 144 (listing cases from all six states of the study showing an intention to need). Despite occasional recognition of the inadequacy of the partnership model and of equal division of property, the courts continue to uphold equal division in the face of need. See, e.g., Conner v. Conner, 97 A.D.2d 88, 100, 468 N.Y.S.2d 482, 491 (1983) (providing a specific example of the recognition of the inadequacy of the partnership model). But see the New York cases cited supra note 144.


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on several occasions: "[e]quitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker." For the most part, however, the courts simply have failed to develop the “other things” that marriage continues to be.

iii. Inattention to Modifiability

Neither the UMDA nor the state legislation that followed provided for modifiability of property distributions. This omission was certainly purposeful; after all, it was the finality of property decrees that recommended property division to the reformers as the preferred mechanism for handling the economic consequences of divorce. Nevertheless, the promotion of property division as a substitute for alimony warranted some explanation for nonmodifiability. Court-decree alimony is almost always modifiable; certainly the UMDA recognizes the modifiability of alimony. Therefore, if property division is to function as support, why should not some portion of the property division be modifiable on proof of changed circumstances? As enacted, the UMDA directs that


335. Section 316 of the UMDA provides for modifiability only of maintenance and support. Unif. Marriage & Div. Act § 316, 9A U.L.A. 489-90 (1973). The Commissioners’ comment clearly contemplates that property divisions not be modifiable: “In accordance with presently existing law, the provisions of the decree respecting property disposition may not be altered unless the judgment itself can be reopened for fraud or otherwise under the laws of the state.” Id. at comment, 9A U.L.A. 490.

A suggestion of modifiability of property decrees—at least mixed property and maintenance decrees—appears in the Preliminary Analysis, the working draft of the predecessors to the final version of the UMDA, see R. Levy, supra note 30, at 172, but does not reappear in the legislation or literature. In a discussion of mixed alimony-property distribution decrees, Professor Levy remarked:

Trial judges should have power to modify divorce decree financial provisions without regard to what label—“alimony” award or “property distribution”—might subsequently be applied to the specific language of the decree. The parties should be permitted to preclude subsequent modification, with the acquiescence of the divorcing judge, only by clear and explicit language in the original decree.

Id. (footnote omitted).

336. See supra notes 31-41 and accompanying text.

337. See 2 H. Clark, supra note 17, § 17.6, at 272-77.


339. Only rarely have courts recognized the importance of the function of property division and alimony on the issue of modifiability. See, e.g., Stein v. Stein, 21 Or. App. 195, 534 P.2d 222 (1975); Brandt v. Brandt, 40 Or. 477, 67 P. 508 (1902); see also supra note 34 (discussing modifiability of property division). One approach to the issue is to determine whether the portion of the decree in issue functions as the recognition of a
when the property is sufficient, a judge should accommodate the future support needs of a deserving spouse entirely, with property. 340 If circumstances of the spouse who received the property award change, however, no statutory authority for modification exists, even though such authority would have existed had the award been made under the maintenance statute instead of the property division statute.

The failure to treat the absence of modifiability may have played a part in the inattention to need factors and the failure to develop a philosophy of the relationship of property division and alimony. Though reform touted property division as preferable to alimony to provide support, the nonmodifiability of property division meant that judges would lose the power to accommodate changed circumstances by modifying the property award. 341 Perhaps the recognition of this distinction between property division and alimony subtly has discouraged courts from using property division to provide postdivorce support.

The nonmodifiability of property division, however, should not keep courts from using property as support altogether. Since there usually is far too little property to provide the total needed support, rarely, if ever, would circumstances change to such a degree that the spouse awarded the greater share would no longer need that share for support. Conversely, in cases in which the changed circumstances cause still greater need, the court could compensate by an award of alimony if that alternative were procedurally available. In sum, though nonmodifiability makes property division an imperfect substitute for alimony as support, the shortcoming should not discourage courts from at least making the attempt to use property division instead of alimony.

iv. Inattention to Available Property

The other matter that received insufficient attention from reformers was the modest amount of property typically available for distribution at divorce. Again, in retrospect, had the reformers addressed this problem, the attention might have helped to develop use of the need factor.

The average divorcing couple has relatively few assets. 342 One study reports that when the family’s income is between $20,000 and $29,999, share of assets accumulated during the marriage or as support. If the portion functions as an asset distribution, then the decree should not be modifiable; if the portion functions as support, then it should be. For an early, and still rare, recognition of determining the function of the award in order to resolve the issue of modifiability, see Brandt v. Brandt, 40 Or. 477, 485-87, 67 P. 508, 510-11 (1902). To appreciate the substance and not just the form of the awards is to recognize that parties “bargain in the shadow of the law.” See Mookin & Kornhauser, supra note 2, at 997.

341. See supra note 32.
342. See L. Weitzman, supra note 30, at 54-69. Professor Weitzman based her ten-year study in part on an analysis of about 2,500 cases from court records in the period 1968-77. Id. at 403-05. Her findings on the assets of the average divorcing couple appear id. at 54-69.
the net value of their assets averages only $21,800.\textsuperscript{343} Moreover, this figure usually is subsumed by the family home.\textsuperscript{344} In the typical case, other than the equity in the home, there simply is no property to divide at divorce.\textsuperscript{345}

The modest amount of property available for distribution in the average divorce deserves some commentary. The legislation promotes property as the preeminent means of accomplishing economic adjustments at divorce. In the great majority of cases, however, the available property is inadequate to the task.\textsuperscript{346} Perhaps with some kind of legislative footnote in the commentary recognizing this fact, judges might have been more alert to this probability and its implication—that courts should try to address need through property division but an award of spousal support would be the rule, not the exception. Instead, the courts appear to have abandoned altogether the effort to address need—either through property division or alimony. In light of the clear directive in legislation like the UMDA to try to end the relationship between the parties with property division,\textsuperscript{347} legislative notice that the property usually would not be adequate to the task was in order.

B. Concerns of Underutilization—the End of Responsibility?

The preceding discussion posited several explanations for the underutilization of the discretionary factors relating to need. Regardless of its cause, however, this judicial inattention raises some concerns. If needy spouses could rely on alimony, the inattention would not be as troublesome. Recent studies on alimony, however, report declining alimony awards.\textsuperscript{348} The economically weaker spouse, usually the wife, must face these declining alimony awards without the assistance of the property awards envisioned by the reform legislation.\textsuperscript{349}

The slighting of the need factors reinforces perhaps some unintended

\textsuperscript{343} Id. at 56.

\textsuperscript{344} Id. at 65.

\textsuperscript{345} Id. at 61-65. The fact that a court may find the equity in the home to be the only property available for distribution has led to its own tragedy: the forced sale of the family home. See id. at 78. The disposition of the family home has generated a number of proposals for legislation to address this problem. See generally Comment, The Marital Home: Equal or Equitable Distribution?, 50 U. Chi. L. Rev. 1089 (1983).


\textsuperscript{348} See supra note 79. Also, the United States Census reported that in 1985 only 15% of ever-divorced or currently-separated women in the United States, as of spring 1986, received an award of alimony. See United States Dept' of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23, No. 152, Child Support and Alimony: 1985 (Advance Report), p.6 (Aug. 1987). Moreover, the average amount of alimony awarded in 1985 was only $3,733 per year, or $311 per month. Id. at 7.

\textsuperscript{349} Even if judges heed the discretionary factors, however, the problem will remain since the average divorcing couple has little property to divide. See L. Weitzman, supra note 30, at 55-58; supra notes 283-85 and accompanying text.
inferences. Some observers interpret the decline of alimony awards as the judiciary's conclusion that divorce always ends one spouse's responsibility for the other. The inattention to the need factors manifests that conclusion in another context. In states where property division statutes address need, however, the legislatures have decided that courts may attempt to meet those needs with the division of property, even if the amount of property proves inadequate. If courts need not even make the attempt, then the state has de facto adopted a policy that the need of the economically weaker spouse never concerns the economically stronger spouse. The stronger spouse need not provide support either by an award of alimony or property division. The existence of this attitude in the alimony context also explains its presence in the context of the division of property.

Observers have offered two reasons as the best explanations of the decline in alimony awards after divorce reform: the enactment of no-fault divorce laws and the changing economic status of women. The reformers knew that no-fault divorce would have an economic consequence, but the consequence they anticipated was a loss of bargaining power. The framework of fault divorce had allowed the economically weaker spouse to contest the divorce unless the stronger spouse made economic concessions. Without this framework, the weaker spouse had little leverage. The reformers addressed this vulnerability by arguing for the recognition of nonfinancial contribution. If reform assured that both spouses would have property rights, then perhaps neither would need the leverage that fault had provided.

Some of the reformers, however, did not anticipate the attendant shift in thinking about responsibility after divorce. Apparently,

350. E.g., L. Weitzman, supra note 30, at 143-53.
351. Certainly many believe that spousal responsibility does end at divorce and that the state should not require one spouse to provide for the economic need of the other after divorce. See Olsen v. Olsen, 98 Idaho 10, 12-13, 557 P.2d 604, 606 (1976) (Shepard, J., dissenting). But see Landes, Economics of Alimony, 7 J. of Legal Stud. 35 (January 1978) (arguing that alimony continues to perform the useful economic function of compensating women for the economic sacrifices that marriage often entails). This Article does not join that debate except to consider why divorce reform should have worked a change in philosophy about the propriety of addressing need.
353. E.g., R. Levy, supra note 30, at 165; Foster & Freed, supra note 301, at 195.
354. For the use of the defense of recrimination in fault-based divorce and its utility in effecting settlement, see Alexander, The Follies of Divorce—A Therapeutic Approach to the Problem, 1949 Ill. L.F. 695, 701-02. See also Kay, supra note 30, at 62 (in fault-based divorce system, innocent spouse who wants to continue marriage can prevent divorce by not asserting cause of action against guilty spouse).
355. See Fineman, supra note 27, at 801-03, 848-50.
356. See, e.g., Prager, supra note 69, at 16-18; L. Weitzman, supra note 30, at 366. Professor Weitzman concluded that no-fault divorce "redefined marriage as a time-limited contingent arrangement." Id. at 368.
judges\textsuperscript{357} and commentators\textsuperscript{358} have deemed the demise of alimony a logical concomitant of no-fault divorce.\textsuperscript{359} The judiciary appears to have concluded that the availability of no-fault divorce has redefined marriage so that spouses no longer assume that they may have commitments to the other that survive divorce.\textsuperscript{360} There has been little explanation of the linkage,\textsuperscript{361} however, and some observers have questioned the connection of no-fault divorce and the end of responsibility as illogical.\textsuperscript{362}

Although judges may have concluded that no-fault divorce has this consequence, the change in divorce statutes does not appear to have had this impact on lay attitudes toward marriage. In fact, researchers report that people continue to have expectations of a lasting marital relationship and continue to develop strong emotional ties to their spouses and to the marriage.\textsuperscript{363} There appears to be little support for the assumption that because divorce is easy, society takes marriage lightly.

The second justification for declining alimony awards—the changing economic status of women—is premature. Women have made some modest gains in closing the wage differential between men and women.\textsuperscript{364}

\textsuperscript{357} See, e.g., Otis v. Otis, 299 N.W.2d 114, 116 (Minn. 1980) (citing law review excerpt linking no-fault divorce and the propriety of temporary maintenance awards).

\textsuperscript{358} See, e.g., M. Glendon, supra note 179, at 52-53 (linking the ease of divorce with economic self-sufficiency).

\textsuperscript{359} The decline in alimony after no-fault divorce is well-documented. See supra note 79. One conclusion of this study is that the absence of fault in considerations on property has had an impact in deliberations on property divisions. Of the six states in this study, only the courts of Connecticut may freely consider fault in making divisions. See supra note 89. Significantly, Connecticut ranks only slightly below Montana in its percentage of cases addressing need. See supra notes 103 & 140.

\textsuperscript{360} See supra note 79.

\textsuperscript{361} The linkage of no-fault and non-responsibility appears not to be universal. The English system, for example, assumes responsibility after divorce. See Glendon, Property Rights upon Dissolution of Marriage and Informal Unions, in The Cambridge Lectures: 1981, 245, 246-48 (N. Eastham & B. Krivy, eds. 1982). Professor Glendon, however, finds the American system better than that of the English. See id. at 248. In fact, the thesis of another work by Professor Glendon is that economic equality and other factors may make separate property principles more compatible with current lifestyles than marital property principles. Glendon, Is There a Future for Separate Property?, 8 Fam. L.Q. 315, 326-27 (1974).

\textsuperscript{362} "'No-fault' divorce has no logical relationship to the legal attributes of responsibility during marriage and upon its termination by divorce or death. It does not follow from the availability of easy divorce . . . that the institution of marriage has been devalued." Haskell, The Premarital Estate Contract and Social Policy, 57 N.C.L. Rev. 415, 432 (1979).


\textsuperscript{364} See 1 J. Morgan, K. Dickinson, J. Dickinson, J. Benus & G. Duncan, Five Thou-
The wage differential, however reduced, remains; a woman earns about sixty cents to a man's dollar. 365 Furthermore, there is no evidence that the gap is closing. 366 Indeed, the facts of married life tend to compound the disparity. The wife often continues to trade off career quality to assume a greater role in meeting family responsibilities. 367 At divorce she may be financially dependent and may never fully compensate the foregone career opportunities. 368 The fact that women have primary or exclusive responsibility for child care after divorce in nine out of ten cases makes these statistics even more dire. 369 Studies reveal that child support awards generally are too low to meet reasonable needs. 370 Moreover, although Congress and state legislatures are trying to remedy enforcement problems, 371 the fact remains that the child support awards, which generally are inadequate in the first place, are difficult to enforce. 372

In sum, neither explanation offered for lower alimony awards—no-fault divorce and economic reform—justifies the decline. The decline nevertheless continues. Moreover, the presence of these attitudes in the property division context compounds the inequities. Rather than providing relief by using property awards to address need, judges routinely ignore the discretionary factors relating to need in dividing property. Although some may question whether the state ever should have imposed responsibility after divorce on the economically stronger spouse, nothing has changed to justify a reversal. No-fault divorce is not related


367. See M. Glendon, supra note 179, at 130-32.

368. See id.

369. L. Weitzman, supra note 30, at 358. As Professor Weitzman points out, equal division of property in the divorcing family of two children distributes one-half to one person, and one-half to the other three people. Id. Professor Glendon reports that for the past twenty years, divorced fathers retained custody in only about ten percent of the cases. See M. Glendon, supra note 179, at 87.

370. E.g., Wishik, supra note 79, at 94-98 (reporting that the average award in Vermont for 1982-83 was $23.50 per week per child).


logically to responsibility after marriage, and economic equality does not characterize the typical marriage.\textsuperscript{373} Divorce often leaves women in need of support and in worse economic positions than men. The question raised by these economic facts of life is whether they argue for further reform to help ensure that some mechanism exists to address postdivorce need.

The answer has many facets, and only one is offered here as a springboard for considering additional reform. The state has an interest in recognizing spouses' continuing responsibility to provide for need where need exists.\textsuperscript{374} That interest is best illustrated by considering the impact of no such recognition. If divorce ends responsibility, then one's only safeguard against economic devastation in the event of divorce is the pursuit of individual career goals.\textsuperscript{375} If divorce always ends one spouse's responsibility for the other, then the states have discouraged the making of sacrifices for the marriage and have encouraged individual pursuits. The law in this way may set or strengthen a norm that it would not choose to foster.\textsuperscript{376} Yet, a scheme that ends responsibility at divorce makes those sacrifices economically foolhardy. The history of alimony and the inadequacy of property awards under the new statutes implicitly carry this message. Indeed, commentators already have noted a trend towards the maximizing of personal goals at the expense of the family.\textsuperscript{377} Allowing courts to ignore the need factors in property division statutes reinforces this message. The states at least should not discourage those spouses who wish to make personal sacrifices for the good of the family.\textsuperscript{378}

\begin{footnotesize}
\textsuperscript{373} Professor Prager predicts that sharing principles will continue to characterize two-career families even when economic parity exists between husbands and wives. \textit{See} Prager, \textit{supra} note 69, at 6-14. If this thesis proves true, then as she maintains, responsibility should continue. \textit{Id.}

\textsuperscript{374} Indeed, the channelling of spouses to maximize their individual career potentials is a subtle but pernicious interference in freedom of choice. If wives and husbands have no assurance of postdivorce support in case of need, then that uncertainty might force both spouses to maximize careers, have fewer children, and shorten or eliminate maternity and paternity leaves. \textit{See} Johnston, \textit{Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality}, 47 N.Y.U. L. Rev. 1033, 1036 (1972); Glendon, \textit{supra} note 44, at 78-81.

\textsuperscript{375} \textit{See} Prager, \textit{supra} note 69, at 12 (describing the danger of a scheme which "punishes conduct of accommodation and compromise"); \textit{see also} L. Weitzman, \textit{supra} note 30, at 369-77. Professor Weitzman concluded that "one's own career is the only safe investment." \textit{Id.} at 376 (emphasis in original).

\textsuperscript{376} For a discussion of this concern, see M. Glendon, \textit{supra} note 179, at 125-38. Professor Glendon, however, is skeptical about any positive impact of public law on the family. \textit{Id.} at 138-40. \textit{Compare generally} Olsen, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 Harv. L. Rev. 1497 (1983) (criticism of efforts at reform in the area of family law).

\textsuperscript{377} \textit{See} Goode, \textit{Individual Investments in Family Relationships Over the Coming Decades}, 6 The Toqueville Review No. 1, 73-79 (1984); \textit{see also} C. Lasch, \textit{Haven in a Heartless World: The Family Besieged} 35-36, 166 (1977) (characterization of current family interactions as similar to relationships in the work place).

\textsuperscript{378} \textit{See}, e.g., Haskell, \textit{supra} note 362, at 427 (maintaining that responsibility of financial support strengthens emotional support as well). For a thoughtful inquiry into altru-
The states should enact and enforce legislation that recognizes that a majority of its citizens bring a commitment to marriage that includes responsibility in the face of postdivorce need. For those people who disagree with this view of marriage, the developing law of antenuptial agreements allows them the option to contract out of any continuing responsibility. A body of statutory law authorizing antenuptial provisions dealing with property already exists, and an increasing number of states recognize provisions limiting and eliminating alimony. Use of these laws enables the state to accommodate postdivorce need and those who disagree with continuing responsibility.

C. Recommendations for Increased Use of Need Factors in Property Division

This Article considers the experience of the need factors in property division statutes as reflected in the appealed cases of six states whose statutes contain a comprehensive list of the need factors. Although the property division statutes in these states, like most states, authorize courts to consider need in dividing the available property, the cases demonstrate a general underutilization of these factors. This section offers recommendations to encourage the use of the need factors and unequal divisions of property to accommodate need. The first is

ism in the family, see Olsen, supra note 376. Professor Olsen explains that the altruism in the family as currently conceived fosters a sexual hierarchy and the domination of women. Id. at 1505. She does not conclude, however, that there should be no altruism in the family. Rather, she concludes that various dichotomies have hindered human development and that altruism should characterize the market as well as all members of the family. Id. at 1560-78.

379. For example, the Uniform Premarital Agreement Act, §§ 3(a)(1) & (4), 9B U.L.A. 373 (1983), recognizes as proper content for antenuptials the determination of property rights and the elimination of spousal support. The Act recognizes only limited attacks on enforceability. Id. at § 6, 9B U.L.A. 376. Professor Glendon advocates enforcing antenuptials unless the provisions affect children or spouses who have been affected by raising children. See Glendon, Family Law Reform in the 1980’s, 44 La. L. Rev. 1553, 1567 (1984); see also Freed and Walker, Family Law in the Fifty States: An Overview, 19 Fam. L.Q. 331, 438 (1986) (noting the evolving acceptance of antenuptials); Comment, For Better or for Worse... But Just in Case, Are Antenuptial Agreements Enforceable? 1982 U. Ill. L. Rev. 531 (analyzes antenuptial agreements in light of contemporary realities and argues that they should enjoy a presumption of validity when certain conditions are met).


382. Because this Article focuses on disparate spousal needs, it does not treat the many
addressed to the judiciary; the remaining are addressed to the legislatures.

1. Appellate Recognition of the Relationship Between Property Division and Alimony

Many of the above conclusions follow from comparing the experience in Montana with those of the other states in the study. As reported in Part II, among the states with enough cases to be statistically significant, Montana reveals the highest percentage of cases with dispositions addressing need and with analyses explicitly utilizing need factors. In addition to the results of the cases, the most noteworthy difference between the Montana cases and the cases from the other five states is the explanation in the Montana cases of the relationship between property division and alimony. Although the statutes of all six states recognize a relationship between property division and alimony, only in the Montana cases do the appellate courts acknowledge and expound on the relationship. The Montana Supreme Court has said, in effect, that the statute means what it says—property, if available, is to perform the role of alimony and, if possible, take its place. That recognition may mean an unequal division of property in favor of the needy spouse, or, as is possible in Montana, an award of non-marital property to the nontitled spouse. The results in the other states lead to the conclusion that un-

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383. See supra notes 103-09, 112, 129, 140 and accompanying text.
384. See supra note 84 and accompanying text.
385. See supra note 262 and accompanying text.
386. The Montana statute provides that the court shall “finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both.” Mont. Code Ann. § 40-4-202(1) (1987).
less the reviewing courts clarify the relationship, lower courts will not use the factors relating to need.

2. Equitable Versus Equal Distribution

A necessary corollary to the Montana experience is the reliance on equitable rather than equal distribution. Although all the states in the study have revealed some timidity in using the need factors, the results suggest more reluctance in the equal division states. Moreover, when reviewing courts in equal division states have upheld unequal divisions, the facts, for the most part, have revealed extraordinary circumstances. Although the property division statutes of these states would allow unequal divisions for need, simple need has not caused the courts to deviate from the norm of equal division.

The recommendation of equitable, as opposed to equal, division raises a number of fears, only some of which will be summarized here. One such fear is a distrust of discretion. Some of the motivation for divorce reform was a distrust of discretion, and equitable division certainly injects a great deal of discretion into the apportionment. Another fear stems from the belief that equal division promotes private settlements. One scholar cynically concludes that the most vocal advocates of equitable distribution are lawyers in family practice because the uncertainty of equitable distribution would multiply the billable hours necessary to decide matters of property. For these and other reasons, after years of evaluating the reform, some commentators continue to advocate equal division of property. Others believe, however, that none of these fears overshadows the reality of economic need of one spouse at divorce.

A laudable goal of proponents of equal division is to discourage stereotypes. Legislation that provides for equal division of property, for example, assumes that men and women have made equal contributions to its acquisition. Legislation mandating equal division also implies that the spouses’ work should be valued equally. Even this noble reason, however, fails to justify equal division. The feminization of poverty compels the conclusion that addressing need is more important than the

387. See supra notes 168-74 and accompanying text.
388. See supra notes 114-16 and accompanying text.
389. See Daggett, Division of Property Upon Dissolution of Marriage, 6 Law & Contemp. Probs. 225, 227-29 (1939); see also Glendon, Property Rights Upon Dissolution of Marriage and Informal Unions, in Cambridge Lectures, supra note 361, at 247-50; supra note 178 and accompanying text.
390. See L. Weitzman, supra note 30, at 64.
391. See Glendon, Property Rights Upon Dissolution of Marriage and Informal Unions, in Cambridge Lectures, supra note 361, at 249.
392. E.g., M. Glendon, supra note 179, at 63-64; L. Weitzman, supra note 30, at 384-87; Younger, supra note 175, at 241-44.
393. Cf. McCord, supra note 186, at 299 (describing this fear in the setting of employment legislation).
394. For references to the phrase, see for example, Ehrenreich & Piven, The Feminization of Poverty, Dissent (Spr. 1984), and New York City Council, The Feminization of
symbolism inherent in rule equality. If further reform will lead to more unequal divisions of property in favor of the spouse with need, then the effort is surely worthwhile, despite the abandonment of the rhetoric of equality.\textsuperscript{395}

3. All Property Versus Dual Property

Another conclusion that the Montana experience suggests raises the distinction between “all property” and “dual property” statutes.\textsuperscript{396} “All property” statutes divide all the property of the marriage, regardless of when and how acquired. Dual property statutes divide only the acquests of the marriage. One feature that partially may explain Montana’s greater attention to need in property division is its all property provision.\textsuperscript{397} The conclusion should not be surprising. Judges usually face the division of scant resources. In light of this scarcity, a judge may be reluctant to divide the small pool of available property any way other than equally. In this way, the judge attempts to leave something for each party. Increasing the pool enables the judge to order an unequal division and still leave some property for the party with less need. In future reform, legislatures should consider increasing the pool of property to be

\textsuperscript{395} See Fineman, supra note 27, at 792; Prager, supra note 69, at 2-6. The realization that rule equality does not insure result equality is not a new one. See supra note 186. This recognition also appears in a classic feminist work. See B. Friedan, It Changed My Life 325-26 (1976). The equal division of marital property, for example, reflects only rule equality, not result equality, in light of contemporary socioeconomic factors. Since women continue to make more career sacrifices in marriage, an equal division of property achieves an unequal result. Women often leave the marriage less able to earn and must consume the divided property to support themselves. Likewise, gender-neutral alimony statutes appear to operate equally in terms of burdens on husbands and wives. To the extent, however, that judges make their decisions based on assumptions that men and women have equal job opportunities, the statutes operate unequally. A number of critics urge that in the next period of reform, drafters should take care to insure equality of result. See, e.g., Fineman, supra note 27, at 791; see generally K. Ferguson, Self, Society, and Womankind: The Dialectic of Liberation (1980); Johnston, supra note 374, at 1070-88, 1090; cf. McCloud, supra note 186, at 283 (propounding the same thesis in the setting of employment legislation).

\textsuperscript{396} The virtues of an all property versus a marital property scheme is an example of an important feature of property division on which this Article does not focus. Much of the early debate following the first proposals of the committee drafting the proposed legislation that eventually became the UMDA centered on the desirability of dividing all the property owned by either party, however and whenever acquired, versus the desirability of confining the pool of property to such property acquired during the marriage, excluding property acquired by gift, bequest, devise, or descent. In fact, the all-property-versus-marital-property debate prompted the controversial rejection by the Family Law Section of the American Bar Association of the original version of the UMDA. Rheinstein, supra note 35, at 429. Indeed, this controversy led to the alternative versions that compromise the final version of § 307. See Unif. Marriage & Div. Act § 307 Alternatives A and B, 9A U.L.A. 238-39 (1973); Kay, supra note 30, at 48.

\textsuperscript{397} See supra note 386; see, e.g., In re Marriage of White, 708 P.2d 267, 269 (Mont. 1985) (affirming award of premarital funds to wife, noting that the court did not have to return the parties to their premarital positions).
divided in order to encourage judges to address need.\textsuperscript{398}

4. Clarification of the Significance of Standard of Living, Employability, and Income-Producing Capability

A few other suggested changes to property division statutes focus on encouraging use of the discretionary factors. One is to increase the importance of the marital standard of living as a relevant factor. As reported, the statutes of all the states in the study except New York and North Carolina refer to standard of living or station as relevant to the division of property.\textsuperscript{399} The results in all the states except Montana, however, reveal the repeated failure to attempt to address an unequal standard of living through property division.\textsuperscript{400} Divorce and its disruption surely increase the living expenses of the once-intact family. That fact of life, however, should not mean that only one of the spouses, usually the wife, bears the decreased standard of living.

Those states with references to standard of living in their property division statutes recognize, in theory, that property division can equalize the economic impact of divorce. The results of the cases, however, indicate a judicial reluctance to honor the theory. In order to encourage the judiciary to give effect to the references to standard of living in property division statutes, the legislatures should make these provisions more explicit. The provision on standard of living also should require that where resources cannot maintain the marital standard of living for both parties, the parties should share the reduction equally.\textsuperscript{401} This requirement, which appears in the family law of other countries,\textsuperscript{402} has a number of virtues. Last, besides the inherent fairness of equalizing the impact of the

\textsuperscript{398} Expanding the pool of property to encourage attention to need involves far more than the controversy over all property versus dual property systems. As legislatures and, through their constructions of the statutes, courts expand the pool of property, they increase the likelihood of unequal divisions of property to address need. Certainly, how a state defines its pool of property available for distribution determines in large measure how fairly the property distribution will operate. \textit{See}, \textit{e.g.}, Sharp, \textit{supra} note 94, at 273. Because of the focus of this Article, the discussion does not treat, except tangentially, the definition of marital property.

\textsuperscript{399} \textit{See supra} notes 226-28 and accompanying text.

\textsuperscript{400} Again, the Montana cases suggest that attention to standard of living does, indeed, make a difference. Unlike the other states, the Montana Supreme Court repeatedly has used standard of living to uphold unequal awards and occasionally to reverse equal awards of property. \textit{See supra} note 229 and accompanying text.


\textsuperscript{402} \textit{See, e.g.}, Glendon, \textit{Property Rights Upon Dissolution of Marriage and Informal Unions}, in Cambridge Lectures, \textit{supra} note 361, at 248 (describing the English goal “of putting the parties in the position they would have been in if the marriage had not broken down”). Professor Weitzman also reports that the English system seeks to leave the parties enjoying roughly equal standards of living at divorce. \textit{See} L. Weitzman, \textit{supra} note 30, at 96.
divorce on the standard of living, reference to the marital standard of living also provides an objective standard, removing some of the unpredictability of equitable awards.

Like standard of living, employability or the ability to earn income is a factor that is included in the state statutes of the study. If courts interpreted employability as they do other discretionary factors, they would compare the spouses’ abilities to earn income in deciding how to divide the property. The cases, however, reveal a reluctance to draw this comparison. Another recommendation, therefore, is to direct the courts, by specific statutory language, to compare the spouses’ income-earning ability. That clarification should encourage judges to award more property to the spouse with less earning ability. A further recommendation, already implemented in some states, is to direct the courts to consider the extent to which a spouse’s earning capacity has been affected by homemaking responsibilities that precluded or curtailed employment outside the home. A property award compensating for the resulting unequal earning capacity would address some of the need occasioned by divorce.

Another consideration that would encourage courts to divide property in accordance with postdivorce need is statutorily to raise the question whether the property allocated is income-producing. None of the states included in this study lists as a discretionary factor the nature of the property as income-producing or not. Even without such a specific reference, the Montana Supreme Court on a number of occasions has directed attention to the character of the property. This direction may

403. See supra note 84.
404. See supra notes 247-50 and accompanying text.
405. See, e.g., Wis. Stat. § 767.255(6) (West 1981). This property division statute allows the court to deviate from an equal division after considering

[the earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.]

Id.

406. The New York Task Force recommended that the homemaker’s reduced earning capacity figure in property division and maintenance. New York Task Force, supra note 401, at 80. Although the legislature enacted some of the recommendations, it has not yet incorporated the suggestion on reduced earning capacity.

One commentator concludes that courts should recognize lost opportunities as a factor under provisions recognizing contribution as a homemaker. Foster, supra note 51, at 45-47; see also Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 Fam. L.Q. 201, 207-12 (1982) (recognizing this factor in maintenance discussions).

407. Again, although there is no specific reference to the character of the property, courts could have considered that factor as a logical component of other listed factors, such as available income, value of property, and opportunity for future acquisitions of capital assets and income.

408. In *In re Marriage of Edwards*, 699 P.2d 67, 71 (Mont. 1985), the court explained
have contributed to the number of divisions of property in Montana recognizing postdivorce need.

The above recommendations offer some ways to encourage the use of need factors in property division statutes.\textsuperscript{409} Even if legislatures follow all these recommendations, however, need might persist. In the first place, the danger exists that judicial interpretations might ignore the statutory directives.\textsuperscript{410} Furthermore, even with interpretations consistent with the legislative directives, the average family owns little property.\textsuperscript{411} The available pool of assets to be divided might not accommodate postdivorce need. Because of the prevalence of insufficient property at divorce, legislatures must scrutinize their alimony statutes and interpretations of them as well. Alimony statutes also may require amendment in ways that focus on the existence of need at divorce.

Nevertheless, the effort to encourage the recognition of need in property division is important. In the first place, all the reasons that prompted the reformers of the 1960’s to offer property as the superior vehicle to address the economic consequences of divorce remain valid.\textsuperscript{412} Property awards, unlike alimony, give a measure of independence to the recipient. These awards, not contingent on remarriage or the life of either spouse, offer more opportunity for financial planning. Except in the cases of

that the reference in the maintenance statute to sufficient property to meet needs means income-producing property. See also In re Marriage of Rolfe, 699 P.2d 79, 83 (Mont. 1985) (chastising lower court for awarding household goods to wife and income-producing property to husband); In re Marriage of Laster, 197 Mont. 470, 643 P.2d 597, 601 (1982) (maintenance justified because property was not income-producing); In re Marriage of Herron, 186 Mont. 396, 408, 608 P.2d 97, 103 (1980) (party can become “property poor” if property is income-consuming).

409. Several of the recommendations to amend property division statutes apply equally to alimony statutes. For example, increased emphasis on standard of living and the sharing of a decreased standard of living might help judges equalize the disparate impact of divorce. See supra note 401 and accompanying text. Another property recommendation pertinent to alimony awards is the consideration of whether property allocated is income-producing. See supra notes 407-08 and accompanying text.

Analysts of the poverty of divorce conclude that legislatures need to give renewed attention to alimony. Many of the conclusions suggest that the legislatures tailor provisions to accommodate the special needs of certain groups. For example, legislatures should take special precautions to make certain that statutes address the needs of the custodial parent with young children and direct full support to maximize long-range employment prospects. See L. Weitzman, supra note 30, at 390-91; Fineman, supra note 27, at 832-33, 886. Another group in need of special protection is older housewives who have been married long but have not developed a career out of deference to their family responsibilities and husbands' careers. L. Weitzman, supra note 30, at 380-81.

410. The most obvious example is the thesis of this study: while statutes in these states make need relevant to the division of property, the courts do not use property as the means to address this need. At the conclusion of an earlier study in California, the author recommended that need factors be added to the list of discretionary factors in California’s statute. Seal, supra note 79, at 15. As this Article demonstrates, the presence of need factors does not necessarily make a difference.

411. See L. Weitzman, supra note 30, at 54-58; supra notes 342-47 and accompanying text.

412. See supra notes 30-41 and accompanying text.
some distributive awards, the property award ends some of the contact between the spouses. If the award is not subject to modification, the property award also reduces litigation. In the second place, the failure to use the need factors in property division suggests that one spouse's responsibility for the other always ends at divorce. By ignoring the need factors, the judiciary imposes a policy of no responsibility in states whose statutes recognize the possibility of one spouse's continued responsibility for the other's need. The reforms suggested avoid this problem by making property statutes that purport to provide for need actually perform that function.

CONCLUSION

Divorce reform promoted the division of property as a substitute for alimony whenever the spouses have sufficient property to accommodate postdivorce need. The property division statutes of most states (certainly of the states selected for this study) reflect the influence of the reformers. These states direct that both alimony and property division awards may address postdivorce need where it exists. Not only do property division and alimony share a support function, but in many states it also is clear that property division is preferable to alimony to address need. Therefore, when sufficient property exists, courts should divide the property in a way that will obviate the need for alimony. Need factors in property division statutes explicitly authorize courts to use the division of property to accommodate this need by an unequal award of property in favor of the more needy spouse.

Although identifying the relationship between property division and alimony may be simple, courts have not implemented it. This study confirms the failure of courts to use the discretionary factors relating to need and the resulting failure to divide property unequally in favor of the more needy spouse.

A number of factors explain these failures. The preference for equal division of property accounts in large measure for the failure to divide property unequally in favor of the more needy spouse. Likewise, the uneven attention that courts give to various statutory factors in the property division statutes and the restrictive definitions of other factors also account for the inattention to need. Finally, the cases are noteworthy for their absence of analysis of the relationship between need and property division. The reviewing courts frequently justify a disposition by explaining the role of contribution, a non-need factor, in recognizing property rights at divorce. In contrast, they give no guidance to the lower courts on the role of property division in addressing need.

The routine failure to use the discretionary factors relating to need, however, suggests a more basic impediment—the lack of consensus on what constitutes need for the purposes of property division. For example, the hypothetical in the Introduction describes a couple who left the marriage with unequal incomes. Because of their ages and work experi-
ence, the wife realistically will never earn an income comparable to the income the husband will enjoy. Does the wife therefore have postdivorce need?

On the face of the property division statutes, the answer is yes. To the credit of reformers, most states have adopted equitable distribution statutes that direct comparison of the postdivorce finances of both spouses. The statutes allow courts to award unequal divisions of property to address the weaker financial position of one spouse.

According to the current interpretations of property division statutes, however, the answer is no. This study focused on states that authorize addressing need through a division of property. In case after case where spouses displayed unequal financial pictures at divorce, usually because of unequal incomes, the lower court failed to use property division to address the inequality. Furthermore, the reviewing court upheld the disposition. Thus, although these statutes as currently enacted authorize a court to divide property unequally in favor of the spouse with greater need, the courts routinely make some other disposition.

These conflicting answers suggest that states must examine what they want to accomplish at divorce. Perhaps the upheaval of divorce reform seduced courts and legislatures into thinking that they could escape this task. The changes introduced by divorce reform may have lulled courts and legislatures into thinking that they would not have to define need because no need would exist. Perhaps courts and legislatures envisioned that expanded concepts of marital property and its division at divorce would save them from the difficult task of deciding what “need” means in the aftermath of divorce reform, particularly in the aftermath of no-fault divorce.

The division of property, especially as currently interpreted, does not avoid the task. Rather, the conflicting signals the legislatures and the courts are sending through property division law demand a clear definition of need.

The property division statutes of most states, like the statutes in this study, list factors relating to need as appropriate considerations in determining property rights. This list of factors reflects the premise that spouses may have continuing responsibilities to each other after divorce because of one spouse’s greater need. The judicial gloss on these statutes, however, ignores this premise. Rarely do the courts divide property unequally in favor of the more needy spouse, usually the wife, simply because she has a greater postdivorce need than the husband.

Two steps are in order to make property awards under these statutes reflect the premise of the legislation. First, states should empower committees or task forces to grapple with the state’s definition of need. Does economic inequality at divorce constitute need? If the answer is no, further action is not required. Current interpretations of property division statutes reflect this conclusion. If the answer is yes, as this Article argues, then the state needs to take further action. In some states, legisla-
tive commentary to the existing statutes may provide solutions. In others, some combination of amendments such as this Article and other commentary suggest may be necessary to reorient the judiciary to the proper role of property division in addressing postdivorce need.

Not all states may choose to recognize continuing responsibility after divorce. The choice, however, should be a conscious one. Those states that purport to address need with property division statutes have chosen to recognize that one spouse’s responsibility to the other does not always end at divorce. The judiciary’s interpretations of these statutes should reflect this choice.