

# *Should Marriage Matter?*

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*In*

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# Marriage at the Crossroads

LAW, POLICY, AND THE BRAVE NEW WORLD  
OF TWENTY-FIRST-CENTURY FAMILIES

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## Should Marriage Matter?

*Ira Mark Ellman and Sanford L. Braver*

### INTRODUCTION

Since 1970, Americans' median age at first marriage has increased by about five years for both men (23.2 to 28.2) and women (20.8 to 26.1) (U.S. Bureau of the Census 2010). The necessary consequence is a decline in the proportion of men and women who marry by any benchmark age. Whereas 94 percent of women born between 1940 and 1944 had married by age forty, only 86 percent of those born between 1960 and 1964 had (Ellwood & Jenks 2004). The question is whether this decline is an artifact of the increasing age at first marriage or a true decline in the proportion of the population that will ever marry. Researchers are divided on this puzzle (Blau, Ferber, & Winkler 1998:274; Oppenheimer 1994). The current consensus seems to be that the educated continue to marry at the same rate but later in life, while the less educated have experienced a true decline in the proportion who ever marry (Cherlin 2010:404; Goldstein & Kenney 2001).

There have been larger marriage-rate declines in some European countries where an increasing proportion of couples live in long-term, marriage-like relationships without formal marriage. But in the United States, cohabiting relationships remain largely short-term, usually ending with separation or marriage.<sup>1</sup> Yet longer-term cohabiting relationships are perhaps becoming more common here also, even among couples with children.<sup>2</sup> In any event, the possibility invites our consideration of how Americans believe the law should deal with such relationships. The potential legal questions divide between those that involve the couple's treatment by third parties, such as employers and government agencies, and those that involve

<sup>1</sup> A set of comparable surveys in the mid-1990s found that the median duration of cohabiting relationships in the United States was fourteen months, the shortest duration of the eleven countries surveyed. It was forty months in Canada and fifty-one months in France (Heuveline & Timberlake 2004).

<sup>2</sup> About 35% of unmarried parents are living together five years after their child's birth, although half of them have married (McLanahan & Garfinkel, chapter 8).

the couple's rights with respect to one another (their rights *inter se*). Both categories are obviously important. This chapter focuses on the second.

One might imagine that couples who live together without marriage make that choice in order to avoid the legal rules associated with marriage. But that vision may overstate the legal planning the average couple puts into the cohabitation decision. Unmarried unions sometimes develop gradually, the partners slowly increasing the frequency with which one stays over at the other's home, without any discussion of the changing nature of the relationship (Manning & Smock 2005). Those who plan their cohabitation more overtly may discuss immediate practical issues without addressing directly the larger question of whether they should marry or cohabit. And even those who do discuss that larger question may not focus on its *legal* aspects. For example, Edin and Kefalas (2005) found that young unmarried mothers in Philadelphia focused on the emotional and symbolic commitments they associated with marriage, not its legal rules.

If couples do discuss the law, they may be primarily interested in the impact marriage could have on their treatment by third parties, which can be immediate and certain. Marriage may qualify one of them for dependent health insurance, or disqualify one of them from a public benefit they are now receiving; it may raise or lower their joint tax liability. By contrast, marriage rarely has any *immediate* impact on their legal obligations *to one another* because the law does not generally regulate spousal relations *during* marriage. Marital status becomes important when their relationship ends, whether by death or divorce. We know, however, that such temporally distant and contingent consequences are generally less potent in motivating human behavior than are immediate and certain consequences (Gilbert 2007:121–161).

So for all these reasons, one might doubt that many cohabiting couples have in any meaningful sense chosen to avoid marriage as a result of their comparative assessment of the legal rules that govern the dissolution of a marital versus a nonmarital intimate relationship. It seems rather more likely that the weak motivational power of marriage's distant and contingent effects at death or divorce are swamped by other considerations, such as the social, emotional, and religious importance of marriage as a symbolic affirmation of their relationship, or the legal advantages marriage may provide them in their relationships with third parties.

Because few couples will consult a lawyer before they marry, those who do think about marriage's legal consequences will likely rely on their own understanding of the law. Their understanding may be flawed. Under U.S. law, as in England, living together as a couple, no matter how long, does not *alone* create any financial rights or obligations between intimate partners.<sup>3</sup> Yet studies have shown that most British residents believe cohabitation alone *does* establish marriage-like *inter se* obligations,

<sup>3</sup> A handful of American states recognize a cohabiting couple as married if they also agree to be married and consistently present themselves to the world ("hold themselves out") as if they were. See Ellman et al. (2010, ch. 10).

and such information as we have about the beliefs of Americans suggests they are the same.<sup>4</sup> So not only may the expectations of cohabiting partners regarding the legal consequences of their relationship be largely unformed, but any expectations they do have may be inconsistent with the legal rules that would in fact apply.

Our studies sought to learn what our respondents think the law *should be*, not what they think it is. The fact that cohabiting partners may not give much thought at the outset of their relationship to their particular legal rights as against one another after the relationship ends does not mean that people in general have no views about what the law *should* provide in that circumstance. And it turns out that knowing what people believe the law should say does tell you something about what they think the law is because people tend to assume that legal rules align with what they believe a fair law would provide (Barlow et al. 2005:45; Kim 1999:45, 447). Intimate partners may well conduct their relationship on the implicit if unexpressed assumption that the law will treat them fairly, as they understand what fairness requires. And even if this were not true, lawmakers should care what the public believes a fair law would provide because lawmaking, especially in the regulation of matters such as personal relationships, should surely take account of any citizen consensus as to what result is fair. The data presented in this chapter tell us there is such a consensus.

The data described in this chapter come from a series of empirical studies that ask a sample of American citizens about the legal obligations intimate partners should have to one another when their relationship ends (Ellman & Braver 2011, 2012; Ellman, Braver, & MacCoun 2009, 2012). The data published until now have focused on child support and claims for post-relationship support (alimony). They use a common methodology and a respondent pool assembled in the same way from study to study. This chapter draws together findings from these earlier studies that bear on the impact of a couple's marital status on our respondents' views. In addition, we report here for the first time data from a study in this series that examined our respondents' views about how a couple's marital status should affect the allocation of their property at the termination of their relationship. Our earlier publications provide methodological and statistical details, for the entire sequence of studies, that we shall only summarize briefly here. Those publications also offer additional context and background, as well as a fuller account of some of the findings described here. The interested reader is referred to that earlier work.

We probe what our respondents think the law should be by giving them a series of vignettes across which key facts are systematically varied. We then ask them to

<sup>4</sup> In a national survey conducted in 2000, 56% of respondents said that British law "definitely" or "probably" provided that "unmarried couples who live together for some time have a 'common law marriage' which gives them the same legal rights as married couples." That result led to a concerted effort by the government, with intense media coverage, to educate the public about the actual law, which treats cohabiting and married couples quite differently. When the same question was then put after this campaign, in 2006, the percentage had declined to 51% (Barlow et al. 2008:40-41). For similar, if less definitive, U.S. reports, see Bowman (1996:711).

imagine that they are the judge asked to decide the case presented by each vignette. Here is an example, taken from our child support surveys, of the basic instructions setting up the questions on each form used in that survey:

We want to know the amount of child support, if any, that you think Dad should be required to pay Mom every month, all things considered. What will change from story to story is how much Mom earns and how much Dad earns. There is no right or wrong answer; just tell us what you think is right. Try to imagine yourself as the judge in each of the following cases. Picture yourself sitting on the bench in a courtroom needing to decide about what should be done about ordering child support in the case and trying to decide correctly. To do so, you might try putting yourself in the shoes of Mom or of Dad, or both, or imagine a loved one in that position.

When respondents resolve a series of such cases in a coherent and consistent pattern, their policy preferences can be inferred from their decisions. The process might be regarded as a statistical equivalent to the familiar common law method by which legal principles are abstracted from the decisions made by judges over time. When we have asked the same respondents directly about principles as well as cases, we have found that their judgments in cases are related to their ratings of proffered principles in ways that are sensible, rational, and nuanced (Ellman, Braver, & MacCoun 2012).

The data we describe here were gathered during 2008 and 2009. Our respondents were Arizona citizens called to jury service in Pima County, where the city of Tucson is located. Citizens are selected for jury service in a random process, and they are rarely excused. State law imposes significant penalties on citizens who fail to respond to a jury summons, and well over 90 percent respond. The Tucson jury pool is thus an excellent cross-section of the county's citizens. Surveys were distributed to members of the jury pool while they sat in the jury assembly room waiting to be called to serve on a particular jury. Our assistant addressed the pool members immediately after the jury commissioner staff welcomed them and oriented them to their jury service. They were told that completion of this "university" survey was voluntary, but the majority chose to accept it and most completed it. Some were unable to complete the survey because the bailiff called them to the courtroom before they finished. Depending on the particular survey form, it might take a respondent from fifteen to thirty minutes to complete. The response rate among those who had the opportunity to complete the survey was always higher than 50 percent and was usually considerably higher. We typically gathered data from a few hundred respondents on any given day. Our surveys included demographic questions that allowed us to determine whether different population subgroups answered our questions in systematically different ways. As we shall see, in most respects they did not.

In our child support surveys, the dependent variable was the amount of child support the law should require. In our alimony surveys, the dependent variables were whether alimony should be ordered and, if so, the amount of alimony that



should be ordered. In our property surveys, it was how the property pool identified in each vignette ought to be divided between the partners. The surveys distributed on any given day generally focused on only one particular issue: child support, alimony, or property allocation. Some surveys were administered on only one day, but others were repeated over several weeks in order to increase the number of respondents.

We first present selected findings from our previously published studies of alimony and child support and then present our new findings on property allocation. The final section of the chapter then considers the implications of the overall picture these data present.

## FINDINGS

### *Alimony*

Unlike the law of some other English-speaking countries, American law is generally clear that unmarried intimate partners have no continuing claim on one another's earnings after they separate (Bowman 2010). By contrast, married partners may seek post-separation alimony, often relabeled in recent decades as "maintenance" or "spousal support." Although alimony is not an entitlement, in nearly all states it is within the divorce court's equitable authority to allow such a claim, at least where the lower-income spouse will otherwise be unable to maintain a living standard that is adequate in light of the couple's marital living standard.<sup>5</sup>

The duration of the marriage is usually an important factor in a court's decision of whether to allow an alimony claim. Because we did not want our respondents' answers anchored by any particular belief about the legal rules (even if the belief was correct), the lead-in for the alimony questions told them the law on alimony claims varied considerably between courts and judges, even as to issues (such as claims between unmarried cohabitants) where it does not actually vary much. Here is what we said:

When couples divorce, one of the spouses may make more money than the other. Judges sometimes require the one who earns more to make regular payments (usually once a month) to the one who earns less. Alimony is different than child support. The purpose of alimony is to assist the former spouse, not the children. A judge can require alimony when no child support is required (because the couple never had children, or because their children are grown). If the couple does have children under 18, a judge can order alimony for the spouse in addition to child support for the children.

While judges can order alimony, they don't have to. In fact, judges don't always agree with each other about the kind of case that should include an alimony order,

<sup>5</sup> Ellman & Braver (2012) contains additional sources for statements in this section.

and the kind that should not. And even when they agree alimony should be ordered in a certain kind of case, they often disagree about the size of each monthly payment, or for how long the payments should continue. Finally, some courts would require alimony when a couple lived together as if they were married, even if they weren't, but other courts would never require alimony unless the couple had married.

Some cases are described below. In each one, a judge must decide whether to require the man to pay alimony to the woman, and if so, how much. We want to know what you think the judge should decide in these cases. There is no right or wrong answer. The facts will vary from case to case, and you may think alimony is appropriate in some cases but not in others. Or, you may think that all the cases should be decided the same way. Either is fine. We just want to know what you think is right.

Respondents were given vignettes in which a couple identified as "Adam" and "Eve" (each forty-five years old) had "agreed to separate" after having decided "their relationship wasn't working for them anymore." Respondents were also told that Adam and Eve will each get one of their two cars, and that they "don't have a lot of other property or savings, but they'll divide what they have equally between them." The vignettes described the husband's "take-home pay" as either \$6,000 or \$12,000 per month and the wife's take-home pay as either \$1,000 or \$3,000 per month. There were thus four different combinations of spousal income. There were also six different "Cases" (identified alphabetically as Case A through Case F), and each case was presented with all four income combinations. The six Cases differed on three dimensions: (1) Marital Status: whether the couple was described as married or as cohabiting (while "they never married, they have lived together for the past . . . years just as if they were married"); (2) Relationship Duration: whether the couple had been together (married or cohabiting) for either twenty-two years or six years; and (3) their status with respect to Children: "None" (the vignette specified that "They have no children"), "Grown Children" (the vignette specified that they "have two children who are now 19 and 21 years old"); or "Young Children" (the vignette specified that there were two children now "4 and 6 years old").<sup>6</sup>

For the "young children" condition, respondents were told that Eve took "primary responsibility" for the children, leaving work each day by 4:30 PM to pick them up from child care and taking days off when the children are sick. They were also given

<sup>6</sup> Because there were three child conditions rather than two, there were actually twelve different cases rather than six. (Two versions of marital status [married and cohabiting] times two versions of relationship duration [6 years or 22 years] times three versions of children [none, young, grown] equals twelve different cases.) There were thus forty-eight different vignettes in all (twelve cases times four income combinations), but each respondent considered only 24 vignettes. The reduction from 48 to 24 was achieved by varying marital status between subjects for half of our 330 respondents, while duration varied between subjects for the other half. For a more complete explanation, see Ellman and Braver (2012).

the dollar amount of child support that Adam will pay Eve each month.<sup>7</sup> For the “grown children” condition, respondents were told that “[w]hen the children were younger, Eve took primary responsibility for them.”

Our respondents were more likely to give alimony to a married claimant than to one who had cohabited. They were also more likely to award alimony when the couple had been together longer, their incomes were more disparate, and they had young children (as compared to either grown children or no children). These findings are unlikely to surprise most readers. Seventy-four percent of our respondents would award alimony in the case combining all the conditions most favorable to an award (a mother of young children, married twenty-two years, who is taking home \$1,000 per month and whose husband is taking home \$12,000 per month). By contrast, only 18 percent of respondents would award alimony in the case combining all the facts least favorable to an award (a childless woman, cohabiting for six years, who is taking home \$3,000 per month and whose male partner is taking home \$6,000 per month).

These basic findings tell us two things. First, our respondents may be willing to allow alimony in a higher proportion of cases than do many courts.<sup>8</sup> Second, marriage matters, but as one of several factors that influence the judgments of our respondents, not as an absolute eligibility requirement. Alimony was awarded in 40 percent of the vignettes involving cohabitants as compared to about 60 percent of the otherwise identical group of cases involving a married couple. Perhaps of even greater interest, 68 percent of our respondents made an alimony award in at least one cohabitation vignette.

The importance of marriage to our respondents’ decision on whether to award alimony also depended on whether the couple had children, and especially on whether they had young children. That relationship is seen most easily by examining Figure 9.1, which shows that the difference marriage made in our respondents’ inclination to award alimony – the “marriage premium” – shrank considerably for vignettes in which the alimony claimant had custody of the couple’s minor children. There was a similar reduction in the “duration premium” for vignettes in which the claimant had custody of the couple’s young children, as shown in Figure 9.2.<sup>9</sup> In considering both figures, recall that in vignettes with young children, our respondents were told that Adam was required to pay child support and were given the

<sup>7</sup> The child support amount was itself varied in a separate between-subject manipulation described in Ellman and Braver (2012).

<sup>8</sup> Our respondents made alimony awards in 60% of the vignettes involving married couples. A Maryland study found that alimony was allowed in 17.4% of divorce petitions filed statewide in 1999; the median marital duration for cases in the study’s sample was about ten years. Alimony was allowed in half the cases in which it was requested (Women’s Law Center of Maryland 2004).

<sup>9</sup> As there was no triple interaction of the marital status, duration, and children conditions, the results in Figure 9.1 are averaged over both relational durations, and the results in Figure 9.2 are averaged over both the married and unmarried conditions (Ellman & Braver 2012).

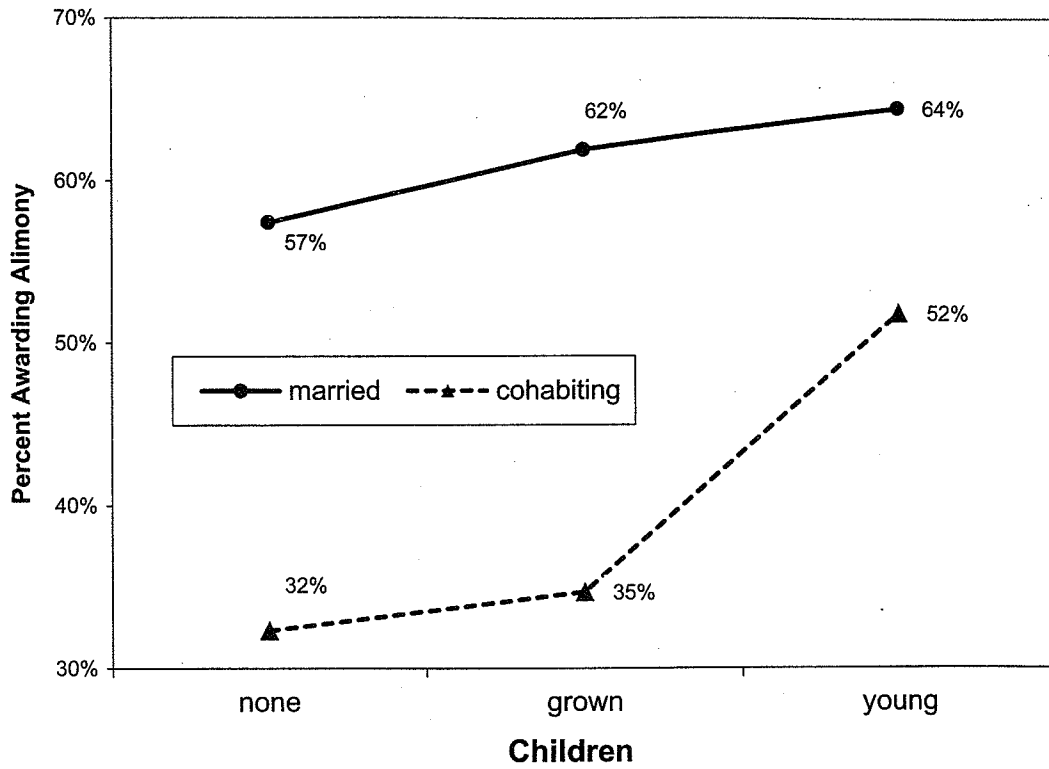


FIGURE 9.1. Percentage of vignettes in which respondents award alimony, by marital status and children condition.

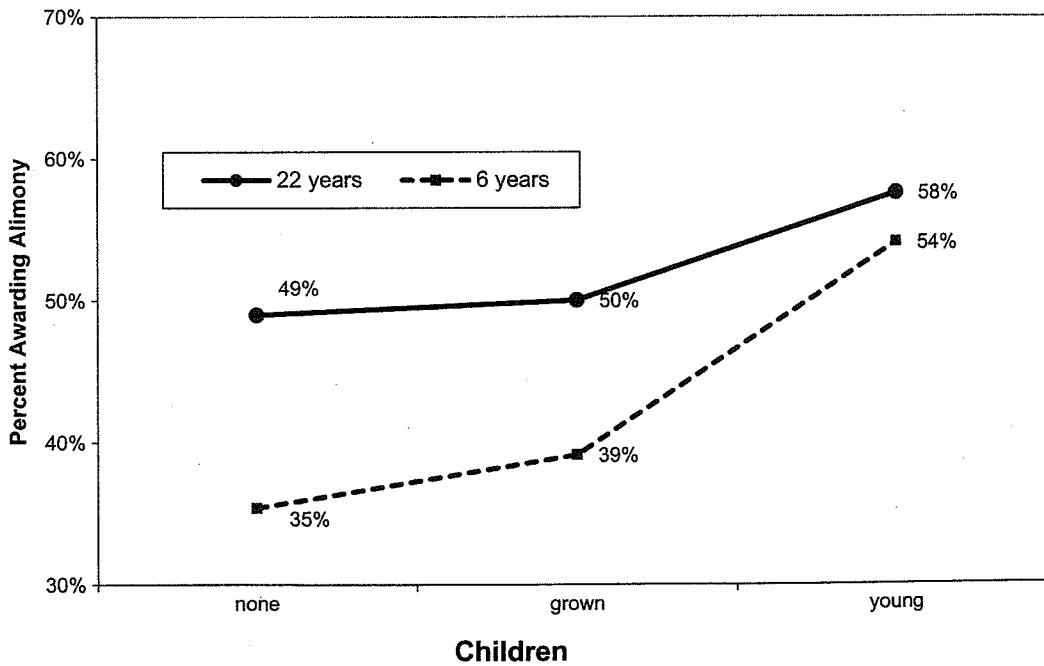


FIGURE 9.2. Percentage of vignettes in which respondents award alimony, by relationship duration and children condition.

precise dollar amount he was required to pay. They were thus *more* inclined to award alimony to the claimant who was also collecting child support than to the claimant with grown children who was not, and this effect is most evident when the couple was unmarried or had a shorter relationship. The mean *amount* of the alimony award, when an award was made, was *not* affected by the presence of a child support award.

These results confirm that marriage was a factor in our respondents' decisions about whether alimony should be allowed, but no more important than other factors such as the disparity in the partners' incomes, the absolute level of each partner's income, the presence of children, and the duration of the parties' relationship. Indeed, one of our more general findings is that our respondents seem to prefer an alimony principle grounded in the partners' income disparity rather than whether the alimony claimant is at risk of falling below a minimally adequate income. For example, when the man earned \$12,000 a month in take-home pay, the award rate for middle-class claimants earning \$3,000 a month (56 percent) was barely lower than that of poor claimants earning only \$1,000 (59 percent). Moreover, the *amount* of the alimony award for cases in which one was made was determined primarily by the man's income, which accounted for 76 percent of the variance in the amount of the award. The woman's income accounted for another 11 percent, while the remaining three factors combined (Children, Marital Status, and Relationship Duration) accounted for only another 3.5 percent. Thus while all five factors influenced *whether* our respondents gave an award, only the partners' incomes had much influence on its *amount*.

Finally, we found little or no relationship between our respondents' demographic characteristics and the effect of marriage on their award rate. For example, although women were somewhat more likely than men to award alimony, marriage had no greater or lesser effect on their award rate than it did on men's. Most other demographic characteristics had no effect on either the overall award rate or on the marriage premium. For example, self-identified conservatives or Republicans did not award alimony at a rate different than self-identified liberals or Democrats; those who had been married (54 percent of our sample) or divorced (34 percent) were no more or less likely than others to allow an alimony award. The one exception to this pattern was education: the marriage premium was greater for the more educated. But the reason was that the more educated had a higher award frequency for married claimants, not a lower one for cohabiting claimants.

### *Child Support*

The marital status of parents was historically important in establishing a child's paternity and thus the legal obligation of the father to support the child. Modern science has combined with social policy to reduce marriage's importance in establishing legal paternity, although there are still circumstances in which a

married woman's husband, rather than the child's biological father, is treated as the child's legal father (Ellman 2002). The increased use of new reproductive technologies also complicates the assignment of paternity (Garrison 2000). But in the more common case of unmarried mothers who become pregnant the old-fashioned way, the child's biological father will normally be the legal father, and his obligation to support his child is generally treated as identical to that of a father who was married to the mother. The duration of the parents' relationship is irrelevant in calculating the amount of the child support obligation.

The child-support rule that marriage shouldn't matter is consistent with the modern belief that children should not suffer disabilities just because their parents had not married, while the different alimony rule that marriage does matter has the force of long history and nearly universal acceptance in American law. Yet as plausible as each rule may seem when considered alone, they are unavoidably incoherent when considered together. The law may distinguish transfers of income between households by their label – alimony or child support – but the reality of household economics makes those labels largely meaningless. Households have joint consumption items, such as the bulk of housing and utility expenditures, which comprise a large portion of the total household expenditures. Parents and the children living with them inevitably share a common living standard. The cost of providing comfortable middle-class housing for the child necessarily includes the cost of providing it for the custodial parent. And the custodial parent who uses alimony income for personal expenses, such as clothing or food, then necessarily has more funds left from other sources with which to buy clothes or food for the child.

So the reality is that child support payments will necessarily benefit the custodial parent, and alimony payments will necessarily benefit the children living with that parent. This very point might help explain why many of our respondents were more inclined to grant alimony to a mother with young children than to an otherwise identically situated woman whose children were grown. The difference in treatment might not have been for her sake as much as for her children's. But note that the reverse is also possible. Someone less inclined to provide alimony when the intimate partners have not married might also be inclined to allow less child support to the unmarried mother than to the married one.

Federal law requires all states to establish numerical child support "guidelines" that contain tables or formulas specifying the presumptive amount of the award to be ordered in most cases. Current guideline amounts are determined largely by parental incomes and the number of children.<sup>10</sup> In a series of studies, we sought to learn the principles our respondents would apply to guideline design (Ellman & Braver 2011; Ellman, Braver, & Maccoun 2009, 2012). One of those studies

<sup>10</sup> Adjustments to this basic amount are commonly allowed or required to reflect the custodial arrangement or the cost of child care and health insurance (see Ellman et al. 2010 ch. 5).

(Ellman & Braver 2011) asked about the relevance of marital status. Four respondent groups constituted a  $2 \times 2$  factorial in which the parents were described as having married or cohabited and as having been together for either four years or fifteen years. In a separate “trailer control” condition (Himmelfarb 1975), a fifth group of respondents was given cases in which the parents’ relationship was limited to the single act of intercourse that led to the conception of the child whose support order was in question; these parents never lived together or married.<sup>11</sup>

Parental incomes varied within-subjects in each group. The mother’s income was \$1,000, \$3,000, or \$5,000 a month in take-home pay, and the father’s was \$2,000, \$4,000, \$6,000, \$9,000, or \$12,000 in take-home pay. Respondents ( $N = 356$ ) were asked to state the amount of child support they would order if they were the judge, all things considered. Each respondent named support amounts in all fifteen income combinations (three maternal incomes  $\times$  five paternal incomes), in whichever of the five family configuration cases they were given, effectively creating his or her personal child support guideline for that family configuration. Respondents were also given other facts that were constant across all the vignettes: that there was one child, a three-year-old boy, who “now lives mostly with Mom, but Dad sees him often,” and that the boy “frequently” stayed with Dad overnight.

The results averaged across the four family configurations in the  $2 \times 2$  factorial are presented in Figure 9.3. They replicated but also extended our earlier findings as to respondent preferences about the construction of child support guidelines. Each parental income had a significant main effect, and their linear  $\times$  linear interaction was also highly significant.<sup>12</sup> These three effects can be appreciated most easily by examining the lines displayed in the figure. The main effect of paternal income is seen in the upward slope of all three lines, demonstrating that the support amount increased with paternal income through the highest paternal income we asked about, \$12,000 monthly in “take-home pay.” This effect tells us that our respondents rejected the view that support should be limited to the amount needed to provide a child a basic or minimum living standard because their preferred support amount would not keep rising across the full range of paternal incomes, had they applied that principle. Our respondents instead favored the principle implicit in most U.S. child support guidelines, i.e., that children should share, at least to some extent, in the living standard enjoyed by the higher-income obligor, even when their basic needs have been met. One might guess that respondents would cease applying this principle when net obligor incomes exceeds some threshold beyond \$12,000 monthly, but we know they apply it at least through that relatively high income.

The main effect of maternal income is why three different lines are required for the three different custodial-parent (CP) incomes, and it tells us that our respondents

<sup>11</sup> Our respondents were told that “the woman got pregnant by the man on the night they met, but they have never lived together, nor been in a relationship since.”

<sup>12</sup>  $F(1,251) = 46.08, p < .01.$

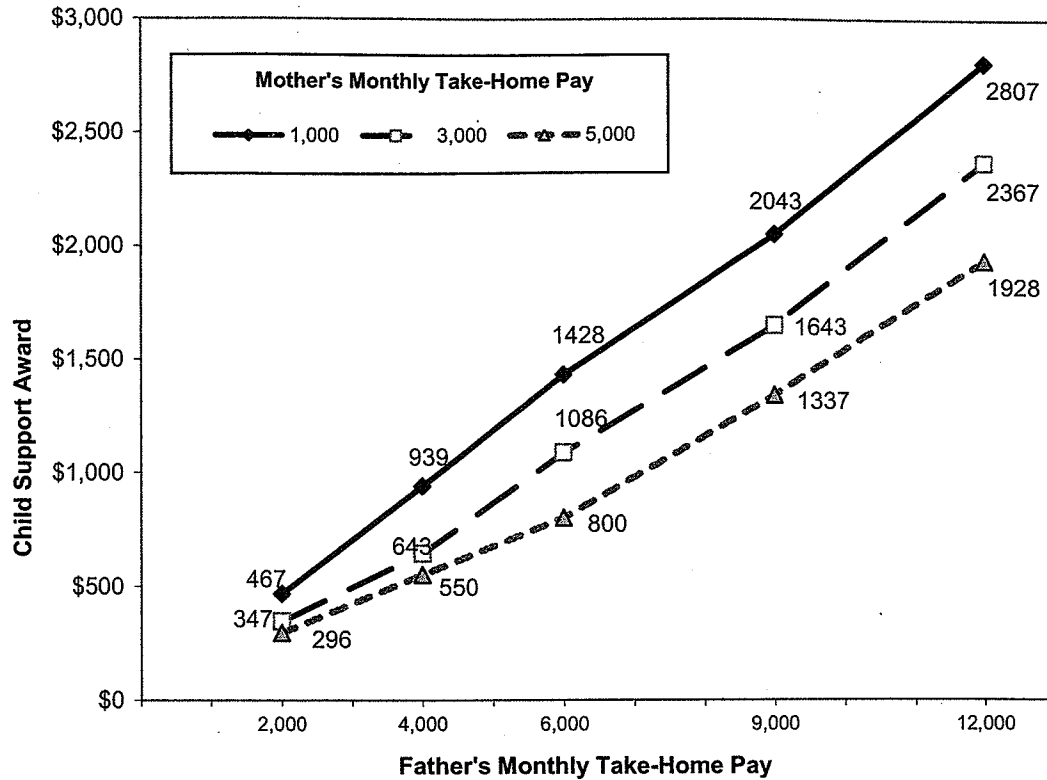


FIGURE 9.3. Mean child support amount named by respondents, by parental incomes

reject the guideline model, used by about ten American states, in which support amounts are a percentage of obligor income without regard to CP income. To the contrary, our respondents believe that, for any given level of noncustodial parent (NCP) income we asked about, the amount of child support should decline as CP income increases. Finally, the significant interaction between the parents' incomes is shown by the fact that the three lines "fan apart" as one moves right – they are not parallel. That means our respondents believe that support amounts should increase more rapidly with NCP income when CP income is lower. American support guidelines do not exhibit such a pattern as consistently as did our respondents.

These three basic patterns persisted whether the vignette parents were married or cohabiting, or together for four years or fifteen years. They were also pervasive across our respondents. That is, while there is considerable dispersion around the *mean* support amount for any given set of parental incomes, there was relatively little dispersion in the *adjustment* to their preferred support amount that our respondents made in response to changes in either parent's income. One can visualize this result by imagining a version of Figure 9.3 that did not present the mean child support amounts for each maternal income, across all respondents, but rather the 356 individual sets of the three regression lines best describing each individual respondent's support amounts. We would see that the three lines for most respondents formed the same pattern as the regression lines for the group means displayed in



Figure 9.3 – three separate, upward-sloping lines that are not parallel but fan out. We would also see that for any given maternal income, the height of these individual lines – their Y-intercepts – varied considerably across respondents, but that the lines' slopes (and thus the regression coefficients for each income term) varied much less.<sup>13</sup> In sum, the three basic patterns we have replicated and extended here are highly robust, arising across individual respondents and across vignettes with an expanded income range and across the variations in parental relationships we presented to our different groups.

That does not mean, however, that marital status did not also affect our respondents' judgments about the appropriate child support amount. It did, both as a significant main effect *and* as a significant interaction with the obligor's income.<sup>14</sup> The overall mean monthly support amount, averaged over all fifteen income combinations for all four family configurations in the  $2 \times 2$  factorial, was \$1,245. But the mean support amount for the cases in which the couples were married was \$121 more, \$1,366, while the mean for cohabiting couples was \$121 less, at \$1,124. There was thus a "marriage premium" of \$242, the difference between the marital and cohabiting means. In addition, the significant interaction between marital status and paternal incomes reveals that the marriage premium results primarily from cases in which paternal income was higher. Figure 9.4 illustrates the pattern by comparing our respondents' mean support amounts for married and cohabiting couples for vignettes in which the mother's take home pay was \$3,000. Note how the lines for married and cohabiting partners converge at the left end of the figure when paternal income is lowest, but increasingly diverge as paternal income increases – a visual representation of the fact that the marriage premium increases with paternal income. The same pattern was repeated for the two other maternal incomes we asked about.<sup>15</sup>

This interaction of marital status and paternal income arises *in addition to*, not instead of, the three general effects we previously noted – the effect of paternal income, of maternal income, and of their interaction. So, while child support amounts rose more steeply with paternal income when maternal income was lower, they rose even more steeply when the parents had married, but less steeply when they had cohabited. The fact that support amounts increased with paternal income at all, we previously observed, suggests that our respondents rejected the view that child

<sup>13</sup> However, we previously found that the slope was indeed steeper for women than for men and for those with more education, meaning that the amount of support increased significantly more rapidly with NCP income for women and for the more educated, even though the variance in slope across all respondents was considerably smaller than the variance in Y-intercept (Ellman, Braver, and MacCoun 2009). A subsequent study also found that differences among respondents in both slope and Y-intercept could be predicted from their Likert ratings of statements setting out abstract principles by which child support amounts should be determined (Ellman, Braver, & MacCoun 2012).

<sup>14</sup> For the main effect of marital status,  $F(1,355) = 8.38, p < .01$ ; for the interaction of marital status and NCP's income,  $F(1,355) = 7.14, p < .01$ .

<sup>15</sup> Results for all three maternal incomes are in Ellman and Braver (2011).

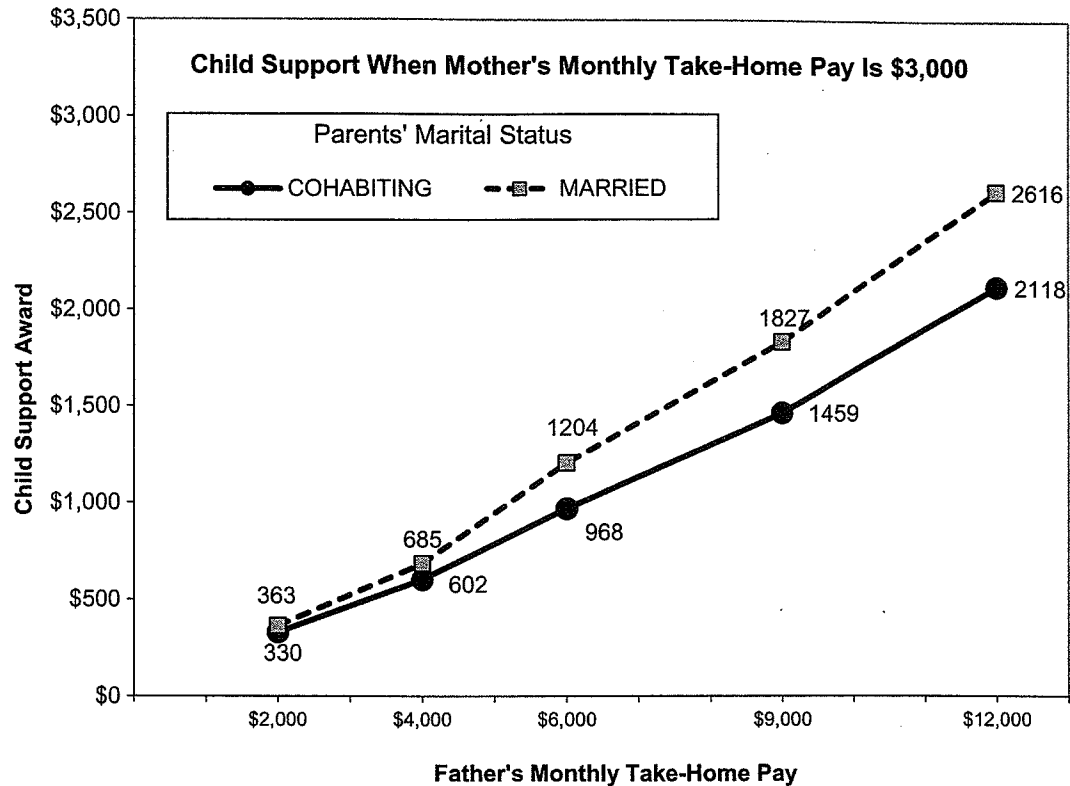


FIGURE 9.4. Mean child support amounts named by respondents for custodial mother earning \$3,000 monthly in take-home pay, by father's income and marital status.

support's only purpose is to ensure children some minimally adequate income, and that they instead believe child support should permit the child to share in the better living standard of the father whose income is higher than the custodial mother's (when it is). How close to the paternal living standard a support order brings a child depends on how one trades off the competing interests of the child and the higher-income obligor (who can object to lifting the custodial parent's living standard under the child support rubric). These results show that our respondents make that trade-off move favorably to the child when the parents had married than when they had cohabited.

Critics of existing guidelines have argued that support amounts for low-income mothers are too low because the guidelines' trade-off of these competing claims is skewed too heavily in favor of the support obligor's interests. In our earlier work, we showed that our respondents appear to agree with the guideline critics because they consistently awarded more child support than would the typical American guideline when custodial parent income was low (but made smaller support awards when custodial parent income was high and the child's interests were therefore not at risk). The newer results on marital status show that, while our respondents would also increase support amounts (over amounts in the typical American guideline) for low-income mothers who had cohabited with the child's father, they would increase them by a larger amount if the mother had been married to the father.

TABLE 9.1. *Mean child support amount across all income combinations, for each of three family configurations*

One-night relationship	Cohabiting parents	Married parents
\$989	\$1,124	\$1,366

While marriage mattered to our respondents, it did not matter whether the parents had been together for four years or fifteen years; that durational difference had no overall effect on awards, nor did it have any effect on cohabiting or married parents considered separately. But it did matter if the parents had not been together at all. The mean support amount in our “one night” or no-relationship cases was significantly lower than that in the other cases. Table 9.1 gives the relative values and shows that there is a “relationship premium” of \$135 – the difference between the mean amount for the cohabiting parents and for parents with no relationship beyond a single incident of sexual relations.

Again, these two effects, of marriage and relationship, lay on top of the overall pattern of three fanning lines that is produced by the interaction of the two parental incomes. This interaction effect alone, found in all family configurations including the one-night case, results in a larger difference in support amounts between family configurations when NCP incomes are higher and CP incomes are lower. The point is illustrated by comparing that difference in two bookend cases: the case that combines the highest maternal take-home pay (\$5,000) with the lowest paternal take-home pay (\$2,000), and the case that combines the lowest maternal take-home pay (\$1,000) with the highest paternal take-home pay (\$12,000). Table 9.2 presents the mean support amount for those two bookend cases for the one-night relationship, cohabiting couples, and married couples.

In the first case (the upper row), involving a low-income father and a high-income mother, our respondents’ mean child support amount changes very little across these three family configurations. By contrast, for the case of the high-income father and the low-income mother (the lower row), the mean support amount increases by more than \$400 when the couple had lived together, as compared to the one-night relationship, and by an additional \$500 higher if the couple had married. In short,

TABLE 9.2. *Mean child support amounts for two “bookend” cases across family configurations*

Father’s THP/ Mother’s THP	One-night relationship	Cohabiting	Married
\$2,000/\$5,000	\$277	\$278	\$314
\$12,000/\$1,000	\$2,131	\$2,533	\$3,080

family configuration hardly mattered at all in the first case, but mattered quite a bit for cases involving wealthy fathers and poor mothers.

So if child support guidelines were based on our respondents' views, a low-income Dad would pay about the same amount of child support no matter whether the parents were together one night, had cohabited for years, or had married, but a high-income Dad would pay more when the parents had cohabited and more yet if they had married, especially when the mother's income was much lower than his. Looking at all our child support data, we conclude that it matters to our respondents whether the parents were married, and if not, whether they had a relationship or just one sexual encounter. At least one important reason it matters, we believe, is that the respondents intuitively appreciated that child support payments confer a benefit on the custodial parent as well as the child, and that they are more tolerant of providing that benefit when the facts of the parental relationship provide more justification for it. At the same time, we must also note that our respondents' support awards rose with paternal income no matter the parental relationship, even if their absolute support levels were lower for unmarried parents and lower yet for those with no relationship. This tells us that, while our respondents' choice of trade-off point (between the child's interest and the father's interest) was more favorable to the father when there was no relationship or the parents had not married, they went beyond a "minimum living standard" approach to child support in all these cases.

Indeed, the low-income *cohabiting* mother would receive more support from our respondents than from a median American support guideline in effect at the same time, except when the father is also poor.<sup>16</sup> (The guideline amount does not vary with marital status.) So our respondents would allow the cohabiting mother more support than does current law, and they would raise support levels by an even greater amount when the parents had been married. They would allow the mother who had

<sup>16</sup> We calculated support amounts from a contemporaneous median guideline (Iowa's) in Ellman, Braver & MacCoun (2009), but only for the three paternal incomes considered in that study (which did not ask about the two highest paternal incomes we examined in the study reported here). The following table shows the Iowa amounts for cases with those three paternal incomes, and the lowest maternal income we asked about, a take-home pay of \$1,000 monthly. It also shows our respondents' mean support amounts for married and cohabiting couples in those same three cases:

2,000	4,000	6,000	Paternal income (maternal income 1,000 in all cases)
456	804	1,122	Support Amount in Iowa Guideline
447	862	1,271	Mean respondent amount for cohabiting parents
487	1,016	1,584	Mean respondent amount for married parents

One can see very little difference for the low-income father, although our respondents demand a bit more from him than the median when the parents are married, but essentially the same as the median when they cohabit. But as the paternal income goes up, our respondents clearly raise support amounts above the median guidelines – but more for the married parents than the cohabiting ones.

no relationship with the father a support amount quite similar to that provided in current law. Our data thus suggest that our respondents' adherence to a child support system that considers family configuration arises from the fact that they would give *more* weight than the typical American guideline to protecting the child's living standard, not less weight.

### *Allocation of Property When the Partners Separate*

The law of every American state makes marriage significant in the allocation of property owned by separating intimate partners. In all but a handful of states, the divorce court has authority to make an "equitable" distribution of property acquired during a marriage even if it was purchased with the earnings of one spouse alone and owned solely by that spouse.<sup>17</sup> In many states, either formal rules or customary practice leads courts to presume that in most cases property acquired during the marriage should be divided equally between the spouses. That presumption is particularly well entrenched in the nine community property states, some of which *require* equal division of marital assets, but in virtually all states there is a strong tendency toward equal division of marital assets following a long marriage. On the other hand, in most American states, cohabitation alone, even a long-term cohabitation, confers no equitable authority on the courts to allocate property between separating intimate partners who were not married.<sup>18</sup>

We investigated our respondents' views concerning the allocation of property in a study we describe here for the first time. We assumed our respondents would favor an equal division of property after a long marriage with no special facts that suggested otherwise, but we wondered whether they might move away from equal division in response to certain factual variations. The partners' marital status was one of the variations we were interested in testing, along with others, such as their relative earnings and their division of domestic chores.<sup>19</sup> As in other studies in this project, we presented potential Pima County, Arizona jurors ( $N > 600$ ) with a series of hypothetical cases to decide. The questions were introduced to them with this language:

This survey is about how *property is divided* between people when they separate after living together or after a divorce. If they cannot agree on how to divide it, a judge may be asked to decide what to do. What the judge might decide depends on both the law and the facts. The law varies from state to state, and the facts vary

<sup>17</sup> For a more complete description of U.S. marital property law, see Ellman et al. (2010) ch. 4.

<sup>18</sup> Washington is the one state in which courts may allocate property between separating unmarried partners in such a case. Many states will, in principle, enforce contracts between cohabiting partners concerning the allocation of their property if they separate, but formal contracts between cohabitants appear to be uncommon, and efforts to enforce informal or implied contracts are usually unsuccessful (Ellman 2001; Estin 2001; Garrison 2008).

<sup>19</sup> We also examined the possible role of fault in our respondents' evaluations, but we defer reporting that data.

from case to case. In the first two parts of this Survey form, we give you some cases to decide. In each case, we tell you some facts, and we ask what you think should be done. There is no right or wrong answer. We just want to know what you think would be fair in each case.

Try to imagine yourself as the judge in each of the following cases. You might picture yourself sitting on the bench in a courtroom needing to decide how the couple's property should be divided between them. You might try putting yourself in the shoes of each spouse or partner, or imagine a loved one in their position.

Assume the law allows you, as the judge, to make the decision, and does not require you to decide in any particular way. You might decide it is right to divide the property equally in every case, or you might decide it is right to give most of the property, or all the property, to one or the other spouse or partner. Just choose the result that you think is right in each case.

All the stories concern a couple we call Adam and Eve, whose union is coming apart. The question is how to divide the money they have accumulated while they were together.

Some facts were the same in all the vignettes: Adam and Eve have been together for twenty-two years; have two sons, nineteen and twenty-one years old, who are now grown and out of the house; some time ago, Adam and Eve bought a house together; when they separated, they both moved out and sold it; they have already divided up their personal possessions and agreed that each would keep the car each drove during the relationship. Most vignettes said that, by the time their house sold, it had gone up a lot in value, so that after paying off their mortgage loan and various fees, they cleared about \$250,000 from the sale, which, in addition to the \$50,000 they were said to have in savings (for a total of \$300,000 in money assets), must now be divided. The vignettes involving unmarried partners said that "Although they never married, Adam and Eve have lived together for the past 22 years just as if they were married." The other vignettes simply described Adam and Eve as married.

Most respondents were asked about eight cases (vignettes) in a within-subjects design.<sup>20</sup> A full set of facts was presented for the first case given; for subsequent cases, respondents were told that "All the facts are the same as in the previous question, except that . . ." In addition to marital status, the series of eight vignettes varied the partners' relative earnings (and therefore their relative contribution to the current wealth) and their contribution to domestic chores. In one "unequal earners" variant, it was said that "*Adam, a college graduate, generally earned more than Eve, who did not graduate from college. At the time of their separation, Adam earned about \$6,000 each month in a management position, while Eve earned about \$2,000 each month as a retail clerk.*" A second "equal earners" variant stated instead that: "*They usually earned about the same income as one another during most of their*

<sup>20</sup> The vignettes were presented in a systematically varying or counterbalanced order, and all results reported here aggregate over these orders.

*relationship, and right now they are each earning about \$4,000 a month.*” When their contribution to domestic chores was unequal, the vignette said: “While the children were young, Eve spent more time than Adam taking care of them (although Adam was clearly an involved father), and she also did most of the housework.” When their contributions were equal, the vignette said: “They shared parenting duties and housekeeping chores pretty equally during their marriage.” Thus, the factors that were varied within subjects constituted a  $2 \times 2 \times 2$  factorial: with two values each for marital status (married vs. cohabiting), earning (unequal vs. equal), and caretaking (also unequal vs. equal). This factorial thus produced the eight different vignettes presented to each respondent. When one spouse was portrayed as earning more, either the other spouse did more domestic chores or their division of domestic chores was equal. When one spouse was portrayed as contributing more to domestic chores, either the other spouse earned more or their earnings were equal.

The examples just described portray Adam as the higher earner when the partners’ earning were not equal and describe Eve as the primary parent and housekeeper when their domestic contributions were not equal. However, these gender roles were reversed for some respondents. Gender was thus a fourth factor, investigated in a between-subjects design. For example, a separate group of respondents received the same  $2 \times 2 \times 2$  factorial of eight questions except that the italicized sentence quoted earlier, which states that Adam was the higher earner, was changed in all the vignettes by replacing “Adam” with “Eve.” Similarly, for another group, “Eve” was changed to “Adam” in the sentence stating that Eve spent more time than Adam taking care of their children and doing housework. We varied these gender depictions between subjects, rather than within subjects (as we did other factors), because of the concern that some respondents who were in fact inclined to respond differently when genders were reversed might mask that view in a within-subjects design that asked them about both gender configurations, because it would direct their attention to the fact that we were interested in learning whether gender affected their answers. The concern was that some respondents, if thus made self-conscious about this question, might then conform their answers (but not their true beliefs) to a gender-equality principle they perceived as socially expected (or “politically correct”). But we wanted to know what their true beliefs were, not the beliefs they may have thought they were expected to have.

Each vignette concluded with a single question for the respondent: “What do you believe is a fair division of the \$300,000 they have?” Respondents answered by circling a number from 1 (all to Eve) to 7 (all to Adam); 4 indicated equal division. (For vignettes in which Eve was the higher earner, the scale was reversed so that 1 was “all to Adam” and 7 was “all to Eve.”)

For the vignette in which Adam and Eve were equal earners, had married, and had taken equal responsibility for their now-grown children, it is difficult to see a basis for choosing any answer other than an equal division of the couple’s property when they divorce. Our respondents felt the same way, as 97.1 percent chose “4”–

“equal division.” The proportion was virtually the same, however (96.4 percent), if the otherwise identical couple had cohabited but not married. An equal-contributing couple together for twenty-two years and described as living together “just as if they were married” is, of course, about as strong a case as one could construct for treating cohabitants the same way as a married couple. If we aggregate all the equal-earner, equal-child care vignettes, whether married or cohabiting, the mean response is 4.01 – virtually exactly equal. We can take this as our baseline case. The question, then, is whether our respondents moved away from this baseline of equal division if told that the partners’ contributions, financial or nonfinancial, were not equal – and whether any such inclination to favor the greater contributor might be stronger when the couple had not married.

Figure 9.5 presents the *mean* response of the indicated group of respondents to each indicated vignette. Our baseline case is the first bar at the far left of Figure 9.5. The additional bars are cases for which statistical significance was found. Numbers higher than 4 indicate a larger share of the property to the partner who earned more: Adam, in the cases with the conventional fact pattern; Eve, in the gender-reversal vignettes.

Notice that, although some bars vary from the baseline result of 4, they do not differ very much. The highest mean response is 4.32; the lowest is 3.92. Our comparatively large N allows the detection of relatively small experimental effects. Because they are statistically significant, we discuss them, but their small size must be kept in mind. A mean response could be close to 4 because almost all respondents chose 4 or because different subgroups departed from equal division, but in opposite directions. The former is generally the case in these data, although the discussion that follows notes an exception for certain vignettes in which male and female respondents answered the questions differently. We found no other demographic characteristics that interacted with our vignette variables, and respondent gender interacted only in the cases we note.

The first group of bars, on the left side of Figure 9.5, show results for the vignettes in which one parent earned more than the other, but they split domestic chores equally. One can see a small shift toward allowing more property to the higher earner, with an overall mean of 4.22. Moving right to the first *pair* of bars, we see that the inclination to award the higher earners more property was significantly<sup>21</sup> greater where the partners were not married (4.28) than when they were (4.17). Put another way, the lower earner was treated a bit better when the partners were married, receiving a small “marriage premium” in the property allocation. The next pair of bars reveals that male respondents were more likely to favor the higher earner than female respondents, as their overall mean for these vignettes, 4.32, was significantly<sup>22</sup> greater than the female respondent mean of 4.13. Finally, we see that the respondents

<sup>21</sup>  $F(1, 475) = 15.00, p < .001.$

<sup>22</sup>  $F(1, 475) = 8.34, p < .01.$



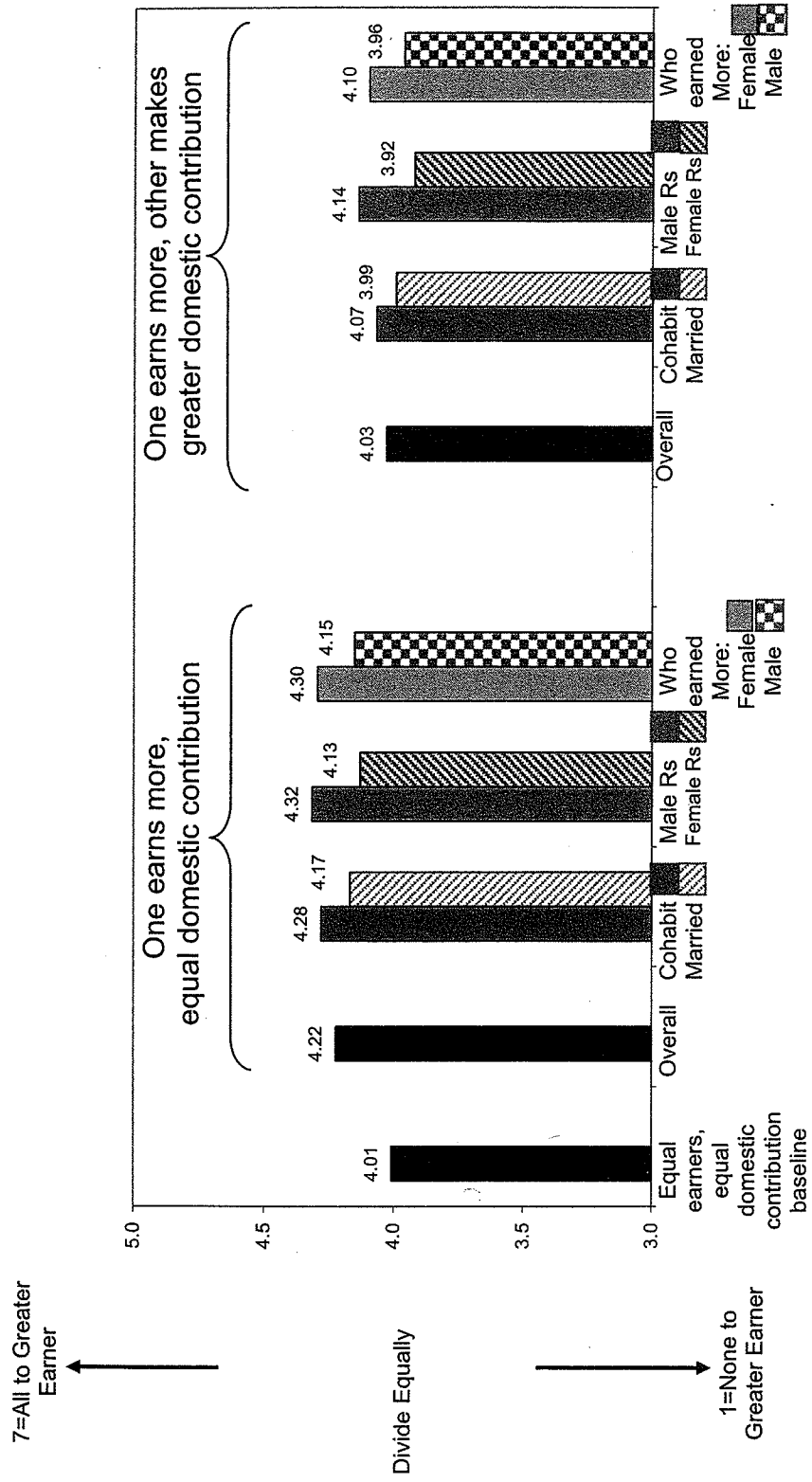


FIGURE 9.5. Division of property, by relative earnings and domestic contributions, marital status, and respondent's gender

overall were more inclined to favor the higher-earning female partner (4.30) than the higher-earning male partner (4.15).<sup>23</sup> Note that while respondent gender mattered for the unequal earnings vignette – as shown, men favored the higher earner more than did women – there was no interaction of respondent gender with marital status. So male and female respondents both averaged a small marriage premium for the lower earner, and the size of their premium did not differ.

The group of bars on the right side of Figure 9.5 show results for the case in which one spouse earns more, but (unlike the group on the left of the figure) the other one performs a larger share of the domestic tasks – what one might call “reciprocal contribution” cases. There is a small marriage premium in these cases as well, as shown in the first pair of bars: the partners were awarded almost exactly equal shares of the property (mean of 3.99) when they were described as married, but the high earner had a small premium when they were not (4.07).<sup>24</sup> Of more general interest, however, is the fact that the means for this group of bars are generally closer to 4 than are the means in the first group; the small premium received by the higher earner is even smaller for cases on the right side of the figure than for cases on the left side. So, it seems our respondents believe that one spouse’s greater financial contribution can be offset by the other’s greater domestic contribution. Indeed, the overall result for reciprocal contribution cases – a mean of 4.03 – is essentially the same as the overall result for the baseline case in which the parents earned the same amount and also contributed equally to domestic chores (4.01).

Yet these similar overall results were reached through different routes. The percentage of our respondents who actually chose equal division exceeded 96 percent in the baseline case, but fell between 66 percent and 78 percent (depending on other vignette facts) in reciprocal contribution cases. That is, somewhere between about a quarter to a third of our respondents did not believe equal division appropriate in reciprocal contribution cases. The respondents’ overall mean nonetheless remained at about 4 because this dissenting group was about evenly divided between those who counted the greater financial contribution more and those who counted the greater domestic contribution more.

Further insight into this phenomenon is gained by looking at the two pairs of bars at the right end of Figure 9.5. The first pair compares female and male respondents; the second pair compares the mean response of *all* respondents in the case in which the man earned more, to the case in which the woman earned more. Male respondents gave higher earners a larger share than did female respondents in reciprocal contribution cases overall (4.14 to 3.92),<sup>25</sup> and respondents overall awarded the female higher earner a larger share (4.10) than they awarded to the male higher

<sup>23</sup>  $F(1,475) = 5.00, p < .05$ .

<sup>24</sup>  $F(1,475) = 8.89, p < .01$ .

<sup>25</sup>  $F(1,475) = 11.07, p < .001$ .

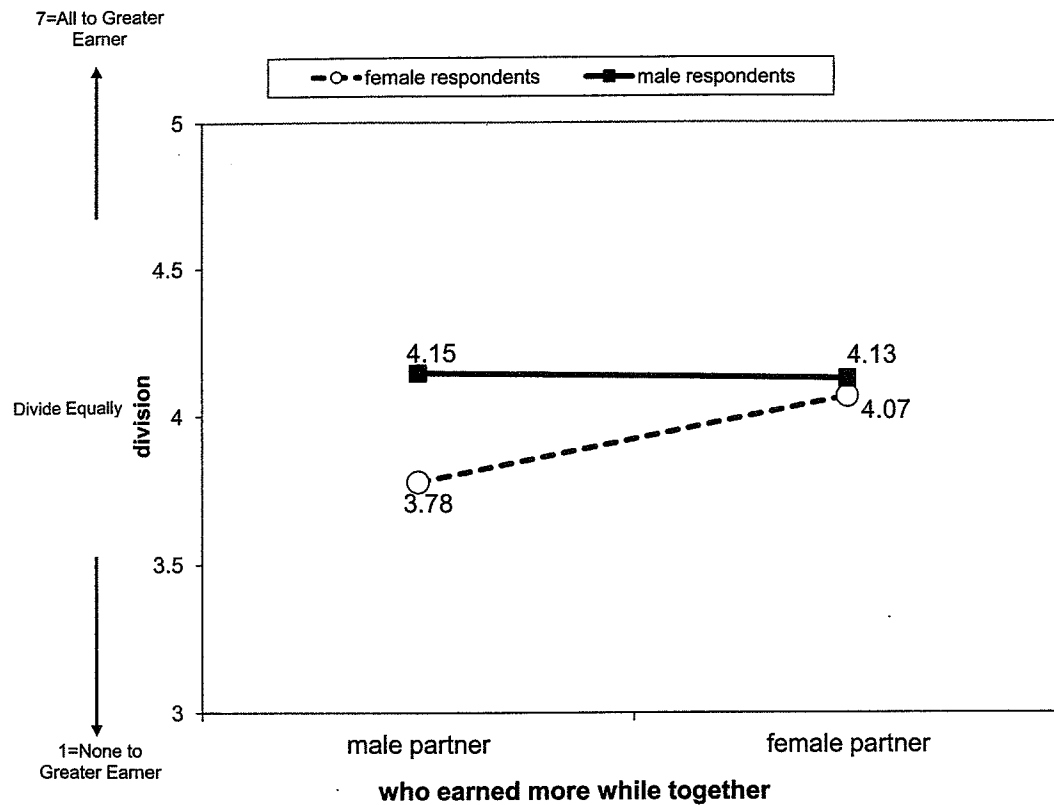


FIGURE 9.6. Division of property, interaction of who earned more with respondent's gender, in reciprocal contribution vignettes

earner (3.96) in reciprocal contribution cases.<sup>26</sup> One might guess that at least some respondents were not inclined to give the lower-earning male partner as much credit for his disproportionate contribution to domestic tasks as they were willing to give the lower-earning female partner, perhaps not accepting at face value the experimenters' description of his contribution (which was of course identical to the description of female partners who were the primary domestic contributor).

Of particular interest, however, is the fact that, unlike in other cases, there was a significant interaction of the two gender effects. As shown in Figure 9.6, male respondents treated the case in which the man was the higher earner essentially the same as the case in which the woman was, slightly favoring the higher earner in both cases (means of 4.15 and 4.13, respectively). Women respondents, however, on average favored the *woman*, whether or not she was the higher earner, in both reciprocal contribution cases: both female higher earners (4.07) and female partners of the male higher earners (3.78) did better than their partners. The mean male response treated the female higher earner (4.13) better than did the mean female response (4.07), as the greater inclination of men to favor the higher earner was gender-neutral.

In results not shown in Figure 9.5, there was a slight but significant tendency for our respondents to favor the partner who made more domestic contributions while their earnings were equal, and in this case there were no significant differences by either the respondent's gender or the marital status of the couple in the vignette.

Our single most powerful finding is our respondents' general and strong inclination to divide assets equally. Combining the results of all the vignettes considered by all the respondents, they chose equal division 82 percent of the time. Other factual variations we also investigated, but do not report in this chapter (concerning the amount of property and claims of marital misconduct), revealed the same reluctance to depart from equal division.

We may have inadvertently pushed our respondents toward equal division by our choice of the basic fact pattern. One can imagine other cases in which their inclination toward equal division might have been weaker, for example, those involving a shorter relationship or different assets, such as stock shares one of them received from his or her employer that became quite valuable.<sup>27</sup> Perhaps the factors that pushed respondents in our study away from equal division might have had a larger effect against such a different factual background. Marital status, then, might have also mattered more in those cases. On the other hand, it would have to have mattered a lot more to have mattered very much. Nor is there any obvious reason to think that the relative importance of the different factors we investigated would change with such factual changes. For example, marital status mattered less to our respondents than did the gender of the higher earner and had less effect on the results than did the gender of the respondent. In short, these data suggest that our respondents believe marital status is relevant in thinking about the allocation of property when intimate partners separate, but they do not believe it is particularly more important than other factors and would not give it the special emphasis that it currently receives in American law. We note that this also seems to be the case in England, where the law also gives no rights in accumulated property to an unmarried cohabitant, but the public believes it *should*.<sup>28</sup>

<sup>27</sup> The possibility that some of our respondents might have assumed that the partners purchased the home in some form of joint title (even though we did not state that) could also have pushed them in the direction of equal division, although that would not necessarily be the legal result; a co-owner who paid more than half the carrying charges (mortgage, taxes, etc.) is entitled to reimbursement by the other owner in an accounting or partition action when they separate (Dukeminier & Krier 1998:359). Unequal financial contribution can establish a correspondingly unequal ownership interest in property held jointly, but that result is more likely if the parties hold title as tenants in common rather than as joint tenants (for which a stronger presumption of equal ownership will arise). "[T]he court may consider the fact the parties have contributed different amounts to the purchase price in determining whether a true joint tenancy was intended. If a tenancy in common rather than a joint tenancy is found, the court may either order reimbursement or determine the ownership interests in the property in proportion to the amounts contributed." *Milian v. De Leon*, 181 Cal. App. 3d 1185, 1196, 226 Cal. Rptr. 831, 837 (1986). We doubt, however, that many of our respondents would be aware of, much less have considered, such property-law details.

<sup>28</sup> Perhaps remarkably, two-thirds of the British public believes an unmarried woman who has lived with a partner for only two years should have the same financial rights as a married woman to a house they

## DISCUSSION

We have offered a sample of results of experiments that seek to learn what facts people believe matter in determining the legal obligations intimate partners have to one another when their relationship ends. Asking respondents to decide cases provides a truer and more nuanced test of their values than can be obtained by asking only general questions about the values themselves. As law teachers know well, people do not often think carefully about a principle until they apply it to decide a case. Asking respondents about cases nonetheless has some unavoidable limitations. On one hand, we did not give our respondents principles to apply because we wanted to learn the principles *they* believe important. On the other hand, what we learned about the principles the respondents used was necessarily affected by the facts we gave them. Had we not systematically varied the marital status of the couples in our vignettes, we could not have investigated whether or how marital status mattered to our respondents' decisions. But it is always possible that factual variations we did not investigate would have interacted with marital status in important ways our current data do not reveal.

The data nonetheless offer some clear messages about our respondents' values. They care a lot about financial inequality and a lot about children. Consider inequality first. Their overarching preference for equal division in the allocation of property is only one example. They also want alimony and child support awards to reduce living-standard disparity between households rather than reserving them to cases where they are needed to ensure that a claimant does not fall below some minimal living standard. And they would reduce living-standard disparity more aggressively than does current U.S. law. While available data do not allow us to make a definitive comparison between our respondents' award rate and the award rate in judicial rulings on alimony claims for cases with comparable facts, they do suggest our respondents would award alimony in more cases than do the courts.

Another one of our studies, not fully described here, compared our respondents' child support awards to the awards called for in current state guidelines and made the same point more clearly. That study (Ellman, Braver, & MacCoun 2009) used vignettes with three different incomes for the mother and father. It found that our respondents favored child support amounts *lower* than the typical guideline result at high maternal income and amounts *higher* than the typical guideline result at low maternal income. This very consistent and systematic pattern would thus reduce living-standard disparity between parental households across all the income combinations we asked about more than do existing guidelines.

Our respondents' approach to child support also reflects their apparent concern for the well-being of children; their approach would increase support amounts for

lived in together but which he had bought in his name alone three years before their relationship

the cases in which the children's living standard depends on it while reducing them for cases in which it does not. Put another way, our respondents were more inclined than current law to require financially capable fathers to pay support amounts big enough to have a large impact on their children, but less inclined to order low-income fathers to pay amounts burdensome to them but too small to be important to their children. Similarly, our respondents were most inclined to award alimony when the claimant was also the primary custodian of the couple's minor children, and they did not make lower awards in those cases even though they were told the dollar amount of the child support award the claimant would receive.

Our inquiry into the importance of marriage to our respondents takes place against these background values; what we learned is that they care about marital status, but they care more about financial inequality and about children. That means that marriage is a brighter line in law than in the intuitions of lay respondents as to what a fair law would provide. So, for example, a small minority of our respondents gave the married lower-earning partner a slightly larger property share than they would give the cohabiting one, but this tendency was swamped by the much more widely shared commitment to treat the two types of intimate partners equally. And while more of our respondents were willing to favor the married partner over the unmarried one with respect to alimony claims, most of that marriage premium disappeared when the claimants had young children, which is of course quite different than current law. When our respondents did make an alimony award, its *amount* was not much affected by marital status or anything else beside the partners' incomes (which provide the main measure of their financial inequality). The mean child support amounts that our respondents set for married claimants were higher than their means for the unmarried – further evidence that they believe marriage matters. But the fact that their entire child support schedule is elevated, so that low-income unmarried claimants would receive higher child support awards than current law allows married claimants, shows their focus is at least as much on children and equality as on marriage.<sup>29</sup> While marriage seems to have mattered to our respondents, the presence or absence of a relationship also mattered, as shown by the higher support awards they allow cohabiting couples as compared to those with no relationship beyond a brief sexual liaison.

Our overall conclusion, then, is that while our respondents certainly give marriage weight in thinking about obligations between adult partners, they do not give it the overarching weight it often receives in American law. They believe intimate partners can acquire legal obligations to one another without marriage as well as from marriage. They see marriage as a relevant factor but not as a qualifying condition.

So how would the law change if it were revised to be more consistent with our respondents' values? Given all the variables we necessarily could not test, we cannot

<sup>29</sup> Compare the support amounts, e.g., in Figure 9.4 with the support amounts for the same parental incomes found in the Iowa guidelines and set out in Ellman, Braver, and MacCoun (2009) at table 3.

give a definite answer to that question. But we can make a pretty good guess. There would be a strong presumption that property acquired during any long relationship that produced children should be divided equally between the partners, whether or not they were married. We would guess that they would favor the same result even if there were no children, but our data do not directly address that variation. The fact that, when there is financial disparity between the separating partners, more than a third of our respondents would allow alimony after relationships of only six years' duration, married or unmarried, leads us also to guess that most would also divide accumulated property equally at the end of relationships considerably shorter than the twenty-two years we asked about. As for alimony itself, most of our respondents would likely be comfortable with a rule that presumed it should be allowed when (1) there is a substantial financial disparity between the partners, *and* (2) the claimant had primary responsibility for the couple's minor children *or* the couple had been together for some minimum period of time that might be longer if they had not married than if they had. They would base the award amount primarily on the size of the income disparity. Finally, the revised law would require higher-income obligors to pay more child support than they now do, whether they were married to the mother or not, but it would not raise the child support amount as much if they were not married, and might not raise it at all if the parents had no relationship beyond a short sexual liaison.<sup>30</sup>

Marriage would matter in such a revised set of rules, but differently than it does now. Something similar might be said more generally about the relationships of young people today: formal marriage (as distinct from living together) matters to them, but perhaps not quite so much as it did for their parents or grandparents. In that sense, the legal changes our respondents seem to support are not only (we would say) interesting and thoughtful, but perhaps also more compatible than current law with how people live their lives today.

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<sup>30</sup> Oddly, while raising the amount of child support significantly reduced the alimony award rate for

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