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The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce

Tess Wilkinson-Ryan and Jonathan Baron

ABSTRACT
We hypothesize that the no-fault divorce law is in conflict with moral intuitions favoring punishment for people who break the marriage contract and that people will be either unwilling or unable to fully ignore marital fault in the context of divorce settlement negotiations. In four Web-based experiments, we asked subjects to read vignettes about divorcing couples and then to rate proposals by each party about how to divide the marital property. Under instructions to ignore fault, subjects nonetheless rated wrongdoers’ proposals lower than victims’ proposals. Some subjects ignored fault purposely, while others were unaware of their own bias. We also find evidence of self-serving bias; subjects taking the perspective of a victim showed more fault-based bias than did subjects taking the perspective of a wrongdoer. We conclude that under certain conditions of unilateral fault, the no-fault divorce law may actually increase the likelihood of impasse in divorce negotiations.

1. INTRODUCTION
Legal scholars, most notably Robert Ellickson (1991), have suggested that individuals often ignore, misunderstand, or even consciously flout laws that violate social or moral norms. Ellickson argues that one of the failures of traditional law and economics analyses is that they do not account for the role of informal norms in real-life negotiations. In this article, we present an empirical study of the role of moral norms

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in private negotiations. In particular, we are interested in the situation in which a person’s moral intuitions are in conflict with the legal rule. Thus, for this series of experiments, we have chosen to consider the case of divorce bargaining. Laws of divorce property division prohibit parties from taking marital fault into account. However, fault is, obviously, a very salient property of divorce.

Our hypothesis is that the conflict between the moral norm against marital misconduct and the legal rule of no-fault property division may disrupt efficient bargaining. For these experiments, we assume that there are costs to a bargaining impasse, because litigation is much more expensive than private settlement. We predict that in a certain subset of cases—namely, cases in which one party has unilaterally breached the marriage contract—parties will be less likely to bargain efficiently in a no-fault divorce regime, and divorce negotiations will reach an impasse with greater frequency.

We ask subjects to consider a variety of hypothetical divorce scenarios, especially situations in which one person is clearly at fault (for example, adultery, abandonment, or deception). Subjects evaluate a series of bargaining proposals made by either the wrongdoer or the victim of wrongdoing; their task is to rate each proposal’s reasonableness.

The first two experiments demonstrate that subjects rate the same offers as more reasonable when proposed by victims instead of wrongdoers. In the third and fourth experiments, we show that some subjects flout the legal instructions on purpose but that the fault effect remains significant even for those subjects who do not intend to disfavor the wrongdoer.

### 1.1. Legal Framework

There are three facets of the current legal framework of divorce that make it an especially apt example of the phenomenon we are trying to study, namely, the response of private parties to a legal rule that conflicts with a moral rule. The first important fact about modern divorce is that most settlements are privately negotiated. In a typical divorce, couples negotiate a financial agreement detailing how they will divide their property, and a judge signs off on the agreement, usually with minimal, if any, oversight (Mnookin 1986). Those unable to reach a private settlement agreement go to court, incurring substantial litigation costs in order to receive a judge-made settlement. Thus, divorce bargaining is a private negotiation that takes place “in the shadow of the law” (Mnookin and Kornhauser 1979). Under a traditional economic analysis, this means
that rational parties will not agree to a distribution amounting to less than what they would receive in a judge-made settlement (minus the costs of litigation). Like Ellickson, we are interested here in how informal norms might push people to violate this economic equation.

The second fact of modern divorce law is that it is somewhat indeterminate. The standard for the division of property is that it should be “equitable,” and equity is based on a variety of ill-defined, unweighted factors, including the duration of the marriage, contributions to the financial assets, the needs of each party, and even the parties’ individual contributions to housework and child care. There is no algorithm by which parties can ascertain how a judge would divide the property.

Finally, and most important, modern divorce law is largely no fault. This means that the one clear instruction is that the property be divided “without regard to marital misconduct.” Under these rules, then, the parties have a vague sense of what considerations they should include in their decision making, combined with a clear prohibition on one of the most salient issues in the divorce, namely, who is to blame. Our contention is that the question of blame will continue to affect bargaining behavior even when there are instructions to ignore it.

To determine whether knowledge of marital fault does, in fact, affect negotiating behavior when there are instructions to ignore fault, we compare subjects’ responses to settlement proposals (for example, “Let’s sell the house and divide the profits fifty-fifty”) as a function of who makes the proposal: a wrongdoer, a neutral party, or a victim.

1.2. Fairness and Punishment

Family law practitioners report anecdotally that their divorce clients are incredulous when they learn that the divorce system lacks an official mechanism for assigning blame. A question motivating this research is whether people will opt to punish transgressors privately when there is no state sanction. One way that people could take fault into account is by purposely flouting a law perceived to produce an unfair result. The wronged party may simply prefer to incur the cost of litigation in order to punish the wrongdoer. A wife whose husband is leaving her for another woman, for example, finds her husband’s proposal that they sell their house and divide the money entirely unreasonable: why should she, who did not initiate the separation, be forced to move out of her house as well? Even knowing that the law supports his position (assuming it is reasonable by other standards), she may prefer to make him choose from two costly options: accede to her demands or take her to court.
There is a substantial literature in psychology and experimental economics documenting people’s willingness to punish others, at a cost to themselves, for behavior perceived as unfair (Kahneman, Knetsch, and Thaler 1986). One conclusion from this line of research is that people would rather sacrifice material wealth (say, 25 percent of the total pie) than accept an unfair outcome. Economic theory predicts that the parties’ contributions and misbehaviors should be irrelevant because they are basically sunk costs, but in fact individuals are very sensitive to the justice of the distribution and are willing to lose money by decreasing the total pie (with, for example, protracted litigation) just to ensure that the size of the slices is fair.

In this study, we assume that a low rating of a proposal’s reasonableness (which is explicitly linked, in the description of the ratings, with an intent to reject the offer) is one way to indicate a desire to punish. In order to assess whether some subjects consciously punish, we ask subjects a series of questions about their approach to the scenarios, including whether they ever consciously went against the law to express disapproval of the wrongdoer. We also compare the fault effect in subjects who report an intentional or explicit bias to those subjects who report relative impartiality.

1.3. Moral Heuristics

This research investigates the role of fault as a heuristic. Fault is a salient factor in a divorce. One way to think about marital wrongdoing is as a moral transgression; one party breached the marriage contract by lying, cheating, or breaking a promise. The relevant moral rule-of-thumb, which is not necessarily bad or wrong, is that a person who breaks the marriage contract should be sanctioned. Even those who try to ignore fault may be biased against the wrongdoer nonetheless. These judgments are complicated. A couple’s house, for example, is an asset, but during the marriage, it has expressive and emotional meaning. When people have to start thinking in terms of dollars, the calculation of its worth becomes more difficult. The same bargaining position may simply feel more or less reasonable depending on who holds it, the wrongdoer or the victim.

Moral intuitions affect a variety of judgments. Consumers have moral opinions that in turn affect purchasing decisions (Baron 1999). Voters and policy makers make moral judgments that affect the allocation of public resources (Skitka and Tetlock 1992). Sunstein (2005) has recently posited a subset of biases and heuristics that affect not assessments of
fact but rather assessments of moral judgment or opinion, particularly judgments relevant for matters of law and policy. Sunstein argues that moral heuristics will produce faulty moral reasoning when moral intuitions are overgeneralized or overweighted in the judgment process. This framework is helpful for thinking about divorce negotiations under no-fault divorce rules. A moral heuristic almost certainly favors honoring the marriage contract and punishing the person who broke the contract. However, overreliance on this heuristic could be counterproductive for parties trying to reach the most efficient outcome.

Sunstein et al. (2002) document a particularly relevant phenomenon termed the “outrage heuristic”: “Punishment judgments are rooted in a simple heuristic, to the effect that penalties should be a proportional response to the outrageousness of the act” (Sunstein 2005, p. 538). As such, people are willing to punish nonhuman entities like corporations in the same manner that they would punish individually culpable human beings, and they are more or less indifferent to the consequences of a given punishment, as long as the punishment fits the crime (Baron and Ritov 1993). There is no legal mechanism in a divorce for assigning blame or meting out appropriate punishment; it seems safe to assume, however, that the outrage factor often plays an important role. If divorce negotiations permit one party to punish the other, even when the punishment is costly, that may be the only outlet for the expression of moral outrage. Furthermore, outrage is increased as a function of betrayal. When the moral violation involves a breach of trust, it is especially awful. We do not mean to argue against the soundness of this particular moral intuition, only to note that it may be poorly served by the limited, mutually costly punishment mechanisms available in divorce bargaining.

In order to explore whether this heuristic affects subjects’ judgments in the divorce context, we identify a subset of subjects who report a low bias and an intention to follow the no-fault instructions. We then compare reasonableness ratings for victims’ proposals to those for wrongdoers’ proposals in this subset of subjects to determine if these subjects still show the (apparently nonconscious, unintentional) fault effect.

1.4. Self-Serving Biases

In order for these fault-based fairness concerns to cause a bargaining impasse, though, there must be some reason to think that the two parties will not have identical intuitions and biases. In other words, there would be no apparent problem if both the wrongdoer and the victim of wrongdoing tended to be biased toward the victim. They would reach an
agreement that was generous to the victim. This is an unlikely result, though, in light of research findings on self-serving biases. Numerous studies of bargaining find that individuals find facts and arguments in their own favor to be more important than evidence supporting the opposite position (Babcock and Loewenstein 1997). In the case of divorce, the self-serving bias might lead to a bargaining impasse via two possible routes. One possibility is that both parties are clear as to who is at fault. The wrongdoer, however, scrupulously follows the no-fault legal mandate. The victim, in contrast, takes a more global view of the situation and reasons that fault should play some role in the settlement. The other possibility is that fault itself is ambiguous, such that both parties believe the other to be at fault. In either of these situations, the bargainers have good-faith beliefs that they are being fair. When their positions are rejected, they may even begin to suspect that the other is not bargaining in good faith and start down the path to punishment via impasse (Babcock and Loewenstein 1997).

In this study, we investigate the role of self-serving biases by asking subjects to consider scenarios from different perspectives and by comparing the effect of perspective in both neutral scenarios and unilateral-fault scenarios.

2. METHODOLOGY

In these experiments, we would like to measure whether subjects themselves are willing and able to comply with the legal rule, whether they believe that legal decision makers (judges, for example) will comply with the legal rule, and whether subjects believe that the legal rule is fair. In order to measure whether subjects follow the no-fault rule, in experiments 1, 3, and 4, we ask subjects to assume a role in each case (as a mediator or a participant, and we specify in each instance) and to make a judgment in accordance with the no-fault rule. Note that in these cases, we do not ask a subject to predict what another actor would do but rather to make the decision herself, using the no-fault instructions and her understanding of the case and her role in it. In experiments 2 and 4, we ask subjects about their beliefs about how a judge would respond to the case. Thus, we want to know not what the subject would do were the subject a divorce court judge but rather the subjects’ perceptions of a judge’s compliance with the no-fault law.

Our subject pool draws from a group of lay adults with a demo-
graphic profile that parallels Americans in general. Subjects are paid a small amount (between $3 and $8) to complete the questionnaires online. We chose to use a sample of American adults rather than college students. By doing this, we are able to use subjects with a wide range of educational attainment. Furthermore, it just made more sense to use adults, many of whom had experience with marriage and divorce, to tap into moral norms about the marriage contract. We chose not to use lawyers and judges much for the same reason; most people who get divorced are not intimately acquainted with the legal rules, much less the economic analysis of negotiation.

3. EXPERIMENT 1

3.1. Method

3.1.1. Subjects. A total of 109 participants completed a questionnaire on the World Wide Web; they were paid $5 for participation. Participants ranged in age from 19 to 66 (mean age of 41); 22 percent were male. A total of 42 percent were married and had never been divorced, 26 percent had never been married, 17 percent were divorced and were not remarried, and 15 percent had been divorced and were remarried. One subject with unusually fast response times was omitted.

3.1.2. Procedure. The questionnaire began:

In the following 12 scenarios, you will be presented with scenarios involving divorcing couples in the midst of negotiating a separation agreement. Each scenario has 6 proposals for how to divide the property, and you will rate the reasonableness of each proposal by itself. Basically, the couples need to decide what they will do with the house, how they will divide the money in their joint bank account, and what they will do with other joint possessions of significant value (e.g., cars, furniture, jewelry).

State law permits them to consider each other's contributions to the household as a guide to property division. So, for example, they could take into account that John's income was used to purchase his car or that Mary has done substantial renovations on the house.

However, this is a no-fault divorce state, so any problems they had during their marriage or any blame about the divorce should not factor into their decisions about dividing property. If they cannot come to an agreement, they will have to go to court and let a judge decide who gets what.

Please rate each proposal on a 1 to 7 scale of reasonableness, where 1
very unreasonable, this proposal should be rejected as totally insufficient; 4 = somewhat reasonable, depending on how other property gets divided; 7 = so reasonable it’s downright generous, this proposal should be accepted immediately.

Each screen (of a total of 72) asked subjects to rate a single proposal. This is a sample screen:

Consider this case from the perspective of an impartial judge.

Sara and John have been married for ten years, and they have no children. Sara has revealed that she is gay. Sara was attracted to members of the same sex even before marriage, but she never confided in John, and this revelation comes as a complete surprise to John. Sara has now filed for divorce.

John proposes that they each keep the car they were accustomed to driving; he will keep the Toyota SUV and Sara will keep the Honda station wagon.

Imagine that you are an impartial judge. How reasonable do you think this proposal is?

All six proposals for a given scenario, three from each party, were presented consecutively, but the order of the scenarios was random across subjects. Three variables were randomized for each scenario: type of divorce (unilateral fault or neither party at fault), gender of the wrongdoer, and perspective (husband, wife, or judge). Thus, each scenario had a version in which one party was clearly at fault and another in which neither party was really at fault. There were 12 different scenarios. They were as follows: adultery, sexuality, failure to provide, refusal of sex, abandonment, cruelty, meanness to stepchildren, broken contract, broken financial contract, crime, financial irresponsibility, and alcoholism.

In the adultery scenario, for example, the two fault conditions (unilateral fault and no fault) read as follows:

Tom and Joanna have been married for ten years, and they have no children. Tom recently revealed that he has been having an affair with a colleague and is leaving Joanna. Tom has already retained a lawyer and filed for divorce.

Tom and Joanna have been married for ten years, and they have no children. They have been growing apart for some time, and recently both
Tom and Joanna have revealed to the other that they have fallen in love with someone else.¹

When one party was at fault, it could be either the husband or the wife in a given scenario for a given subject. (In the adultery scenario, for example, some subjects read about Joanna’s affair and others about Tom’s affair.) We also asked subjects to consider the proposals from the point of view of a particular party: the husband, the wife, or an impartial judge. For each item in these scenarios, we are interested in four variables: whose perspective is being taken, which party is making the proposal, what kind of divorce it is (unilateral fault or neutral), and, if it is a unilateral-fault divorce, which party is at fault. In our analyses, we often look at the data in terms of combinations of these variables. So, for example, we might want to look at the difference between ratings of wrongdoers’ proposals and ratings of victims’ proposals in unilateral-fault scenarios; then we look at items in which the party making the proposal is the same as the party at fault and compare it with items for which the proposer is different from the party at fault. (Each proposal is analyzed as one item.)

In this experiment, the first 34 respondents encountered an error in one of the scenarios (meanness to stepchildren), and those responses were omitted. In these analyses, we also omitted the crime scenario. In the unilateral-fault version of the crime scenario, one of the parties embezzles money, drives the couple to bankruptcy, and goes to jail. This is not a valid scenario for our purposes, because this is the kind of fault that could be considered under the law. A judge can award a lesser portion to the party responsible for diminution of the joint assets. Since most people (correctly) intuit that the person at fault in this situation should get less money, including this group of items biases the results in favor of our hypothesis.

### 3.2. Results

Table 1 shows the overall means for each condition. Fault had an effect on subjects’ ratings of the settlement proposals; a wrongdoer’s proposal was evaluated as less reasonable than a victim’s proposal on the 7-point scale. Our first analysis compared, by subject, ratings of different proposals as a function of the proposer (who was either a victim or a

¹ The complete questionnaire is available online (Divorce Cases (div1a) [http://finzi.psych.upenn.edu/~baron/ex/tess/div1.htm]).
Table 1. Mean Ratings of Proposals by Proposer and Perspective

<table>
<thead>
<tr>
<th>Proposer’s Perspective</th>
<th>Spouse’s Perspective</th>
<th>Judge’s Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim’s proposal</td>
<td>5.26</td>
<td>4.30</td>
</tr>
<tr>
<td>Wrongdoer’s proposal</td>
<td>4.96</td>
<td>4.01</td>
</tr>
<tr>
<td>Neutral party’s proposal</td>
<td>5.05</td>
<td>4.32</td>
</tr>
</tbody>
</table>

We also analyzed the data by scenario and by item, comparing the responses of subjects who saw a given scenario or proposal in one of two conditions, one in which the husband is at fault and one in which the wife is at fault. The main effect of fault was significant across subjects ($t = 4.296$, $df = 108$, $p < .0001$); the average subject rated proposals made by victims about one-third of a point (.326) higher than the score for proposals made by wrongdoers. The effect of fault was not significantly different for male and female subjects ($t = 1.131$, $df = 44.268$, $p = .2641$). However, female subjects showed a preference for women’s proposals overall (mean difference $= .319$, $t = 5.108$, $df = 84$, $p < .0001$), whereas men showed no preference (mean difference $= .005$, $t = .052$, $df = 23$, $p = .9588$; test of differences is significant: $t = 2.582$, $df = 41.08$, $p = .0135$). Subjects distinguished between wrongdoers’ proposals and the proposals of parties to a nonfault divorce (hereinafter called a neutral divorce), rating wrongdoers’ proposals about a quarter point (.244) lower than the score for neutral parties’ proposals ($t = 3.545$, $df = 108$, $p = .0006$). Although the direction was as expected, there was no significant difference by subject between ratings of victims’ proposals and ratings of neutral parties’ proposals (mean difference $= .082$; $t = 1.4914$, $df = 108$, $p = .1388$). The test of differences is not significant, however: the difference in ratings between neutral parties’ proposals and wrongdoers’ proposals is not significantly greater than the difference in ratings between neutral parties’ proposals and victims’ proposals ($t = 1.635$, $df = 108$, $p = .1049$). However, when subjects took the perspective of a judge, their ratings of neutral parties’ proposals (mean $= 4.72$) were significantly closer to their ratings of victims’ proposals (mean $= 4.71$) than to ratings of wrongdoers’ proposals (mean $= 4.39$) (test of differences: $t = 2.032$, $df = 108$, $p = .0447$). In other words, judges treated victims the same as they treated parties to a neutral divorce, but they disfavored wrongdoers.

We tested each item across subjects, comparing the responses of subjects assigned to one of two conditions, one in which the wrongdoer
makes the proposal and one in which the victim makes the proposal. The mean difference across subjects, aggregated across items, was .264 ($t = 3.254$, $df = 65$, $p = .0018$). However, the items are not entirely independent, as subjects are responding to six questions within the same 11 scenarios.

The effect of perspective was also highly significant. We first compared ratings of “own” proposals with ratings of “other’s” proposals, collapsing across fault conditions (husband’s fault, wife’s fault, no one’s fault); in other words, we compared the overall ratings of items in which perspective and proposer are congruent (own) and the ratings of items in which perspective and proposer are incongruent (other’s; for example, take the wife’s perspective and rate the husband’s proposal). This difference was highly significant, with a mean difference of .852 ($t = 7.496$, $df = 108$, $p < .0001$). We then tested the difference between judge’s ratings and ratings of own proposals. Subjects show a significant effect of perspective, rating proposals .432 higher when they take the perspective of the proposer than when they take the perspective of an impartial judge ($t = 4.703$, $df = 108$, $p < .0001$). And subjects are much harder on a proposal, rating it .420 lower, when they take the point of view of the spouse than when they take the point of view of the judge ($t = 5.741$, $df = 108$, $p < .0001$).

The effect of perspective (the difference in the mean rating of own and other’s proposals) was significantly greater in unilateral-fault scenarios than in neutral scenarios. For victims, the effect of perspective was greater than it was for wrongdoers (mean = .592, $t = 3.2918$, $df = 108$, $p = .0013$). In other words, victims rated their own proposals about 1.25 points higher than they rated a spouse’s proposal, but wrongdoers rated their own proposals only about .66 points higher than they rated a spouse’s proposal. Subjects taking the perspective of the wrongdoer (.66) and subjects taking the perspective of a party to a neutral divorce (.73) did not differ significantly as to the effect of perspective ($t = .5205$, $df = 108$, $p = .6038$), but subjects taking the perspective of the victim were much more biased in favor of their own proposals and against a spouse’s proposals ($t = 4.1355$, $df = 108$, $p < .0001$). Wrongdoers’ responses were significantly more similar to neutral parties’ responses than were victim’s responses ($t = 2.1901$, $df = 108$, $p = .0307$).
4. EXPERIMENT 2

In this experiment, we modified the method of the first experiment. Here we are interested in how subjects respond to unilateral-fault divorces under no-fault divorce laws. In order to be sure that subjects fully understand the difference between a fault-based divorce and a no-fault divorce, they answer the same questions for each scenario four times: once as though they were permitted to account for fault and again under the no-fault rules and, within each of these categories, once with the wife at fault and once with the husband at fault. Finally, in this experiment the participants are always asked to consider the proposal in light of a judge’s response. If some people believe that fault should be taken into account in divorce negotiations, they may also believe that the judge will see things their way, thus making the possibility of a judge-made settlement more attractive. The design of this experiment is entirely within-subject; subjects saw each of the eight scenarios in all four permutations of a 2 × 2 of fault (husband’s or wife’s) and law (fault based or no fault).

4.1. Method

4.1.1. Subjects. A total of 105 participants responded to a survey on the World Wide Web; they were paid $8 for participation. A total of 8 subjects were omitted because their response times were so fast, leaving 97 for analysis. The ages ranged from 24 to 78 (mean 43), and 22 percent were male.

4.1.2. Procedure. Subjects read these instructions:

In this experiment, you will be presented with 32 scenarios involving divorcing couples who have gone to court. A judge will rule on how they should divide their property. The judge decides what to do with joint property like the house, the bank account, and other valuable possessions.

In each case, spouses submit proposals or requests to the judge, asking for property or certain ways of dividing the property. You will be asked to imagine what the judge would do to be fair and follow state law.

No-Fault Divorce Laws:

In all cases, the judge is trying to be fair and equitable to both parties. However, many states are “no fault” divorce states; in those states, the judge knows the reasons for the divorce, but those reasons cannot be reflected in the property division. The judge must use other factors, like each person’s financial contributions to the marriage, or who owned which property before they got married, in order to decide what is fair.
Fault-Based Divorce Laws:

In other states, certain divorces are “fault” divorces, which means that one person is deemed at fault. In those cases, the judge is allowed to make decisions in light of a party’s fault in the divorce.

How Will the Judge Respond?

For each proposal, please estimate the judge’s response on a scale from 1 to 7, where 1 = totally unreasonable, judge will not even consider this proposal; 4 = somewhat reasonable request that the judge will evaluate in light of all other requests; and 7 = very reasonable—even generous to the other party—so the judge will almost definitely grant.

The 32 scenarios consist of 8 basic scenarios repeated 4 times, with 6 questions after each.²

The eight scenarios in this experiment included two adultery situations, abandonment, cruelty, broken contract, broken financial contract, crime, and alcoholism. (As in the previous experiment, the crime scenario was omitted.) Each scenario was constant across proposals; subjects saw the scenario story at the top of the screen, and they rated the proposals, presented in random order within the scenario, sequentially. Only one proposal was shown at a time. The order of the scenarios was randomized across subjects, as was the order of conditions.

4.2. Results

Marital wrongdoing affected subjects’ predictions of the judge’s reaction in both fault and no-fault states (see Table 2 for the means). The effect was, predictably, quite large for fault states (mean difference = .933, \( t = 9.607, df = 96, p < .0001 \)), and, in fact, it was significantly larger than the effect in no-fault states (\( t = 6.652, df = 96, p < .0001 \)). However, fault still had a significant effect on predictions of judicial response when subjects were instructed that the judge could not take fault into account (mean difference = .339, \( t = 6.366, df = 96, p < .0001 \)). Results were significant for both male and female subjects, and there were no effects of subject gender (\( t = .7084, df = 32.781, p = .484 \)).

5. EXPERIMENT 3

In this experiment, the goal is to replicate and extend the main finding of the first two experiments, namely, that people take fault into account

² The complete questionnaire is available online (Divorce Cases (div2a) [http://finzi.psych.upenn.edu/~baron/ex/tess/div2.htm]).
Table 2. Mean Ratings of Proposals, by Legal Rule and Proposer

<table>
<thead>
<tr>
<th>Legal Rule</th>
<th>Wrongdoers' Proposals</th>
<th>Victims' Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-fault law</td>
<td>4.32</td>
<td>4.66</td>
</tr>
<tr>
<td>Fault-based law</td>
<td>4.03</td>
<td>4.96</td>
</tr>
</tbody>
</table>

in making these quantitative assessments, even when they are instructed not to. Here we are interested in why people show an effect of fault. Are they consciously punishing the wrongdoer, or are they unaware of the extent to which fault biases their responses?

5.1. Method

5.1.1. Subjects. A total of 79 participants responded to a questionnaire on the World Wide Web; they were paid $3 for participation. The ages ranged from 19 to 69 (mean 41.9), and 25 percent of the respondents were male.

5.1.2. Procedure. The questionnaire began with a description of the task, similar to that in the first two experiments. Here the two relevant conditions were the gender of the proposer and the gender of the wrongdoer, both of which were randomized across subjects. Further instructions asked subjects to act as an impartial judge or mediator and described the legal rules:

These couples all live in states with no-fault divorce laws. This means that the reasons for the divorce cannot be factored in to the property division. It does not matter if one person is clearly a victim and the other clearly to blame. You must use other factors, like each person’s financial contributions to the marriage or who owned which property before they got married, in order to decide what is fair.

Subjects rated four proposals for each of eight scenarios (though only seven will be analyzed, as the crime scenario was omitted). In this experiment, the gender of the proposer was random (in order to make sure that there was nothing inherent in the proposals that was affecting the results in the previous experiments), as was the gender of the wrongdoer. Where necessary, we edited stories and proposals to make them more gender neutral, such that it would be plausible that either a man or a

3. The complete questionnaire is available online (Divorce Cases (div3a) [http://finzi.psych.upenn.edu/~baron/ex/tess/div3.htm]).
woman could make a request. For example, we omitted proposals dealing with fairly gender-specific property, like jewelry.

At the end of the experiment, subjects were asked five additional questions and also had space to make any additional comments:

1. How impartial were you able to be in ignoring fault? (1 = totally biased, 4 = impartial much of the time, but with lapses, 7 = totally impartial)
2. Did you ever consciously go against the no-fault law to punish the wrongdoer or help the victim in a scenario?
3. How often did your responses depend on which party was at fault in the divorce?
4. How difficult was it to ignore the facts of each case and focus on the law? (1 = not difficult at all, 4 = somewhat difficult, 7 = impossible)
5. Do you think that your responses will show any bias against the wrongdoers? If yes: Why do you think you were biased?

5.2. Results

In this experiment, we replicated the results of the first two experiments, finding a main effect of fault (mean difference $= .60, t = 6.325, df = 78, p < .0001$). A total of 64.5 percent of subjects reported that they never went against the law to punish the person at fault; 35.5 percent reported that they did punish. A total of 58.2 percent of subjects said that their responses would not show a bias against the wrongdoer; 41.8 percent said they would show a bias. Figures 1–3 show the distribution of responses to the questions of the difficulty of remaining impartial, the self-evaluation of impartiality, and the extent to which subjects took fault into account.

Self-reported impartiality was inversely correlated with the actual fault effect ($r = -.333, t = -3.095, df = 77, p = .0027$). To measure overall impartiality, we took the final responses and aggregated them into a single measure of impartiality (in which a higher number means greater impartiality) and scaled the responses to account for individual variation.

Subjects who reported that they had gone against the law ($n = 27$) showed the biggest fault effect, with a mean difference of .892 between victims and wrongdoers on the 7-point scale ($t = 6.140, df = 26, p < .0001$), and these people ($n = 49$) showed a significantly larger effect of fault than did those who reported that they did not go against the law ($t = 2.399, df = 60.5, p = .0195$). However, even those who reported
that they did not go against the law to punish wrongdoers nonetheless showed a significant fault effect, almost a half-point difference between victims and wrongdoers (mean = .433, $t = 3.48$, df = 48, $p = .0011$). Subjects who reported that their responses would not show bias did show a significant effect of fault (mean = .500, $t = 4.074$, df = 45, $p = .0002$). Finally, subjects who responded with 1, 2, or 3 out of 7 to the question of how difficult it was to remain impartial showed a significant effect of fault (mean = .342, $t = 2.3986$, df = 32, $p = .0225$).

Men’s self-reported bias (or lack thereof) more strongly predicted actual bias than did women’s self-reported bias. There were no significant differences between reported impartiality between men and women ($t = .9802$, df = 44.963, $p = .3322$). The correlation between the im-

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**Figure 1.** Distribution of responses to the question, How impartial were you able to be in ignoring fault?
Figure 2. Distribution of responses to the question, How often did your responses depend on which party was at fault in the divorce?

The partiality measure was $-0.670$ for men ($t = -3.828, df = 18, p = 0.0012$) and $-0.237$ for women ($t = -1.844, df = 57, p = 0.0704$). The difference between these correlations is significant ($z = 2.05, p = 0.0404$). A total of 62.5 percent of women and 70 percent of men reported that they did not go against the law in order to punish the wrongdoer. For women, however, there were no significant differences in the fault effect for women who said that they did punish (mean = .833) and those who reported that they did not punish (mean = .624) ($t = .9314, df = 45.634, p = .3565$). The difference between those who reported going against the law and those who did not was highly significant for men, in contrast, even though the total number of male subjects was only 20 ($t = 3.401, df = 9.988, p = .0068$). Men who reported that they
did punish showed a significant mean difference of 1.095 ($t = 3.962$, $df = 5$, $p = .0107$), whereas those who did not made no differentiation between victims’ proposals and wrongdoers’ proposals (mean = −.046, $t = .2416$, $df = 13$, $p = .8129$).

6. EXPERIMENT 4

In this experiment, we want to push subjects to disentangle three factors: their approach to the negotiation, a judge’s view of the problem, and the adequacy of no-fault divorce laws for ensuring justice between the parties.
6.1. Method

6.1.1. Subjects. A total of 85 subjects, with ages ranging from 21 to 69, responded to a survey on the World Wide Web; they were paid $5 for participation. A total of 24.7 percent of the subjects were male.

6.1.2. Procedure. This experiment was much the same as experiment 3, with eight scenarios of four questions each and with the gender of the proposer as well as the gender of the wrongdoer randomized. The instructions included the following line: “Assume that the judge goes strictly by the book and remains impartial even when he thinks the law is unfair.”

In this experiment, we replaced the crime scenario with another situation in which one spouse decides that he or she does not want children:

Phil and Carol have been married for 8 years, and they have no children. They are now getting divorced. Carol wants children, and Phil does not. When they got married, Phil promised that they would start a family as soon as their careers were better established, but he has finally admitted that his career and freedom are too important to him to compromise by having kids.

Also, in this experiment, subjects answer three questions about each proposal:

1. How would a judge in a no-fault state evaluate this proposal? Estimate the judge’s response on a scale from 1 to 7, where 1 = totally unreasonable, judge will not even consider this proposal; 4 = somewhat reasonable request that the judge will evaluate in light of all other requests; and 7 = very reasonable—even generous to the other party—so judge will almost definitely grant.

2. How reasonable do you think this proposal is? (1 = totally unreasonable; 4 = somewhat reasonable; 7 = very reasonable, even generous to the other party)

3. Do you think that the no-fault divorce law offers a fair way to deal with this issue? (1 = The law is very unfair in this situation. 3 = The law is somewhat fair in this case. 5 = The law is perfectly fair in dealing with this situation.)
6.2. Results

In this experiment, we replicated the main fault finding from the previous three experiments. An average subject predicted that a judge would rate proposals by victims about a third of a point higher (.332) than the score for proposals by wrongdoers ($t = 5.706, df = 84, p < .0001$). Subjects’ own assessments (“How reasonable do you think this proposal is?”) showed an even greater bias, with a mean difference between victims’ proposals and wrongdoers’ proposals of .521 ($t = 8.036, df = 84, p < .0001$). The difference between judges’ ratings and own ratings was significant ($t = 3.846, df = 84, p = .0002$). Fault also affected the ratings of the law’s fairness; subjects found the law slightly fairer for dealing with victims’ claims than wrongdoers’ claims (mean = .101, $t = 3.087, df = 84, p = .0027$).

The average response to the question of fairness was 3.7 of 5. There was no significant correlation, across all subjects, for subjects with low ratings for the law’s fairness and a high effect of fault for the questions regarding a judge’s response ($r = -.048, df = 83, p = .6655$). The correlation between fairness and subjects’ own ratings was slightly higher but still not significant across subjects ($r = .161, df = 83, p = .1412$). The average subject response to the legal rule for a given proposal in a given scenario was 3.7 of 5, where 3 means that the law is somewhat appropriate for handling the situation and 5 means that the law is totally adequate in this case. There were almost three times as many responses of 5 (842 of 2,720) as responses of 1 or 2 combined (319).

7. Discussion

These results indicate that people take marital fault into account when they make judgments and decisions about divorce negotiations, even when they are instructed to ignore it. People rate bargaining proposals from marital wrongdoers as less reasonable than proposals from neutral parties (parties to faultless divorce) and proposals from victims. Subjects also estimate that a judge’s assessment would be similarly biased against the wrongdoer. This effect of fault is diminished, but still significant, when we ask subjects to rate proposals under conditions, one in which fault is a permissible factor for a decision and another in which it is not. Table 3 shows a summary of these results.

Some people report that their bias is the product of a conscious choice, which reflects an unwillingness to comply with an unfair law. Others
report that they have no intention of punishing the wrongdoer but nevertheless show a large effect of fault in their judgments. Women appear to have much less insight into their own bias than men do. However, we do not sample gender well, and the men in this sample may be unusual, a possibility discussed in more detail below. Finally, subjects taking the proposer’s perspective rate a proposal higher than those taking the spouse’s perspective. This difference is greater in unilateral-fault divorces than in neutral or shared-fault divorces.

The question motivating this research was how people respond to a legal rule that is not in accord with their moral intuition. In these experiments, we see that many people’s instinct is to punish, or at least disfavor, wrongdoers. Subjects expressed distress that, under the no-fault law, parties can breach a contract without repercussions. A typical comment was: “Doesn’t seem fair for the party who hasn’t done anything wrong and hasn’t broken her part of the contract to be treated equally as the one who has.” Subjects also worried that the permissible consideration of contributions should actually include contributions to the relationship itself, a factor excluded under the no-fault laws: “No-fault may make things simpler, but why award one party equal proceeds when the relationship was never equal to begin with. If you’re going to court, time should be given to evaluating each person’s contribution to a relationship and compromising.” And, perhaps most commonly, the restrictions of the law made subjects angry or frustrated: “In this case, the no fault is for the birds. Sam was ignorant in thinking he could get his own way once he was married.” And, in fact, we know that more than a third of subjects in experiment 3 were willing to intentionally go against the legal rule in order to punish the wrongdoer, presumably when they determined that the law would yield an unfair result. This was somewhat surprising given that the instructions asked subjects to respond from the point of view of an impartial judge following no-fault rules, but some subjects apparently thought the judge would concur that

Table 3. Ratings of Proposals in Unilateral-Fault Scenarios under No-Fault Rules

<table>
<thead>
<tr>
<th></th>
<th>Experiment 1</th>
<th>Experiment 2</th>
<th>Experiment 3</th>
<th>Experiment 4 (Judge)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victims</td>
<td>4.76</td>
<td>4.66</td>
<td>5.02</td>
<td>4.81</td>
</tr>
<tr>
<td>Wrongdoers</td>
<td>4.45</td>
<td>4.32</td>
<td>4.42</td>
<td>4.48</td>
</tr>
<tr>
<td>Difference</td>
<td>.31*</td>
<td>.34*</td>
<td>.60*</td>
<td>.33*</td>
</tr>
</tbody>
</table>

*p < .0001.
the law was unfair. One subject even said as much; after responding that she had consciously gone against the law sometimes in order to punish the wrongdoer, she commented, “I am sure the judge would have done it, too.”

Nonetheless, we also have evidence that many subjects do not find the law egregiously unfair and yet respond negatively to the wrongdoer. One way to think about this result might be in the framework of the moral heuristic. Most people’s intuition is that a person at fault in a relationship is not equally entitled to the benefits or proceeds from the relationship. We might think of this as the system 1 intuition, or perhaps as the anchoring intuition. The legal framework asks people to override this intuition, which requires a kind of system 2 correction. The problem, then, is a failure to fully correct for the heuristic. Or, in the language of anchoring, the problem is a failure to adequately adjust from the anchor—in this case, the moral intuition.

Why does it matter if people take fault into account even when they are instructed to ignore it? If everyone agreed that fault is important and the law is unreasonable, divorcing parties could make contracts with one another in accord with their shared moral intuitions. This, in fact, would be a result in line with Ellickson’s (1991) predictions about the effects of informal norms. Our results suggest that this is not the case, even though the norm prohibiting marital misconduct appears to be quite universal. Subjects are certainly attuned to the informal norm, but they will turn to the legal rule when it is to their benefit to do so. When subjects are put in the position of the victim, they rely heavily on the moral norm as a basis for decision making. However, when subjects assume the role of the wrongdoer, they adhere to the legal rule.4

There are several limitations based on these methods. The first problem is that only about a quarter of all subjects were men. However, even

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4. In experiment 1, we asked people to assess the reasonableness of various bargaining positions from the perspective of the husband, the wife, or the judge. Perspective was important in all cases; people found their own proposals more reasonable than the proposals of a spouse; subjects taking the perspective of the judge more or less split the difference and found that a reasonable point lay between those of the opposing parties. When subjects were assessing proposals in neutral divorces—divorces in which fault was, by definition, not an issue—they still rated their own proposals higher than others’ proposals. When subjects took the perspective of the wrongdoer in a divorce, their responses were very similar, which suggests that wrongdoers are able to behave as though fault is not an issue in the divorce. Subjects taking the perspective of the victim, however, are significantly more biased in favor of their own proposals and against those of the spouse (the wrongdoer); their responses are quite different from the responses in a neutral divorce.
when analyzing male subjects separately, we found significant effects of fault that were consistent with responses from female subjects. The second limitation of this methodology is that it is somewhat unclear how generalizable our results are to actual divorce cases; after all, these are hypothetical scenarios and proposals that in no way affect the subjects’ lives. There is no real cost, for example, to our subjects if they want to disfavor a wrongdoer, since they will not have to pay any lawyers’ fees. However, the fact of the fault is almost surely less salient to subjects reading brief scenarios than it is to people experiencing the dissolution of a marriage, which would suggest that our results are actually conservative. Finally, we do not know whether subjects fully understood our instructions or the implications of their responses. The results clearly indicate that subjects were responsive to instructions about whether they could take fault into account, but they may not understand the cost of flouting the law. We assume that when parties’ responses are unreasonable in light of the instructions, they risk impasse and costly litigation. We conveyed this information in the instructions, but we do not know if subjects grasped the meaning and if they were more willing to consciously go against the legal rule because they did not understand the consequences.

Divorce bargaining is bargaining “in the shadow of the law”; it is both private, in the sense that parties can create almost any contract that they choose, and public, in that the legal norm affects parties’ ex ante expectations and entitlements. What happens to that bargaining, though, when the legal rule is counter to most peoples’ intuitions? This research indicates that people are resistant to unfair applications of such a rule, and even when they agree to try to follow it, they are unable to do so and are often unaware that they have not been successful.

REFERENCES


