

Does Gender-Neutral Custody Laws Increase the Likelihood of Divorce?

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Extended Abstract

One of the major changes in the American family is the sharp increase in the divorce rates over the twentieth century. Between the mid-1960s and the 1980s, the divorce rate in the United States increased by over 200%. The higher rate of divorce has consequences in many aspects of the family: the allocation of resources, child outcomes, female labor supply, parental investment in education, and other factors. Researchers and policy makers have devoted considerable effort to explaining the causes and consequences of increasing divorce.

Around the same time when the divorce rate went up, divorce laws in the U.S. went through a revolution that liberalized divorce, known as the “no-fault divorce revolution.” Prior to the revolution, divorce was allowed only when one spouse showed fault, such as adultery, abandonment and felony, in a marriage. The no-fault revolution increased the ease of divorce. In the no-fault divorce regime, a divorce was granted as long as both spouses desired it by mutual consent, with no “showing-of-fault” required. Some states further moved by allowing “unilateral divorce”, where divorce can be granted at only one spouse’s request. According to Gruber (2004), by 2004 all states had passed the no-fault divorce regulations and 34 states had adopted unilateral divorce. The movement towards unilateral divorce and the increasing divorce rate are well correlated.

Economists have debated whether the legal transitions caused the increase in the number of divorced people and in divorce rates. Using women observed in the 1979 Current Population Survey, Peters (1986) found that divorce rates were not higher in states that adopted no-fault divorce. Allen (1992), however, found that no-fault

divorce law increased divorce rate. He changed the coding of three questionable states and removed the regional dummies from the regression. Friedberg (1998) used a panel data of state divorce rates, and concluded that unilateral divorce accounted for 17 percent of the increase in divorce rates between 1968 and 1988. Gruber (2004) examined the stock of divorce each year in the U.S. Census, and confirmed that unilateral divorce regulations significantly increased the incidence of divorce. Wolfers (2006) reconciled the contradictory findings in the literature, arguing that the divorce rate exhibits a dynamic pattern following the adoption of unilateral divorce. It rises immediately after the change in divorce laws, but reverses within about 10 years.

While many scholars have looked at divorce law changes, few people have paid attention to another major trend in the United States family laws in the last several decades. In the 1970s and 1980s, there were major changes across states in another regulations concerning divorce: child custody assignment.

In the United States, the assignment of child custody is governed by the custody laws in each state. For the most part of the last century, the “tender years” doctrine, a legal doctrine that presumes the mother is the preferred custodian for young children in the case of parental separation, was the primary determining factor in the resolution of custody disputes between parents before the 1970s (Klaff 1982). Legal practice changed significantly in the 1970s and the 1980s. Most states discarded the tender years doctrine in their custody laws and mothers were no longer *automatically* favored in custody arrangements. Instead, courts adopted the “best interests of the child” (BIC) doctrine, which consists of several criteria to determine which parent is the more suitable parent, and which makes no reference to the gender of the parent. The change in legal doctrine was as swift and dramatic as the change in divorce laws. By 1990, at least 39 states had completed the transition in both state statutes and court practice. The movement towards gender-neutral custody laws also coincided with the increasing prevalence of divorce.

Since most marriages involve children, the assignment of children in the case of marital dissolution is an overlooked, and potentially important, factor in divorce

trends. Under “tender years doctrine”, the majority of mothers went through divorce without having to worry about losing the custody of their children. The transition to gender-neutral custody assignment increases the possibility that child custody is assigned to fathers in contested custody cases. Changes in legal doctrine will not only result in more father custody after divorce, but more importantly, they also change the relative bargaining power between husbands and wives in marriages. Under the new regime, wives have more to lose in the case of divorce, which might decrease their incentive to divorce. The opposite case applies to husbands.

Since the transition in child custody law works in different directions for women and men regarding their expected gain from divorce, the net impact of custody law changes on divorce rate is ambiguous. There has been no literature to date that empirically analyzes this issue. Furthermore, regardless of the direction of the influence, the analysis of unilateral divorce and divorce rate is potentially biased without considering child custody law. The effects that we have previously attributed to divorce may in fact be partially due to changes in the circumstances surrounding marital dissolution, which include child custody arrangements. As such, the analysis of divorce and children’s development would not be complete without examining the laws governing custody assignment.

The legal coding of the changes in child custody law is complicated—there is no uniform definition of the transition. While some states have statutes regarding gender equality in their custody laws for years, state courts still implicitly use the “tender years doctrine” to favor mothers when assigning child custody. The inconsistencies between state statutes and court practice make it difficult to determine when the legal transition happened by simply examining the legal statutes. There has been no comprehensive coding on when each state changes its custody law.

I provide the first systematic coding of the transitions of child custody law. I look at both the transition in legal statutes—whether the state has added statutes equalizing parental rights *and* the transition in case practice—whether the tender years doctrine has been discarded in court practice. I carefully read through contested cases in child

custody and statutes in each state during the transition period to identify the year when states have completed the transition. I was able to determine the year of custody law changes for 37 states. My legal coding is the first to record each individual state's year of transition to gender-neutral custody assignment in a systematic and transparent way. The coding is an important contribution to our ability to analyze the effects of custody assignment in empirical research.

Even with the coding, it is important to establish that the movement away from the "tender years" doctrine to the BIC and the movement to unilateral divorce laws are uncorrelated with each other. If states that liberalized divorce were the same states that liberalized child custody laws, it will not be possible to disentangle the effects. Not only is this important for estimating the effect of child custody law changes, but also for that of unilateral divorce law. If the changes in two laws are highly correlated, the estimates of the impact of unilateral divorce law on divorce in the previous literature are likely to be biased by the influence of custody laws, as argued by Peters (1992). My empirical analysis confirms that the changes in two laws are not correlated. Knowing *when* a state adopted unilateral divorce laws does not tell us when it changed child custody laws. Similarly, knowing *whether* a state has adopted unilateral divorce does not tell us when or whether the state adopted custody laws either.

The source of identification in my paper is states' different timing in transitions of divorce law and child custody laws. The independence of the two legal trends allows me to estimate the effects of both changes separately and jointly. While child custody laws and divorce regulations developed independently, people take both aspects of the divorce law into consideration when making divorce decisions.

My empirical analysis is composed of two parts. The first part focuses on the divorce decisions made by individuals. Using micro data from the U.S. Census and the American Community Survey (ACS), I examine the impact of gender-neutral custody law on the *stock* of divorce. I find that living in a state with gender-neutral custody laws increase people's likelihood of being divorced, being separated and never been

married. In fact, I find that previous studies have overestimated the effect of unilateral divorce law on the likelihood of divorce because they failed to control for the custody law. Controlling for the changes in custody law reduces the estimates on unilateral divorce law by more than 10%.

In the second part, I estimate the impact of gender-neutral custody law as well as unilateral divorce law on the divorce rate of each state, the *flow* of divorce. I find that, changes in child custody laws do not have a contemporaneous impact on divorce rates, either by themselves or joint with the adoption in unilateral divorce law. However, gender-neutral custody laws have a long-term impact on the divorce rate of a state. Nine years after the changes in child custody law, the state divorce rate starts to rise. The increase persists until 15 years after custody law changed.

Overall, the results suggest that changes in child custody laws had a large impact on both the stock and flow of divorce in the second half of the twentieth century. Child custody laws have a longer-term impact on divorce rates, and the net impact is a large effect on the stock of divorced people. In addition, I show that failure to account for changes in custody laws leads to bias in the estimates of the effect of divorce law changes. Child custody law is an important part of divorce, and the results suggest that the empirical analysis of divorce must include this factor.

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