Lay Intuitions About Family Obligations: The Case of Alimony

*Ira Mark Ellman and Sanford L. Braver**

Most people have a sense of obligation to family members that is more powerful than the law in compelling compliance with its demands. When families dissolve, however, the power of such nonlegal norms often dissolves as well. The question then becomes what the law should require in their stead. This Article is part of a larger series of studies that have examined this question by asking what citizens believe the law should demand, using surveys of persons called to jury service in Tucson, Arizona. Respondents are asked to imagine they are the judge charged with deciding a series of cases in which the facts are systematically varied so as to reveal the implicit principles that survey respondents employ in deciding them. Previously reported results in this project have examined studies of the amount of child support that people believe appropriate, and how they believe child custody disputes should be resolved. This study examines lay views about alimony. It finds considerable divergence between American law in practice and the views of American citizens as to what the law should be.

Survey respondents were willing to award alimony considerably more often than the law now does. More clearly, in deciding whether to allow an alimony award, they care most of all about the claimant's responsibility as primary caretaker of the couple's minor children, to some extent (but noticeably less) about the partners' marital status and their relational duration, and very little at all about the claimant's history of having cared for the couple's now-grown children. Moreover, the way these factors affect our respondents' judgments about alimony are not very dependent on who they are. Our respondents did vary among themselves, of course, in the frequency with which they allowed alimony, but they varied relatively little in how factors such as marriage, relational duration, the presence of

* College of Law and Department of Psychology, Arizona State University.

minor children or the history of care for now-grown children affected their judgments.

The citizen consensus reflected by these patterns differs, however, from the prevailing legal rules, the views of many scholars, and the recommendations of the American Law Institute. This striking discrepancy is interesting although not always surprising. Our respondents' willingness to award alimony to non-marital partners, for example, is consistent with the law of some other Western countries, even if not with American law, suggesting perhaps that it is American law, not our respondents, that is peculiar. Perhaps it is also understandable that our respondents seem more concerned with the welfare of the couple's current minor children than with addressing perceived inequities in the current economic circumstances of the adult partners. In any event, the views of our respondents pose a challenge to policymakers. Given the dearth of theoretical justification for current American practice, its rejection by American citizens seems all the more telling.

Introduction

Most people feel obligations to their family, and assume their family members feel the same toward them. Even when irritated or frustrated by the needs of those close to us, we often help nonetheless. One reason is that our own sense of wellbeing is often tied inextricably to that of our families'. If our children are ill, despondent, unsuccessful, or unhappy, then we are troubled as well. Successful marriages may be built on the same emotional ground: We care deeply about the welfare of our spouse, and we expect our spouse to care deeply about ours, in a way that goes beyond the ordinary empathy we feel for those around us. These feelings of family obligation may be expressed in terms of duty, but it is different than the duty that, for example, a lawyer feels toward a client. We may have internalized the standards of our profession, but they are still grounded on formal documents that are the ultimate authority for establishing their bounds. Similarly with contractual duties. That does not mean we never do more than our contract or profession requires: A sense of decency or propriety or reciprocity may lead us to offer more than the rules say we owe. But in these cases we are likely to feel we have a choice about whether to extend ourselves in this way. By contrast, we may have no sense of choice about meeting family obligations, even though no formal or legally binding code says what they are.

Although the forces that drive our sense of family obligation are largely nonlegal, they are very powerful — more powerful, probably, than law can ever hope to be in influencing our daily social interactions. Nonetheless, those forces sometimes fail, and legal intervention in the relationships of family members may then be needed. That happens especially when families explode or dissolve. The theoretical basis for legal intervention then becomes important, but setting it out presents a continuing problem. Obligations that are created in the first instance by law, or whose primary source is law, necessarily come with some underlying theoretical apparatus that purports to explain them. Family obligations are different. No jurisprudential theory exists to explain or justify the silent rules that govern most family relations, or to explain how or why they may vary among societal subgroups. The emotions and social expectations that compel people to care about and for family members do not easily translate into principles setting sensible rules for the law to apply when those emotions and expectations fail. Indeed, it would be a mistake to expect the law to replace the faded ties of affection. It must serve some different and more limited role. But what? The theoretical challenge is difficult. Even though most people believe that fulfilling family obligations is an essential component of decent and moral behavior, literature offering a reasoned explanation of the boundaries of our family obligations, or reasons for them, is scarce.[1] It is then yet another step to explain why or when such moral duties should become enforceable legal obligations.

The difficulty of fashioning a fundamental theory explaining the law of family obligations explains its absence, even for relatively non-controversial obligations such as the duty to support one's children.[2] More contested obligations, such as the duty, under the rubric of alimony, to continue to share income with a former spouse, are certainly no easier to explain. One of us has tried twice to set out a rationale for a relational obligation akin to alimony that arises from marriage-like relationships of sufficient duration,[3] and while those efforts have drawn attention they have not been universally admired. Others have looked to contract ideas as the basis for imposing

---

1 An admirable and impressive effort, however, is found in Samuel Scheffler, Boundaries and Allegiances (2001).

2 *See, e.g.*, Scott Altman, *A Theory of Child Support*, 17 Int'l J.L. Pol'y & Fam. 173 (2003); Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?*, 66 Mod. L. Rev. 175 (2003).

3 American Law Institute (ALI), Principles of the Law of Family Dissolution: Analysis and Recommendations ch. 4 (2002) (Ira Mark Ellman, Chief Reporter for the Principles, had primary responsibility for this chapter); Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989).

continuing *inter se* obligations on former intimate partners,[4] but it is difficult if not impossible to find in ordinary contract principles an explanation for the alimony obligations the law has long imposed on some former spouses. Moreover, a contract approach would leave most cohabitants with no claim[5] — a result consistent with prevailing American law but not the law of many other Western democracies.[6]

This Article is one installment in a larger project that tries a different route altogether. It does not attempt to find a rationale for family obligation — or the abandonment of family obligation — in high theory, but instead in the norms we can discern ordinary people employing when they are asked to think about the legal obligations former family members should have to one another. Prior work in this project has uncovered insights into how people think about child support and child custody.[7] The study reported here examines how they think about alimony. It asks whether ordinary citizens have any common understanding of the principles that ought to govern alimony claims.

We conduct that inquiry by giving our lay respondents, a representative cross-section of citizens awaiting jury duty in a southwest jurisdiction in the United States, a series of case vignettes. We ask them what they would decide if they were the judge in the case applying whatever legal principles

---

4 For arguments that contract is a useful way to think about marriage in general and alimony in particular, see Margaret Brinig & Stephen Crafton, *Marriage and Opportunism*, 23 J. Legal Stud. 869 (1994); for a reply to this argument, see Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. Ill. L. Rev. 719, 742-47. For more general claims for a contractual view of marriage, see Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998); for a more general argument against thinking about relational obligations in contract terms, see Ira Mark Ellman, *"Contract Thinking" Was Marvin's Fatal Flaw*, 76 Notre Dame L. Rev. 1365 (2001).

5 Ellman, *supra* note 4.

6 Cynthia Grant Bowman, Unmarried Couples, Law, and Public Policy ch. 5 (2010).

7 Sanford L. Braver, Ira Mark Ellman, Ashley Votruba & William V. Fabricius, *Lay Judgments About Child Custody After Divorce*, 17 Psychol. Pub. Pol'y & L. 212 (2011); Ira Mark Ellman, Sanford L. Braver, and Robert J. MacCoun, *Abstract Principles and Concrete Cases in Intuitive Lawmaking*, Law & Hum. Behav. (forthcoming 2012), *available at* http://www.springerlink.com/content/6725852nh784l778/ (by subscription) (an earlier version is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755707); Ira Mark Ellman, Sanford L. Braver & Robert J. MacCoun, *Intuitive Lawmaking: The Example of Child Support*, 6 J. Empirical Legal Stud. 69 (2009) [hereinafter Ellman, Braver & MacCoun, *Child Support*].

they believed right. We then look to see whether their judgments reflect any consistent principles. This method, sometimes called "policy capturing," is different than simply asking them whether they agree or not with any of the statements contained in a list of possible rules. In companion studies we have pursued both approaches simultaneously, which can be valuable in understanding what respondents think. We believe, however, that the best way to find out what they really believe is to ask them how individual cases should be decided.

A series of case vignettes meant to reveal the principles that the respondents believe important must vary the vignette facts systematically along dimensions that are chosen with particular rules in mind. The first task in constructing the vignettes is therefore to choose the principles to investigate. The possibilities are somewhat bounded by the need to avoid rules stated at a high level of abstraction. One could, for example, imagine a court adopting a relatively abstract principle of decision such as "alimony should be limited to cases involving the separation of a couple who have shared their life so fully, and invited such reliance on one another, that one of them can be found responsible for the disproportionate losses suffered at separation by the other." Such a statement of principle could work in a judicial system which, through the accretion of precedent, provides more definite meaning to its key terms. But until the principle's key terms are given more definite meaning, one cannot really fashion vignettes to test the respondents' belief in it. Two respondents who both agree with the principle as stated might nonetheless disagree on the outcome for a particular case because they have different understandings of the principle's meaning. To uncover their actual views would thus require a large set of vignettes designed to reveal their varying understandings of the principle's terms. It is easier, by contrast, to test a rule stated at a more concrete level, such as "the longer the couple has been together, the stronger is the alimony claim." And note as well that this rule could be a way of operationalizing the more abstract principle set forth in the first statement.

The recommendations of the American Law Institute (ALI) (for which Ellman was the Chief Reporter) are probably the best-known effort to set out a relatively concrete set of principles by which to decide alimony claims.[8] The vignettes developed for the current investigation examine our respondents' support for some of the principles urged by the ALI, although the investigation

---

8 The Institute calls its remedy Compensatory Spousal Payments, but it is intended to replace alimony. It adopts this change in name to reflect its view that the remedy should be based upon the loss suffered by the spouse entitled to the payments, rather than by that spouse's need. American Law Institute (ALI), *supra* note 3.

is not limited to them. The Method Part of this Article, below, explains in more detail how the vignettes were developed.

I. Method

A. Participants

Respondents were citizens called to serve on jury panels in Pima County (Tucson) Arizona on two different days. Legal rules allow the county Jury Commissioner to summon citizens to appear on a specified day to serve on the jury panel.[9] The Commissioner combines a list of registered voters with a list of persons to whom the Department of Transportation has issued either a driver's license or a non-driver's identification card. After culling duplicates, the Commissioner picks potential jurors (the "jury panel") from this combined list through a computer-generated random selection process intended to ensure that those selected constitute a representative cross-section of adult citizens in the county. Failure to respond to the summons constitutes contempt of court, punishable by a fine. These rules, along with their rather stringent enforcement, yield less self-selection and bias in the Tucson jury pool than is common in some other jurisdictions. Well over ninety percent of those summoned eventually appear.[10]

---

9 We have used such a jury pool in all our other studies. See, for example, the studies cited in *supra* note 7.

10 By statute in Arizona (Ariz. Rev. Stat. § 21-331) (LexisNexis 2011), those chosen by this process are sent a jury summons and a questionnaire. Answers to the questionnaire allow the Jury Commissioner to determine whether the person is disqualified or eligible to be excused from service. To be qualified one must be over eighteen, a citizen, and a resident of Pima County. In addition, felons whose rights have not been restored and insane persons are disqualified from jury service. Excuses may be granted to persons who are over seventy-five years old, who are fulltime caregivers, who have a medical reason for being unable to serve, who have served on a jury within the prior two years, or who do not speak English. There are no other bases for an excuse. Those who claim they are unable to speak English are called on the telephone and questioned in English to confirm their claim. Those who do not respond at all to the jury summons are sent a Failure to Appear notice three days later. A Failure to Appear notice is required in only ten to twelve percent of the cases, as the rest of those summoned appear on the specified day. The Failure to Appear Notice explains that a failure to respond to a jury summons constitutes civil contempt of court, and that a fine of up to five hundred dollars may be imposed on persons guilty of such contempt. Many of those who do not initially respond appear in response to

After arriving and signing in at the jury assembly room, panel members wait to be called to jury service. They must often wait more than an hour. They received instructions, as a group, from the Jury Commissioner staff about their prospective jury service. Following that presentation, our research assistant asked the panel if, since "they were there anyway," they would voluntarily assist the researchers and the court by participating in a "university-based" survey about alimony. Approximately seventy-five percent of the panel members accepted the invitation and fifty-seven percent of the panel members actually completed the survey form they were then given. Most of the failures to complete the survey — the falloff from seventy-five percent to fifty-seven percent — were the result of the panel member being called to jury duty shortly after beginning.

Of the 331 citizens completing the survey, fifty-eight percent were women, fifty-four percent were married, thirty-four percent had been divorced, and sixty percent had children. Eight percent said they had at some time been ordered to pay child support, but only two percent had been ordered to pay alimony (almost all of these were male); thirteen percent had at some time been the person to whom someone else was ordered to pay child support, but only four percent had received alimony (almost exclusively female). The average age was almost forty-five. The education levels of the respondents were higher than national averages: Only about three percent had failed to graduate from high school, twenty percent had a Bachelors degree, and nearly seventeen percent a graduate or professional degree. The high level of graduate degrees may reflect the location in Pima County of the University of Arizona. Our sample was also wealthier than the national average, with fewer respondents earning less than fifteen thousand dollars (eight percent vs. 14.6 % for the United States) and more earning above sixty thousand dollars (forty-seven percent vs. thirty-nine percent for the United States).[11] They described themselves, on average, as centrist in political outlook, and sixty percent of those who identified a party affiliation chose Democrat.

---

this notice. Telephone Interview with Kathy Brauer, Jury Commissioner, Pima County Superior Court (May 17, 2007).

11 The national figures here were derived from the data reported in Bureau of Labor Statistics & Bureau of the Census, Annual Demographic Survey: March Supplement tbl. HINC-01 (2006), *available at* http://pubdb3.census.gov/macro/032006/hhinc/new01_001.htm.

B. Survey Instruments

The survey instrument contained two sections we shall analyze here.[12] One of these contained the demographic questions providing the information we have just summarized. The other section contained the "scenarios" or vignettes: statements describing a particular marital situation, including spouses' incomes. The introduction to this section explained the nature of alimony and their task as follows:

> 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. These payments were traditionally called "alimony" although many states (including Arizona) now call them "maintenance." 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, 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

12 An additional section contained fourteen attitudinal statements about alimony presented in Likert format (1 = Strongly Disagree to 7 = Strongly Agree). An example is "A spouse should never have to pay alimony after divorce, whether or not that spouse has to pay child support." For space reasons, these results will not be presented here, but in a forthcoming separate report.

> decided the same way. Either is fine. We just want to know 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 whether to require alimony in the case, and trying to decide it fairly. To do so, you might try putting yourself in the shoes of the man or the woman, or both of them, or imagine a loved one in that position.[13]

The participants were then asked to respond to twenty-four scenarios or vignettes. In each, a couple identified as "Adam" and "Eve" (each forty-five years old) was described as "now separating." "They both decided their relationship wasn't working for them anymore and agreed to separate. They have two cars, and they'll each get one when they separate. They don't have a lot of other property or savings, but they'll divide what they have equally between them."

The vignettes gave the husband's "take-home pay" as either six or twelve thousand dollars per month, crossed with wife's take-home pay of either one or three thousand dollars per month. There were thus four different combinations of spousal income. There were also six different "Cases" and each case was repeated with each of the four income combinations.[14] The six Cases (identified as Case A to Case F), crossed with the four income combinations, generated the twenty-four distinct vignettes. 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 (for the latter, the ellipsis above was filled in with one of

---

13 In this study we did not reverse genders for any of our scenarios. It would obviously have been interesting to have results from such a gender reversal, but including an additional variable of the gender of the obligor would have required a large increase in the number of respondents, assuming we wished to repeat the analyses we present here for each gender condition. The alternative of aggregating the analyses across gender conditions might have altered the results, but in unknown ways, so that aggregated analyses would not provide a useful measure of how our respondents would decide the great majority of cases actually put before courts, in which alimony claims by men against women are relatively uncommon. We have in fact done gender reversals for other studies in this project (concerning property allocation and child support), but we have not yet published those results.

14 The order of these incomes was counterbalanced in four orders: a) 12-1, 12-3, 6-1, 6-3; b) 12-1, 6-1, 12-3, 6-3; c) 6-3, 6-1, 12-3, 12-1; or d) 6-3, 12-3, 6-1, 12-1. All results below are reported across all these orders.

the two numbers); 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" (in this condition, it also said that: "When the children were younger, Eve took primary responsibility for them")); or "Young Children" (the vignette specified that there were two children now "4 and 6 years old"). With Young Children, the scenario also mentioned that

> Eve has taken primary responsibility for the children. She is sure to leave work by 4:30 every day so she can pick the children up from day care, and she takes off from work if the children are sick or there are other emergencies. Eve will have primary custody of the children when they separate, and Adam will pay Eve [$XXXX] each month in child support.

The dollar amount of child support varied with the parental incomes stated in the vignette. For half the respondents, the child support amount for any particular combination of parental incomes was based on the amounts called for under the then-current Arizona Child Support Guidelines. For the other half, it was based on the median of child support amounts jurors in an earlier study had chosen as appropriate for that family configuration. The child support amount favored by our median juror respondent was consistently higher than the child support amount specified by the Arizona guidelines.[15] Because there were three Children conditions, there were actually twelve possible cases in total (two Marital Status X two Duration X three Children), although only six Cases were given each respondent. For half our respondents, Marital Status varied between subjects, rather than within subjects (we

---

15 The relevant Arizona Child Support Guidelines were those adopted for use beginning in January 2005. Arizona revised its guidelines in 2011. While we have not yet separately reported our results from the surveys asking about child support for this particular family configuration, that survey study, from which these medians were calculated, employed methods identical to those we have described in a related study of juror beliefs about child support amounts for a different family configuration. *See* Ellman, Braver & MacCoun, *Child Support*, *supra* note 7. The child support amounts specified in the vignettes in this study are shown in the following table. Each survey form used amounts that were based on either the Arizona guidelines, or the median amount favored by the jurors in our prior study, for all vignettes.

Parental Incomes: CP/CP	6,000/3,000	6,000/1,000	12,000/3,000	12,000/1,000
Guideline support amounts	854	998	1,365	1,517
Median of prior Jurors	1,200	1,600	2,550	4,000

interchangeably describe "within subjects" as "repeated measures"), and for the other half Duration varied between rather than within subjects.[16] For example, where Duration varied between subjects, the within-subject design was a two (Marital Status) X three (Children) X two (Adam's income) X two (Eve's income) factorial, yielding twenty-four different vignettes, but half the respondents had survey forms that gave the relationship duration as twenty-two years in all the vignettes, while the other half received forms giving the relationship duration as six years for all vignettes. Where Marital Status varied between subjects, Duration varied within subjects.

After describing the facts, each vignette asked the respondent: "Should the court require Adam to pay alimony to Eve? Tell us what you think by checking the line below that reflects your view." Then they checked one of the following two alternatives:

> *No*, Adam should *not* have to pay any alimony to Eve.
> OR
> *Yes*, Adam *should* have to pay alimony to Eve.
> Those answering "Yes" answered a further question[17]:
> *How Much?* Adam should pay Eve $_____ a month.

II. Results

We first analyze the factors that influence *whether* our respondents award alimony, and then consider the factors that influence the *amount* of the award.

---

16 This choice was made to increase the generality of any findings. In this type of survey, context effects often play a large role, that is, in answering one question, respondents may be affected by the other questions they have previously answered. One can detect the presence of such effects by varying a factor both between and within subjects, *see* Sanford L. Braver, Robert J. MacCoun & Ira Mark Ellman, Converting Sentiments to Dollars: Scaling and Incommensurability Problems in the Evaluation of Child Support Payments, Paper Presented at the Third Annual Conference on Empirical Legal Studies (Sept. 12-13, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121240.

17 Additionally they were asked the following questions if they answered Yes: "*For How Long?* The payments should continue (pick one below) ___until something important changes, such as their incomes, or Eve's remarriage OR ___until something important changes, but not more than ___ years. (Fill in your choice for the maximum number of years)". These additional questions are not analyzed in the current Article.

A. Whether Alimony Was Awarded

1. Individual Differences Among Respondents

Over all vignettes combined, our respondents awarded alimony in almost exactly fifty percent of the cases. Male respondents gave alimony in forty-four percent of the cases, while female respondents did so in fifty-seven percent, a significant difference, $t(167)=2.42$, $p<.02$. However, there was no interaction of the respondent's gender with any of the vignette characteristics. For example, as we describe below, respondents were more likely to award alimony if the parties had married rather than cohabited, but this was true of both men and women, and this "marriage premium" was no different for women than for men. Similarly, while the presence of children made our respondents more likely to award alimony (as will be described below), the "children premium" was no greater for women than for men.

The age and education of our respondents was also significantly associated with the decision to award alimony. The older the respondent, the more likely she was to award alimony. Indeed, the association of awarding alimony with age was slightly stronger than its association with gender. What is perhaps more surprising is that older people showed no greater tendency than younger ones to favor married claimants over cohabiting claimants — their marriage premium was no greater. The association of education with awarding alimony was weaker than gender or age, but still significant. The pattern of the association was different, however. More educated respondents were more likely to allow alimony, but only to married claimants. Education had no effect on the frequency with which respondents allowed alimony to a cohabiting claimant. So while the marriage premium was greater for the more educated, the reason is that they gave married claimants alimony more often, not because they gave cohabiting claimants alimony less often.

No other demographic characteristic that we asked about had any significant relationship with the decision to allow an alimony award. Among the characteristics that did *not* matter: Self-identified conservatives or Republicans did not award alimony at a different rate than self-identified liberals or Democrats; those who had been married (fifty-four percent of our sample) or divorced (thirty-four percent) were no more or less likely than others to allow an alimony award.

2. Differences in the Vignette Facts

The more important question for the construction of legal rules is how our respondents' judgments were affected by the factual changes we manipulated: Which versions of the vignettes drew a higher proportion of alimony awards?

Before addressing this question, we make a methodological observation that is relevant to our analysis of these results.

Recall from our earlier description in the Method Part that Marital Status and Relationship Duration each varied as a between-subjects factor, but then again as a repeated-measures factor. This complicates the analysis of their effects, because it means there are essentially two experiments, i.e., two versions of the entire study. Both versions use a five-factor design analyzable by Analysis of Variance (ANOVA): Marital Status (two levels) X Relationship Duration (two levels) X Children (three levels) X Male Partner's Income (two levels) X Female Partner's Income (two levels) (the latter three factors were always repeated measures factors). Thus, in each experiment, interaction effects involving up to five factors simultaneously were possible. Fortunately, the *results* were not especially complex. Neither the five-factor interaction, nor any of the five four-factor interactions, was significant in either version.[18]

There were also ten possible three-factor interactions. Of these, six were significant in neither version, and four were significant in one but not the other. There are two choices when significance is found in one analysis but not the other. Perhaps the more thorough (but complex) is to examine the two designs individually to consider whether a reasonable account can be offered as to why one design finds significance but the other does not. On the other hand, the more conservative course is to consider only those factors that are significant in both designs. We followed this more conservative course with both three-way and two-way interactions, given their complexity. Because no three-way interactions were significant in both analyses, we present no more on them. Three of the ten possible two-factor interactions *were* significant in both designs: Male Partner's Income X Female Partner's Income, Marital Status X Children, and Relational Status X Children. Both Marital Status and Children were also significant in both versions as main effects.[19] We report on all these significant results below. We also discuss below Relational Duration as a main effect, significant within subjects but not between subjects. Finally, we report on how the alimony award was affected by the amount of child support, a factor applicable in only the minority of the vignettes in which the couple had minor children.

---

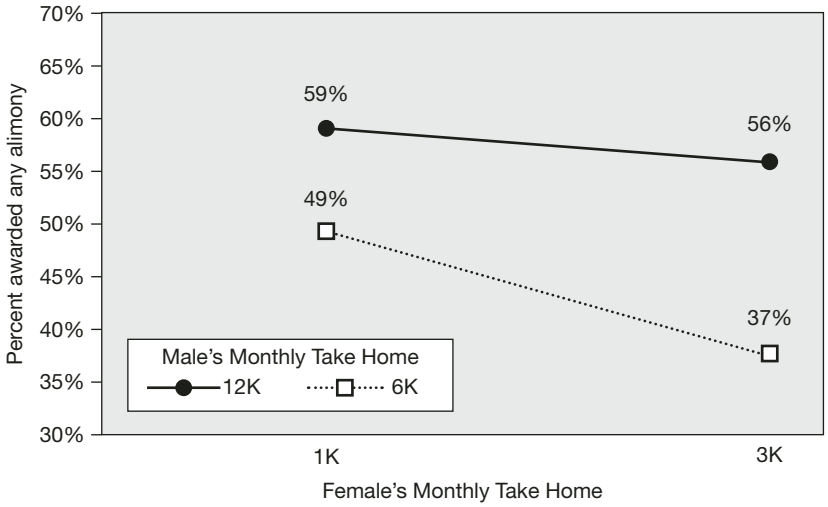
18 An exception is that the Duration X Children X Male Partner's Income X Female Partner's Income four-factor interaction was significant for the Marital Status Between analysis only, but just barely so, at $p<.04$, and only for the Linear trend on Children.

19 Three more two-way interactions were significant in one design only, while the remaining four were not significant in either design.

i. The Two Partners' Incomes

Both partners' incomes were very highly significant ($p<.001$) as *main effects* in both experiments: The percentage of vignettes in which alimony was awarded was higher when the man's income was higher, or the women's income was lower.[20] More importantly, the interaction of the incomes was also significant ($p<.001$). When factors interact it is generally best to observe their joint influence together, rather than focus on the effect of each one separately. The joint effect of these two factors was similar in both versions of the experiment, and is exhibited in Figure 1, which combines the results from both versions.

Figure 1: Percent Awarded Alimony, by Man's and Woman's Income



As illustrated by Figure 1, alimony is awarded more often when the man's income is higher (compare the solid upper line showing the results at $12,000 per month with the lower dashed line showing results at $6000) or when the woman's income is lower (compare the $1000 points on the left with the $3000 points on the right). The two lines in Figure 1 are not parallel, however, illustrating the significant interaction effect, and that the disparity between the two partners' incomes is important. The line for the man earning $6000 a

20 When duration varied within subjects and marriage between subjects, the percentage of vignettes in which alimony was awarded increases from forty-four percent to fifty-two percent as the man's income increases from $6000 monthly to $12,000, and from forty percent to fifty-six as the woman's income *declines* from $3000 to $1000. When duration varied between subjects and marriage within, the corresponding percentages for male income were fifty percent and fifty-seven percent, and for female income, forty-seven percent and sixty percent.

month has a steeper slope than for the man earning $12,000, because changes in the woman's income have a greater impact on alimony claims against the lower earning man. A $2000 decline in the woman's income increases the income disparity considerably when the man earns $6000. When he earns $12,000 there is considerable disparity at either value of the woman's income.

ii. Marital Status

Marital Status was significant as a main effect in both experiments ($p<.001$). Married women received alimony about half again more often than did otherwise identical cohabiting women (sixty-four percent vs. forty-three percent when Marital Status varied within subjects; fifty-nine percent vs. thirty-six percent when it varied between subjects). What is also noteworthy, however, is the high rate of alimony awards for cohabiting women. Our respondents allowed awards in nearly forty percent of the vignettes involving cohabiting women, which may be surprising given not only the nature of the cases we presented (recall that half the cases involved six-year relationships, and there were no children in a third of them), but also the fact that the dominant American rule would not allow alimony awards under these facts in *any* of the vignettes we offered. Eighty-six percent of our respondents allowed an award in at least one of the vignettes involving a couple that had been married, establishing that while individuals may differ over the facts required to justify alimony, there is broad agreement that alimony awards are sometimes appropriate when a couple has been married. Perhaps more surprisingly, sixty-eight percent of our respondents allowed an alimony award in at least one of the vignettes involving a cohabiting couple. A substantial majority of our respondents thus reject the proposition that marriage is a requirement for an alimony award.

iii. Relational Duration

Relational duration was a highly significant main effect when it varied within subjects. Respondents who were asked about *both* longer and shorter duration relationships distinguished between them: They awarded alimony in fifty-two percent of all cases (married and unmarried combined) when the partners had been together twenty-two years, but only forty-three percent when the partners were together for six years, $F(1,131)=33.01$, $p<.001$. The results were different, however, when Relationship Duration varied between subjects: There was almost no difference in the award rate between the group of respondents asked exclusively about couples who had been together for six years, and the group asked exclusively about couples together for twenty-two years (53.4% vs. 53.2%, $F(1,138)=.02$, $p=.89$). Note that the proportion

of vignettes in which alimony was allowed when the couple was together twenty-two years was nearly the same in both experiments (fifty-two percent vs. fifty-three percent); the difference between experiments was exclusively in the proportion of vignettes in which alimony was granted when the couple was together only six years. Those who also considered twenty-two-year couples allowed alimony less often to six-year couples than those asked *only* about six-year couples.

There are many differences between the two experimental designs that could encourage this result. The first is salience: Respondents asked only about couples together for six years may be less likely to consider whether that duration is too short to support an alimony award, than are respondents asked both about those couples, and *also* about couples together for twenty-two years. Moreover, duration is inherently a relative measure: Whether six years is a long or short time may seem difficult for some to say; whether it is shorter than twenty-two years is not. Context is thus likely to make six years seem shorter in the repeated measure design, which invites comparison to the alternative story in which the couple is together for twenty-two years, than in the between-subjects design that does not. One need not choose between the two results here: both are valid. Which one is the answer depends upon the question. On one hand, one can say that half of those asked would consider awarding alimony at the end of a six-year relationship. On the other hand, one can also say that there is more support for alimony when the relationship is longer.

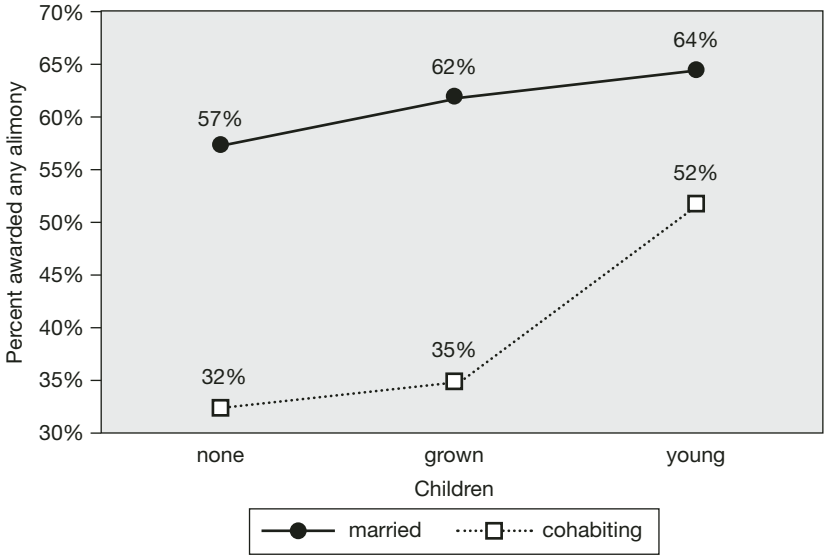
iv. Children

Children were significant as a main effect in both the between- and within-subject analyses. When there were no children, alimony was given in forty-five percent of cases; it rose slightly to forty-eight percent when the children were grown, and more substantially, to fifty-eight percent, when there were young children. Recall that in the young children condition, respondents were told that the mother had *also* been awarded child support for a specified dollar amount, so that their alimony award was in addition to the child support award.

There were also two two-factor interactions involving Children that were significant. Marital Status X Children was not only significant in both experiments, but also produced essentially identical patterns in each. The percentages, averaged over the two analyses, are presented in Figure 2. As noted earlier, marriage also had a significant main effect, and so the solid line plotting the percentages receiving alimony when the couple was married is higher than the dashed line plotting the percentages for cohabiting couples. It can also be seen, however, that the gap between the married and the cohabiting

couples narrows substantially when the couple has young children. This interaction effect is also significant.

Figure 2: Percent Awarded Alimony, by Marital Status and Children

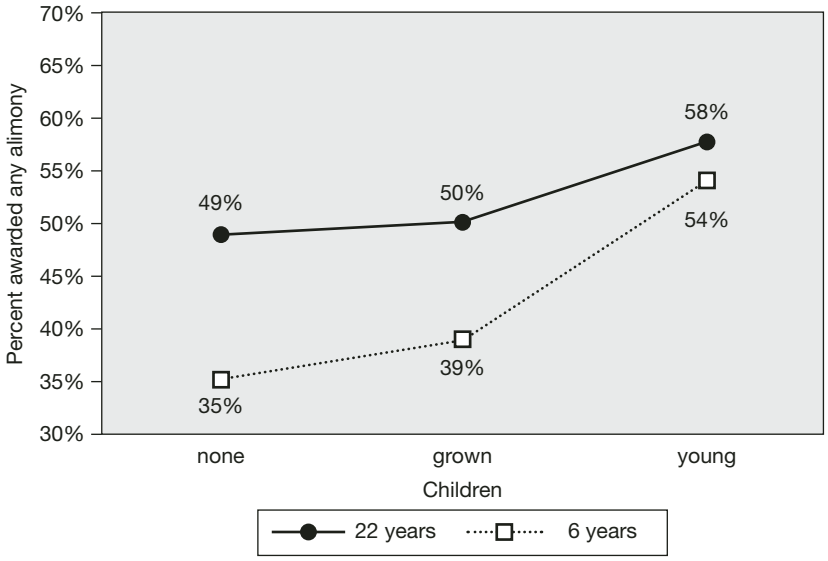


The interaction of Relationship Duration X Children was also significant in both analyses, although the patterns were affected by the fact that Relational Duration was significant as a main effect only when it was within subjects (unlike Marriage, significant as a main effect in both experiments). In the within-subjects experiment, the interaction between Relational Duration and Children, plotted in Figure 3, shows the same pattern as the interaction between Marriage and Children: While longer duration relationships elicited more frequent alimony awards overall, the gap narrowed substantially, and significantly, when there were young children. While the interaction was also significant when Relational Duration varied between subjects, the pattern differed in the way one would expect given the impact of the between-subjects design on the ability of respondents to express their preferred pattern.[21]

---

21 As explained earlier in the discussion of relational duration as a main effect, the reason there was no main effect in the between-subjects design was that the award rate was not depressed for shorter relationships, as it was in the within-subjects design. (The award rate for longer durations was essentially the same in both designs.) The consequence, in the interaction analysis for the between-subjects design, was that the line for six years was higher than in Figure 3, to the extent that it crossed the line for twenty-two years.

Figure 3: Percent Awarded Alimony, by Relationship Duration and Children
(In the Relationship Duration Repeated Measures Analysis)



v. Amount of Child Support Allowed

For those vignettes in which there were minor children, the respondents were told the dollar amount of the child support that would be awarded. Half were told an amount based on the then-applicable Arizona child support guidelines, while the other half were told an amount equal to the median child support award given by the respondents to an earlier survey we had conducted.[22] That survey median was higher than the amount called for under the Arizona guidelines. Table 1 shows how the percentage of respondents allowing alimony differed as a consequence of the amount of child support they were told would be awarded. Only results that were statistically significant ($p<.05$) are presented. Because Relational Duration (six years vs. twenty-two years) had little effect, the results are collapsed across durations. We thus looked at the effect of the child support amount we specified on the percentage of respondents awarding alimony for eight categories of vignettes, the four possible income combinations for married parents, and the four possible income combinations for cohabiting parents. The child support amount we specified had a significant effect in five of those eight vignettes, and those five significant effects are presented in Table 1. It can be seen that four of the five were the four vignettes presenting parents who are married,

22 *See supra* note 15.

whereas the child support amount we specified had a significant impact on the respondents' decision to award alimony in only one of the four vignettes in which the parents were cohabiting. For all five vignettes in which the effect was statistically significant, it was in the expected direction: Alimony was awarded in a lower percentage of the cases when the child support amount was higher. On the other hand, the child support amount we specified had a significant effect on the *amount* of alimony awarded in only one of the eight vignettes, married parents in which the father earned $6000 and the mother earned $3000.[23] In sum, the amount of child support awarded was more important to the alimony decision when the parents were married than when they were cohabiting, and even then affected primarily the decision as to whether or not to award alimony, rather than the amount of alimony awarded.

Table 1: Percent of Respondents Awarding Alimony, for Cases in Which that Percent Was Significantly Associated with the Amount of Child Support Awarded ($p<.05$).

Married or Cohabiting	Dad's Income	Mom's Income	% of Respondents Allowing Award	
			Arizona Guideline CS Amount	Survey Median CS Amount
Married	12,000	1,000	85	60
Married	12,000	3,000	72	54
Married	6,000	1,000	83	68
Married	6,000	3,000	69	52
Cohabiting	6,000	1,000	69	54

vi. Overall Patterns Summarized

Demographic characteristics of the respondents: We previously noted that women awarded alimony in fifty-seven percent of the cases presented to them while men did so in forty-four percent, a thirteen percent difference between the genders. This difference between men and women was not affected by the marital status of the alimony claimant in the vignette, or by whether the couple in the vignette had children. Nor did the marital status of the respondent — single, married, divorced — have any significant impact on the

23 And in this case, a larger alimony award was allowed when the child support award was higher.

proportion of cases in which they allowed alimony. Indeed, age and education were the only respondent characteristics apart from gender that were related to the proportion of cases in which alimony was awarded; older and better-educated respondents awarded alimony in more cases. The relationship of the alimony decision with education was less, however, than with gender; that with age was slightly greater. The impact of the respondent's education was also focused on cases in which the alimony claimant was married; the respondent's education made no difference in the proportion of cases in which cohabiting claimants were awarded alimony.

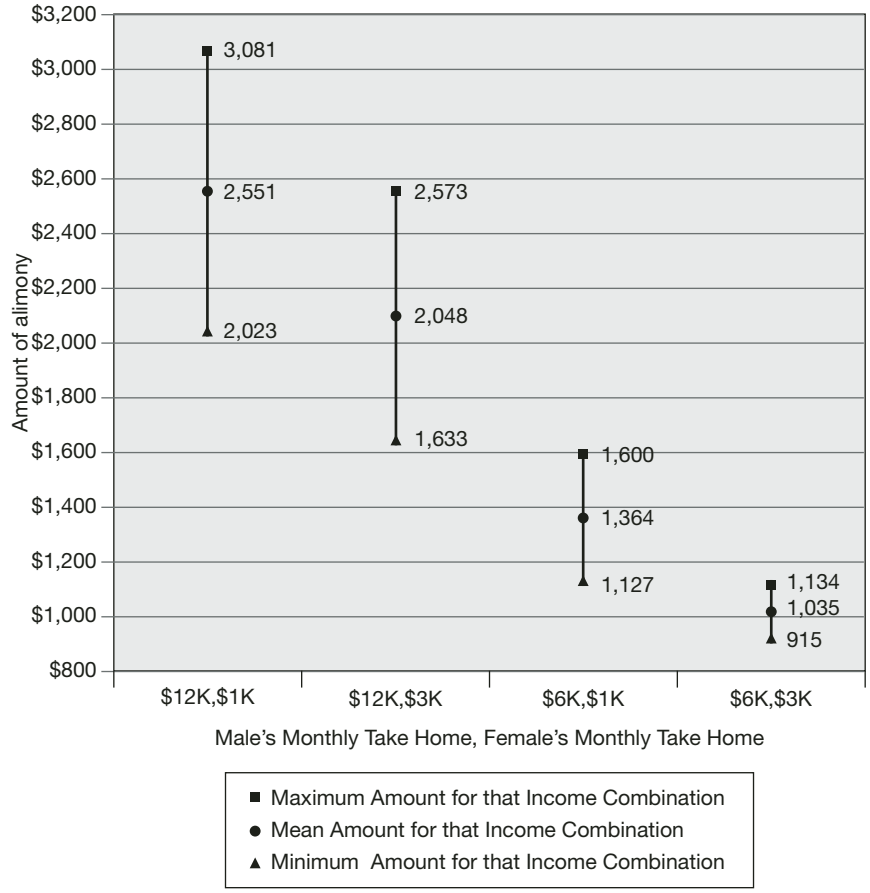
Characteristics of the couple in the vignette: The duration of the couple's relationship, their marital status, and their incomes all affected whether our respondents found an alimony award appropriate when the couple's relationship ended. While our respondents awarded alimony in approximately half of all the vignettes presented to them, that proportion was about five percent higher (fifty-five percent) when the couple had been together for twenty-two years and five percent lower (forty-five percent) for couples who had been together only six years — a difference of ten percent between the two duration groups. Similarly, the difference between the married and cohabitant claimants was about twenty percent (alimony was allowed in about sixty percent of the cases in which the claimant was married, and about forty percent when cohabiting). The difference in the award rate between high and low male incomes was about eight percent, and between high and low female incomes about sixteen percent. Whether there were children was also significant, although the overall impact of Children cannot be summarized in this way because of the interactions of Children with both Marital Status and Duration.

The impact of the significant factors described above was generally additive, such that a married woman was more likely to receive an alimony award than a cohabiting one; a woman married for twenty-two years more likely to receive an award than one married six years; a woman married twenty-two years with young children more likely to receive an award than one with grown children; and so forth. Combining all the conditions most favorable to an award (a mother of young children, married twenty-two years, taking home $1000 per month, having been married to a husband taking home $12,000 per month) yielded the highest percentage of alimony awards of all: seventy-four percent. By contrast, in the fact pattern combining all the factors *least* favorable to an award (a childless woman cohabiting for six years, taking home $3000 per month while her male partner took home $6000 per month), only eighteen percent would award alimony.

B. Amount of Alimony Awarded

The analysis of the amount of alimony awarded was a bit complicated. An overall mean of the award amount obscures the fact that in roughly half the cases no alimony was awarded. It would be more useful, we therefore believed, to compute the average amount awarded by those who believed some award was appropriate. That information, broken down by each partner's income, is presented in Figure 4.

Figure 4: Maximum, Mean, and Minimum Award Amounts for Each Income Combination, When Alimony Is Awarded



As can be seen, the amount was largely determined by the incomes of the two parties. In fact, the male's income accounted for seventy-six percent of the variance in the amount of the award (again, among those who gave any alimony), while the female's income accounted for another eleven

percent. The remaining three factors combined (Children, Marital Status, and Relationship Duration) accounted for only another 3.5%. Thus while all five Factors influenced *whether* our respondents gave an award, only the two partners' incomes had much influence on its *amount*. As an illustration, in the vignettes in which the male was said to bring home $6000 monthly and the female $3000 monthly, the average amount of monthly alimony chosen over all the scenarios (again, for those awarding something) was $1035. The lowest amount for this income combination (found in those cohabiting six years with no children condition) was only a bit less, $915, while the highest was only a bit (i.e. ~$100) more, $1134.

III. Discussion

A. The Decision to Allow Alimony

One can understand the overall pattern of results we found as combining agreement among our respondents on *which* factors matter in deciding whether to allow alimony, with disagreement as to the *threshold value* of each factor that should be required to allow alimony. There was agreement that the incomes of the parents, their marital status, the duration of their relationship, and the presence of children, all mattered. Marriage is of course a binary variable; either the couple was legally married, or they were not. The remaining factors are all in principle continuous, even though we did not sample many different values. The data nonetheless suggest that our respondents are in general more likely to award alimony as the male partner's income goes up, the female partner's income goes down, the relational duration is extended, and when children are in the household. As the value of each variable thus changes, more of our respondents award alimony. Those who require lower threshold values will favor awards in more cases, but most will favor awards in at least some.

B. Individual Differences Among Respondents

Few will find it surprising that women allowed alimony awards more often than men. Melvin Aron Eisenberg has drawn a distinction between neutral areas of law and non-neutral areas.[24] In neutral areas, people do not necessarily imagine themselves as being on one side or the other of potential disputes. In thinking about alternative rules of contract law, for example, most people

24 Melvin Aron Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. Miami L. Rev. 187 (1983).

have little reason to see themselves as either the person seeking to enforce an agreement, or the person defending against an enforcement claim. Family law, by contrast, is not neutral in this sense. Thirty-four percent of our respondents had been divorced, and more than a fifth had been either the obligor or the obligee in a child support order, with women overwhelmingly obligees and men overwhelmingly obligors.[25] (Many fewer had been obligor or obligee in an alimony order.[26]) These demographic variables were not themselves associated with the decision to award alimony. The point is rather that men and women experience divorce differently, and that the possibility of divorce is sufficiently common that even those who have not divorced themselves are likely to have seen the divorce of family or close friends, or to be the child of divorced parents.

What is perhaps more interesting is that while gender mattered, it did not interact with vignette variables such as marital status or the presence of minor children. There was no difference between men and women respondents in the marriage premium or the child premium. So while men and women are different in their threshold values — how much it takes to bring them to decide to favor an alimony award — they are not different in the way they weigh information like marital status or the presence of children. Beyond gender, we found that age and education were both positively associated with the decision to award alimony, although the association with education was not large and was important only in raising the likelihood of an award to a married claimant. Age was as important as gender, perhaps even slightly more, but like gender did not interact with vignette variables such as marital status. It was rather that older respondents were in general more likely than younger ones to allow an award. Perhaps even more surprisingly, the greater inclination of older respondents to allow an award applied equally to spouses and cohabitants. The impact of age could be either a cohort effect or a life cycle effect. Both explanations seem plausible to us, but we have no way to tell whether either or both is correct.[27] These demographic factors do not

---

25 Only four of twenty-nine child support obligors were women, and only two of forty child support obligees were men.

26 Two percent had been obligors, four percent had been obligees.

27 One could speculate that the views of older respondents were formed some years ago, in an environment in which gender roles were more widely accepted and followed than they are today, which might in turn make older respondents more inclined than younger ones to award alimony (cohort effect). Or one might speculate that younger respondents have not yet personally experienced (as have older ones) the kinds of events that make alimony claims more persuasive, such as the birth of children and the resulting tendency (of many couples) to adopt

interact, so that, for example, the correlation between age and the likelihood of awarding alimony is essentially the same for men as for women.[28]

At least as interesting as what did matter was what did not, which was every other demographic characteristic we inquired about. One of us, at least, was surprised by our finding that self-identified conservatives or Republicans allowed alimony at no different a rate than self-identified liberals or Democrats, and even more that this absence of difference was true even as to claims by unmarried cohabitants. The implication is that the value choices involved in deciding on an alimony claim are different than, and not necessarily related to, the value choices associated with political views. Nor did the respondents' income matter. One might have expected higher-income individuals (who are more likely to be alimony obligors), and lower-income individuals (more likely to be obligees) to view these questions differently, but they did not.

While individual differences thus seem important, one must keep in mind that the great majority of our respondents believed that alimony was at least sometimes appropriate. They shifted between allowing and refusing an alimony award in response to factual variations in the vignettes. The interesting question is whether the law's treatment of the shifting vignette facts is consistent with that of our respondents.

C. Impact of Changing Vignette Facts

The confused debate over the meaning of "need" in alimony provisions reflects, in part, two possible understandings of alimony's purpose: to protect a former spouse from poverty, or to protect a former spouse from a large living-standard decline that can occur when the partners no longer share a household, even if the reduced living standard is still above what's needed to avoid poverty. The first purpose would be met through a single objective eligibility standard: Claimants would be allowed alimony if they would otherwise fall below the income required to avoid poverty, at least so long as their former partner had sufficient income to help. This might be called the "poverty" standard. The second purpose requires a more flexible eligibility standard, as even those claimants who earned enough themselves to maintain a satisfactory living standard would be allowed alimony if their former partner earned considerably more. Partner income disparity, rather than the claimant's income alone, would thus be the basis of the eligibility standard if this second purpose is to be served, and we can thus call it the "disparity" standard.

---

somewhat separate family roles, leading to different earning histories (life cycle effect).

28 It is .24 for women and .27 for men.

The potential alimony obligee in our vignettes fell on both sides of this poverty-disparity divide, depending on whether she earned $1000 or $3000 monthly in "take-home pay." Our lower-earning female, at $1000 a month, is near the official poverty guideline, and below the income cap set by most means-tested welfare programs.[29] Our higher-earning female, at $3000 a month in "take-home" pay, is well above the median Arizona living standard.[30] One can thus see that if respondents believed in the "poverty" standard for alimony, they would allow claims by the lower-earning female but deny them

---

29 The official federal poverty guideline for 2007, when this data was collected, was $10,210 annually, or $851 per month, for a single person, For 2011, the latest year available as of this writing, that monthly figure was $908. *Prior HHS Poverty Guidelines and Federal Register References*, U.S. Department of Health and Human Services, http://aspe.hhs.gov/poverty/figures-fed-reg.shtml (last visited July 5, 2011). It is widely understood that this official figure actually underestimates the amount needed to avoid poverty, which is why most means-tested assistance programs set the income required for eligibility at or below some multiple of it. See generally the sources reviewed and described in *Further Resources on Poverty Measurement, Poverty Lines, and Their History*, U.S. Department of Health and Human Services, http://aspe.hhs.gov/poverty/contacts.shtml (last visited July 5, 2011). For a description of efforts to update the poverty measure, undertaken by a panel of the National Academy of Sciences at the direction of the Census Bureau, see Kathryn Porter, *Proposed Changes in the Official Measure of Poverty*, Center on Budget and Policy Priority (Nov. 15, 1999), http://www.cbpp.org/cms/index.cfm?fa=view&id=1385. For a summary of the recommendations of that panel prepared by the Rapporteur, see John Iceland, Experimental Poverty Measures: Summary of a Workshop (2005). In earlier surveys conducted using the same methods and respondent pool as the present study, we asked respondents how much money they believed a single adult, living alone, would need each month to be "just out of poverty." Their median answer, $1500, was in fact just beyond the amount required for most, but not all, federal means-tested income assistance programs, and obviously greater than the lower-income female in our vignettes.

30 One can adjust the 2007 median Arizona income for an intact family of four, using the National Academy of Science's recommended formula, to yield an equivalent income for a single individual. That amount is $2009. *See* Bruce R. Cohen & David N. Horowitz, Interim Report of the Child Support Guidelines Review Committee, Submitted to the Arizona Judicial Council 12-17 (2009), *available at* http://www.azcourts.gov/portals/84/MeetingMaterials/2009/09October/09pdfs/Childsupportguidelines.pdf. Our earlier survey also asked our respondents how much a single individual would need to spend to have a "solid middle class" living standard. Their median response of $2908 was about what the higher-income female in our vignettes earned, *see* Ellman, Braver & MacCoun, *Child Support*, *supra* note 7.

for the higher-earning female. If they believed in the disparity standard, by contrast, they should certainly allow claims by the woman earning $3000 monthly when her partner earned $12,000, and perhaps as well when her partner earned $6000, depending on the level of disparity the respondent believed necessary to trigger eligibility.

As we noted above, even when the couple in the vignette was married, about fourteen percent of our respondents denied claims in every case we presented to them.[31] These respondents applied a different principle than either the poverty or the disparity standard. Their view is apparently that even a long marital relationship producing children yields no relational obligations between the spouses that survive their separation. But among the great majority who believe alimony is appropriate in at least some cases, the disparity standard seems clearly favored. The data reported in Figure 1 shows that thirty-seven percent of our respondents would allow alimony when the claimant earned $3000 and her partner $6000, and fifty-six percent would when the partner earned $12,000 (these are the percentages across all values of the marital status, relational duration, and children variables). Most of our respondents therefore believed that even the claimant capable on her own of maintaining a middle-class living standard should receive alimony when the income disparity was large enough. Those who would allow an award when the partner earns $6000 have a lower "disparity threshold" than those who would support an award only if he earns $12,000, but both groups agree there is a disparity level beyond which alimony is appropriate even if the claimant is able to maintain a decent living standard on her own.

The increase in the alimony award rate, as one goes from an income pairing of $6000/$3000 to a pairing of $12,000/$3000, is about the same as the increase in the award rate when one goes from the full set of cases involving cohabiting couples to the full set involving married couples. So this particular change in income disparity has about the same effect on the award rate as does marriage. As previously noted, however, formal marriage is different because it is inherently a binary classification, and in the United States its absence excludes an alimony claim in all states.[32] In our sample,

---

31 *See supra* Section II.A.2.ii.

32 One can, in principle, have a claim for something like alimony if one has a contract that so provides. This potential exception is not of great importance because such contracts are rare, and would in any event be governed by the contractual terms and not the law of alimony. Moreover, the enforceability of a contract claim to periodic payments is problematic even when allowed, because repeated actions would be necessary to collect each past due payment or set of payments. The enforcement remedies available for periodic payments of child

however, alimony was awarded in forty percent of the cohabiting vignettes, and nearly seventy percent of our respondents thought an award appropriate in at least one cohabiting vignette. This kind of result is consistent with other surveys that have shown that people assume the law imposes obligations on the parties to a marriage-like cohabiting relationship.[33]

Respondents who were asked about both six and twenty-two year relationships allowed alimony more often when the relational duration was longer (forty-three percent compared to fifty-two percent). Though statistically significant, this difference in percentages was not as large as for marriage or income disparity. One possibility is that even though most of our respondents believed duration was important in establishing eligibility for an award, most also thought six years was enough to qualify. This interpretation is suggested by the fact that there was no main effect for duration when the condition varied between subjects, perhaps because, considered alone rather than in contrast to twenty-two years, most of our respondents thought six years was good enough. In other words, six years may occupy a position in the duration "borderline" area, not clearly on one or other side of the eligibility requirement, at least for many of our respondents. This interpretation would be confirmed by a replication of this study that also asked about shorter durations, such as one or two years, if it found a much larger drop off in awards for these very short durations. In that case, we could conclude that most people believe relational duration is important to establish an alimony claim and that one or two years is too short, but that many people believe six years is sufficient when other relevant factors also support a claim.

The way in which the presence of children affected our respondents' judgment also has policy implications. A point commonly made in the academic literature and embraced by the American Law Institute is that the parent who has primary responsibility for the couple's children during the relationship suffers a loss in earning potential as a result. Having served as the children's primary caretaker thus qualifies a parent for an award under the ALI Principles.[34] Moreover, the ALI assumes that the magnitude of that

---

support and alimony, including wage assignment for future payments as they become due, are not available to collect on a contract claim.

33 The best-known is the work of Ann Barlow, who found that the English and Welsh believe this even though there is no common law marriage in Scotland, *see* Anne Barlow, Carole Burgoyne, Elizabeth Clery & Janet Smithson, *Cohabitation and the Law: Myths, Money and the Media*, *in* British Social Attitudes: The 24th Report 29 (Alison Park et al. eds., 2008). There are similar if less definitive American reports, *see* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 711 (1996).

34 American Law Institute (ALI), *supra* note 3, § 5.05.

loss is proportional to the number of years during which a parent took on this responsibility, and therefore recommends a formula for calculating the award level that gives a claimant a larger award when the period of primary responsibility (up to the time of divorce) has been longer. This formula thus gives a primary caretaker spouse a larger *alimony* award if divorced after the children are grown than if divorced when the children are still young (because, for example, a mother divorced when the children are five cannot have more than five years of being the primary caretaker, while a mother divorced after the children are grown might have eighteen years). Of course, only a parent with minor children is eligible, in addition, for a child support award.[35] The lower-earning parent with grown children who had been the primary caretaker during marriage thus has a particularly strong alimony claim under the ALI Principles.

The ALI approach to alimony thus focuses on claims one partner may have for compensation from the other arising from past events; it does not award alimony in response to current needs. (Hence the ALI renames the remedy "compensatory payments.") Our respondents seem to have a different view. One can take the case in which there are no children as reflecting a "baseline" of relational obligation that survives the separation. Our respondents allowed an alimony award in forty-five percent of such cases, responding more sympathetically to the cases with greater income disparity between the partners. Adding the fact that the claimant had cared for the couple's now-grown children (and presumably suffered some earning capacity loss as a result) did not move our respondents very much from this baseline: The percentage of these cases in which they allowed alimony was barely higher than in the baseline case (forty-eight percent compared to forty-five percent). But when the children were still young at the time of separation our respondents allowed alimony in fifty-eight percent of the cases, a substantial jump. They thus seemed to care less than the ALI about compensating the mother for the lingering costs that arose from her history of care, and more about the custodial household's current situation.

This point is made even strongly, one might argue, by the interaction between the marital status and the children conditions shown in Figure 2. When the couple was married the presence of children does not affect the frequency of alimony award very much at all (fifty-seven percent for the childless couple, compared to sixty-four percent for the couple with young

---

35 The ALI recommends a method for calculating child support that provides a more generous award than do most current American states when the custodial parent's income is much less than the other parent's. But that award, of course, ends when the children are grown.

children), although once again the lowest award frequency is for childless wives, and the highest for wives with young children. But for unmarried parents, young children (but not grown children) have an enormous impact, raising the alimony award rate by twenty percentage points as compared to the childless couples (thirty-two percent to fifty-two percent of the vignettes). It thus seems that respondents otherwise disinclined to award alimony when the partners were not married do so anyway if the claimant is caring for the couple's young children.

The interaction of children with duration, shown in Figure 3 for respondents asked about both durations, tells a similar story. For couples together twenty-two years, the presence of children does not have nearly so large an impact as it does for those together only six years. Much of the gap in award frequency between short and long duration relationships thus disappears when there are young children, and the reason is the dramatic jump in the award frequency for six-year cohabiting relationships, not any decline in awards when relationships are twenty-two years. It thus seems that, as with marriage, respondents otherwise disinclined to award alimony when the couple had been together for only six years do so anyway if the claimant is caring for the couple's young children. And as with marriage, the impact of grown children on award rates is much less than the impact of young children. Our respondents are, in short, much more interested in making sure a current custodial parent has adequate income, than in ensuring an adequate income to the woman who had cared for the now-grown children during the relationship.

The impact of the presence of young children on our respondents' decision to allow alimony appears even more powerful when one recalls that every vignette with young children reminds the respondent that the alimony claimant will receive child support, and provides the amount of that child support award. One might therefore have guessed that respondents would not think the children's interest required allowing alimony to the custodial parent. Indeed, the opposite impact — that the child support would reduce the likelihood of allowing alimony — might have been expected. Parents and children living together necessarily have many joint consumption items, and as a practical matter cannot enjoy different living standards. While that means that any source of custodial parent income, including alimony, is likely to benefit the children, it also means that child support is likely to benefit the parent. Yet the presence of a child support award (and the young children) made our respondents *more* inclined to allow alimony.

One possible explanation is that the amount of the child support award (which our respondents were told in each vignette) struck them as being too low to provide sufficient income to the custodial household. One way to test this possibility is to see whether the proportion of cases in which alimony is

awarded is affected by the *amount* of the child support award. We found that when the parents had been married, it was. Respondents who were told a child support award amount taken from the then-current Arizona guidelines allowed alimony significantly more often, in all four parental-income combinations, than those who were told the considerably higher child support amounts based on the median awards favored by the respondents in an earlier study we conducted. The percentage differences between the two groups were large. This result suggests our respondents appreciate that alimony and child support necessarily help both the children and the custodial parent, even if the law does not recognize this, so that the need for one award is affected by the amount allowed for the other.[36]

Perhaps inconsistent with the prior analysis is the fact that the *amount* of the alimony award was completely unaffected by the amount of the child support award. That is, while a lower child support amount increases the likelihood that our respondents will award alimony, it does not increase the amount they award. This result recalls the classic finding of Robert B. Cialdini and David A. Schroeder that telling prospective charitable donors that "even a gift of only a penny will help" makes them more likely to give, but does not reduce the amount of their gift.[37] Here as well, factors that affect whether a respondent believes an alimony award is called for do not necessarily affect the respondent's judgment as to the award's appropriate amount.

That general observation is repeated again when we look more generally at the amounts our respondents gave, which were affected almost exclusively by the partners' incomes. Children, marital status, and relationship duration, all important to the decision to allow alimony, had very little effect on how much was allowed. And when we look at income, we found that most of the variance in award *amounts* (seventy-six percent) was accounted for by the man's income; the woman's mattered, but far less (accounting for only eleven percent of the variance). Yet Figure 1 suggests that changes in the woman's income had more effect than the man's in the decision as to *whether* alimony should be awarded at all. This apparent effect may be an artifact of the research design in which we asked about only two income values for each partner, with one of the values for the woman being quite low. Reducing the woman's income to $1000 taps into both the rationales for alimony, protecting the

---

36 As reported in *supra* Table 1, we obtained the same result for cohabiting parents in one of the four income combinations, but not in the other three. We have no suggestion as to why.

37 Robert B. Cialdini & David A. Schroeder, *Increasing Compliance by Legitimizing Paltry Contributions: When Even a Penny Helps*, 34 J. Personality & Soc. Psychol. 599 (1976).

claimant partner from poverty and addressing significant income disparity, because it both puts her near the poverty line and also makes her income quite disparate from that of the lower-earning man as well as the higher-earning one, while only the income disparity concern is present at the higher female income. On the other hand, the importance of the man's income in setting the *amount* of the alimony award still suggests that income disparity was important to our respondents, if not their primary concern, in setting alimony awards. Moving the female income from below to well above the poverty threshold did not matter as much, in their judgment of the appropriate size of the alimony award, as did increasing the man's income from a comfortable middle-class level to one that is in the upper five percent of all Americans. Their choice of the award amount, as much as their choice of whether to allow an award, seems to evidence a view that the high-income man should share some of his affluence with his former partner.

Conclusion

As we suggested at the beginning of this Article, American law cares a great deal about the partner's marital status in deciding whether alimony should be awarded, and the American law in practice puts considerable weight on the duration of the partners' relationship as well. The presence of minor children does not matter at all, except when their care justifies the divorced mother's reduced participation in the labor force and thereby avoids the potential claim that her low income is due to her shirking. The lingering earning capacity loss that arises from a history of having been the primary caretaker of now-grown children has received more attention from scholars and provides a basis for an alimony award under the approach recommended by the American Law Institute. In short, the dominant American view about alimony might be described as putting great emphasis on marital status and duration, and evincing some concern with the earning capacity loss from having cared for now-grown children, but relatively little concern with the claimant's current role as the primary caretaker of minor children. Finally, the dominant American practice makes alimony a relatively uncommon remedy.

This study suggests rather strongly that the views of American citizens are almost exactly the opposite. They appear willing to award alimony considerably more often than the law now does. More clearly, in deciding whether to allow an alimony award, they care most of all about the claimant's responsibility as primary caretaker of the couple's minor children, to some extent but noticeably less about the partner's marital status and their relational duration, and very little at all about the claimant's history of having cared for

the couple's now-grown children. Moreover, the way these factors affect our respondents' judgments about alimony are not very dependent on who they are. Our respondents did vary among themselves, of course, in the frequency with which they allowed alimony, but they varied relatively little in how factors such as marriage, relational duration, the presence of minor children, or the history of care for now-grown children affected their judgments.

This striking discrepancy between American law and the views of American citizens is interesting if not alarming. In some respects their views are not surprising. In their willingness to award alimony to non-marital partners, for example, Americans turn out to be similar to the citizens of some other Western countries, even if the American law is not. And perhaps it is also not surprising that they seem more concerned with the welfare of the couple's current minor children than with addressing perceived inequities in the current economic circumstances of the adult partners — even though they may be more willing than the law to address those inequities as well. In any event, the views of our respondents pose a challenge to policymakers. Given the dearth of theoretical justification for current American practice, its rejection by American citizens seems all the more telling.