Ira Mark Ellman

Charles J. Merriam Distinguished Professor of Law and Affiliate Professor of Psychology   
Arizona State University Sandra Day O'Connor College of Law

**Bibliography of Articles from the Empirical Project**

**Exploring Citizen Views About Fairness in Family Law Rules**

\* (Articles with an asterisk are recommended as background reading for Ira’s CSLS Speaker Series presentation on Monday, October 6, 2014, “How Ordinary Citizens Think about Fairness in Family Law Rules.”)

\***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.

\***Sanford Braver, Ira Mark Ellman, and Robert MacCoun, *Public Intuitions About Fair Child Support Allocations: Converging Evidence for a "Fair Shares" Rule, 20 Psychology, Public Policy, and Law 146 (2014)***

*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.

**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,* 20 Psychology, Public Policy, and Law 251** **(2014)**

*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,* 17 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.

**Forthcoming**

**Ira Ellman, Stephen McKay, Jo Miles, and Caroline Bryson, *Child Support Judgments: Comparing Public Policy to the Public’s Policy*, forthcoming International Journal of Law, Policy and the Family, December 2014.** (This is the first of four articles that will appear reporting on the replication of the child support studies in the United Kingdom.)

*Abstract:* Any child support regime necessarily makes policy choices about how parental income should be shared between the two parental households. Those choices involve balancing the claims of the child, the claims of the custodial parent for help with the expenses of providing for the child, and the claims of the support obligor for autonomy in deciding how to spend his own earnings. That balancing task is complicated by the fact that the child and the custodial parent necessarily share a living standard, so that any child support transfer, large or small, will unavoidably benefit the custodial parent as well as the child. This article reports the findings of an empirical study designed to reveal the policies favoured by the British public on these questions, involving face to face interviews with 3,000 British residents. It compares the public’s preferred policies to the policy choices implicit in the current UK child support schedule. It concludes that there are important gaps between the two, and recommends that consideration be given to amending the current UK law to better align it with the public’s values on these matters. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433820.>

**Ira Ellman and Sanford Braver, *Child Support and the Custodial Mother's Move or Remarriage*** (to be presented at the 2014 CELS conference, Berkeley).

*Abstract:* When a custodial mother marries a new partner, the income of the custodial household rises. The stepfather may earn much more than the father, or much less. He may or may not assume the social role of father, but his day to day contact and interaction with the child will often be more than the father’s. If the mother and stepfather move together with the child to a location distant from the father, he may be more likely to replace him in the child’s life. Whatever a stepfather’s legal obligations of support, economic realities ensure that his income will have an impact on the child’s financial well-being, and possibly a major impact. Yet the usual understanding is the law excludes the income of the mother’s new husband from consideration in setting the father’s child support obligation. Nor does it consider the impact of the remarriage, or any move, on the ability of the father to maintain a paternal relationship with the child. While these categorical exclusions are found in nearly every state’s formal rules, there are nonetheless examples of departures from them, some longstanding, that exist in particular circumstances, when the economic and social realities have overriden them. The increasing tension between the traditional rules and modern economic and social realities seems likely to present occasions to consider the rules’ reform. This paper asks whether the traditional rules are in fact consistent with the beliefs of citizens as to what the law should provide. It does so by presenting a random sample of several hundred citizens with a set of cases in which they are asked to decide the appropriate level of child support. One can then infer their preferred rules by considering how their answers vary with changes in the custodial mother’s circumstances. Results in the cases are supplemented with Likert questions probing citizen views on statements of principle. The results show considerable support for taking remarriage into account in setting child support obligations, especially when the stepfather’s income is higher and even more so when the remarriage is combined with the custodial household’s move to a location distant from the father. The possible reasons for these results are discussed.

**Related Articles**

**Ira Ellman, *A Case Study in Failed Law Reform: Arizona’s Child Support Guidelines*, 54 Arizona Law Review 138 (2012).**

*Abstract:* 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. A reform proposed by a court-appointed committee would have put in place rules that would have yielded support amounts quite close to those that this research suggests citizens favor. Interestingly, the amounts were arrived at by a process engaged in by the committee of experts that echoed the manner in which fairness evaluations were obtained in the research. This article seeks to understand why the recommendations of this committee were nonetheless failed to be adopted. 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 from it will work for its defeat.

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

This article examines the theoretical underpinning that should be used in thinking about setting child support amounts, and was the initial theoretical work that was the impetus for the empirical project that followed.