The Elusive Shadow of the Law

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This article explores the conditions which lead to variation in the degree to which law affects private negotiations? It is an extension and modification of Mnookin and Kornhauser's (1979) formulation that negotiations occur in the shadow of the law. Drawing on prior research on disputes, I hypothesize that this effect depends on the way a claim is framed (which in turn is affected by the claimant's gender), on the mode of attorney involvement, and on claimant use of informational networks. I examine these hypotheses by an analysis of a small sample of recently divorced men and women who were interviewed about the negotiations that led to their custody and child-support arrangements.

It has become conventional wisdom that law affects many private negotiations. Yet how and to what extent law affects negotiations is an open question. According to the conceptualization offered by Mnookin and Kornhauser (1979), settlements are the result of "bargaining in the shadow of the law." They wrote: "We see the primary function of contemporary divorce law not as imposing order from above, but rather as *providing a framework* within which divorcing couples can themselves determine their post-dissolution rights and responsibilities" (emphasis added; p. 950). Their conceptualization of the bargaining process has been widely cited[1] and assumed to apply to many different kinds of bargaining situations in which a court proceeding might ensue if negotiations fail. Its central assumption is that law is the principal norm by which people define their troubles and formulate their claims. It also implies a piv-

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[1] Their article had 16 citations listed in the 1988 *Social Science Citation Index,* 34 in 1989, and 33 in 1990.

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otal role for attorneys in the formulation of claims. It is these central assumptions that I shall examine here.

A substantial body of new research rejects the assumption that disputes are always transformed into the language of the law. In a direct challenge to the presumed centrality of law, Melli et al. (1985:12; also Erlanger et al. 1987) concluded that "rather than a system of bargaining in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining" (Melli et al. 1985:12), by which they meant that the outcome of settlement negotiations determines court rulings and that judges and courts had no immediate influence over divorce settlements. Yet, their challenge did not address the extent to which legal considerations affected private negotiations. Other challenges to the centrality of law go still further, arguing that in many disputes people may choose between several different types of norms (Felstiner et al. 1980–81:634; Engel 1980, 1984). In a study of perceptions of law in a working-class community, Merry (1990) suggests that claims, during both formulation and processing, may be framed or transformed in ways that exclude law or push it to the periphery. In the neighborhood disputes she examined, "the language in which these problems are talked about within as well as outside the courts is the language of social relationships, not that of the law" (ibid., p. 37). The disputes she described are thought of by her subjects as involving boyfriend/girlfriend relationships, marital problems, and roommates rather than as of theft, assault, or disturbing the peace. Likewise, Ellickson (1991) found that among northern California cattle ranchers, problems involving cattle trespass and fence repair were addressed using social norms rather than the law. As Macaulay (1979:123) notes, "there seems to be a 'folk culture' that defines, among other things, which kinds of cases one should take to a lawyer, which call for solutions not involving lawyers, and which should be just forgotten."

Thus two conflicting positions dominate the literature. One asserts the centrality of law and is epitomized by Mnookin and Kornhauser's metaphor of "bargaining in the shadow of the law." The other denies the law's centrality and argues that social or folk norms may govern the formulation of claims and their processing. The former is an absolutist position; the latter concedes a role for law, and several formulations argue that social norms are most likely to be preferred when problems or disputes arise among closely knit groups (Engel 1980; Merry 1981; Ellickson 1991). However, little work has been done on specifying the conditions that lead to the employment of social norms rather than legal rules.

This article examines the selection of norms for settling disputes arising in a particular context: divorce. I use divorce be-

cause it was the context that Mnookin and Kornhauser (1979) employed to develop their argument. Before turning to an examination of the particular situation in which people negotiating a divorce find themselves, I wish to outline a more general framework for examining the choice of norms and the role of law in the negotiation of disputes.

I. A General Framework to Explain Choice of Norms

A. The Dependent Variable: Use of Law or Folk Norms

As Felstiner et al. (1980–81) point out, some sort of standards *must* be used in situations that lead to a recognition that a problem, or what they call "a perceived injurious experience," exists. That involves the perception that something has gone wrong, for example, being hurt by someone who does not have the legal or social authority to inflict such harm. The perception of an injury that generates a dispute requires the invocation of a legal or a social norm of acceptable behavior that leads the injured person to feel aggrieved and to make some sort of claim (legal or social) on the person who inflicted the injury. While the two types of norms do not necessarily have a different content, they exhibit a distinct form and origin. Social norms are usually found in oral traditions; they are not codified and have not been enacted by an official institution such as a legislature or the courts. Law, on the other hand, in the context of the United States and other developed nations, resides in documents formally adopted through some state institution. In addition, one may count as law what the legal realists call "living law," by which they generally mean interpretations of black-letter law apparent from the way the law is actually applied.

Social norms refer to standards for conduct that are not referred to as legal standards. People mold their behavior in accordance to social norms not because the law requires it or because they fear some official sanction but because their peers demand conformity. Social sanctions of many kinds enforce social norms; some sanctions (for example, what anthropologists call "truthful gossip") may operate without intervention by formal institutions. In the divorce situation, social norms press particularly hard on women not to abandon their maternal role; they commonly exhort both parents to avoid inflicting harm on their children. In my interviews with divorced individuals, such norms are demarcated by the absence of references to legal sanctions or the law.

The dependent variable in my formulation, therefore, is a disputant's choice of the legal or social norms to dispose of the problem involved in the dispute. In the study reported here,

recently divorced men and women were asked: "How important if at all was your understanding of the law in working out the final provisions?" As explained more fully below, positive responses were considered as indicating employment of law; negative responses were taken as evidence of the employment of social norms.

B. The Independent Variables

I concentrate here on two clusters of independent variables that affect the kind of norms which people invoke. The first embraces the manner in which people initially frame their disputes or problems,[2] while the second encompasses interactions with attorneys and social networks. I argue that the manner in which a problem is initially framed (as signified by the language used when talking about it) is related to the ultimate use of legal or social norms. The simple form of this hypothesis is that there is a direct relationship between initial framing and ultimate use of legal norms. Implicit in this hypothesis is an assumption that the framing and choice of language precede the choice of norm and are not the consequence of it. A more complex model posits a role for attorneys and social networks that influences the use of law after the initial framing occurs.

1. The Initial Framing of Problems and Disputes

Following Merry (1990), the choice of norms at one extreme involves the articulation of rights using a legal vocabulary, even though the persons using it may not understand the full meaning of the words they employ. At the other extreme are problems articulated in relational terms where the vocabulary is affiliative and emphasizes a web of interdependent relationships. Thus law may or may not play a central role. For example, how equity in a house is to be divided at divorce may be framed as a problem of law in which property entitlements are specified by statute and cases. Alternatively, the problem may be framed in terms of where one's children will live and attend school; it is then a relational problem in which social norms governing parent-child relationships may be more significant than the legal norms of property entitlement.

The choice may rest on both the characteristics of the disputants and the manner in which they perceive their problem. It is well known, for instance, that when disputants are acquaintances or have a stake in their future relations, they may behave differently than when they are complete strangers. As

[2] I speak about the framing of both problems and disputes since sometimes negotiations take place without a dispute having been sharply defined. For instance, in divorces what will happen to children may be seen first (or only) as a problem rather than as a dispute.

strangers, they are less constrained by shared social norms. For instance, Ellickson (1991) shows that a fence-building project may be viewed either in terms of property rights between strangers or in terms of maintaining good relations with neighbors. In the former case, legal rules govern the placement of the fence, the apportionment of its costs between the abutting land owners, and the arrangements for its maintenance; in the latter case, social norms such as a norm of proportionality (each party pays a fair proportion of the costs) may govern. Some circumstances are more likely to involve strangers than others, yet in many situations, people may choose between treating their others as strangers or dealing with them in terms of a valued relationship.

The choice of type of norm may also rest on the gender of the person. As Gilligan (1982) has suggested, men and women see their lives differently. Women are more likely to emphasize relationships, responsibility, and caring; men are more likely to see themselves in nonattached ways. Thus choice between a socially oriented relational perspective and a legalistic rights perspective may be strongly associated to gender. Some feminists have argued that this distinction is particularly triggered when the dispute occurs in a context where roles are distinctly gender oriented (Fineman 1991). Family life is one such context since, as Gerson (1985) reports, it is not uncommon for women to think of themselves first as mothers and secondarily as wage earners, while men perceive themselves primarily as wage earners and only secondarily as fathers. One may, therefore, hypothesize that men initially are more likely to see divorce problems as involving money and property and to frame them in a rights-oriented legalistic manner while women will more often utilize a relational framework, perceiving divorce as being about the relationships with their spouse or children. By contrast, one might expect that when gender roles do not intrude so directly into the staging of a dispute, as, for example, in personal injuries arising from automobile accidents, it is less likely that the frame chosen will be related to gender.

The difference between the two kinds of framing is also captured by what people want done to remedy their grievances. If they want conciliation, they are unlikely to use a legalistic framework for articulating their dispute. On the other hand, some remedies are particularly well grounded in legal concepts. If disputants wish to enforce a contract, they are likely to frame the issues using some of the legal terminology of contract law. In divorce if a father and mother are most concerned about their parental roles, they are unlikely to frame the issues legalistically. Yet, if either wishes to pin down exactly who has responsibility for what, the granting of legal custody becomes important.

2. Intervening Variables

Several intervening variables may modulate the relationship between a disputant's initial framing of a problem and his or her ultimate choice of legal or relational norms. Two variables that are particularly likely to have such an effect are the manner in which disputants use attorneys and the degree to which disputants activate social networks.

Lawyers. Attorneys speak the language of the law and often frame issues in terms of legal norms rather than social norms. They tend to see situations from a rights perspective. Therefore, whether an attorney is consulted and what the attorney is asked to do are likely to have a powerful effect on the ultimate use of legal or relational norms. The absence of attorneys or their marginalization increases the probability that social norms predominate negotiations.

The role of attorneys in formulating claims has been documented in several settings. For instance, in examining the claims process in personal injury suits, Ross (1970:166–70) found that unrepresented clients generally negotiated in a quite different manner from those who used an attorney. In Ross's words, such a claimant "is ignorant of the accepted principles according to which his demands can be rationalized. He does not know which, if any, threats may be effective in the situation, and he is incapable of making deliberate commitments to support these threats" (p. 170). Similarly, the premise of the Supreme Court's decisions requiring counsel for indigents in criminal cases beginning with *Gideon v. Wainright* (1963) has been that lawyers enable clients to erect legal defenses they cannot invoke themselves.

Moreover, the amount of expertise, effort, and understanding attorneys bring to a case has been shown to alter the impact of the law on the outcome. As Rosenthal (1974) shows, some lawyers pursue their own agendas rather than those of their clients; he found that clients who pushed their attorneys received larger payments than those who failed to supervise their attorneys. No such variation in outcome would exist if attorneys applied legal entitlements uniformly to all their cases. Similarly, the attorney-client interactions in divorce cases reported by Sarat and Felstiner (1986, 1987, 1989) suggest that formal entitlements sometimes play a small role in lawyers' presentation of their role in the divorce process; their attorneys appeared to emphasize legal process and informal procedures much more than legal substance. Finally, some attorneys are more expert than others. With respect to Wisconsin consumer cases, Macaulay (1979:130) writes:

> Those most expert about consumer laws tend to be lawyers who counsel businesses and draft documents in light of these laws. Yet these are the lawyers least likely to see an individual

> consumer's case—except, perhaps, as a favor to a friend. Most other lawyers in Wisconsin know very little about any of the many consumer protection laws, and it is difficult for most attorneys to master all of the relevant statutes, regulations, and cases in this area.

Thus, although we may expect that law plays a larger role in those negotiations in which lawyers participate than those in which they do not, the character of attorney-client interactions also contributes to that effect.

Personal Networks. Second, the use of law in handling disputes may be influenced by the disputants' personal network of relatives, friends, co-workers and acquaintances. People in these networks may provide information about the law which may help them reformulate their issues in a legalistic framework. If disputants have close friends who are lawyers or who work in a law office or know someone who had an experience with the law (such as a legal case that is like the problem being discussed), it is more likely that they will obtain legal information from such sources and it becomes more probable that they will resort to law. However, not all people in such networks will promote a legalistic framing. Many may know little about the law; the probability that social norms will be used increases when contacts in their network speak the language of relationships and stress social norms. Social isolates will not obtain such additional information or experience such influence.

The importance of the network in which disputants are embedded has been noted in a number of studies. I found that debtors who knew others who had gone through bankruptcy were much more likely to avail themselves of personal bankruptcy than similarly burdened debtors without such social links (Jacob 1969). Likewise, Ladinsky and Susmilch (1983) found that informal "brokerage" networks were of some importance in the processing of consumer disputes. Another kind of linkage, described by Macaulay (1979), is membership in a formal organization that among other tasks undertakes to formulate the law in ways advantageous to its membership. Finally, some people belong to organizations that are regularly counseled by lawyers and others about their legal problems. Wasby (1970:87–99) summarizes a number of studies documenting the importance of such legal communications in producing compliance with Supreme Court decisions.

Summary. The several variables affecting the choice of law or social norms are summarized in Figure 1. I have drawn only the arrows that flow directly from the independent variables toward the dependent variable. The flow of time is implicit in the model. I hypothesize that when the idea of divorce dawns, its initial framing may be influenced by the gender of the person involved; that initial framing emphasizes or deemphasizes legal

norms. Then, as divorce becomes more imminent, attorneys and information networks will also affect the degree to which law plays a role in the negotiation of the decree. This is no doubt a vast simplification; the divorce process is rarely as linear as this model implies. The implied causal arrow may sometimes point in the opposite direction, and interaction effects are quite likely to exist. However, it is better to begin with a simple model, and in any event, my data do not permit the demonstration of complex paths.

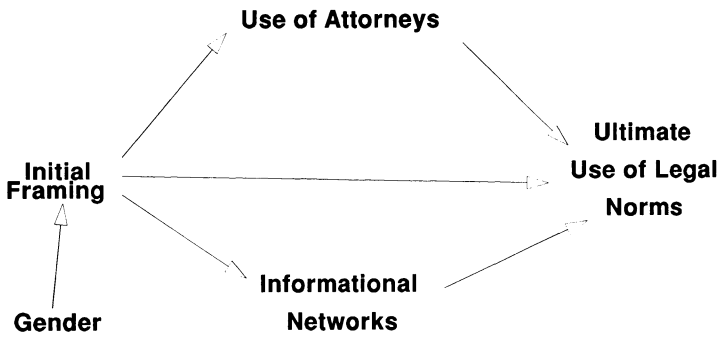

Figure 1. The use of legal norms

II. The Divorce Setting and the Data

A. The Divorce Setting

My research seeks to apply this model to the divorce setting. Divorce has one special characteristic: every divorce requires some kind of court action. Consequently, every party to a divorce must to some degree become involved with law. However, the peculiar characteristic of divorce can easily be exaggerated. Other disputes, even when they do not require a court action, often produce a negotiated agreement that is ultimately enforceable in a court if one of the parties later so chooses. The court process in most divorce cases is entirely ritualistic; settlements are handled as "agreed orders" with a brief "prove-up" hearing at which the complainant answers a few questions to demonstrate both the jurisdiction of the court and the authenticity of the agreement. Judges usually do little more than check that all required provisions are present before signing the divorce decree that incorporates the agreement. Consequently, the core of the divorce process, as with all disputes or problems that are not submitted to trial, lies in the negotiations that produce the agreement.

Divorce principally involves two kinds of problems. One is about the manner in which financial obligations and property accumulated during the marriage are to be divided. We would

expect such problems, like many others about property, to be suffused with ideas about legal entitlements. The second problem centers on relationships: those to be severed and those to be altered.

One problem I examine in this study concerns the financial support of children. Child support is not solely about property; it also involves some relational characteristics because the payments often represent both a financial commitment and an emotional attachment to the spouses' children. Yet, because the issues are essentially about money and because child support is often thought about in the context of the total financial package involved in the divorce, child support may easily, but not necessarily, be framed in legalistic terms as one involving property. The second problem I examine is about who will care for the children. Although children were once thought of as property that "belonged" to one spouse or the other (Zelizer 1985), they are now thought of primarily as objects of affection and spoken of primarily in relational terms. The issue of who shall have responsibility for raising the children may be framed in the legal language of custody rights as well as in the relational language of care giving and the maintenance of a close ties.

The law of divorce in Illinois provides legal criteria for determining both kinds of problems. Statutes establish who shall support children and guidelines that are supposed to determine the minimum amount of child support that the noncustodial parent shall pay. Elaborate regulations govern collecting such payments if they are not made voluntarily (Illinois Marriage & Dissolution of Marriage Act 1989:¶¶ 505, 507). Likewise, Illinois statutes specify a set of conditions that should determine whether a child is to be in the custody of one parent or the other or both; the criteria are summarized by the formula that the "best interest of the child" shall govern (ibid., ¶¶ 601–602).

The divorce situation, therefore, provides manifold opportunities to frame issues in both legalistic and relational ways. Both child support and child custody have the potential for either kind of framing. Once the issues have been framed, my model then leads us to expect that this initial inclination to see issues in legal or relational terms will increase or decrease the likelihood of using law to resolve the issue, modified by the role of attorneys and by the information received from informal informational networks.

B. The Data

To examine the model described above, I and my assistants interviewed 96 recently divorced men and women in Cook County, Illinois. As explained in the Appendix, the respon-

dents came from a random sample of divorces filed in the last six months of 1987; the 96 interviews used in my analysis were those completed with the men and women we could contact and who would permit interviews. Attrition of the original sample removed potential respondents who were particularly mobile (a disproportionate number of whom were men), who lived in the worst neighborhoods where my interviewers feared to work, and who were Spanish speaking. What remains, however, is neither a snowball nor a convenience sample; the respondents had no ties to each other (except for a few who had been divorced from each other), to a common lawyer, or to a common workplace or residence. They come from most segments of the population.[3] The interviews were structured so that each respondent was asked the same questions in the same order; many of the questions were open ended and the interviews were tape recorded and later transcribed. The verbatim responses were then coded into the categories used in the following analysis.

Both because there are too few respondents (96) and because they are no longer a random sample, I make no inferences from the sample distributions to population characteristics. However, the wide variety of respondents makes it possible to discern many of the patterns which are likely to exist in the general divorcing population. Although I will cite percentages, employ cross-tabulations, and use such comparative adverbs such as "more" and "most," I do not claim that this study provides quantitative estimates for the population of divorcing couples. Rather, it shows a range of alternative processes and is illustrative of the model I have proposed.

III. Operationalizing Framing of Problems and Use of Law

A. Initial Framing of Custody and Support Issues

Parents use a variety of phrases to speak about support and custody issues. My interviewers asked each respondent near the beginning of the interview when he or she first began thinking about divorce and then asked the following question:

> In this time before you saw a lawyer, what were you thinking of with regard to things like where your children would live, who would have custody? What were you thinking of with respect to how they would be supported?

When the respondents spoke about where their children would live and who would care for them (i.e., custody), some framed the issues in legal terms and tended to speak about con-

[3] For further details, see the Appendix.

flict while others framed the issues in relational terms, speaking about the maintenance of harmony. The legalists spoke about their "rights," as in "what I was entitled to" [167W], or they used the legal terms of sole custody and joint custody [657W] and referred to what they thought would be legal criteria for getting custody, such as the alleged alcoholism or drug addiction of the other parent [672W] or the other parent's "running around" [458W]. As one father put it, he could not think of getting custody, "unless I could prove she was . . . a . . . a drug addict or physically abusive and so on" [115H]. On the other hand, the language used in a relational framework was substantially different. One woman responded, "It was never a question in my mind that I value her father's relationship to us; it's healthy and strong. I never considered interfering with that" [124W]. A man similarly emphasized relationships by saying: "In terms of the children, we . . . always assumed that we would share the custody, the responsibilities, the joy, and hardships of parenting, more or less on an equal basis" [118H]. His former wife put it in similar terms: "I thought I'd be very flexible, which is how we wound up being accommodating for the kids. I mean, I always saw it: their interests first before mine or [Frank's]" [118W]. Another respondent stated, "I just wanted to make sure the children were cared for and that their economic needs, their social needs, their spiritual and educational needs would be met" [172H].

The question of who would support the children elicited different legalistic responses among men and women. Men were likely to have to pay support, and they saw support as involving legal sanctions that would force them to pay a certain amount. They tended to speak about "having to pay" [523H], doing "what I had to do" [836H], and "being scared about how much they [the court] would take for the children" [505H]. Women were likely to become recipients and used a different terminology to frame the issue in legalistic ways. One told of her feeling "that the laws of Illinois would cover me" [453W]; several spoke specifically about the law's standards in setting support [419W, 429W, 700W, 847W]. Only two echoed the men's language, saying that their former husbands "would have to pay support" [150W, 657W].

A substantially different vocabulary was employed by those men and women who saw the problem of how their children would be supported in relational terms. One woman replied: "This was *not* a situation where I was worried that my ex-husband would not provide support, because he is very involved with my daughter" [124W]. Another asserted, "I knew he would, although we couldn't get along, I knew that he would . . . support them, with or without the laws" [149W]. A man

noted, "I wasn't out to get her and she wasn't out to get me" [708H].

Among the 90 respondents whose responses could be clearly coded, 60 gave responses which were consistently either legalistic or relational.[4] The remaining 30 gave split responses but were coded as either legalistic or relational according to the strength of their responses to the relevant questions. For instance, the following woman [402W] who spoke ambiguously about child support but used legal terms in speaking about custody was coded as a legalist: "Support was kind of interesting. . . . I'm financially able to support them so I didn't have any fears about support, because I knew if I had to [support them], I could. I expected joint custody and I expected no child support. . . . I got it, but I didn't expect it." In other instances custody was spoken about in clearly relational terms, but support was referred to in vaguely legalistic ones, as in the following example of a man [453H] coded as a relational framer: "I wanted them to be wherever they would be at their best"; a few questions later, he elaborated: "I hoped that it wouldn't become a conflict situation. We were resolved that they should be with whoever could best care for them. And they'd have a stable environment." With regard to child support he simply said, "They would become my responsibility," a response normally coded as legalistic since it referred to obligation rather than relationship and seemed in context to refer to the law's mandate. Following this coding scheme, we coded 42 of the 90 respondents (58%) as framing these issues primarily in relational terms and coded 38 (42%) were coded as framing them in primarily legalistic terms.[5]

B. Using Law in Divorce Settlements

The dependent variable in our model is whether law was perceived by the respondent as being used in molding the final settlement. After they had described their interactions with their attorneys and how the final provisions of their divorce were worked out, the interviewees were asked, "How important, if at all, was your understanding of the law in working our the final provisions?" For some, the perceived impact of the law was substantial, as illustrated by the following response: "Pretty, pretty important. I do deal with contracts, I'm a carpenter, and at the time of the divorce I was a contractor, so I was pretty . . . involved in contracting and reading the fine

[4] See Appendix for data on coding reliability.

[5] The data suggest that a mixed framing category might exist. I have not pursued that possibility because with my small number of interviews, the number of cases in many of my categories would become extremely small. I discuss the implications of this possibility at the end of this article.

print" [115H]. Another spoke in equally firm terms: "It was real important. Oh, at first I didn't know I was entitled to this maintenance which I'm using to further my education . . . which will enable myself and my daughter to have a better standard of living" [124W]. Other respondents, however, perceived the law's provisions as having only a peripheral significance. They began with needs and resources in settling the amount of support and with an understanding of each other's willingness to parent in determining responsibility for the children. Such respondents denied that the law had played any role in determining the content of their divorce decree, as is illustrated by the following respondent [129W]:

I: How were the final provisions worked out? Were they worked out in direct negotiations between you and your husband, by the attorneys, in court, or some other combination?

R: Just he and I, just between the two of us.

I: In those discussions how important, if at all, was your understanding of the law in working out these provisions?

R: Not at all.

I: Not at all? Did you make use of the law to get what you wanted?

R: No.

The "use of law" variable in the following analysis is the result of coding all the interviews on this question. Respondents with affirmative answers were coded as using law; those with negative answers were coded as not using law in their negotiations.

However, "use" of law as respondents perceived it does not entirely capture the impact of the law in these matters. Illinois divorce statutes provide guidelines specifying the minimum amount of child support the noncustodial parent must contribute; the amount is expressed as a percentage of net pay and rises with the number of children. Although it is written in gender-neutral language, it operatively presumes that fathers will pay support. Most respondents had heard of these guidelines from either their attorneys or their friends; the guidelines were almost always remembered as mandating a specific percentage rather than as establishing a floor from which parties could, if they wished, negotiate. Consequently, most respondents treated the amount of child support as something that was nonnegotiable, having been set by the lawyers as "mandated" by the law. Thus, one respondent told us that "law was pretty much cut-and-dried at 25% of the salary after certain deductions" [522H], and another said, "she [the attorney] told me how the law was going to pick a sum" [509W]. Respondents' perception of the finality of the law is captured by the state-

ment, "the law is: two children, 25% of his net pay" [664W]. Few of my respondents understood the law as specifying a minimum that might enable them to bargain. Consequently, their understanding of the law removed child support from the negotiating table for 72% of the respondents and, instead of empowering them with a grant of entitlements as Mnookin and Kornhauser (1979) suggested, *dis*empowered them. When asked, "How much say or influence did you feel you had in deciding the amount of child support you would receive (or pay)?" only 39% claimed that they had "a lot" or "some" influence. However, that left open to negotiation where children would live and who their care givers would be. When asked "How much say or influence did you feel you had in deciding the custody arrangements for your children?" 80% said "a lot" or "some."

In the following analysis I will use the respondents' *perceived* use of law because it has the potential to affect negotiations. Later I will return to the constraining effect of law evident in child-support decisions.

IV. Findings

A. The Effect of Gender on Initial Framing

The hypothesis that women are more likely to frame their divorce issues relationally than men is not supported by our data. The proportion of mothers and fathers choosing a relational framework was almost identical: 56% of the fathers and 59% of the mothers.

However, because the problems created by marital dissolution are often different for fathers and mothers, they sometimes used different language to frame their issues, particularly with respect to child support. Many women sought the law's protection to obtain income transfers from their former spouses to help support their children; most men faced having to pay that support. However, not all women perceived themselves as supplicants. In fact, only 51% expected their husbands to pay; 27% expected to bear the burden entirely themselves. Self-sufficiency seems related to a woman's initial framing of the support issues legalistically or relationally. Among the legalists, almost three-quarters were dependent, expecting their husbands to pay child support. By contrast, among those framing their divorce issues relationally, slightly more than half (55%) were dependent; the remainder were self-sufficient. One might speculate that self-sufficiency helps to marginalize the legalistic framework for some women by freeing them *not* to think about their legal rights or making those rights peripheral to their situation.

Thus gender has some significance in the initial framing associated with economic self-sufficiency or dependence. Unfortunately, my data are insufficient to allow me to explore gender effects more fully.

B. The Direct Effect of the Initial Framing

The simplest prediction emerging from my conceptualization is that the choice of framework directly affects whether law is used in the negotiation process. We would predict that those who initially choose a legalistic framework would be much more likely to use the law than those initially choosing a relational framework.

The data do not support the expectation. One third of both those who initially chose a legalistic framework and a relational framework ultimately reported using the law in their negotiations; two-thirds of both groups reported not using the law. There is more to this finding, however, than meets the eye. The paths by which the legalistic and relational framers come to use the law appear to depend substantially on the intervening variables shown in Figure 1.

C. The Effect of Attorneys

So far I have described how respondents thought about their child-related divorce problems when they first began thinking about divorce and before they consulted an attorney. Eventually all these respondents either had their own attorney or consulted their spouse's lawyer. However, the role that attorneys played varied widely. I asked the respondents a series of questions about their attorneys, among them, "What did your attorney do for you?" "How were the final provisions worked out?" and "What did your attorney tell you about support or custody?" The responses revealed a variety of attorney-client relationships. Clients most often used their attorneys as an information source, learning from them particularly about the child-support guidelines and often also about the several possible kinds of custody arrangements. But the quality of legal information, as Sarat and Felstiner (1986, 1987, 1989) also found, was not high, as illustrated by the comments of the following respondent [481W]:

> I: What if anything did this attorney tell you about the law of child support and the law of custody?
>
> R: He handed me some kind of pamphlet or brochure, which I don't even think I read.

Another respondent [505H] put it slightly differently:

> He told me child support, two kids their age, 27% of my pay. Uh, custody he said, I don't know—we really never talked about laws of custody. Basically I think when I went to him I said I'd like to have every . . . other weekend and one night a week. He said O.K., that sounds fine. So he never told me anything.

In addition to serving as a legal informant, the lawyer was seen by two-thirds of the respondents as a clerk, converting agreements they had reached into legal form and taking them to the court and processing them there, as reflected in the following exchange between my interviewer and a respondent [129W]:

I: And what did he [the lawyer] do for you?

R: Just drew up all the papers.

Almost the same words were spoken by the following respondents [188H]:

I: And what did she do for you?

R: Nothing really, just drew up the contracts. That was basically it.

Negotiating for the parties was a far less frequent service that attorneys provided. Typical was the response of the following woman [509W]:

I: As far as the final provisions of the divorce, did you work them out basically through the attorneys in court, or in direct negotiations with your ex-husband?

R: We sat down.

I: The two of you?

R: Directly.

Each interview was coded for as many of these responses (as well as those indicating the lawyer acted as a counselor or as a litigator) as were present. On average there were just over two responses coded for each interview as shown in Table 1. The most striking element of the answers is that attorneys played mainly informational and clerical roles; that is, they informed respondents and processed their papers. Only a minority credited their attorneys with negotiating their divorce; few mentioned any activity that might be labeled litigation.

The effect of the attorney's role varies distinctly with the initial choice of framework as shown in Table 2. As one might expect, the legalists more often allowed their lawyers more scope and used them as negotiators (44%) than did the relational framers (33%). At the same time, a substantially larger proportion (80% vs. 68%) of the relational framers used attorneys as clerks. Moreover, somewhat more of the legalists who employed their attorney as negotiator rather than as clerk or informant used the law ultimately in formulating their divorce (47%). By contrast, the manner in which relational framers uti-

lized lawyers had little effect on whether they were law users. In both groups the use of law was most frequent among those who employed their attorneys as negotiators and least for those who used their attorneys as clerks.

Table 1. Number of Reported Activities of Attorneys

Attorney Activity	No. Reported
Attorney as information source	71
Clerk	67
Negotiator	36
Counselor	16
Litigator	8
Total (N=96; multiple responses coded)	198

Table 2. Reported Use of Law by Initial Framework and Role of Attorney (Percent)

	Legalistic Framers			Relational Framers		
	Attorney as . . .					
	Negotiator	Clerk	Info Source	Negotiator	Clerk	Info Source
Those who used attorneys	44	68	71	33	80	82
Percentage of attorney users who used law	47	30	42	40	33	38
No. of respondents[a]	23	15	24	23	15	37

[a] Because multiple responses were coded for each respondents, the total number of responses is greater than the total number of respondents.

D. The Effect of Informational Networks

A second intervening variable in my model is the role of informational networks in which litigants may be embedded. In the case of divorce, these networks consist of links with many potential informants about the legal system. A few of those seeking a divorce have direct, professional experience with the legal system because they are lawyers or work in a law office. More have relatives who are attorneys or work for them. Still more have relatives or friends who have experienced divorce. Yet many people are not embedded in any useful network at all, either because they are ashamed or embarrassed to speak to others about their marital problems or because none of their contacts have any worthwhile information. My interviewers asked respondents, "Did anyone else besides [your attorney] such as a counselor, friend, or relative tell you about what might happen with respect to child support or custody?" If the answer was affirmative, we followed with probes to identify the source and the kind of information provided. I examine here

the hypothesis that employment of such a network will increase the likelihood of the use of legal norms.

The kind of information and its extensiveness which people obtained from the social network varied enormously. Some obtained quite specific and partially correct legal information from their network as the following exchange with a woman [430W] with one child illustrates:

I: Did anyone such as a counselor, friend, or relative tell you what might happen with respect to child support or custody? You mentioned that there have been divorces in the family, had they told you what happened?
R: Yeah, basically, they just told me.
I: And who was this? Family, close relatives or . . .?
R: It was a cousin.
I: Cousin. What . . . did . . . he or she tell you about custody?
R: Just that they agreed when he would have her, and . . . when he had to pay.
I: What did he or she tell you about child support?
R: That it was for 20% for the first child, 25% for after that . . . , of his gross income.

Others received vague (and less correct) legal information about child support law from sources they could no longer pinpoint, as the following exchange with a woman with three children shows [405W]:

R: I ruled that he had to give me at least 20% of his salary for the children.
I: And how did you know these thing?
R: By listening to other people

For others, the information was not of a legal character but concerned the impact that various custody and visitation arrangements would have on the children. The importance of such information for some clients was extraordinary. The following woman [124W] relied heavily on her circle of women friends:

I: Were there other people—other friends or relatives who gave you advice about the law?
R: There were essentially my close women friends, some of whom had been through divorce, or difficulty. And I would say that the main support that I received from them was just around clarifying this issue of custody and joint custody, and what happens to people who have joint custody, and what happens to those children. Did they [the children] ever feel that there was one parent who said you're my priority, I'm raising you, my schedule's organized around you, my job's organized around you . . . and I'll always be with you? Or if the kid was

made to feel like a car or a house or, or, or *an object.* I would say I got that from my women friends who had that experience.

I: How important [were] these kinds of information in terms of what you finally decided to ask for in terms of custody and support?

R: That was 95%. I would say, the role of the actual lawyer, in terms of providing information and clarity was about 5%. By the time I worked with the lawyer it was like paperwork.

Less than half (46%) of my respondents obtained information from others about their divorce.[6] As Table 3 shows, among those who were initially legalists, getting information from personal networks made little difference in the proportions who later used the law in their negotiations. Not so for those initially using a relational framework; those who got information from their personal network were about twice as likely to use the law than those who did not get information from their personal network. Thus it appears that being connected to a personal network was a particularly important factor for the use of law by those who did not initially think of their divorce in legal terms.

Table 3. Effect of Using Personal Networks for Information by Initial Legalistic and Relational Framers' Use of Law (Percent)

	Legalistic Framers		Relational Framers	
	Got Info from Network	No Info from Network	Got Info from Network	No Info from Network
Used law	35	35	45	24
Did not use law	65	65	55	76
No. of respondents	17	17	20	25

V. Discussion

My results provide partial backing for some of the propositions posited earlier. However, it is important to stress once again that while I use cross-tabulations, I do not assert that the results represent estimates for the population of divorcing men and women. Rather, my results should be interpreted to advance the plausibility of the propositions.

Viewed in this light, the initial framing of issues in these divorce cases related to later use of the law in complex ways. When we combine the effects of the initial framing with the role of attorneys, we find that those men and women who both framed issues in a legalistic manner *and* used their attorneys as

[6] More men (54%) did so than women (41%). Because of the small number of respondents, it is not possible to pursue this gender difference further here.

negotiators were the most likely consciously to use the law. In those situations the law cast a sharp shadow on the negotiations. However, the use attorneys as negotiators had a smaller impact on those who initially framed issues in terms of relationships. In addition, my data show that being embedded in an informational network may boost use of law when a person initially frames the problem in relational terms, but personal networks have no such effect on those who at the outset frame their problems legalistically.

The law may also simply remove some issues from the negotiating table. This is what happened to child-support issues for most of the respondents. Although its provisions specify minima, it was almost universally interpreted by both attorneys and clients as mandating a percentage of net pay. Consequently, many of my respondents simply did not deal with support in their negotiations. Yet even though law was capable of having such a powerful effect, some women in my sample did not negotiate about child support for a different reason: they were self-sufficient. They had been the breadwinners in their family before the divorce and saw little hope in getting their husbands to contribute to their children's support after the divorce. For such women, child support was peripheral and the law's impact, minimal.

Gender by itself did not appear to have any tendency to push respondents toward a legalistic or relational framework or to the exploitation of law in negotiations. The men I interviewed were not more likely to be legalistic in their approach to the divorce than the women. Only when gender is combined with the economic role of the wife or husband did its effect become evident in the ways in which men and women considered this issue.

The model I have proposed tells us a great deal about how the shadow of the law comes to fall on negotiations. The law's impact seems to depend on a quite complex process. People initially frame their problems in a legalistic or relational manner, but how they ultimately use the law then depends considerably on how they employ attorneys and whether they mobilize social networks for advice and information.

The attorneys' role is particularly complex. It is constrained not only by the frame of mind with which clients approach lawyers and by what clients want but also by what the law permits or seems to mandate and by what clients can pay for. In divorce it seems that attorneys do not typically conduct the negotiations. They are more likely to serve as scribe and facilitator, translating agreements reached by the parties into legalese and submitting the required papers to the court. For relational framers, the role played by attorneys had little effect on whether law was reported to be a factor in their divorce settle-

ment. However, for legalistic framers, active negotiation by the attorney resulted in a greater perceived use of law.

The attorney's role as informant did not seem to boost the clients' perceived use of law, a result quite consistent with Sarat and Felstiner's (1986, 1987, 1989) description of the manner in which divorce lawyers interact with their clients. Yet, when lawyers told respondents that the law mandated a specific amount of child support, this information had the effect of ending all further consideration of this matter. For other aspects of the divorce, many clients came to their lawyer with most issues already decided. In particular, those who framed the issues in relational terms did not wish to exacerbate the tense relationships they may have had with their departing spouse. They looked to their lawyer as a facilitator. Legalists, on the other hand, often seem to have had a different kind of relationship with their attorney. They wanted their rights, could not obtain them alone, and looked to their lawyer for assistance in the negotiations. They were less likely to shy away from more conflict. Finally, however, one must also remember that on average divorce attorneys have little opportunity to charge large fees. Thus the role of the attorney is constrained not only by what clients want but also by what they can afford to pay. That factor may well explain the low incidence of the litigator's role.

Considerably more is also to be learned from a closer examination of the use of social networks. As I report elsewhere (Jacob 1992), social networks play a very important role in leading clients to particular attorneys. However, it is difficult to reconstruct the impact of networks retrospectively because conversations with friends and relatives take place in many inconspicuous circumstances that are difficult to recall, particularly with respect to their timing and content. Nevertheless, we may speculate that differential effects would be associated with the degree of expertise of those a person consults, the degree to which they trust such people and the sequence in which they speak to them. By examining the interactions of people as they talk about their divorce, one may find an explanation of why legalists seem to be driven to the law while those who frame issues relationally are not.

My findings emphasize how dimly the shadow of the law is cast on the divorce negotiations of my respondents. Divorce appears be an arena where bargaining does not routinely take place in the shadow of the law. Rather, my respondents' interviews suggest that much of the bargaining over children and support payments occurs with little awareness or concern about law. Expectations about relationships dominate most of the thinking about custody, and agreements are often worked out in private with very little apparent law talk. The agreements resulting from these informal negotiations are then eventually

brought to attorneys to be translated into the legalese of the formal decree that is presented to a judge during the "prove-up" hearing. Consequently divorce is not an optimal arena for exploring the conditions under which the law has much influence over negotiations because the range of its impact is so truncated in most divorces. My interviews suggest that Mnookin and Kornhauser's initial focus on divorce for their formulation of the background influence of law on private negotiations may have been an unfortunate choice.

There are many circumstances in which law might cast a much sharper shadow on negotiations than in divorce. I would surmise that this would occur in commercial property transactions where the "rights" of each buyer, seller, and lender must be specified (Flood 1987) and relational concerns are often minimal. Moreover, when a problem typically involves strangers, as in many automobile accidents, there is less incentive to apply social rather than legal norms, as highlighted by David Engel's (1984) analysis of such cases in "Sander County" where outsiders sued in court while insiders settled informally.

Moreover, one may recall that about one-third of my respondents were characterized as legalistic or relational framers even though their responses indicated some elements of each. This reflects the fact that many people approach disputes with a mixture of outlooks. Whether a legalistic or relational framework dominates may depend not only on the variables examined here but also on the salience of the issue to which the framework is attached. Such an elaboration of my model might considerably strengthen the effect of the framing variable, but it involves the decomposition of disputes into their many parts, which considerably complicates both data collection and analysis beyond what is possible here.

The expectation that bargaining occurs in the shadow of the law is not a general rule but one that is contingent on many conditions. My research suggests that the language in which a claim is initially framed combined with the manner in which attorneys are used and the success of consultation with personal networks are perhaps the key variables in determining the strength of the shadow of the law. However, my research was conducted only in the context of a single problem and with a small set of respondents. Other contexts and larger samples will undoubtedly clarify the law's impact.

Appendix on Data Collection and Analysis

Several choices confront researchers who wish to study negotiations. One may seek to simulate them in an experimental setting; one may observe them directly; or one may retrospectively interview participants at some point after they have concluded.

Each method has costs and benefits. Simulation requires substitution of actual settings with contrived ones which the researcher hopes are equivalent in all essential respects. I did not feel I knew enough about the settings that I wished to study to accomplish that. Alternatively, I might have thought of observing negotiations directly. However, the negotiation process itself is much more complex than its usual characterization suggests, and many difficulties stand in the way of a direct assessment of what goes on during the bargaining. Negotiations are often visualized as discrete events like trials. However, many negotiations are not like trials; they do not take place at set times in prescribed public locations. Many drag on for weeks and months and occur not only in lawyers' offices, courthouse hallways, and anterooms but over the telephone, at lunch, over the dinner table, and even in the bedroom. To assess the influence of the law with confidence, one would need to follow these negotiations from beginning to end.

The third alternative was to seek recollections of the negotiations and of the awareness by participants of their legal endowments and self-reports of whether they employed them. Even when complete, accurate, and not self-serving, such interviews may insufficiently recall the law's overt effects, the subtle and unobtrusive influence exerted by the law's framing of the discussion, or its supplying the vocabulary and expectations that structured the negotiations.

I chose the interview alternative because it promised to yield information for a relatively large number of negotiations taking place in a variety of circumstances. The advantage of this approach is twofold: it is possible to obtain information from a wide variety of participants since the selection of informants is not linked to a single setting such as Sarat and Felstiner's (1986, 1987, 1989) research, which revolved around a handful of lawyers who permitted observation in their offices. It is also possible to obtain information about the evolution of the settlement over time through retrospective interviews; that is not possible in observations since many negotiations begin before clients enter an attorney's office and continue for a considerable period. However, the price paid is that one obtains recollections that may not be completely accurate. One must ask whether one can believe what one is told or whether respondents consciously or unconsciously mouth rationalizations and reconstructions that make them appear better (or worse) than was actually the case. The best validity check in the present research was provided when we interviewed both former spouses at separate occasions and with different interviewers.

The interviews were conducted with structured instruments so that the same questions were asked of all respondents in the same sequence. The interviews lasted between 30 minutes and two hours and were tape recorded. Although the questions were asked in a structured sequence, the interviews are filled with out-of-sequence recollections as the respondents' memories were jarred. Except for a few that were conducted at the respondent's workplace or some other site, most took place in the respondent's home. The interviews were conducted between 1 June and 30 September 1989.

Respondents were chosen by random sampling of completed divorces involving children in Cook County (Chicago and its inner suburbs), Illinois, between 1 July and 31 December 1987. The names were selected from the computerized files in the court clerk's office using a random number generator. The divorces had been filed 18 to 24 months prior to the scheduled interviews (many Cook County divorces are filed early in the divorcing process

and take more than a year to be completed). My assistants and I interviewed people within a few months of the time they were issued their divorce decree, that is, when most of their negotiations had been completed.

The final set of interviews, however, is not a random sample because I was unable to interview all those whose names were originally selected. Despite our original screening, 12% still were in the process of getting their divorce or did not have minor children. Many (27%) had moved out of Cook County, and others could not be located even though we sent a letter to every respondent and followed the letter with a telephone call where we could locate a number and with a personal visit to the address listed in the court records. Some respondents lived in neighborhoods which I judged too dangerous for my interviewers to enter—housing projects and slum areas of Chicago with an exceptionally high incidence of crime; these were also neighborhoods where respondents often could not be reached by telephone or no building existed at their address. In addition, some of our respondents were not fluent enough in English for us to conduct our interviews. Twelve percent were not interviewed because of these reasons. Finally, 13% refused to participate. Thus, we were able to interview only 14% of the original sample of 1,032. Of 140 completed and usable interviews, 96 were used in this analysis. The remainder pertain to cases involving postdecree proceedings. This compares favorably with many studies of divorcing populations (Wallerstein & Kelly 1980; Kaslow & Schwartz 1989; Sarat & Felstiner 1986, 1987, 1989; Jacobson 1983; Greif 1979), although some have done better (Maccoby et al. 1990; Seltzer 1990). We lost more men than women as well as more of those with very low incomes living in very rundown neighborhoods.

While our respondents no longer constitute a random sample, they remain a much more diverse set of the recently divorced than is true of most studies. They do not come from just the upper socioeconomic strata as did Wallerstein and Kelly's (1980) sample; they are not drawn from a clinical setting as was true for Wallerstein and Kelley, Jacobson (1983), and Kaslow and Schwartz (1989); they are not limited to clients of a small number of attorneys (Sarat & Felstiner 1986, 1987, 1989). Three-fifths of the respondents were women. One-quarter acknowledged incomes of less than $10,000; 54% had incomes between $10,000 and $30,000; 22% claimed incomes over $30,000, including a few who said they earned more than $50,000. Their educational level was generally high, with 70% having finished high school or beyond. They worked in a wide array of occupational settings ranging from lawyer and corporate manager to hair stylist and electrician. Twenty-three percent were African-American. They resided in all corners of Cook County. Unlike many convenience samples, they were unrelated to each other (except when both former spouses were interviewed), were not attached to any common institution, and were represented by a wide variety of attorneys or not represented at all.

The open-ended questions were coded twice by myself and (independently) once by a research assistant from typed transcripts of the complete interviews. Intercoder agreement on the coding of items used here ranged from .80 to .96.

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