Articles From the American Project, and Related Work

Child Support: *Original Empirical Work*

Ira Mark Ellman, Sanford Braver and Robert MacCoun, Intuitive Lawmaking: The Example of Child Support, 6 Journal of Empirical Legal Studies 69 (2009)

Abstract: Setting the amount of a child support award involves tradeoffs in the allocation of finite resources among at least three private parties: the two parents, and their child or children. Federal law today requires states to have child support guidelines or formulas that determine child support amounts on a uniform statewide basis. These state guidelines differ in how they make these unavoidable tradeoffs. In choosing the correct balance of these competing claims, policymakers would do well to understand the public's intuitions about the appropriate tradeoffs. We report an empirical study of lay intuitions about these tradeoffs, and compare those intuitions to the principles underlying typical state guidelines. As in other contexts in which people are asked to place a dollar value on a legal claim, we find that citizen assessments of child support for particular cases conform to the pattern that Ariely and his coauthors have called "coherent arbitrariness": The respondent's choice of dollar magnitude may be arbitrary, but relative values respond coherently to case variations, within and across citizens. These patterns suggest that our respondents have a consistent and systematic preference with respect to the structure of child support formulas that differs in important ways from either of the two systems adopted by nearly all states.

Ira Ellman, Sanford Braver, and Robert MacCoun, Abstract Principles and Concrete Cases in Intuitive Lawmaking, 36 Law and Human Behavior 96 (2012).

Abstract: Citizens awaiting jury service were asked a series of items, in Likert format, to determine their endorsement of various statements about principles to use in setting child support amounts. These twenty items were derived from extant child support systems, from past literature and from Ellman and Ellman's (2008) Theory of Child Support. The twenty items were found to coalesce into four factors (principles). There were pervasive gender differences in respondent's endorsement of the principles. More importantly, three of these four principles were systematically reflected, in very rational (if complex) ways, in the respondents' resolution of the individual child support cases they were asked to decide. Differences among respondents in their endorsement of these three principles accounted for differences in their patterns of child support judgments. It is suggested that the pattern of coherent arbitrariness (Ariely, Loewenstein, & Prelec, 2003) in those support judgments, noted in an earlier study (Ellman, Braver, and MacCoun 2009) is thus partially explained, in that the seeming arbitrariness of respondents' initial support judgments reflect in part their differing views about the basic principles that should decide the cases. Click below for the final edited manuscript submitted to Law and Human Behavior. Subscribers to Law and Human Behavior may download the published version at http://www.springerlink.com/content/6725852nh7841778/

Sanford Braver, Ira Mark Ellman, and Robert MacCoun, Public Intuitions About Fair Child Support Allocations: Converging Evidence for a "Fair Shares" Rule (forthcoming May,

2014, Psychology, Public Policy, and Law)

Abstract: Nearly all American states use one of two systems for setting the amount of child support that noncustodial parents (NCPs) are required to pay to custodial parents (CPs). In previous work we found that lay judgments of the child support amount the law should require differ in meaningful ways from these two systems: Our respondents favor child support amounts that are more responsive to the NCP's income, and much more responsive to the CP's income, than those set by either system. They also favor dollar amounts that increase more rapidly with NCP income when CP income is lower, producing a characteristic fanning lines pattern when dollar support amounts are charted against NCP income for several different CP incomes. We give the label "Fair Shares" to these two features of our respondents' child support judgments. We describe 6 new experimental studies that vary the context of these judgments in ways that test whether the "Fair Shares" account is robust. Our studies consistently replicate the fan shaped pattern and shed further light on lay judgments.

Ira Mark Ellman and Sanford Braver, Lay Intuitions About Child Support and Marital Status, 23 Child and Family Law Quarterly 465 (2011)

Abstract: Given the fact that the child and custodial parent generally share a living standard, there is some tension between the traditional rule excluding marital status altogether as a consideration in setting child support levels, and the traditional American rule making marriage an absolute requirement in claims by one spouse against the other for support (traditionally, 'alimony') for herself. How should that tension be resolved? This study extends the authors' prior child support studies by a) expanding the range of paternal incomes presented to respondents, and b) examining the effect of the parents' marital status and relational duration. We replicate our prior findings on the impact of parental incomes, and the disparity between them, across the expanded income range. We also replicate the finding that overall, citizens favor higher support amounts than the law provides when custodial parent income is low, but lower support amounts when the custodial parent income is higher. We also now find that our respondents would increase support awards for low income mothers (over current levels) by larger amounts when parents had married, than when they had cohabited, and would give the lowest awards to mothers who had had no relationship at all with the father, beyond the single sexual act leading to the child's conception. We explain why the pattern of their support awards suggests that in setting child support levels they give more weight than current American law to the children's interests.

Child Support: Further Empirical Work Currently in Progress

Ira Mark Ellman and Sanford Braver, Citizen Views On Whether and How A Mother's Move or Remarriage Should Affect The Father's Duty to Pay Child Support. This paper replicates the basic child support studies described above, but with systematic variations in the facts intended to explore the extent to which respondents alter their view of the appropriate support amount in response to the obligee's remarriage or move to a distant location that substantially burdens the support obligor's access to the child. Drafts should be available to submit for publication by the summer of 2014.

Sanford Braver, Ira Mark Ellman, and William Fabricius, Public Opinion about a Parenting Time Adjustment in Child Support Awards. This paper reports on a study that examines the extent to which variations in the father's parenting time affect the amount of child support respondents require the father to pay. It also includes some variations in which the father does not see the child because a) the mother refuses him access, b) mother moves away, c) the parents agree he will not see the child, and c) the father moves away. Finally, it considers for comparison a case in which the support-paying mother's access to the child is frustratinged by the custodial father's move away. Drafts should be available to submit for publication by the summer of 2014.

Child Support: Data-Based Theoretical Work

Ira Mark Ellman, A Case Study in Failed Law Reform: Arizona's Child Support Guidelines, 57 Arizona Law Review 137 (2012)

Abstract: It is hardly news to observe that a proposed legal reform is not adopted even though nearly all experts believe it would effectively advance the law's widely supported policy goals. But if this phenomenon is commonplace, that is all the more reason for trying to understand why it happens. The recent effort to reform Arizona's child support guidelines provides a particularly compelling case study of such a failed law reform effort, for several reasons. First, child support has generally not been politically contentious: Both Democrats and Republicans have for several decades combined to support changes in child support law intended to ensure that non-custodial parents contribute to the support of their children. Second, this is not merely a case of legislative inaction. In Arizona, as in many states, the state supreme court is the body assigned the task of writing the rules that establish how much child support a non-custodial parent must pay. The proposed reform would have become law had the legislature not affirmatively acted to overrule the recommendations of a series of committees the court had appointed to study the issue. Finally, all available information suggests that the proposed reforms were more consistent with the views of the Arizona electorate than the existing provisions they would have replaced. In sum, the legislature acted to prevent adoption of child support reforms proposed by the public bodies entrusted with deciding them even though the reforms were consistent with the views of the public and supported by nearly all the experts asked to study them. This Article attempts to understand why this happened. Among other things, it concludes that the reform suffered from an asymmetry in citizens' motivation to engage the political process: those who stand to gain from a reform may not work as hard for its adoption, as those who stand to lose will work for its defeat.

Ira Mark Ellman and Tara O'Toole Ellman, The Theory of Child Support, 45 Harvard Journal on Legislation 107 (2008).

Abstract: What is the appropriate amount of child support to require in particular cases? How should we take account, if at all, of subsequent events such as either parent's remarriage? It seems obvious that the answers to such questions ought to turn on our purpose in requiring support payments in the first place. But while fixing the amount of child support can be politically contentious, and has attracted the attention of partisans on both sides of the gender gap, the literature contains no systematic examination of support rules in light of their underlying policy purpose. This

article identifies the three fundamental policy purpose that explain why we require child support, shows that the federally-required guidelines that determine most support orders are not usually designed to further those policies, and shows why this design failure the unintended but inevitable consequence of the methods most states rely upon for constructing their guidelines. The Article offers a new method for setting support guidelines that would ensure they reflect the policymakers' purpose. It draws on work in law and economics, and psychology, in analyzing current practice and in formulating its suggested alternative.

Ira Mark Ellman, Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines, 2004 University of Chicago Legal Forum 162.

Abstract: Federal law requires all states to have guidelines that determine the amount of a child support award in most cases. It also requires the states to reexamine these guidelines every fourth year to ensure that they continue to set appropriate awards in light of possibly changing economic conditions. These revisions are typically carried out with the assistance of economic consultants. This article is about the substance of that revision process as it is conducted in most states, and in particular the method employed by these consultants. That method effectively defines a particular conception of how child support awards should be formulated, a conception most accurately described as continuity of marginal expenditure. Consultants engage in a technical exercise through which they implement this conception, ultimately yielding a set of recommended award levels for varying family sizes and parental incomes. That exercise involves estimates of parental expenditures which rely upon equivalence scales, and upon data collected in the Consumer Expenditure Survey.

This article argues that that the conception of child support implied by the consultants' methods is not in fact compatible with the relevant public policy, and is adopted by lawmakers primarily because they do not understand it. The paper also concludes that even if the consultants' conception were correct, the implementation cannot be because of well-known defects in equivalence scale methodology upon which they rely. In addition, flaws in the Consumer Expenditure Survey data are likely to distort considerably the consultants' analysis. These conceptual and implementation flaws in the typical consultants' analysis are especially troubling because they appear to be entirely invisible to the policymakers charged with writing child support guidelines.

This Article, therefore, is not about whether child support guidelines are too low or too high. It is about how an opaque technical analysis, relied upon by policymakers who do not understand it, keeps them from even considering that question in any systematic way. Child support guidelines are thus an example of how a public body's use of expert consultants can convert the rulemaking task into a technical exercise involving methodological choices whose policy implications are concealed from those responsible for choosing the policy. Specific suggestions are offered for reforming the guideline writing process to make policy choices more salient and to obtain better information upon which to base those choices.

Ira Mark Ellman, Should Visitation Denial Affect The Obligation to Pay Support?, in William Comanor, editor, The Law and Economics of Child Support Payments (2004) (also in slightly expanded form at 36 Ariz.St.L.J. 661 (2004).

Abstract: When parents do not live together, the relationship between their children and the parent with whom they do not primarily live is often difficult to establish or maintain. In some cases those difficulties may be exacerbated by the custodial parent's resistence to regular contact and visitation with the other parent, expressed through conduct that violates the judicial decree setting forth the custody terms. In other cases substantial impairment in the noncustodial parent's relationship with the child may unavoidably result from custodial-parent conduct that is both lawful and reasonable, such as justified relocation with a young child to a distant location to which the other parent cannot follow. At one time the support obligor might have stopped making payments in either situation, effectively undermining the formal legal rule requiring him to pay, but improvements in the enforcement of child support obligations increasingly exclude that form of self-help. Where impairment in the parent-child relationship arises from noncompliance with the visitation provisions of the custody decree, a possible response is its improved enforcement, but inherent difficulties in the available enforcement tools suggest that this response will always leave some cases unresolved. Nor will enforcement address the question in the relocation context.

Renewed attention is therefore appropriate to the question of whether formal relief from the child support obligation should be allowed in such cases. The legal doctrine is confused. On one hand the right of access and the obligation of support are both regarded as fundamental attributes of parental status, and typically arise and end together in the context of legal rules establishing or terminating parental status. On the other hand, in many states the law makes clear that one parent's obligation to pay support is not dependent upon the other parent's cooperation in allowing access to the child. The rule that the obligation to pay support and the obligation to permit access are not interdependent is also often surprising to the parents themselves, because it appears to violate the social norm of reciprocity. It survives in the law largely for two reasons, one procedural and one substantive. As a procedural matter parties are supposed to seek modification of an outstanding judicial decree they believe no longer appropriate, rather than ignore it and raise their substantive concerns only later as a defense to an action against them for noncompliance. As a substantive matter, courts assume that the continued payment of child support obligations are essential to the child's welfare, and they are therefore disinclined to reduce or end them as a remedy even if convinced of the custodial parent's improper behavior.

This article concludes that while both these procedural and substantive reasons are weighty, they do not, or need not, apply to the full range of cases in which the law denies reductions in the support obligation sought on visitation-denial grounds. The article also considers other reasons for enforcing support, and finds these additional reasons are also often inapplicable to the visitation-denial cases considered here. Carefully distinguishing among cases according to both the severity of the visitation denial, as well as the procedural posture, the article suggests changes in the legal rules that would in many cases satisfy the procedural objection. It also suggests two categories of cases in which the substantive objection will often be of limited relevance: cases involving the enforcement of arrearages where the children are near or beyond the age of majority, and cases in which the support obligee has remarried. It therefore concludes that the increasingly effective enforcement of the support obligation ought to be accompanied by recognition of a visitation-denial

ground for reducing, suspending, or terminating it, in select cases.

Original Empirical Work, Not Child Support

Ira Mark Ellman and Sanford Braver, Citizen Views About Fault in Property Division 47 Family Law Quarterly 419 (2013).

Abstract: While most American states today exclude or severely limit consideration of marital misconduct in allocating property at divorce, about 15 still allow judges broad discretion to consider it. This study asks whether there is popular support for considering fault in property allocations. We surveyed a representative cross-section of over 600 citizens awaiting jury service, asking for two types of judgments. One type asked respondents how they would allocate marital property in each of two hypothetical cases: a baseline case for which we knew, from prior research, respondents would favor equal division, and a second case that was identical but for claims by one spouse of the other's adultery. There were 14 variations of the adultery case, differing in selected factual details; each respondent was asked about just one randomly selected variation. The second type of judgment asked respondents to indicate the strength of their agreement or disagreement with each of a series of statements presenting reasons for courts to consider, or not consider, allegations of marital misconduct in allocating property. Only when the adultery was admitted with no excuse or justification offered for the behavior was there any notable departure from equal division of the property, and 65% of respondents preferred equal division even in that case. Analysis of the Likert items suggests respondents' reluctance to consider fault is based more on process concerns than on a moral indifference to adultery.

Ira Mark Ellman and Sanford Braver, Should Marriage Matter? (in Marriage at the Crossroads (Cambridge University Press 2013) (Elizabeth Scott and Marsha Garrison, editors).

Abstract: This is a draft of a chapter that will appear in a forthcoming book. It brings together data 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, & MacCoun 2009; Ellman, Braver, & MacCoun 2012; Ellman & Braver 2011; Ellman & Braver 2012). These published studies 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 question of how much impact a couple's marital status has on our respondents' views. We also report here for the first time findings from another study in this same series that examined our respondent views about the impact a couple's marital status should have on the allocation of their property at the termination of their relationship.

These data reveal that our respondents care about marital status, but they care more about financial inequality and about children. While they 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.

Ira Mark Ellman and Sanford Braver, Lay Intuitions About Family Obligations: The Case of Alimony, 13 Theoretical Inquiries in Law 209 (2012)

Abstract: 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 paper 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 survey respondents employ in deciding them. Previously reported results in this project have examined studies of the amount of the child support 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 on 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, some 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.

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.

Ashley Votruba, Sanford Braver, Ira Mark Ellman, and William Fabricius, Moral Intuitions About Fault, Parenting, and Child Custody After Divorce (2014) (forthcoming, Psychology, Public Policy, and Law)

Abstract: Allocations of child custody post-divorce are currently determined according to the Best Interest Standard, i.e. on what is best for the child, as compared to standards of the recent past

which weighed fairness to the parents or parental fault (or marital misconduct). Since any such evolving standards rest so fully on changing cultural norms, an important question is how these standards correspond to the moral intuitions of lay citizens asked to take the role of judge in hypothetical cases. Do factors such as whether one parent had an extramarital affair influence their custody decision-making? In the current studies, a representative sample of citizens awaiting jury service were first given a neutral scenario portraying an "average" family. Almost 80% favored dividing custodial time equally between the two parents, replicating our earlier finding. Then, in Study 1, they were given a second, Test case, vignette in which either the mother or the father was said to have carried on an extramarital affair that "essentially ruined the marriage". In Study 2, either the mother or the father was said to have sought the divorce, opposed by the other, simply because he or she "grew tired" of the marriage. For both Test cases, more than half the respondents made little or no adjustment to their parenting time allocation, but a substantial minority did, awarding the offending parent significantly less parenting time. While one might guess some respondents would be motivated to punish the adulterous parent, we believe it less likely they would believe it appropriate to punish a spouse who sought to end a marriage they no longer found satisfying. Given that there was relatively little difference in our respondents' reactions to the two test cases, we therefore considered explanations, for the responses of those who did reduce parenting time, that could apply equally to both test cases. We suggest two possibilities: 1) they find the behavior in both test cases evidence that the offending parent's commitment to parenting is deficient, since they were willing to risk imposing divorce on their children by their behavior, or 2) a spouse who imposes the burden of parental separation on the children by causing divorce should be penalized, not for the offensiveness of their conduct, but for the harm they caused their children by bringing about the divorce.

Sanford Braver, Ira Mark Ellman, Ashley Votruba, and William Fabricius, Lay Judgments About Child Custody After Divorce, Psychology, Public Policy, and Law 212 (2011).)

Abstract: In a pair of studies, we examine lay people's judgments about how hypothetical cases involving child custody after divorce should be resolved. The respondents were citizens called to jury service in Pima County, AZ. Study 1 found that both male and female respondents, if they were the judge, would most commonly award equally shared custody arrangements, as advocated by most fathers' groups. However, if the pre-divorce child care had been divided disproportionately between the parents, this preference shifted, slightly but significantly, toward giving more time to the parent who had provided most of that care, consistent with the Approximation Rule advocated by the American Law Institute. Moreover, respondents judged that the arrangements prevailing in today's court and legal environment would award equal custody considerably less often, and would thereby provide much less parenting time to fathers, than the respondents themselves would award. Study 2 found that respondents maintained their strong preference for equally shared custody even when there are very high levels of parental conflict for which the parents were equally to blame, but awarded substantially less time to the culpable parent when only one was the primary instigator of the parental conflict. The striking degree to which the public favors equal custody combined with their view that the current court system under-awards parenting time to fathers could account for past findings that the system is seriously slanted toward mothers, and suggests that family law may have a public relations problem.