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Moral Intuitions About Fault, Parenting, and Child Custody After Divorce

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Allocations of child custody postdivorce are currently determined according to the best interest standard; that is, what is best for the child. Decisions about what is best for a child necessarily reflect cultural norms, at least in part. It is therefore useful as well as interesting to ask whether current understandings of the best interest standard align with moral intuitions of lay citizens asked to take the role of judge in hypothetical cases. Do factors such as whether 1 parent had an extramarital affair influence how respondents would award custody? In the current studies, a representative sample of citizens awaiting jury service was first given a neutral scenario portraying an "average" family. Almost 80% favored dividing custodial time equally between the 2 parents, replicating earlier findings. 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, our respondents awarded the offending parent significantly less parenting time; about half of our respondents in each Study. The findings indicate that many citizens feel both having an affair and growing tired of the marriage is sufficient cause to award decreased parenting time, reasons for which are explored in the discussion.

Keywords: divorce, child custody, no fault, moral intuition, parenting

Between 40% and 50% of marriages end in divorce (Cherlin, 2010). These divorces obviously affect children, although such effects vary in their magnitude, nature, and causal pathways (Amato, 2005; Bhrolchain, 2001; Bhrolchain, Chappell, Diamond, & Jameson, 2000; Braver & Lamb, 2012; Hetherington & Kelly, 2002; Lamb, 2012; Potter, 2010). Parental conflict, troubled parent–child relationships, and wholesale changes to their lives are risk factors for social, psychological, and educational difficulties in children and are all associated with family breakdown (although whether divorce per se is the causative agent is more debatable, because these stressors often precede divorce; Chase-Lansdale, Cherlin, & Kiernan, 1995; Cherlin et al., 1991). Recent decades have seen renewed interest in strategies to reduce the risks associated with family breakdown. One possible lever is ensuring custodial arrangements that increase the prospects of the child retaining a healthy and supportive relationship with both parents (Amato, 2005; Emery, 1999b).

Family law, including custody law, is inevitably affected by prevailing cultural values, possibly even more so than for many other areas of law. This influence can be demonstrated by examining the historical contexts during which shifts in the law occurred. Prior to around the second half of the 19th century, English family law was primarily concerned with the preservation of family estates, passed down through generations via the primogeniture rule favoring the eldest son (Glendon, 1981). During this time, married women also had very little independent voice of any kind. They could not vote, own property, earn wages, or sue in their own right. Coinciding with the societal interest in preserving family estates and a lack of women's rights, paternal rights ruled in custody disputes (Grossberg, 1985; Hartog, 2000). This legal tradition carried over to the American colonies and was the prevailing standard during the founding of the United States. Consequently, at America's founding child custody was commonly awarded to fathers.

But by the last quarter of the 19th century, American culture started to shift away from regarding a child as the property of the father. Instead it moved toward believing that custody should be awarded based on the child's interests. At that time, people began to believe that most children, especially if they were young, were better off in the care of their mothers. This shift can be attributed

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in part to a shift in the recognition of women's property rights and to changes in family structure resulting from the industrial revolution (Grossberg, 1985; Hartog, 2000). American judges, exercising discretion in the absence of any statutory rules governing the matter, began to award custody to mothers (Grossberg, 1985; Hartog, 2000). Following this trend, most state legislatures began recognizing the importance of the child's interests and eventually adopted a maternal preference, at least for young children.

Again, in the 1960s cultural norms shifted, influencing the divorce reform movement that took place in the late 1960s that eventually led to no-fault divorce and abandonment of the maternal preference (Kay, 2002). During this time in American history, there was increasing concern with gender equality. Recognizing this cultural shift, abandonment of the maternal preference was recommended by the Commissioners on Uniform State Laws in the influential Uniform Marriage and Divorce Act, adopted in 1970, which instead provided for a gender-neutral Best Interests Standard (BIS) (Uniform Marriage and Divorce Act, 1970). The influence of gender equality was also evident in the United States Supreme Court's decisions. In 1979, the Supreme Court held that state laws allowing wives, but not husbands, to claim alimony on divorce violated the Equal Protection Clause of the Fourteenth Amendment (*Orr v. Orr*, 1979). Concerns arose that the maternal preference in custody was constitutionally suspect as well. Ultimately, the gender equality movement led to a gender-neutral custody standard (Kay, 2002). Although brief, this historical analysis highlights the ways cultural norms and values have influenced shifts in custody law (for a more thorough analysis, see Grossberg, 1985; Hartog, 2000).

Cultural norms and values were also responsible for causing a nationwide shift toward no-fault divorce. Prior to the middle of the 20th century, divorce in most states required one spouse to prove the other "at fault." All states recognized adultery as grounds for divorce; less restrictive states recognized additional grounds such as "mental cruelty." Couples who wished to divorce often fabricated the necessary grounds in sham proceedings, with the implicit cooperation of their lawyers and, often the courts, either because there was no factual basis for the only grounds their state recognized, or because they did not wish to put such facts in the public record (Ellman et al., 2010). By 1985, as divorce became more socially acceptable, all states eliminated this need for sham proceedings by allowing divorce by mutual consent. Indeed, most also allowed unilateral divorce: either spouse can end the marriage without showing the other is at fault (but in some states, only after a waiting period of several years; Ellman et al., 2010).

Many reformers who wished to eliminate fault as a requirement for divorce also wished to eliminate it as a basis for child custody decisions. "The pressing need to eliminate any judicial consideration [with regard to custody] of marital misconduct of a parent that did not affect a child, which was most commonly used to disqualify mothers as custodians" (Kay, 2002, pp. 31–32) was an explicit desiderata of many reformers. The BIS was widely considered a custody standard much preferable to a gender-based or fault- and misconduct-based standard because it emphasized what is good for the child, rather than what is fair for the parents or the parents' rights (Warshak, 2007). For this reason, the BIS was viewed as a crucial step forward for custody standards. As Kelly (1994) stated, "For the first time in history, custody decisions were to be based on a consideration of the needs and interests of the child rather than on the gender or rights of the parent" (p. 122). The BIS is also praised for its advantages of being simple, egalitarian, flexible, and adaptable (Chambers, 1984; Warshak, 2011). Flexibility is beneficial because it allows individualized decisions for each family based on their specific circumstances and needs rather than trying to pigeonhole families into the same, possibly inadequate formula (Warshak, 2011). Likewise, the adaptability of the BIS allows it to "accommodate new knowledge and understanding about children's needs and to respond to changing legal and social trends" (Warshak, 2011, p. 100).

Although many recognize the benefits of the BIS over previous doctrine, there are two important criticisms. First, the standard's flexibility makes it more difficult to predict the custody decisions of courts applying it and may also invite subjective evaluations grounded in part on the judge's values—which of course may vary among judges. The unpredictability may in turn distort the bargaining process necessary to settle custody contests and avoid their litigation (Mnookin & Kornhauser, 1979). Second, the discretion given to the courts under the BIS results in a lack of guidance or objective basis for choosing between two fit parents. Without providing such guidance or weighing specific factors, there is the possibility that judges allow their own values and morals to influence the custody decisions whether or not they are aware that it is happening.

As an example of how laws base their statutes on the BIS, the Arizona version of the BIS (from Arizona Revised Statutes, Title 25, Section 403) reads[1]:

> A. The court shall determine custody, either originally or on petition for modification, in accordance with *the best interests of the child* [emphasis added]. The court shall consider all relevant factors, including . . .
>
> B. In a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in *the best interests of the child* [emphasis added].

While most believe the retreat from fault was a salutary development, not all commentators do. The majority of those who critique no-fault do so in the belief that repealing it will reduce divorce rates and increase the sanctity of marriage (Schneider, 1994;Wardle, 1991), a claim that has been highly contested (Wolfers, 2006). But some believe fault should also be taken into account in allocating property (Braver & Ellman, 2013; Parkman, 2000) and in alimony (Brinig & Buckley, 1998; O'Connell, 1988, but see Ellman, 1996; Ellman & Lohr, 1998). Finally, some argue that fault should be weighed in child custody (Bradford, 1996). However, that is not the position now taken by most states (Ellman et al., 2010), most scholars (Ellman et al., 2010), or the American Law Institute (2002). But little is known about how the public views any of these proposals. It is plausible that people would view marital fault as relevant to child custody arrangements because it has been well documented that selection pressures have evolved a tendency for humans to search for, identify, and punish "wrong-

[1] This is the version of the law that was in effect when the study was run. Since then, the laws changed (in 2013). The new version of the Arizona Revised Statutes is available at http://www.azleg.gov/ArizonaRevisedStatutes.asp?Title=25

doers" (Buckholtz et al., 2008; Cushman & Greene, 2012; Fehr & Gächter, 2002; Haidt, 2013; Wilson, 2012).

The history elucidated previously shows that custody law has evolved in concert with changing societal values and cultural norms. Thus, it is important for lawmakers to really understand social consensus and lay moral intuitions. We do not argue that laymen's moral intuitions are the *only* relevant consideration decision-makers should take into account, of course, but contend they *are* relevant. That it is important to assess the moral intuition of the populace as a backdrop for legal policy is hardly an unprecedented proposition. There have been numerous studies that examine people's moral sentiments in the context of torts, contracts, and criminal prosecutions (e.g., Korobkin, 2002; Roberts & Stalans, 1997; Robinson & Darley, 1995; Thomas & Hogue, 1976; Tyler & Boeckmann, 1997; Wissler, Evans, Hart, Morry, & Saks, 1997). Likewise, lay intuitions may also be informative in the context of child custody in family law and thus provide policymakers with useful information about societal values.

Current Studies

In our previous study assessing lay moral intuitions (Braver, Ellman, Votruba, & Fabricius, 2011), we found that in a "baseline" case that presented no obvious basis for believing a child will be better off if primary residential custody is given to one parent as opposed to the other, the preponderance of respondents in our sample of citizens said that if they were the judge, they would divide the custodial time equally between the parents. We then tested the strength of that "baseline" preference for equal custody in several test cases that presented facts that, under some proposals or by some courts or some custody evaluators, would lead to the conclusion that the child's interests required a different arrangement. In one study, respondents were told that either the mother or the father (depending on condition) had performed 75% of the child caretaking provided by the parents when they were together, a factor that would register strongly in that parent's favor under the Approximation Rule proposal (American Law Institute, 2002; Scott, 1992). In fact, we found these factual changes only marginally affected our respondents' judgments of the best custodial arrangement and that a large majority nonetheless continued to prefer equal time allocations in both cases.

In a second study, participants were told that there was considerable conflict between the parents, for which the two parents were equally responsible. Many custody evaluators and judges would be hesitant to recommend equal custody in such cases, in which there was considerable parental conflict, no matter who was responsible. For example, Stahl (1999) in his guide for professional custody evaluators opines "high conflict parents cannot share parenting" (p. 99). Similarly, Buchanan (2001) writes "when parents remain in high conflict, joint custody is . . . ill-advised" (p. 234). But again, our lay citizen respondents showed virtually no shift from equal custody in this case.

In contrast, we found a large shift away from an equal time allocation in a third test case, which also involved a lot of conflict between the parents, but in which the respondents were told that *only* the mother or *only* the father (depending on condition) was the primary instigator. In these scenarios, our participants awarded the parent causing the conflict far less parenting time than the other parent. One plausible reason for the previous finding could be that the respondents believed that the parent who caused that conflict was somehow not as good a parent. But another possible interpretation is that they believed the conflict-causing parent should be punished for his or her bad behavior with a less favorable result in their custody dispute.

If the latter possibility is correct, it suggests that respondents are using something akin to fault-based reasoning in deciding custody. If respondents wish to punish parents in their custody ambitions because they disapprove of instigating conflict, perhaps they would also be moved to similarly punish them for engaging in traditional fault actions, such as adultery.

In the current studies, we attempt to replicate our baseline findings with a new sample and to probe further the previous issue by asking respondents to decide cases with two new fact patterns meant to shed more light on whether they consider marital misconduct without regard to its possible impact on the children. In one of the studies, either the mother or the father was said to have committed adultery during the marriage, but the affair was kept secret from the children and in no way affected them. The respondents were also told that both parents "deeply love the two kids and are both reasonably good parents who are involved in their children's lives about like average families." Also in both cases, the respondents were told to decide the case on the basis of the child's best interest.

How would the courts deal with such a case under current law? In applying the BIS, courts generally exclude consideration of marital misconduct unless it is part of a larger set of facts that constitute evidence of parental deficiencies in the offending spouse. Adultery alone, without more, is insufficient to disfavor a spouse in a custody dispute. But perhaps this legal rule is inconsistent with the public's views. The public might believe that adultery is immoral and that an immoral parent should not receive primary or equal custody, whether to punish that parent, or to protect the child from such immoral influences. If our respondents believed that, they would award less time to a parent who had an affair than they would in a neutral scenario that was otherwise identical.

This study sought to find out whether that was the public's view by asking them to resolve both a neutral case and an otherwise identical case involving adultery. To better understand the motivations of respondents who decide the adultery vignette differently than the neutral case, we also conducted a second study in which an otherwise blameless parent obtained a unilateral divorce just because he or she "grew tired" of the marriage. Respondents who wished to punish a parent for adultery, or protect the child from the immoral influences of an adulterous parent, should treat this third vignette differently than do respondents deciding the vignette involving adultery.

Method: General

Respondent Pool and Survey Distribution

The respondents were from the Pima County (Arizona) jury panel. Those summoned to serve on a jury panel are citizens chosen from the voter and driver's license records. Using a computer-generated random selection process, the jury panel is chosen to be a representative cross-section of the adult citizens in

the county. Of those who are summoned by the county jury commissioner, over 90% eventually appear (Braver, 2007).

When an individual is summoned to participate on a jury panel in Pima County, they arrive in one of three shifts, at 7:30 a.m., 9:00 a.m., or 11:00 a.m. They then wait until a bailiff escorts a number of randomly chosen individuals from the jury assembly room to the judge's court room. This continues throughout the morning. It is not uncommon for an individual to wait to be called for more than an hour. In addition, they may be called but then not chosen for that specific jury. In this case, they return and wait to be called again. It is during these waiting periods that the survey was administered. Participation in the survey was voluntary.

After each shift arrived, checked-in, and listened to instructions from the jury commissioner staff, they then listened to a Research Assistant who said the following:

> We are from the University. We'd very much appreciate your participation in a survey asking your opinions about child custody. Participation is not required as part of jury duty. But you're sitting here anyway, and you can help us, as well as state officials, by answering these questions. Please read the Instructions on the form carefully. Don't put your name or Juror number or any other identification on the form, which will remain anonymous and confidential. Raise your hand when you complete the survey, and one of us will pick it up. If you are called for jury service before you are finished, turn the survey in unfinished—we'll pick it up as you go out the door.

Three research assistants then handed out the surveys. Different versions of the survey were distributed at random such that different jurors randomly received different surveys. For the current study, of the 422 jurors present who were approached and offered the survey, 120 chose not to take a survey form and the remaining 302 surveys were accepted. Of these 302, 227 were completed, 69 were not completed because the respondent was called for jury service, 2 were not completed because the respondent left for lunch, 2 were abandoned by the respondent, and for 2 more the respondent ultimately refused to complete it. (Of the 227 completed surveys, 52 were for the separate previously published study described earlier [Braver, Ellman, Votruba & Fabricius, 2011], leaving a total of 175 for the 2 studies herein described). Thus, the participation rate (excluding those prevented from completing by being called to jury or lunch) was $227/(422-69-2) = 65\%$, almost identical to the rate found by Ellman, Braver, and MacCoun (2009). For this reason, and the representative nature of the jury panel, our past studies using this identical method and jury pool have found that the sample responding to the survey closely matches the national population in age distribution, level of education achieved, and household income.

Survey Instrument

The survey for both Study 1 and Study 2 had two sections, the first of which comprised the custody scenarios. It began with the following "stage setting" instruction:

> When a married couple with children gets a divorce, a decision needs to be made about where the children will live. If the two parents can't agree about this, the courts or judges will make this decision.
>
> We want you to put yourself into the role of the judge in the following stories in which the two parents are in the process of getting a divorce and they don't agree about what the living arrangements should be for their two school-age children. Please read the following stories very carefully and try to imagine yourself sitting on the bench in a courtroom needing to decide about what should be done about the couple's disagreement and trying to decide as wisely as possible. You should also assume that there is nothing in the law itself that gives strong guidance; every case needs to be decided on its own merits *based on what is best for the child.* There is no right or wrong answer; just tell us what *you* think is right.

The scenario section for both Study 1 and Study 2 then described two hypothetical families in the process of divorce. The first, Family A, was the NEUTRAL family, described as follows:

> *In Family A*, the evidence presented to you shows that in many respects, this appears to be a pretty average, normal family. For example, there are no indications about emotional or mental problems, drug or alcohol problems, domestic violence or physical or sexual abuse on the part of either parent. There is nothing suggesting that either one lacks "fitness" as a parent. Most of the marriage was without unusual conflict and the family life was quite average. The two children both appear to be normally adjusted, doing neither particularly well nor particularly poorly in school and otherwise. Additional evidence shows that both parents deeply love the two kids and are both reasonably good parents who are involved in their children's lives about like average families in which both parents work full-time (both M–F, 9-to-5).
>
> The marriage became lost when both parents began to feel that the other was not living up to expectations as a husband or wife. They decided to seek marriage counseling, but it did not help or change either person's mind about giving up on the marriage. So the divorce is proceeding.
>
> Since the separation, there has been relatively little conflict between the mother and the father. Both try especially hard never to argue in front of the children. Evidence shows that neither says bad things about the other to the children. Also neither tries to gain the loyalty of the children for themselves nor to undermine the other's authority or relationship with the children. They are both trying to make the best of the current situation.
>
> Each genuinely feels the children would be better off mostly in their care and not so much in the care of the other parent. They really disagree about this, and as a result are asking you, the judge, to decide for them, understanding that each parent now wants as much living time with the children as you see fit to grant. Each one would be able and willing to make whatever adjustments to their work and living situation is necessary to accommodate whatever level of living time with the children you, as judge, see fit to order.

After reading the previous scenario, the respondent was prompted to answer two questions:

(1) What would YOU decide if you were judge?

(2) What do you think WILL happen if the description above was a real family in today's courts and legal environment?

For both questions, the possible responses were

_____Live with mother, see father minimally or not at all
_____Live with mother, see father some
_____Live with mother, see father a moderate amount
_____Live with mother, see father a lot
_____Live equal amounts of time with each parent
_____Live with father, see mother a lot
_____Live with father, see mother a moderate amount
_____Live with father, see mother some

_____Live with father, see mother minimally or not at all

As shown, the responses to the questions are based upon a nine point scale ranging from 1 = the children "*live with mother, see father minimally or not at all*" through 5 = "*live equal amounts of time with each parent*" to 9 = "*live with father, see mother minimally or not at all.*" This scale allowed us to determine the amount of time the respondent thinks the children should spend with each parent given the information presented in the scenario. The alternatives were the ones used in previous studies of living arrangements (Fabricius & Hall, 2000), which—incidentally—allow direct comparison with the arrangements students from divorced families say they actually had, as well as would have wished.

A second family, Family B, was then described, and responded to with the same two questions as above; we termed Family B the test case. The nature of the test case differed by study and condition within study, and will be described and analyzed subsequently.

The final section of the survey was the demographic section. In this section, the respondent was asked to answer a number of demographic questions including their gender. This section always appeared at the end of the survey.

Results: Neutral Scenario

For all the surveys, the respondents were asked to assess the custody arrangement for the neutral scenario in which the family was fairly average with no notable issues. For this analysis, the neutrals for Study 1 and 2 were examined together, because all respondents were treated identically up through this point. Furthermore, attesting to the successful randomization, the effect of which test case scenario the respondents received subsequently was small and nonsignificant, $F(3,141) = .62$, $p = .61$. The resulting frequency distributions for both the If I Were Judge item ($M = 4.76$) and the What Will Happen item ($M = 3.67$; we term this factor "Perspective") are shown in Figure 1. These two means are very significantly different, $F(1,141) = 105.17$, $p < .01$. There was no indication of interaction of Perspective × Test Case Scenario, $F(3,141) = .28$, $p = .84$.[2]

As is evident by the distribution shown in Figure 1, most respondents (76.7%) answered "live equal amounts of time with each parent" for If I Were Judge. When answering the What WILL Happen item, in contrast, the respondents varied more, from "live with mother, see father minimally or not at all" (2.1%) to "live equal amounts of time with each parent" (29%), but on average answered "live with Mother, see Father a moderate amount."[3]

Study 1: Extramarital Affair

Method

Study 1 varied the description of the test case (Family B), describing one of the two parents as having an extramarital affair that "ruined the marriage." The description of Family B took four paragraphs, three of which (the first, third, and fourth) described Family B as "like" or "the same as" Family A, and were identical for all conditions of both Study 1 and 2. These paragraphs read:

> *Family B is the same as Family A in most respects.* That is, this family, too, appears to be a pretty average, normal family. There are no indications about emotional or mental problems, drug or alcohol problems, domestic violence or physical or sexual abuse on the part of either parent. There is nothing suggesting that either one lacks "fitness" as a parent. Again, most of this marriage was without unusual conflict and the family life was quite average. In this family, too, the two children both appear to be normally adjusted, doing neither particularly well nor particularly poorly in school and otherwise. Additional evidence shows that both of these parents, too, deeply love the two kids and are both reasonably good parents who are involved in their children's lives about like average families in which both parents work full-time (both M–F, 9-to-5).
>
> . . .
>
> *Like in Family A,* since the separation, there has been relatively little conflict between the mother and the father. Both of these parents, too, try especially hard never to argue in front of the children. Evidence shows that neither says bad things about the other to the children. Also, as in Family A, neither tries to gain the loyalty of the children for themselves nor to undermine the other's authority or relationship with the children. They are both trying to make the best of the current situation.
>
> *Like in Family A,* each parent genuinely feels the children would be better off mostly in their care and not so much in the care of the other parent. They disagree strongly about this, and as a result are asking you, the judge, to decide for them, understanding that each parent now wants as much living time with the children as you see fit to grant. Each one would be able and willing to make whatever adjustments to their work and living situation is necessary to accommodate whatever level of living time with the children you, as judge, see fit to order.

The second paragraph (inserted where the ellipses are above) described the demise of the marriage, the respect in which the second family differed from Family A (whose marriage, recall, ended "when both parents began to feel that the other was not living up to expectations as a husband or wife. They decided to seek marriage counseling, but it did not help or change either person's mind . . ."). For Study 1, the marriage was said to have ended when one of the parents discovered the other's year-long extramarital affair. The exact language was as follows. (Presented is the version where mother had the affair; the bracketed word was substituted for the preceding word in the version in which father had the affair.)

> What is *different* about this family is that in this family, the mother [father] became involved in a year long affair, which the father [mother] eventually learned of. This affair essentially ruined the marriage and it became apparent to both parents that the marriage was lost and needed to end. The affair was kept secret from the children and evidence shows it in no way conflicted with the mother's [fa-

[2] In analyzing only the What WILL Happen judgments, there was similarly no effect of Test case version, $F(3,141) = .38$, $p = .77$.

[3] We also examined the impact of respondent's gender on these judgments in a 2 × 2 (Gender × Perspective) analysis. There was no Gender main effect, $F(1,127) = .93$, $p = .34$, but there was a significant Gender × Perspective interaction, $F(1,127) = 4.81$, $p = .03$. Subsequent analysis revealed that the genders did not differ on what they would decide, $F(1,127) = 2.10$, $p = .15$; the significant interaction was largely because male respondents felt fathers would actually get significantly less parenting time in today's environment ($M = 3.40$) than female respondents thought ($M = 3.74$).

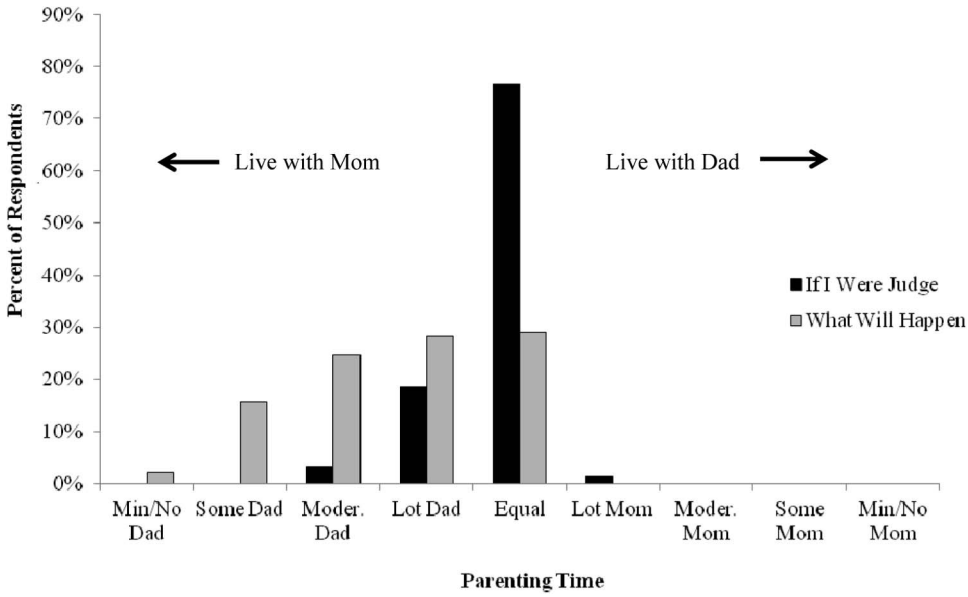

Figure 1. Parenting time awards respondents would make in neutral case.

ther's] (or father's [mother's]) ability to parent or the time either spent with the children.

Results

The Extramarital Affair study was initially analyzed as a three-factor mixed analysis of variance with the factors of Whose Affair, a 2-level between subjects factor, and both Case Type (neutral vs. test case) and Perspective (If I Were Judge vs. What Will Happen) as 2-level repeated measures factors. The triple interaction was not significant, $F(1,65) = .02$, $p = .88$. Of the three potential two-factor interactions, only the Case Type × Whose Affair was significant, $F(1,65) = 17.53$, $p < .01$. To explicate this effect further, because there was also a very strong and significant effect of Perspective, $F(1,65) = 55.66$, $p < .01$, a "simple simple main effect" analysis comparing adjacent cells (Keppel, 1973) was performed as shown in Table 1 (arrows indicate a significant difference) for the If I Were Judge responses[4]: (a) $F(1,65) = .62$, $p = .44$; (b) $F(1,65) = 12.17$, $p = .001$; (c) $F(1,65) = 15.76$, $p < .001$; (d) $F(1,65) = 6.63$, $p = .01$.

Table 1
Means for If I Were Judge for Extramarital Affairs, by Case Type, and Whose Affair, With Arrows Indicating Significant Differences

If I were judge	Neutral		Test
Mother affair	4.76	↔ b	5.41
	a		↕ c
Father affair	4.85	↔ d	4.36

Note. The higher the mean value, more parenting time for father is being awarded. 5 = equal time.

As Table 1 shows, the respondents, if they were judge, would award custody differently in the test case than in the neutral case, awarding significantly less parenting time to the spouse having the affair and correspondingly more to the innocent spouse. For Mother Affair, the respondents on average awarded .65 units more parenting time to Dad in the test case than in the neutral case. For Father Affair, the respondents awarded .49 units more parenting time to Mom in the test case than in the neutral. Further testing showed that the .65 units Mom was penalized for her affair was not significantly different than the .49 units Dad was punished for his, $F(1,65) = .38$, $p = .54$. Put another way, almost identical proportions (close to 1/2) awarded less parenting time to whichever parent had the affair than they awarded to that parent in the neutral case.

The distribution of choices for the test cases is presented in Figure 2, which can be contrasted to those for the neutral case of Figure 1.

Study 2: Who Grew Tired of the Marriage

Method

The method was largely the same for Study 2. The only exception was the second paragraph, describing the demise of the marriage. Here, there was no extramarital affair; the end of the marriage was instead said to be because of one parent's simply growing tired of the marriage (rather than being a mutual decision, as in the neutral scenario.) Here is the exact wording for this paragraph (presented is the version where mother grew tired of the

[4] Analogous analyses were conducted for What Will Happen. The results were often significant (and even interacted with respondent's gender), but complex, and do not bear on the issues in this article. To avoid distracting the reader, they are omitted.

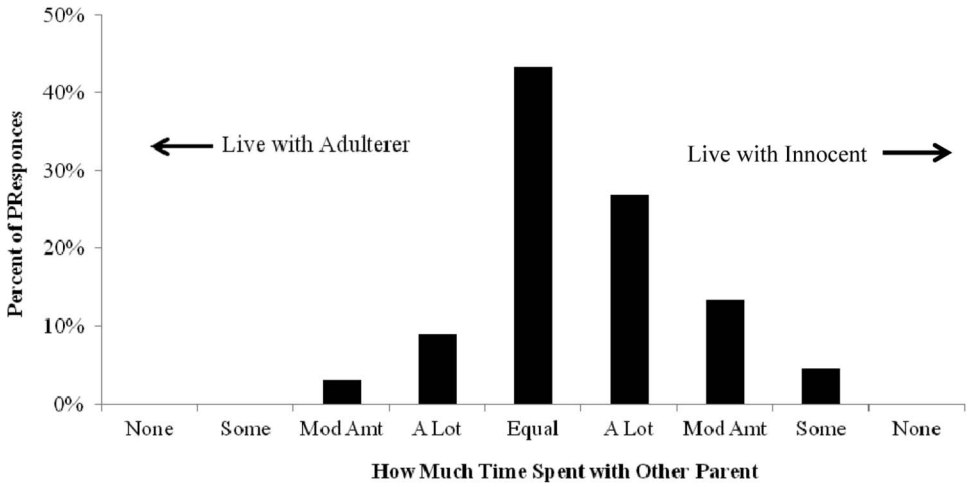

Figure 2. Parenting time awards respondents would make in extramarital affair case.

marriage; the bracketed word was substituted for the preceding word for the version in which father grew tired of the marriage).

> What is *different* about this family is how the marriage became lost. Rather than *both* parents deciding together to end the marriage, as in Family A, *in Family B, the mother* [father] simply grew tired of the marriage and told the father [mother] she [he] wanted a divorce. Since *he* [she] didn't want a divorce, he [she] suggested they seek marriage counseling, but it did not help or change the mother's [father's] mind about giving up on the marriage. So the divorce is proceeding.

Results

Similar to the previous study, the Who Grew Tired of the Marriage scenarios were initially analyzed as a three factor mixed analysis of variance with the factors of Who Grew Tired, a two-level between-subjects factor, and with Case Type and Perspective both as two-level repeated-measures factors. The triple interaction was again not significant, $F(1,69) = .49$, $p = .49$. Of the potential two-factor interactions, only Case Type × Who Grew Tired was significant, $F(1,69) = 37.25$, $p < .01$. This, along with the significant main effect of Who Grew Tired, $F(1,69) = 13.62$, $p < .01$, led to further analysis in the form of "simple simple main effect." Table 2 shows this analysis (arrows indicate a significant difference for If I Were Judge[5]: (a) $F(1, 69) = .02$, $p = .89$, (b) $F(1, 69) = 14.22$, $p < .01$, (c) $F(1, 69) = 22.26$, $p < .01$, (d) $F(1, 69) = 11.55$, $p < .01$.

Table 2
Means for If I Were Judge for Who Grew Tired Study, by Case Type, and Who Grew Tired, With Arrows Indicating Significant Differences

If I were judge	Neutral		Test
Mother grew tired	4.69	↔ b	5.19
	a		c ↕
Father grew tired	4.71	↔ d	4.26

Note. The higher the mean value, more parenting time for father is being awarded. 5 = equal time.

As Table 2 shows, the respondents awarded less parenting time to the spouse who grew tired of marriage and correspondingly more to the spouse who wanted to remain in the marriage. In Mother Grew Tired, the test case judgments gave on average .50 units more time to Dad than in the neutral case; and in Father Grew Tired, the test case judgments gave .45 units more time to Mom than the neutral case. Further testing showed that the .50 units Mom was penalized for losing interest in the marriage was not significantly different than the .45 units Dad was punished for doing the same, $F(1,69) = .05$, $p = .82$. While half of respondents awarded less parenting time to a father losing interest than they did in the neutral case, only a third did so when it was the mother who lost interest. This difference was not significant, $\chi^2(1) = 1.71$, $p = .19$.

Discussion

The neutral scenario presented participants with a fairly average family with no notable issues and asked them to choose a custody arrangement for this family. Respondent judgments for the neutral scenario were nearly identical across the four versions (two conditions for each study, differing in the gender of the spouse who had the extramarital affair or chose to end the marriage), no matter the test scenario that followed. Their predictions of how the case would actually be resolved were also consistent across the four versions. We are thus confident that the neutral scenario provided a stable baseline against which to compare our respondents' custody judgments in the test cases.

The results in the neutral scenario replicated our earlier findings in Braver, Ellman, Votruba, and Fabricius (2011): 77% of our

[5] Similar to the previous footnote, analogous analyses were conducted for What Will Happen in the Grew Tired study. Again, the results were often significant (and even interacted with respondent's gender), but complex, and do not bear on the issues in this article. To avoid distracting the reader, they are omitted.

respondents (it was 69% in the previous study) favored custodial arrangements calling for equal allocations of parenting time for a fairly average family with no notable issues. In contrast, only 29% (28% in the previous study) thought equal time would be ordered "in today's courts and legal environment." As in our earlier study, both male and female respondents thought courts would give mothers substantially more parenting time than they themselves would. Note that these data tell us only how our respondents believe the legal system would resolve this particular case. We have no data telling us whether their beliefs are correct or how judges would actually decide this same scenario.[6]

Maternal preference rules were largely replaced in the 1970s with rules directing courts to resolve custody disputes in a gender-neutral manner most consistent with the child's best interest (Kay, 2002). Whatever courts may actually do, data in our neutral case tells us that the great majority of *our* respondents do not apply a maternal preference: when given facts that provide no basis for believing either parent superior on best interests grounds, they choose equal time. Moreover, our prior work (Braver, Ellman, Votruba, & Fabricius, 2011) found that most respondents still preferred equal time when given facts, such as unequal division of prior caregiving, or high levels of mutually instigated conflict, that would move most courts and custody evaluators away from it. The results in the test cases should be viewed against this background.

Study 1 presented our respondents with a test case involving adultery. As Kay (2002) noted, "prior to the early 1970s . . . custody of the children . . . turned to some degree on matrimonial fault" (p. 30), as did alimony and property distribution. But a clear intent of the no-fault reformers was to make evidence of such behavior irrelevant "unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child)" (Uniform Marriage and Divorce Act, 1970). Thus, while there once was a time when courts might assume a parent who committed adultery was unsuited to have primary custody of the children, such a per se rule is not the law today. The parent's sexual conduct is relevant today only insofar as it affects the child's interest. As the American Law Institute formulates the test, a court deciding a custody contest "should not consider" a parent's "extramarital sexual conduct . . . except upon a showing that it causes harm to the child" (American Law Institute (2000), *Principles of the Law of Family Dissolution*, at § 2.12[1][e]). Courts have historically assumed such harm for some bad conduct, such as criminal violence, without requiring proof of the proposition, and they once made such assumptions for adultery also. But not today. In sum, the law can consider extramarital affairs if they tell one something about the custody arrangement most likely to serve the child's interest, but not just to punish the adulterous parent.

The average judgment of respondents in the adultery test case was nonetheless significantly different than the average judgment of respondents deciding the neutral case. Our respondents allocated adulterous mothers .65 units less parenting time then they gave mothers in the neutral case, and adulterous fathers .49 less than fathers in the neutral case. (Recall that the difference between the penalty imposed on mothers and fathers—.65 vs. .49—was not significant.) But these are average results. Because the study used a repeated measures method, we could examine how individual respondents changed their judgment from the neutral to the test case. The father's affair had no effect on the judgment made by 51% of our respondents, and the mother's affair had no effect on the choice made by 41%.[7] Among the nearly half who did shift their view on account of the affair, many shifted their time allocation only one unit on the nine point scale, from "live equal amounts of time with each parent" to "live with mother [father], see father [mother] a lot." So many of those who shifted their time allocations still gave "a lot" of time to the adulterous parent. More than 20% shifted their judgment two or more units away from the adulterous spouse, a larger move on the nine point scale and thus a greater departure, it might seem, from what current law requires.

Of course, we did not tell them what the law was, nor did we ask them to give us a judgment that complied with it. To the contrary, we said that there "was nothing in the law itself that gives strong guidance; every case needs to be decided on its own merits" and asked them to tell us what they would do if they were the judge, "based on what is best for the child." A 2006 Pew survey found that 88% of Americans believe adultery to be "morally wrong," far more than the proportion that condemned any of the other behaviors Pew asked about (Pew Research: Social & Demographic Trends 2006).[8] So one might assume that those who gave the adulterous parent less time did so because *they* believe it's proper to punish that parent for their bad conduct, even if the law does not, and that more than 20% (those who shifted their judgment two or more points) disagree with current law quite strongly.

Nonetheless, we did not ask those who shifted their custody decision to explain why they did, and we cannot conclude from Study 1 alone that their purpose was to punish the adulterous spouse for immoral behavior. There are other possible motivations, and the results of Study 2 suggest they need be considered. There was no adultery in the test case for Study 2. Instead, one parent asked for a divorce that the other "didn't want." The parent seeking the divorce offered no specific complaints about the other parent, but "simply grew tired of the marriage" and the other spouse's suggestion to try marriage counseling "did not help or change the [initiator's] mind about giving up on the marriage." The Study 2 test case thus describes no marital misconduct by either spouse that would make them "at fault" under the now-extinct fault divorce laws and, it might thus seem, no immoral conduct to punish. Yet our Study 2 respondents

[6] Nor does it seem that data currently exists that would accurately tell us. Doing so would require a comparison to the arrangements of real families who match the hypothetical neutral family in every particular, including that they could not settle the custody arrangements themselves but required a judge's decision that was described on (or transformed to) the 9-point scale we used. Only one study in the published literature (Fabricius & Hall, 2000) used that scale to describe the child's postdivorce living arrangements, and it found the mean of its sample of over 800 recent divorces was 3.12, whereas the mean of our respondents' What they thought WILL Happen judgment was 3.67. However, the 3.12 figure aggregated over families of *all* descriptions and *all* manners of settling. Other data show that in 68%–88% of cases, mothers end up being awarded primary physical custody; however, only 2%–10% have those custody provisions decided by a judge (Stevenson, Braver, Ellman, & Votruba, 2012). Future research could provide judges with the same scenarios we gave our participants, and these results could be compared with the current results, although this research would lack the ecological validity of examining the judges' actual custody allocations.

[7] Of the remaining 59%, 12% of these adulterous mothers were awarded *more* custodial time.

[8] Only 35% thought sex between unmarried adults was morally wrong, while 50% thought abortion was.

were almost as likely to subtract parenting time from the parent who just "lost interest" in the marriage as the Study 1 respondents were to reduce parenting time for the adulterer. The average reduction in parenting time for *both* was about half a unit. A bit less than half the respondents reduced the parenting time of the father who lost interest, virtually the same as for the father who had an affair. A third reduced the parenting time of the mother who lost interest, a bit less than the 47% who reduced it for the mother's adultery. But that difference was not significant.[9]

We believe this finding rules out what might have at first seemed the most obvious explanation for the choices made by our Study 1 respondents: that they reduced the adulterer's parenting time to punish him or her for the immoral behavior. To conclude otherwise seems to require the assumption that many of our respondents believe spouses who seek divorce because they find their marriage unsatisfying commit a moral wrong equivalent to adultery. We know of no data to suggest that equivalence and we think it unlikely.

So what then is the explanation for our respondents' judgments? The similarity in the results for Studies 1 and 2 oblige us to examine the two scenarios for common features that could explain why half our respondents adjust their parenting time allocation for both of them. That approach is more parsimonious than assuming that the motivation for reducing parenting time in Study 1 was a desire to punish adultery they believe immoral, while the motivation for the very similar reductions in Study 2, for the "grew tired" spouse, was (necessarily) something entirely different. We suggest three possible explanations for our respondents' choices that could apply to both scenarios: (a) that the respondents who reduced parenting time in either Test case believed that the behavior of both the adulterous parent and the grew-tired parent demonstrated they were somehow not as good a parent; (b) that these respondents believed a parent who causes the marriage to end, without good reason, should be penalized for having imposed the burdens of parental separation on their child; or (c) that the "wronged" parent garners sympathy from the respondents who consequently award more parenting time to that parent. We discuss each possibility in turn.

Could our respondents have believed the affair demonstrated that the adulterous or "grown-tired" parent was not as good a parent as the partner? Our scenarios were intentionally constructed to make that belief unlikely, precisely because we could not learn if our respondents would punish a parent for morally objectionable behavior if we used facts that confounded the variables by suggesting the morally suspect parent was also a poor parent. Thus, the neutral and test scenarios all said that "There is nothing suggesting that either one lacks "fitness" as a parent," that "[a]dditional evidence shows that both . . . parents . . . deeply love the two kids and are . . . reasonably good parents who are involved in their children's lives," and that they had both conducted themselves well since their separation, avoiding conflict, or arguments in front of the children, or bad-mouthing the other parent to the children. "They are both trying to make the best of the current situation."

But despite our efforts, we cannot rule out the possibility that some of those who penalized the offending parent in either test case believed the behavior in question cast doubt on their capacity as a parent. To see why, consider first the test case in Study 1 involving a year-long adulterous affair. People may well think there's considerable risk that a year-long affair will eventually ruin a marriage, no matter what the adulterer does to conceal the affair from the other parent and their children. And they might believe that parents who engage in extended affairs know, or should know, that risk. Putting one's children at a high risk of parental divorce to pursue an affair might seem evidence that the adulterer is inclined toward self-indulgence at the children's expense. Respondents who had this view might well have doubted that the adulterous spouse was really the other spouse's equal as a parent, even though the scenario facts included generally positive statements about "both parents" that did not distinguish between them. We believe it quite possible that such doubts about the adulterer's *parenting* could explain why half our respondents gave the adulterous parent less time.

Analogous observations may be made about the spouse who decides to end the marriage because he or she had "grown tired" of it. Some of our respondents might believe "growing tired of" the marriage is far too weak a justification for subjecting one's children to divorce, and think the parent who proceeds on that basis is too quick to place his or her own comfort ahead of the children's interests. While probably few would favor penalizing in any way a *childless* spouse who sought to end a marriage she or he no longer liked, there's some evidence that a fair number believe married *parents* should try hard to "stick it out" and stay together for the children's benefit.[10] Respondents who penalized the spouse who grew tired of the marriage in the second test case might have this view, and might therefore doubt the adequacy of this parent's commitment to the children. This explanation for the parenting time shift in both test cases, the adulterous parent and the grown-tired parent, would not, in principle, violate BIS rules against employing the custody decision to punish a parent's misconduct, because the shift reflects instead a judgment about parenting capacity. (In an actual case, of course, the trial court might need to buttress such decisions with some additional facts to show that its conclusions about relative parenting ability were based on more than surmise.)

The second possible explanation we offer for our respondents' judgments in both Test cases may be closer to incompatibility with the BIS. The BIS is by its terms future focused: the question is the custodial arrangement that is best for the child going forward.

[9] Another way of judging that the patterns were "almost identical" is based on the patterns of means in Table 1 and 2, as well as the values of F for comparisons (a) through (d). But the two sets of results may also be tested more formally. Because the data for both the "Affair" "*study*" and the "Growing Tired" "*study*" were collected at the same jury session, which "*study*" respondents happened to be assigned to is random. So it is just as correct to consider them 2 "levels" of a single study. This implies a 2×2 design on the between subjects factors: Who "Offended" (Mom or Dad) $\times$ "Offense Type" (Affair vs. Lost Interest). To assess whether the results differed by offense type, we examined whether the Case Type $\times$ Who Offended 2-factor interaction (recall that, for Affair, the interaction was $F(1,65) = 17.53$, $p < .01$), and for Growing Tired, $F(1,69) = 37.25$, $p < .01$, was qualified by a triple interaction when we included Offense Type as an additional factor. In fact, the triple interaction of Case Type $\times$ Who Offended $\times$ Offense Type was nonsignificant (*ns*) with an $F < 1$. When conducted again, this time only on the "What I'd Do" judgments (excluding the What Will Happen judgments), *ns* results with $F < 1$ were again obtained.

[10] A poll reported http://marriage.about.com/od/parenting/qt/staytogether.htm found that, in response to the question "Should a couple stay together for the sake of the kids?" roughly a third each answered "yes", "no," and "not sure." Some commentators (e.g., Scott, 2000) even argue the law should erect additional barriers to divorce when a couple has minor children.

What happened in the past is relevant only insofar as it helps predict that future. The first explanation that we have just outlined is faithful to this principle. The second is not, but the distinction is subtle.

We told our respondents in Study 1 that the affair had "ruined the marriage." The adulterer was therefore responsible for the divorce, and thus also for the burden it places on the children. We told our respondents in Study 2 that the divorce will take place despite one spouse's desire to continue the marriage, because the other spouse grew tired of it. The spouse who grew tired of the marriage was therefore responsible for the divorce and the burden it places on the children. Thus, our respondents might reasonably think both offending spouses were responsible for making their children worse off than they would have been had the marriage not been disrupted. But that does not necessarily mean they think the offending parents in either case would not be as good as their respective spouses *in the future*, after the separation. An adulterer now free to remarry, or a former spouse now free of an unhappy marriage, may have fewer stresses or demands competing with his commitment to his child, and might be a better parent than before the divorce. That is one reason why the scenario description of *both* parents as loving and caring may be entirely plausible in both test cases. But it's also possible that respondents who believe this also believe the children are worse off than if the offending spouse had not destroyed the marriage by committing adultery, or by seeking divorce for no compelling reason. In that case they might reduce both offenders' parenting time to penalize them for this harm they imposed on their children. We cannot know, but nothing in our data allows us to rule out this alternative to the first explanation.

A third possible explanation is that the participants develop sympathy for the "wronged" parent and award that parent more custody. In Study 1 the wronged parent had their marriage ruined because of the other parent's year-long affair. In Study 2, the wronged parent had their marriage fall apart even though they wanted it to stay together because the other parent simply grew tired of the marriage. In both of these situations it is easy to imagine that the wronged parents are viewed as victims by the respondents and would garner sympathy because of the harm they have suffered. Perhaps, then, some respondents compensated the wronged parent by awarding more custody time out of sympathy. Like the other two explanations, our studies cannot rule this out as a possible underlying driver of the differences we observed in the test scenarios compared with the neutral case.

Whatever the explanation for their judgment, about half the respondents were willing to depart from the outcome endorsed in the neutral case, in response to the facts of our two Test cases, although many who departed from equal time did not depart very much. Custody decisions, of course, are made by judges, not juries of laymen. One might expect judges to adhere more reliably than lay respondents to a legal rule if there is no good evidence that doing so would protect the child's interests. And of course, in an actual case the facts would be developed more fully, allowing the judge to rule out, or confirm, any of the three suppositions about the parents we suggest might have motivated our respondents' choices.

As with most experimental research, the generalizability of our findings is at issue. Experimental manipulations using vignettes allow researcher to isolate the influence of a single variable while holding all other information constant. Although this has the benefit of allowing the researcher to make firm inferences that would otherwise be obscure in nonexperimental designs, vignette studies lack the richness of information and level of variability that is present in actual custody cases. Actual custody cases are rarely as simple as those used in our study. Thus, although we can draw conclusions about the influence of an extramarital affair or one spouse growing tired of the marriage on the custody decisions of our respondents, it is difficult to know if respondents' judgments would generalize to more detailed actual cases. Likewise, the generalizability of this research is also limited based on the specific wording we used in the scenarios, and other variations may produce different results. For example, we used the phrase "grew tired of the marriage" which may carry a specific connotation that impacted respondents' decisions. It is possible that using a different phrase such as "felt the marriage was empty" could change the outcome of the study. In addition, the findings might differ if aspects of the families' description we held constant (e.g., "most of the marriage was without unusual conflict and the family life was quite average . . . the two children both appear to be normally adjusted, doing neither particularly well nor particularly poorly in school and otherwise") were altered. Future research could continue to look at other variations of wording and factors to examine their influence on custody decisions.

Another limitation to the generalizability of this study is that it was completed in only one location within the United States, Pima County, Arizona. Throughout the United States, norms and values can vary on a number of dimensions. For example, states vary in the degree to which they are politically and socially conservative. Without doing additional studies like these in other states we cannot definitively say that our results generalize throughout the United States. We note, however, that additional analyses (not shown) suggest the findings we presented above did not differ beyond chance by the demographic variables we assessed, such as race, gender, education or income level, or by political ideology, providing some degree of reassurance about generalizability.

There are a number of important policy implications we can draw from our findings. First, our respondents' decisions in the neutral and test cases reflect the continuing cultural shift toward gender equality that was influential in the movement away from a maternal preference and toward the adoption of the BIS. Overwhelmingly our respondents in these studies and those in Braver, Ellman, Votruba, and Fabricius (2011) favored equally shared parenting time; but it is important to note that in all of our scenarios we told our respondents that both parents were "reasonably good parents." These findings suggest that there is a clearly emerging cultural value that when both parents are competent, children should spend about equal time with both parents after a divorce. To the degree that one thinks there is benefit in our policy regarding child custody to continue to be synchronized with the cultural norms of parenting, then these policies should encourage equal parenting time for each parent. In line with this idea, a consensus report was recently released endorsed by 110 experts which "supports the view that shared parenting should be the norm for parenting plans for children of

all ages, including very young children (Warshak, 2014, p. 59).” In fact, some policy initiatives have already begun moving in the direction of a presumption of shared parenting time as being in the best interest of the child. For example, Arizona recently adopted new legislation that directs courts to “maximize parenting time between the two parents” unless there is evidence suggesting this would be against the child’s best interests (Arizona Revised Statutes, Title 25, Section 403). Another law when into effect in Arkansas in August 2013 that states “joint custody” (defined as “the approximate and reasonable equal division of time with the child by both parents individually”) . . . “is favored” (§ 9–13-101).

In addition, we have offered three possible explanations for the modest reduction in parenting time that half our respondents favored in both test cases: they believed the offending spouses would be worse parents than their respective partners, they believed the offending spouses should be penalized for the harm they caused their children by bringing about the divorce, or they are sympathetic toward the “wronged” parent and award them additional custodial time in compensation. Further research is required to choose between these explanations. We do believe, however, that our data cast doubt on a fourth possible explanation that many might have a priori thought the most likely—that our respondents in Study 1 reduced parenting time for the adulterous spouse in order to punish that adultery because they believe it immoral. That explanation seems unlikely to be correct.

Indeed, the reluctance of our respondents to punish the adulterous spouse in the custody adjudication seems one of our most noteworthy results, especially if, as seems likely, most would also say they find adultery morally objectionable. Half would make no adjustment at all and most of the rest would make only a relatively small adjustment that is no greater than our respondents would make for the spouse who simply wants to end the marriage. This disinclination of our respondents to use the custody law to vindicate their moral beliefs could have its source in their focus on the children’s interests, a possibility that seems consistent with the guesses we offer to explain the modest parenting time adjustments that some respondents make. That conclusion, if correct, suggests that our respondents are considerably more sophisticated and thoughtful in their judgments than many might predict, and that the law’s current bar on considering fault in custody adjudications is quite compatible with current social mores.

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