

## SETTLING IN THE SHADOW OF SEX: GENDER BIAS IN MARITAL ASSET DIVISION

*Jennifer Bennett Shinall*<sup>†</sup>

*Divorce has a long history of economically disempowering women. From the time of coverture to the era of modern divorce reform, women have been persistently disadvantaged by divorce relative to men. Family law scholars have long attributed this disadvantage to the continued prevalence of traditional gender roles and the failure of current marital asset division laws to account adequately for this prevalence. In spite of the progress made by the women's movement over the past half-century, married, heterosexual women endure as the primary caretaker in the majority of households, and married, heterosexual men endure as the primary breadwinners. Undoubtedly, women who have made career sacrifices during a marriage face a harsh economic reality when the marriage breaks down. But this Article is the first to question whether the persistence of traditional gender roles is solely responsible for the gender imbalances in economic security following a divorce. Instead, this Article posits that gender bias against women—bias that is completely separate from women's caretaking or breadwinning status—also harms women in divorce proceedings. This gender bias may be harbored by judges, mediators, lawyers, and even litigants themselves.*

---

<sup>†</sup> Associate Professor of Law, Vanderbilt Law School, 131 21st Avenue South, Nashville, TN 37203, jennifer.shinall@vanderbilt.edu, (615) 343-9622. For helpful feedback throughout the course of this project, the author extends a special thanks to Nancy King, Owen Jones, Ellen Clayton, Beverly Moran, Brian Fitzpatrick, Joni Hersch, W. Kip Viscusi, Kathryn Anderson, Andrew Keane Woods, Brian Frye, Christopher Bradley, participants in the Conference on Empirical Legal Studies in Europe, and participants in faculty law and economics workshops at Vanderbilt University, the University of Kentucky, the University of Toronto, the University of Texas, the University of Toronto, and Georgetown University. The author also wishes to acknowledge Hannah Frank for her excellent research assistance.

*To test this theory, the Article utilizes an experimental vignette study, fielded on 3,022 subjects. Subjects were randomly assigned to view one of several highly similar scenarios where a couple is divorcing after a long-term marriage, and asked to divide marital assets between them. In half of the scenarios, the male spouse was the sole breadwinner and the female spouse was the principal caretaker, consistent with traditional gender roles. But in the other half of the scenarios, the situation was reversed, with the female as the sole breadwinner and the male as the primary caretaker. Comparing results across subjects reveals that subjects consistently favored the male spouse over the similarly situated female spouse. On average, both male and female subjects assigned a greater share of the marital assets to the male breadwinner than to the female breadwinner. Male and female subjects also assigned a greater share of the marital assets to the male caretaker than to the female caretaker. The results are consistent with gender bias, as subjects penalize the female spouse in both the stereotypic (male-breadwinner/female-caretaker) and the nonstereotypic (female-breadwinner/male-caretaker) scenarios. Given these sustained preferences for the male spouse in the divorce setting, the Article concludes by considering empathy induction, auditing, and legal presumption reforms to counter the effects of bias in divorce settlements and to assist women, at last, in gaining equivalent economic standing with men after a divorce.*

#### TABLE OF CONTENTS

INTRODUCTION .....	1859
I. UNEQUAL OUTCOMES: UNDERSTANDING WOMEN’S DISADVANTAGE IN	
DIVORCE.....	1863
A. <i>The Disappointment of Equitable Division</i> .....	1863
B. <i>Accounting for Gender Roles</i> .....	1870
C. <i>Accounting for Gender Bias</i> .....	1877
II. THE EXPERIMENT .....	1884
A. <i>Experimental Background</i> .....	1884
B. <i>Experimental Design</i> .....	1888
C. <i>Results</i> .....	1893
1. <i>Subjects Attribute Fault to the Filing Party</i> .....	1894
2. <i>Subjects Reward the Breadwinner</i> .....	1895
3. <i>Subjects Reward the Male Breadwinner More than the Female Breadwinner</i> .....	1896

4. Subjects Reward the Male Caretaker More than the Female Caretaker.....	1897
5. Subjects Favor the Male Spouse Over the Female Spouse .....	1899
6. Male Subjects Favor the Male Spouse More than Female Subjects.....	1900
III EQUALIZING OUTCOMES: OVERCOMING BIAS AGAINST WOMEN.....	1901
A. <i>Inducing Empathy to Counteract Bias</i> .....	1902
B. <i>Auditing for Bias</i> .....	1905
C. <i>Introducing a Presumption of Equality</i> .....	1906
CONCLUSION.....	1908
APPENDIX.....	1910

## INTRODUCTION

Marriage has come a long way, particularly in the past half-century. Many long-term couples no longer default to marriage as the taboos associated with cohabitation and children outside of marriage decline.<sup>1</sup> Same-sex marriage, once a thing of fantasy, is now a constitutionally protected right.<sup>2</sup> Even for more traditional, heterosexual married couples with children, power dynamics may have shifted<sup>3</sup> as an increasing number of women work outside the home,<sup>4</sup> and an increasing number of men undertake childcare responsibilities.<sup>5</sup>

---

<sup>1</sup> See, e.g., *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families> [https://perma.cc/8T29-WUPW] (documenting a decline in marriage rates, a rise in cohabitation rates, and a rise in the share of children born to unmarried mothers since 1960).

<sup>2</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99 (2015) (holding that the right to marry is a fundamental right inherent in liberty that may not be deprived by the state).

<sup>3</sup> For a discussion of the economic theory of the family and how family power dynamics may shift with spousal economic power, see *MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES* (Shoshana A. Grossbard-Shechtman ed., 2003); see also Karen D. Pyke, *Women's Employment as a Gift or Burden? Marital Power Across Marriage, Divorce, and Remarriage*, 8 *GENDER & SOC'Y* 73 (1994) (exploring through survey evidence how women's power shifts across marriages with rising and falling economic power).

<sup>4</sup> See, e.g., MITRA TOOSSI & TERESA L. MORISI, U.S. BUREAU LABOR STATISTICS, *WOMEN IN THE WORKFORCE BEFORE, DURING, AND AFTER THE GREAT RECESSION* (2017), <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf>

So too has divorce, the counterpart of marriage, come a long way in the past half-century. Approximately fifty years ago, a reform movement began sweeping the country to make divorces easier to obtain.<sup>6</sup> No longer would spouses be required to prove a specific reason or party at fault for the marriage's breakdown. Instead, a faultless breakdown due to irreconcilable differences would be enough to end a marriage.<sup>7</sup> On the heels of this revolutionary reform, divorce rates rose precipitously so that, today, more than one in four U.S. adults have ever been divorced.<sup>8</sup>

Although so much about divorce has changed over the past few decades, one aspect of divorce has remained quite consistent over time: women's economic disadvantage.<sup>9</sup> Besides simplifying the divorce process, divorce reform introduced significant changes to how marital assets were divided, so that assets would thenceforth be divided

---

[<https://perma.cc/DA8C-NFUA>] (“A major factor that contributed to the growth of the U.S. labor force in the second half of the twentieth century was the remarkable increase in the labor force participation rate of women.”); Francine D. Blau & Anne E. Winkler, *Women, Work, and Family* (Nat'l Bureau of Econ. Research, Working Paper No. 23644, 2017) (reviewing positive long-term trends of mothers' participation rate in the labor force). *But see* Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why is the U.S. Falling Behind?*, 103 AM. ECON. REV. 251, 253–55 (2013) (arguing that the lack of “family-friendly” work policies in the U.S. has led to a relative decline in labor force participation by women).

<sup>5</sup> See Kim Parker & Gretchen Livingston, *7 Facts About American Dads*, PEW RES. CTR. (June 13, 2018), <http://www.pewresearch.org/fact-tank/2018/06/13/fathers-day-facts> [<https://perma.cc/3B4T-H4TX>] (“Today, fathers who live with their children are taking a more active role in caring for them and helping out around the house.”). *But see* Claire Cain Miller, *Men Do More at Home, but Not as Much as They Think*, N.Y. TIMES (Nov. 12, 2015), [https://www.nytimes.com/2015/11/12/upshot/men-do-more-at-home-but-not-as-much-as-they-think-they-do.html?\\_r=0](https://www.nytimes.com/2015/11/12/upshot/men-do-more-at-home-but-not-as-much-as-they-think-they-do.html?_r=0) [<https://perma.cc/6U6E-9YYU>] (“[Men] say they do as much housework and child care as their wives—even though data show that they don't.”); Brigid Schulte, *Once the Baby Comes, Moms Do More, Dads Do Less Around the House*, WASH. POST (May 7, 2015), [https://www.washingtonpost.com/news/parenting/wp/2015/05/07/once-the-baby-comes-moms-do-more-dads-do-less-around-the-house/?utm\\_term=.fd02df2d7a60](https://www.washingtonpost.com/news/parenting/wp/2015/05/07/once-the-baby-comes-moms-do-more-dads-do-less-around-the-house/?utm_term=.fd02df2d7a60) [<https://perma.cc/6HXS-WZT2>] (discussing the evidence that mothers do more in terms of childcare and housework).

<sup>6</sup> See *infra* Section I.A.

<sup>7</sup> See *id.*

<sup>8</sup> See Lydia Saad, *Divorce Doesn't Last*, GALLUP NEWS (Mar. 30, 2004), <http://news.gallup.com/poll/11161/divorce-doesnt-last.aspx> [<https://perma.cc/6YNM-A932>] (reporting that 27 percent of Americans have ever been divorced).

<sup>9</sup> See *infra* Section I.A.

equitably<sup>10</sup>—a move intended in part to prevent husbands from taking everything and leaving their wives destitute.<sup>11</sup> Yet women as a whole continue to see their finances decline after divorce. In fact, a recent study estimated that women's incomes decline after divorce between 12% to 30%, while men's incomes increase between 31% to 36%.<sup>12</sup> Meanwhile, women's post-divorce poverty rate remains almost three times the post-divorce poverty rate of men.<sup>13</sup>

Family law scholars have long recognized this gender gap in economic outcomes after divorce, but they have largely blamed the continued popular embrace of traditional gender roles and the current law's inability to account for it.<sup>14</sup> Specifically, family law scholars have assumed that the problem stems from the inability of marital asset division law to value women's contributions to the home, as well as its failure to recognize that women persist as the primary caretaker in most households.<sup>15</sup>

Such forces undoubtedly account for some of the persistence in unequal gender outcomes after divorce.<sup>16</sup> Nonetheless, one danger of solely relying on these gender-role-based explanations is that they make it easy for critics to blame the divorce disparity on women making different economic choices than men.<sup>17</sup> Another danger of solely relying

---

<sup>10</sup> Marital assets are divided equitably in forty-seven states. See Joni Hersch & Jennifer Bennett Shinall, Division of Marital Assets in High Asset Divorces, App. Table 1 (unpublished working paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3353484](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353484) [<https://perma.cc/KW6M-ENW3>].

<sup>11</sup> See *id.*

<sup>12</sup> Stephen P. Jenkins, *Marital Splits and Income Changes over the Longer Term* (Inst. for Soc. & Econ. Research, Working Paper No. 2008-07, 2008), [https://www.iser.essex.ac.uk/files/iser\\_working\\_papers/2008-07.pdf](https://www.iser.essex.ac.uk/files/iser_working_papers/2008-07.pdf) [<https://perma.cc/B3EW-5JF2>]; see also Darlena Cunha, *The Divorce Gap*, ATLANTIC (Apr. 28, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-divorce-gap/480333> [<https://perma.cc/KXD7-WSBY>] (discussing the financial burdens of divorce for women).

<sup>13</sup> Jenkins, *supra* note 12, at 16–17.

<sup>14</sup> See *infra* Section I.B.

<sup>15</sup> See *id.*

<sup>16</sup> See Jenkins, *supra* note 12, at 19–20 (arguing that women's relative disadvantage after divorce has improved over time because more women are now in the labor market, although admitting that the disadvantage still exists).

<sup>17</sup> Conservative voices are often quick to dismiss gender-based economic disparities as a product of women making different choices than men. See, e.g., Walter Olson, *Gender Pay Gap: When You've Lost Slate...*, CATO INST. (Jan. 30, 2014, 1:49 PM), <https://www.cato.org/blog/>

on these gender-role-based explanations is that it precludes other possible explanations. And there is reason to believe that another explanation exists—gender bias.

Research on implicit and explicit bias has abounded in the legal scholarship of the past two decades, yet remains noticeably absent from the family law literature.<sup>18</sup> Despite well-known disparities in attitudes towards minorities and women<sup>19</sup>—and despite the well-known disparities in divorce outcomes by gender—scholars have yet to consider whether gender bias by decision-makers, lawyers, and litigants may be responsible for at least some of the post-divorce gap in men’s and women’s finances. Throughout this Article, I use the term gender bias to signify a preference towards individuals of one gender that is independent of their economic choices in the labor market.

This Article fills the gap within the family law literature by assessing the effects of both household roles and gender bias in determining marital asset split. Using an experimental vignette study, the Article evaluates whether decision-makers display equal treatment of divorcing male and female spouses, and whether decision-makers’ treatment varies with the prior economic contributions of each spouse. Evaluating the results across subjects reveals a consistent preference for the male spouse in dividing marital assets—a result consistent with gender bias. Decision-makers award a smaller percentage of assets to the woman, relative to a similarly situated man, regardless of the woman’s prior economic contributions to the household. The Article thus advocates for reforms targeted at legal actors and legal decision-makers to counteract the effects of gender bias in divorce settlements.

In making this argument, the Article proceeds as follows: in Part I, I briefly review the divorce reform movement, its failure to align men’s

---

gender-pay-gap-when-youve-lost-slate [https://perma.cc/SV54-V23E] (“Most, if not all, of the gap melts away once you factor in variables such as hours worked, choice of occupation, and midcareer family interruption, among others.”). *But see* Emily Crockett, *The Gender Wage Gap Isn’t About Women’s Choices. It’s About How We Value Their Work*, VOX (Aug 23, 2016, 12:40 PM), <https://www.vox.com/2016/4/12/11410270/equal-pay-day-2016-womens-choices-wage-gap> [https://perma.cc/VVY8-GJ4L] (“[T]hose choices are often tied to things like gender stereotypes, social pressure, and how well certain industries accommodate family responsibilities.”).

<sup>18</sup> See *infra* Section I.C.

<sup>19</sup> See *id.*

and women's outcomes, and prior scholarly explanations for its failure. I further look beyond family law scholarship to consider the possible role of gender bias in divorce reform's failure. In Part II, I introduce the experiment and discuss the results. Part III suggests three reforms to counteract the role of gender bias in divorce—instituting empathy-induction reforms for decision-makers, auditing decision-maker outcomes, and, most importantly, introducing a legal presumption of equal division.

#### I. UNEQUAL OUTCOMES: UNDERSTANDING WOMEN'S DISADVANTAGE IN DIVORCE

For decades, scholars have lamented the economic harms divorce brings upon women but not upon men. Women's relative disadvantages after divorce are longstanding, extending from times when married women were prohibited from owning property.<sup>20</sup> The movement to reform divorce laws in the 1960s and 1970s was intended in part to ameliorate this disadvantage, but as reviewed in Section I.A, the movement's actual effect has been questionable. After considering these reformed divorce laws, which remain in place today, Sections I.B and I.C consider possible explanations for the persistence of women's post-divorce economic disadvantages decades after divorce reform.

##### A. *The Disappointment of Equitable Division*

Coverture has long been formally abolished,<sup>21</sup> yet some vestiges of this doctrine lingered within state laws until just a few decades ago.<sup>22</sup>

---

<sup>20</sup> See *infra* Section I.A.

<sup>21</sup> Coverture is the common law doctrine by which women's rights and obligations were subsumed by their husbands upon marriage. Traditionally, this legal doctrine prevented married women from being sued, forming contracts, or owning property. The advent of state married women's property acts in the mid-nineteenth century began the gradual chipping away of the doctrine, which would take more than a century to disappear completely. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127-32 (1995).

<sup>22</sup> See, e.g., Siegel, *supra* note 21, at 2132-49 (giving an account of the slow demise of the coverture doctrine with respect to women's entitlement to their earnings); see also Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 354

Indeed, one of the final remnants of the doctrine that remained concerned the distribution of marital assets upon divorce. Only half a century ago, states persisted in dividing assets according to the property-title owner at the time of divorce.<sup>23</sup> This traditional regime, not surprisingly, favored husbands over wives, as men were more likely than women to be the household's primary or sole earner (and continue to be so even today).<sup>24</sup> Men, as a result, held the title to most, if not all, of the marital property. The natural consequence of the traditional property-title holder regime, as Elizabeth Scott has noted, was for the costs of divorce to "[fall] disproportionately on wives, who had far more to lose than did husbands if the marriage failed."<sup>25</sup> For victims of this regime, the only remedy available in many jurisdictions was the award of

---

(1989) ("In sharp contrast to Blackstone's famous common law formulation that . . . the woman's legal existence is merged into the man's at marriage, the modern view is that marriage is a partnership of equals. All common law states now . . . recogniz[e] that both spouses have been partners in acquiring property during the marriage regardless of which spouse holds title."). Cf. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2230 (1994) ("The question that faces modern courts is whether to preserve coverture's allocation [of earnings upon divorce] or to change it.").

<sup>23</sup> See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 8 & n.25 (1987) (noting that a 1969 review of state divorce laws "shows seventeen common law states and the District of Columbia as not authorizing, prohibiting, or restricting property distribution on divorce, and twenty-five common law states as allowing such distribution under some circumstances"); see also Goldfarb, *supra* note 22, at 353 ("Under English law and in the early years of common law development in this country, the wife automatically became financially dependent on the husband at the time of marriage, and the husband automatically gained control of his wife's property and income—together with the obligation to support her.").

<sup>24</sup> Fifty years ago, the women's labor force participation rate was less than half the men's rate, with particularly low rates for married women. See Claudia Goldin, *The Quiet Revolution that Transformed Women's Employment, Education, and Family*, 96 AM. ECON. REV. 1, 4 (2006). Moreover, even the women who chose to work fifty years ago earned far less than did men. In the 1960s, the median female worker earned less than 60% of what the median male worker earned. Today, that ratio has improved (although a gender gap persists), so that the median female worker earns approximately 75% of what the median male worker earns. See Casey B. Mulligan & Yona Rubinstein, *Selection, Investment, and Women's Relative Wages over Time*, 123 Q.J. ECON. 1061, 1063 (2008). Today, the women's labor force participation rate (approximately 60%) still remains less than the men's rate (approximately 70%). See U.S. BUREAU OF LABOR STATISTICS, REPORT 1049, WOMEN IN THE LABOR FORCE: A DATABOOK 1-2 (2014), <https://www.bls.gov/cps/wlf-databook-2013.pdf> [<https://perma.cc/26JB-KWKV>].

<sup>25</sup> Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1934-35 (2000); see also *id.* at 1963.



alimony,<sup>26</sup> yet such awards often proved insufficient and went unpaid.<sup>27</sup> Consequently, twentieth-century divorce law advocates and reformers decried the traditional property-title-holder division regime as a mechanism for constraining and impoverishing women.<sup>28</sup>

Actual reform to U.S. divorce laws did not begin, however, until 1969. In that year, the pioneering state in the divorce reform movement, California, passed its Family Law Act, the first no-fault-based divorce regime in the country.<sup>29</sup> Although attribution of fault and property division may, on their face, seem to have little to do with each other, in fact they were both key elements in the same comprehensive divorce reform movement often described by commentators as the no-fault divorce revolution.<sup>30</sup> Besides its namesake reform, which eliminated the requirement that one spouse take the blame for the breakdown of the marriage in the event of divorce,<sup>31</sup> this revolution encompassed reforms

---

<sup>26</sup> Alimony provides a periodic support award to the economically disadvantaged spouse after divorce; traditionally, alimony terminates upon death or remarriage of the disadvantaged spouse. For perspectives on alimony awards and the development of U.S. divorce laws, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 181–84, 434–40 (1973); LYNNE C. HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* (1980).

<sup>27</sup> Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 *BROOK. L. REV.* 621, 627 (1991) (noting that alimony “often failed to do economic justice. . . . Sometimes, for example, a husband was simply unable to pay alimony that adequately compensated a wife for property she had brought into the marriage”).

<sup>28</sup> See, e.g., Garrison, *supra* note 27, at 629–30 (“The reasons reformers gave for favoring property division over alimony were numerous. First of all, they noted, alimony was seldom awarded and even more infrequently paid.”); Max Rheinstein, *Division of Marital Property*, 12 *WILLAMETTE L.J.* 413, 424 (1975) (“[T]he separate ownership of his or her respective assets meant that on divorce both spouses would walk away with whatever each happened to own. In the case of a housewife, this easily meant nothing. If she needed support, she would be given a claim for alimony against the husband. This claim would be precarious, if enforceable at all, and it might be forfeited if she was guilty of adultery or other serious marital misconduct.”).

<sup>29</sup> See Kay, *supra* note 23, at 1.

<sup>30</sup> See, e.g., HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

<sup>31</sup> No-fault divorce introduced the standard of “irreconcilable differences[] which have caused the irremediable breakdown of the marriage” as grounds for divorce. See CAL. CIV. CODE § 4508 (West 2019).

in property division, child custody,<sup>32</sup> and gender- and sexuality-based presumptions.<sup>33</sup> With respect to property division, the frontrunning California legislation settled on a system of equal division of assets.<sup>34</sup> Even though subsequent reforms by other states would mimic the California legislation in many respects, the majority of states would instead settle on an alternative property division regime: equitable division of assets.<sup>35</sup>

The proliferation of the equitable division standard is largely due to the promulgation of the Uniform Marriage and Divorce Act (UMDA) by the National Conference of Commissioners on Uniform State Laws.<sup>36</sup> An ongoing project since the 1960s, the final version of the UMDA, issued

---

<sup>32</sup> The 1969 California Family Law Act eliminated the general presumption that mothers were the best custodians of children (except, in the statute's words, during a child's "tender years"). See Kay, *supra* note 23, at 41–43. Rather, it adopted a best interests of the child standard for custody determinations. See *id.* at 41. Ten years later, another piece of reform legislation in California would favor the joint custody model. See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 308 (1987).

<sup>33</sup> See Kay, *supra* note 23, at 41–43 (describing the elimination of California's custody presumption in favor of the female parent); Kay, *supra* note 32, at 296 ("Although California courts did not hold gay parents unfit as custodians merely because of their sexual orientation, little more was required to sustain an award of custody to the other parent based on the best interests of the child.").

<sup>34</sup> See CAL. CIV. CODE § 4800(b)(1)–(2) (West 2019).

<sup>35</sup> Equal versus equitable division of assets was the subject of much debate at the time of the divorce revolution, with otherwise similar interest groups taking opposite sides. See, e.g., Doris Jonas Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 230 (1981) (reporting that the National Organization for Women backed equal division, in contrast to other women's groups); Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555–57 (1984) (arguing against equitable division); Joan M. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 176–77 (1976) (arguing for equal division as a starting point for dividing assets); see also Kay, *supra* note 23, at 57 (describing the debates).

<sup>36</sup> See Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 BYU L. REV. 43, 44 ("[T]he Uniform Act has been identified as the policy vehicle for the rapid spread through the United States of . . . 'equitable distribution of marital property'—the concept that marriage should be treated as a partnership whose assets must be fairly distributed between the spousal partners at divorce without regard to their formal ownership."); see also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 227–28 (1989).

in 1973, endorsed the equitable division standard.<sup>37</sup> According to one of the UMDA's reporters, the preference for equitable division arose from a concern that "the legislation of equality [would result] in a worsened position for women and, by extension, a worsened position for children."<sup>38</sup> This concern was particularly salient since the UMDA also favored one-time division of marital property over ongoing alimony awards as a principal means of dividing assets at the time of divorce.<sup>39</sup> Under the UMDA, equitable division of assets requires that assets be divided

without regard to marital misconduct, in just proportions after considering all relevant factors including: (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker; (2) the value of the property set apart to each spouse; (3) duration of the marriage; and (4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.<sup>40</sup>

While state-by-state legislation may have introduced some variations in language, this UMDA definition of equitable division remains the baseline standard in equitable division states.<sup>41</sup>

Although the equitable division standard—like no-fault divorce reform more generally—was supposed to improve economic conditions

---

<sup>37</sup> UNIF. MARRIAGE & DIVORCE ACT § 307 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973).

<sup>38</sup> Levy, *supra* note 36, at 51 (alteration in original).

<sup>39</sup> UNIF. MARRIAGE & DIVORCE ACT §§ 307, 308(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973); *see also* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2306 (1994) ("[T]he law has adopted a model that has the effect of treating ex-spouses primarily as strangers. The emphasis has been on a 'clean break' between the partners, effectuated by a one-time division of marital assets and restrictions on ongoing financial obligations.").

<sup>40</sup> UNIF. MARRIAGE & DIVORCE ACT § 307 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973).

<sup>41</sup> *See* Levy, *supra* note 36, at 44 ("[T]he Uniform Act has been identified as the policy vehicle for the rapid spread through the United States of . . . 'equitable distribution of marital property.'").

for wives upon divorce,<sup>42</sup> scholars began to decry the realities of new divorce legislation almost immediately. The origins of this backlash against divorce reform are often traced to a 1985 book by sociologist Lenore J. Weitzman, *The Divorce Revolution*.<sup>43</sup> After conducting an extensive qualitative and quantitative case study of divorce outcomes in California in the wake of its no-fault legislation, Weitzman concluded that in the year following divorce, the standard of living for ex-husbands increased by 42%, while the standard of living for ex-wives declined by 73%.<sup>44</sup> The accuracy of Weitzman's figures have subsequently been called into question,<sup>45</sup> yet even revised figures assessing relative quality of life after a no-fault divorce are dismal for women.<sup>46</sup> Beyond California, a few subsequent empirical studies have focused on no-fault regimes in which assets are divided *equitably* between divorcing spouses, as is the case in forty-seven states.<sup>47</sup> These studies have concluded that outcomes for women under equitable division regimes have been particularly poor.<sup>48</sup> Because equitable division does not even guarantee women equal division of marital assets,<sup>49</sup> it may leave divorcing women in a particularly vulnerable state when the proceedings have concluded.<sup>50</sup>

---

<sup>42</sup> See Garrison, *supra* note 27, at 623–24 (“[T]he rules governing alimony and property division were also motivated by a desire to improve the position of divorced wives.”).

<sup>43</sup> WEITZMAN, *supra* note 30.

<sup>44</sup> See *id.*

<sup>45</sup> See, e.g., Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528–36 (1996) (finding that, in the year after divorce, the standard of living for ex-husbands increased by 10%, while the standard of living for ex-wives declined by 27%).

<sup>46</sup> See *id.*

<sup>47</sup> See Hersch & Shinall, *supra* note 10 (finding that individuals dividing a marital estate “equitably” in a vignette study favored the husband, regardless of the wife’s education level and the level of marital assets).

<sup>48</sup> See, e.g., Garrison, *supra* note 27, at 739 (“The [equitable] property distribution provisions of the new statute thus failed to provide major benefits to divorced wives.”); see also MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

<sup>49</sup> See FINEMAN, *supra* note 48 (criticizing the emphasis of divorce reform legislation on equalizing treatment, instead of outcomes).

<sup>50</sup> Cf. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 85 (1993) (“No-fault presumes that a one-time division of traditional property on divorce will equitably

How vulnerable divorced wives remain under equitable division regimes remains a source of debate. Some scholars have argued that divorced women are economically worse off under equitable division regimes than they were under traditional property-title-holder division regimes.<sup>51</sup> Others have pushed back against this assertion, asserting that economic conditions of divorced women have improved, at least somewhat, since the no-fault divorce revolution.<sup>52</sup> From an empirical standpoint, the difficulty in resolving this debate stems from an inability to source reliable and representative data on divorces. Divorce cases are generally subject to simple, non-extensive filing requirements, particularly if they settle; the divorce cases in which more extensive filings and judicial opinions are available are highly contested, and arguably less representative, divorce cases.<sup>53</sup> Such difficulties exist when gathering data on even the most recent divorces; gathering data on pre-

---

settle the parties' rights and responsibilities. This presumption has proved to be wishful thinking. The typical insubstantial amount of tangible marital assets, together with the discretionary nature of the division of those assets, often make the division of property both insignificant and unpredictable.”).

<sup>51</sup> See, e.g., Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 259–60 (2013) (“Did the divorce revolution betray the interests of American women? While there has been considerable disagreement about the impact of divorce reform on women’s standard of living, many agree that judicial practices involving the division of marital property and the allocation of alimony have systematically disadvantaged women.”). See generally WEITZMAN, *supra* note 30 (arguing that divorce reform laws “have shaped radically different futures for divorced men on the one hand, and for divorced women and their children on the other”).

<sup>52</sup> See, e.g., Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1113 (1989) (“The point of this analysis is not to argue that the current divorce and alimony standards adequately or equitably serve the needs of divorcing women and their children. They unquestionably do not. But the attempt of Weitzman and others to blame the law’s inadequacies on the shift from a fault-based to a no-fault divorce regime misses the mark: women were not ‘better off’ under the old, fault-based divorce system. Indeed, in many ways they fared considerably worse.”); Kay, *supra* note 32, at 293 (admitting that no-fault divorce regimes still required further improvements, but arguing that initial reforms successfully “provide[d] a supportive context for substantive, rather than formal, equality” for men and women).

<sup>53</sup> As such, most sophisticated empirical studies have relied on observational data that contains few, if any, details about respondents’ divorce case as well as variations in state law to draw conclusions about the effects of divorce. See, e.g., Kate J. Stirling, *Women Who Remain Divorced: The Long-Term Economic Consequences*, 70 SOC. SCI. Q. 549, 549–61 (1989); Alessandra Voena, *Yours, Mine, and Ours: Do Divorce Laws Affect the Intertemporal Behavior of Married Couples?*, 105 AM. ECON. REV. 2295 (2015).

revolution divorces poses the additional challenges associated with older data.<sup>54</sup> Still, based on the limited empirical data that do exist, scholars have universally concluded that divorced women continue to be financially worse off than divorced men under modern equitable division regimes.<sup>55</sup>

The question then arises as to why women, on average, remain comparatively disadvantaged by divorce. With regard to this question, multiple hypotheses have developed to explain the persistence of women's unfavorable state. These hypotheses have universally focused on current laws' failure to account for differences in the social constructions (and social realities) of gender.<sup>56</sup> The next Section briefly discusses these hypotheses and their associated reform proposals.

### B. *Accounting for Gender Roles*

Family law scholars largely agree that women's comparative disadvantage after divorce—which has endured beyond the divorce revolution—derives from divorce laws' inability to account for highly pervasive differences in gender roles. Social and cultural constructions of men's and women's proper priorities, household responsibilities, strengths, and weaknesses are remarkably widespread, which have translated into large gaps in men's and women's relative economic

---

<sup>54</sup> For example, older divorce files are unlikely to be digitized and are more likely to be missing or incomplete.

<sup>55</sup> See, e.g., Singer, *supra* note 52, at 1104 (“Virtually all of these studies have found that no-fault divorce is financially devastating for women and the minor children in their households.”); Starnes, *supra* note 50, at 70 (“Startling inequities have resulted, as judges ignore the realities of scant property and limited earning potential and adopt the legislative assumption that homemakers need minimal, if any, maintenance.”); see also Robert E. McGraw, Gloria J. Sterin & Joseph M. Davis, *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 487 (1982) (“Despite the best intentions of the drafters of Ohio’s marital termination law, all parties involved in marital termination suffer economically, but the wife and children suffer most.”); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 353 (1987) (finding that in New Haven, Connecticut, divorce settlements received by women declined in the no-fault era).

<sup>56</sup> Feminist theory traditionally distinguishes between sex (which is defined by biological differences) and gender (which is defined by social or cultural constructions of gender norms). See generally Judith Butler, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 8–9 (2006).

power.<sup>57</sup> Although men's role in household caretaking has increased over time,<sup>58</sup> women continue to bear the vast majority of such work. Even now, only one-fifth of fathers serve as the primary caretakers of their children,<sup>59</sup> and married women devote almost twice as much time to childcare as do married men.<sup>60</sup> Beyond children, married women also spend over 50% more time on housework than do married men.<sup>61</sup> Conversely, men continue to serve as the sole or primary breadwinner in the majority of households.<sup>62</sup>

Conformity with traditional gender roles has remained remarkably common for married, heterosexual couples, yet modern equitable division laws—in the spirit of treating both spouses the same<sup>63</sup>—do not

---

<sup>57</sup> Indeed, at least some of the raw gap in pay between men and women has been attributed to the greater average share of time that women spend on home production. *See, e.g.*, Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 *AM. ECON. REV.* 1091, 1092 (2014) (acknowledging that it “wouldn't hurt” for men to spend more time on home production in order to close the gender gap); Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 *J. ECON. LITERATURE* 789, 846 (2017) (“As we have seen, greater housework time is expected to negatively affect wages.”).

<sup>58</sup> *See, e.g.*, *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RES. CTR. (Nov. 4, 2015), <http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load> [https://perma.cc/J3ZE-8PHX]; Press Release, U.S. Bureau of Labor Statistics, *Married Parents' Use of Time, 2003–06* (May 8, 2008), <http://www.bls.gov/news.release/pdf/atus2.pdf> [https://perma.cc/UUN7-3SXT] (suggesting that fathers have increased their time devoted to childcare but remain far from catching up to women).

<sup>59</sup> LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, P70-135, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011 21 (2013), <https://www.census.gov/prod/2013pubs/p70-135.pdf> [https://perma.cc/QY74-UBRM].

<sup>60</sup> *See* Joni Hersch, *Home Production and Wages: Evidence from the American Time Use Survey*, 7 *REV. ECON. HOUSEHOLD* 159, 166 (2009) (reporting that married women spend an average of 28.76 minutes on childcare every day, but men only spend an average of 15.67 minutes).

<sup>61</sup> *See id.* (reporting that married women spend an average of 147.56 minutes on home-related production every day, but men only spend an average of 93.60 minutes).

<sup>62</sup> Although men's dominance as the primary or sole household breadwinner is declining, much of this decline is due to the increasing share of unmarried mothers. *See* Sarah Jane Glynn, *Breadwinning Mothers are Increasingly the U.S. Norm*, CTR. FOR AM. PROGRESS (Dec. 19, 2016, 11:59 AM), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm> [https://perma.cc/4ER8-57TH].

<sup>63</sup> *See* Starnes, *supra* note 50, at 139 (“No-fault mistakenly assumes that the division of property and little, if any, maintenance will afford equity to these women.”).

directly address gender.<sup>64</sup> In deciding what distribution is equitable, these laws acknowledge that courts should consider both “the contribution or dissipation of each party” to the “value” of the marital estate and “the contribution of a spouse as a homemaker.”<sup>65</sup> Beyond this acknowledgment, however, equitable distribution laws provide little guidance regarding *how* economic and non-economic contributions should be balanced, nor do they directly address the power imbalance that may result from one spouse holding most (or all) of the economic control.<sup>66</sup> It is precisely equitable division laws’ failure to address the economic power imbalance inherent in conformity with traditional gender roles that has been faulted by most family law scholars.<sup>67</sup>

For example, many scholars have blamed equitable division laws’ failure to recognize that a spouse who takes a family-related career break<sup>68</sup> (most often the woman)<sup>69</sup> permanently diminishes her long-term earnings trajectory.<sup>70</sup> Consequently, even if that spouse reenters the workforce upon divorce, both her immediate and long-run rate of compensation will be permanently lower than what she would have achieved in the absence of a break.<sup>71</sup> Beyond impairing the earnings trajectory of the nonworking spouse, scholars have further faulted equitable division laws’ failure to recognize the permanent

---

<sup>64</sup> See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 307(a) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1973) (Alternative A) (serving as a model for future states’ equitable division laws).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See Starnes, *supra* note 50, at 139 (“No-fault laws that authorize divorce at will place all women who assume primary caretaking responsibilities in jeopardy.”).

<sup>68</sup> Note that this argument would hold for a spouse who decided to drop out of the labor market completely or just to reduce labor market work in order to focus more on the home.

<sup>69</sup> See Starnes, *supra* note 50, at 139 (discussing “the ordinary case of a wife whose role as primary caretaker limits her career options and advancement, and thus reduces her post-divorce income”).

<sup>70</sup> See Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 INT’L ECON. REV. 31, 33–43 (1980) (modelling the conditions under which individuals will choose to specialize in household roles within marriage); Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 INT’L ECON. REV. 333, 334–46 (1981) (same).

<sup>71</sup> See Manser & Brown, *supra* note 70; McElroy & Horney, *supra* note 70.



improvement in the working spouse's long-term earnings trajectory.<sup>72</sup> According to economic theory, the nonworking spouse specializing in the household allows the other spouse to specialize in working—that is, to devote more time and energy to his job—which, in general, should lead to greater success than he would have experienced in the absence of specialization.<sup>73</sup> Thus, without an explicit legal mechanism to compensate working spouses for their permanently higher earnings trajectory and nonworking spouses for their permanently lower earnings trajectory, many scholars insist that equitable division laws will continue to produce “an economic catastrophe for homemakers”<sup>74</sup> and to disadvantage women as a whole.<sup>75</sup>

Similar arguments have been made with respect to equitable division laws' failure to counteract the norm of entitlement of breadwinners to their earnings. Joan Williams has referred to this norm as the “he who earns it, owns it” rule, observing that the rule “is so strong that typically it is not overcome even by explicit statutory language allowing courts to give wives entitlements that reflect their domestic contributions.”<sup>76</sup> The broad discretion granted to trial courts under equitable division laws permits this norm to pervade judicial decisions, even if not acknowledged directly, by becoming the starting point from which marital assets are divided.<sup>77</sup> Williams has deemed this starting point as “a holdover from coverture,”<sup>78</sup> arguing that until such a

---

<sup>72</sup> For a discussion of the economic theory of household specialization, see generally GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981); Joni Hersch, *Marriage, Household Production, and Earnings*, in *MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES* (Shoshana A. Grossbard-Shechtman ed., 2003).

<sup>73</sup> See BECKER, *supra* note 72, at 30–53 (discussing the economic theory of household specialization); Hersch, *supra* note 72 (same); see also Williams, *supra* note 22, at 2252 (“[T]he dominant family ecology illustrates that wives' labor is an integral part of the dynamic that produced the husband's ideal-worker status.”).

<sup>74</sup> Starnes, *supra* note 50, at 139.

<sup>75</sup> See *id.* (“No-fault mistakenly assumes that the division of property and little, if any, maintenance will afford equity to these women. The broad discretion given trial courts exacerbates this mistake, by inviting unrealistic and gender-biased views of a homemaker's opportunities for rehabilitation and self-support.”).

<sup>76</sup> Williams, *supra* note 22, at 2252.

<sup>77</sup> For a discussion of cases in which judges have started from the assumption of breadwinner entitlement, see Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 748–54 (1993); Starnes, *supra* note 50, at 95–97.

<sup>78</sup> Williams, *supra* note 22, at 2257.

starting point is explicitly disavowed by the text of equitable division laws, the nonworking spouse, and women generally, will continue to be relatively disadvantaged by divorce settlements.<sup>79</sup>

A final argument related to equitable division laws' failure to acknowledge traditional gender roles has been made with respect to their influence on men's and women's behavior, instead of their economic situation. Rather than focusing on the problems created by conformity with traditional gender roles during marriage, these scholars focus on the problems created for women by conformity with traditional gender roles during divorce proceedings.<sup>80</sup> Specifically, scholars have noted that the shift towards negotiating a one-time property division under equitable division regimes may expose the weaknesses in how women are traditionally socialized: to prefer cooperation<sup>81</sup> and to value caring.<sup>82</sup> Harnessing evidence from behavioral law, economics, and psychology on gender and negotiation, Tess Wilkinson-Ryan and Deborah Small have argued that the move

---

<sup>79</sup> See *id.* ("The key question is whether the law will acknowledge the continuing family ecology or will ignore it. Traditionally, this question did not arise, because coverture arbitrarily allocated ownership of family assets to the husband. Courts and legislatures need to ask themselves whether to continue coverture's allocation or to change it.").

<sup>80</sup> See, e.g., LENORE J. WEITZMAN, *Gender Differences in Custody Bargaining in the United States*, in *ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 395, 403–04 (Lenore Weitzman & Mavis Maclean eds., 1992) (finding that the way in which women bargain for child custody disadvantages them); Penelope Eileen Bryan, "Collaborative Divorce" *Meaningful Reform or Another Quick Fix?*, 5 *PSYCHOL. PUB. POL'Y & L.* 1001, 1002 (1999) ("Power disparities between husbands and wives, gender bias and incompetence among lawyers and judges, and indeterminate substantive laws combine to produce inequitable and destructive results."); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 *LAW & INEQ.: J. THEORY & PRAC.*, 109, 111 (2008) ("[W]e expect that gender effects in divorce bargaining could vary importantly as a result of the legal context.").

<sup>81</sup> See, e.g., Trina Grillo, *The Mediation Alternative: Progress Dangers for Women*, 100 *YALE L.J.* 1545, 1603–04 (1991) (arguing that women's tendency to cooperate renders them vulnerable in divorce mediation proceedings); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 *VA. L. REV.* 421, 423–33 (1992) (arguing that women are socialized to have a "taste for cooperation," which disadvantages them in divorce negotiations).

<sup>82</sup> See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 488 (1992) (arguing that women's care orientation disadvantages them in divorce negotiations against their husbands); Nancy Illman Meyers, *Power (Im)Balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 *U. TOL. L. REV.* 853, 880 (1996) (arguing that divorce mediation exacerbates "the threat that women's care orientation already poses for them in financial negotiations").

away from ongoing alimony under equitable division regimes has disadvantaged women because

research indicates that women are more comfortable *asking* for things than *negotiating* for things. Alimony involves transfers from one party to another, whereas a financial settlement involves a division of resources between two parties; the former seems like more of an *ask* situation and the latter more of a *negotiate* situation.<sup>83</sup>

Compounding this disadvantage for women is the fact that the equitable division standard is inherently ambiguous, and psychology research suggests that preexisting “gender differences are typically larger when situations are ambiguous.”<sup>84</sup>

Whether the culprit is gendered approaches to bargaining or gendered approaches to household responsibilities, family law scholars have largely blamed adherence to traditional gender roles for women’s continued disadvantage in divorce proceedings. Some broad reform proposals exist to counter this persisting adherence: Vicki Schultz, for example, has suggested shortening the work week to encourage women to continue working (in spite of caretaking responsibilities) and men to take a greater role in caretaking.<sup>85</sup> But, in the absence of such private sector reforms, most scholars have focused on reforming the text of equitable division laws to acknowledge and, in some sense, to compensate for any disadvantages created by conformity with traditional gender roles. For example, Cynthia Starnes has argued that equitable division laws should be reformed to match contemporary partnership laws, in which the economically disadvantaged spouse (usually the woman) receives a buyout of her interest in the enterprise—that is, the marriage.<sup>86</sup> Williams has argued that the text of equitable

---

<sup>83</sup> Wilkinson-Ryan & Small, *supra* note 80, at 112.

<sup>84</sup> *Id.* at 111–12.

<sup>85</sup> Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1205–07 (2010).

<sup>86</sup> Starnes, *supra* note 50, at 139 (“I advocate a new model of marriage based on contemporary partnership law. Under this model, divorce occurs when a spouse dissociates from the marriage before expiration of the term. Dissociation ends the relationship, but it does not usually end the spouses’ shared enterprise, which continues to generate income in the hands of one or both spouses. The spouse who takes the smaller portion of the marital enterprise—that is, the spouse who earns less—should receive a buyout. Most often, this buyout rule will require a husband to pay maintenance to a wife who served as primary caretaker.”).

division laws must be amended to reflect that a breadwinner's earnings are not owned by the breadwinner alone, but instead by the breadwinner's entire family, in order to counter the norm of entitlement to individual earnings.<sup>87</sup> Wilkinson-Ryan and Small have suggested implementing default rules (such as a default rule favoring ongoing alimony support) designed to counter any disadvantages created for women who adhere to traditional female bargaining styles in divorce proceedings within equitable division regimes.<sup>88</sup>

As this Section has demonstrated, family law scholars have largely assumed that women's relative disadvantage in divorce negotiations is the result of the inherently weak situation that traditional roles engender. This prior scholarship has been highly sympathetic towards women who embrace traditional gender roles—and are economically penalized in divorce as a result—and has decried their plight as normatively unfair. Yet, because the embrace of traditional roles may be alternatively characterized as stemming from individual choice, this prior scholarship opens the door for less sympathetic observers to characterize women's relative disadvantage as perfectly fair and the result of individual desert. Indeed, the media is full of commentators who are quick to discredit all gender gaps as the result of women making different economic choices than men.<sup>89</sup>

Surprisingly absent from the family law scholarship is any consideration that women's relative disadvantage in divorce stems from

---

<sup>87</sup> Williams, *supra* note 22, at 2229–30 (“The question upon divorce is whether entitlements *within the family* will follow entitlements *within the market*. Of course the husband owns his wage vis a vis his employer, but this does not determine whether he owns it vis a vis his family.”) (emphasis in original).

<sup>88</sup> See Wilkinson-Ryan & Small, *supra* note 80, at 130–32 (arguing that “the default rule has importance for its expressive content and for its effects on people’s learning about the legal system”).

<sup>89</sup> See, e.g., Karin Agness Lips, *Don’t Buy Into the Gender Pay Gap Myth*, FORBES (Apr. 12, 2016, 11:15 AM), <https://www.forbes.com/sites/karinagness/2016/04/12/dont-buy-into-the-gender-pay-gap-myth/#d8081f025969> [<https://perma.cc/J4UY-UY7H>] (arguing that the commonly used gender pay gap statistic “doesn’t take into account a lot of choices that women and men make—education, years of experience and hours worked—that influence earnings”); Christina Hoff Sommers, *6 Feminist Myths that Will Not Die*, TIME (June 17, 2016, 3:20 PM), <http://time.com/3222543/wage-pay-gap-myth-feminism> [<https://perma.cc/SV6E-36C4>] (“American women are among the best informed and most self-determining human beings in the world. To say that they are manipulated into their life choices by forces beyond their control is divorced from reality and demeaning, to boot.”).

something other than their making different economic choices. Despite an increasingly robust literature on both implicit and explicit bias in other areas of legal scholarship, family law scholars have not considered the possibility that decision-makers, lawyers, and even litigants themselves may be biased against women in divorce proceedings, regardless of these women's economic choices. The next Section turns to review the literature on bias from other areas of legal scholarship and to reflect on its potential role in the division of marital assets.

### C. *Accounting for Gender Bias*

The effect of bias on legal decision-makers has received a great deal of attention by scholars, particularly during the past two decades.<sup>90</sup> Bias against historically-disadvantaged groups may be conscious or unconscious, or as termed in the literature, explicit or implicit.<sup>91</sup> Certainly, the explicit bias that has existed for centuries against African Americans, women, and other disadvantaged groups is well documented.<sup>92</sup> Yet as modern society has evolved, and explicitly biased views have become increasingly taboo, scholars have begun to question the role that conscious bias presently plays in decision-making—even

---

<sup>90</sup> See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1056 (2017) (arguing that there is enough evidence of implicit bias to subject an employer to a disparate treatment claim under Title VII when he or she relies on unchecked subjective decision-making that leads to disproportionate employment outcomes by race or gender); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1204–08, 1232 (2009) (examining the effect of implicit racial bias on judges' decisions); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 216–19 (2001) (examining the effect of race on jurors in race-salient criminal cases).

<sup>91</sup> For a discussion of the robust legal literature on implicit bias, and an argument that scholarly attention should shift back to explicit bias, see Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018).

<sup>92</sup> See, e.g., FELIPE FERNANDEZ-ARMESTO, *OUR AMERICA: A HISPANIC HISTORY OF THE UNITED STATES* (2014) (documenting both the successes and the oppression of individuals of Hispanic origin throughout American history); HENRY LOUIS GATES, JR., *LIFE UPON THESE SHORES: LOOKING AT AFRICAN AMERICAN HISTORY 1513–2008* (2011) (documenting the oppression faced by African Americans throughout centuries of history); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (2003) (documenting attitudes towards working women throughout American history).

though both legal and economic outcomes remain relatively worse for historically disadvantaged groups.

Instead, many legal scholars have shifted their focus to the role of unconscious bias in creating unequal outcomes.<sup>93</sup> Instead of assuming that individuals have complete control over their decisions (whether biased or not), implicit bias acknowledges that individuals do not always maintain conscious control over the impressions they have with respect to other people.<sup>94</sup> Moreover, these impressions can, and often will, be biased against historically-disadvantaged groups.<sup>95</sup> In psychology, implicit bias is classically demonstrated through the Implicit Association Test (IAT) in which subjects are asked to associate members of a group with pleasant or unpleasant words, and their response times are measured. In the race version of the IAT, respondents are typically quicker to associate pleasant words with White faces than with Black faces, thus demonstrating an implicit preference for Whites.<sup>96</sup> Although much of the research focus has remained on race,<sup>97</sup> implicit bias has also been demonstrated with respect to ethnicity, age, disability, and gender.<sup>98</sup>

Not all scholars are on board with implicit bias, and many continue to argue that explicit bias remains the culprit for the persistence of

---

<sup>93</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 948–52 (2006) (explaining the psychology behind implicit bias); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006) (“Implicit bias poses a special challenge for antidiscrimination law because it suggests the possibility that people are treating others differently even when they are unaware that they are doing so.”).

<sup>94</sup> See Greenwald & Krieger, *supra* note 93, at 947 (“In contrast, the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”).

<sup>95</sup> See Jolls & Sunstein, *supra* note 93, at 969 (noting that “most people have an implicit and unconscious bias against members of traditionally disadvantaged groups”).

<sup>96</sup> See Greenwald & Krieger, *supra* note 93, at 952–53 (discussing the IAT test).

<sup>97</sup> For an accessible summary of the implicit bias research, see MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

<sup>98</sup> See Greenwald & Krieger, *supra* note 93, at 949 (“Dissociations are commonly observed in attitudes toward stigmatized groups, including groups defined by race, age, ethnicity, disability, and sexual orientation.”).

inequality among historically disadvantaged groups.<sup>99</sup> Instead, these dissenting scholars argue that decision-makers are simply more sophisticated about hiding, or not admitting to, their conscious bias.<sup>100</sup> Still, even scholars who resist the idea of implicit bias agree that some kind of bias persists throughout the legal system.<sup>101</sup> Despite the fact that scholars may dispute the level of consciousness behind decision-maker bias, they collectively acknowledge the persistence of such bias in perpetuating disparate outcomes for disadvantaged groups.<sup>102</sup>

Testing for the presence of bias (whether explicit or implicit) in legal decision-making is difficult, if not impossible, using data collected from reported case outcomes. Although disparities in case outcomes experienced by historically disadvantaged litigants might be attributable to bias, they might also be attributable to other unobservable differences between disadvantaged and nondisadvantaged litigants, such as disparities in the quality of representation. Thus, legal scholars have increasingly relied on experimental vignette studies to examine the influence of bias in case outcomes. In such tests, subjects are randomly

---

<sup>99</sup> See, e.g., THE NAT'L ACADS. OF SCIS., ENG'G, MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 7–22, 279 (2018) (“It is worth noting that one implicit measure of social cognition, the Implicit Association Test (IAT), has sparked vigorous debate. Questions have been raised about whether certain aspects of the measurement procedure (e.g., the cognitive demands of the task or the differential salience of categories, like Black and White), can create an illusion of biased behavior, racial animus, or the unconscious process psychologists refer to as ‘implicit bias’ on the IAT, even when the participant does not harbor negative views toward Black people.”); Adam Hahn et al., *Awareness of Implicit Attitudes*, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 1369, 1369 (2014) (finding experimentally that individuals may have some awareness of so-called implicit biases); see also Clarke, *supra* note 91 (arguing that explicitly biased statements continue to abound, but courts have developed sophisticated ways to ignore such statements).

<sup>100</sup> Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 199 (2018) (“It is surely a mistake to conclude that all discrimination lacking a confession arises from unconscious forces. This relates to how I believe the narrative should be changed. When most legal scholars discuss implicit bias, what they generally mean is not that the bias is unconscious but that much of discrimination occurs through stereotyping.”).

<sup>101</sup> See *id.* at 198–200 (arguing that most so-called unconscious biases are actually a form of conscious stereotyping).

<sup>102</sup> Compare *id.* at 245 (concluding that “[d]iscrimination remains a vibrant force in society” but casting doubt on scholarly conclusions that implicit bias is to blame), with Jolls & Sunstein, *supra* note 93, at 996 (“It is now clear that implicit bias is widespread, and it is increasingly apparent that actual behavior is often affected by it, in violation of the principles that underlie antidiscrimination law.”).

assigned to view a scenario and asked to make a decision regarding that scenario; while the scenarios are otherwise similar, some scenarios prime subjects with respect to a historically disadvantaged group. Researchers then test whether inter-subject responses meaningfully differ when the scenario involves a member of a historically disadvantaged group.<sup>103</sup> While that experimental vignette studies are quite effective at detecting bias in subjects, they are less effective at distinguishing between implicit and explicit bias in subjects.<sup>104</sup>

A concrete, and common, implementation of such a vignette study involves scenarios in which subjects are asked to serve as jurors in a criminal trial, determining guilt or innocence at the end. Although the basic facts remain the same, in some scenarios, the defendant is a member of a minority group, which subjects are made aware of either directly or indirectly (typically through the defendant's name). Researchers then compare rates of guilt determination in the minority defendant scenarios versus the nonminority defendant scenarios.<sup>105</sup>

Beyond the criminal context,<sup>106</sup> experimental vignette studies have been used widely throughout legal scholarship in areas as diverse as civil juror decision-making,<sup>107</sup> judicial decision-making,<sup>108</sup> contract law,<sup>109</sup>

---

<sup>103</sup> For a discussion of the wide use of experimental vignette studies throughout empirical scholarship, see Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 72 (2016) ("Vignette studies combine survey questions with experimental methods; they are an accepted and frequently used methodology in a number of disciplines, including social psychology, sociology, and law.").

<sup>104</sup> Even if subjects are explicitly asked questions about their level of conscious bias, they may not admit the full extent of their conscious bias. See Selmi, *supra* note 100, at 211 ("[P]eople may not be more biased than they realize but . . . they are more biased than they are willing to admit.").

<sup>105</sup> For an example of such vignette studies, see Rachlinski et al., *supra* note 90 (examining the effect of implicit racial bias on judges' decisions); Sommers & Ellsworth, *supra* note 90, at 216–17 (examining the effect of race on jurors in race-salient criminal cases).

<sup>106</sup> See also Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1349–58 (2014) (analyzing juror perceptions of mens rea culpability categories); Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 903–22 (2015) (analyzing juror discernment of hearsay evidence in criminal cases); Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1326–44 (2011) (examining subjects' ability to apply the legal definitions of mens rea in specific factual contexts).

<sup>107</sup> See, e.g., Joni Hersch & Beverly Moran, *Coitus and Consequences in the Legal System: An Experimental Study*, 68 SMU L. REV. 927, 935–44 (2015) (investigating whether and how knowledge of a previous sexual relationship between legal adversaries influences subjects' perceptions of the appropriate outcome in civil actions).



intellectual property law,<sup>110</sup> and employment law.<sup>111</sup> Yet in spite of their prevalence in other areas, vignette studies remain scarce within family law scholarship. Three notable exceptions include a vignette study testing willingness to report domestic violence,<sup>112</sup> a vignette study examining the generosity of marital property awards to women who have taken a career break after having children,<sup>113</sup> and a vignette study testing the influence of fault in divorce property settlements.<sup>114</sup> This latter vignette study experiment, authored by Tess Wilkinson-Ryan and Jonathan Baron, tested whether subjects were influenced by perceptions

---

<sup>108</sup> See, e.g., Rachlinski et al., *supra* note 90 (examining the effect of implicit racial bias on judges' decisions); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 876–98 (2015) (testing whether judges act based on their emotional reactions to litigants); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 710–35 (2015) (examining the effect of anchoring on judges' award determinations).

<sup>109</sup> See, e.g., Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1022–32 (2010) (examining perceptions of contract breach); Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1281–95 (2015) (examining subjects' intuitions about contract formation); Tess Wilkinson-Ryan & David A. Hoffman, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 408–18 (2013) (examining parties' diverging approaches to self-protection before and after they perceive that they have reached final agreement).

<sup>110</sup> See, e.g., Shyamkrishna Balganesh et al., *Judging Similarity*, 100 IOWA L. REV. 267, 289 (2014) (demonstrating that other potential issues in a copyright claim significantly influence judgment of the two works' similarity); Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921, 1946–71 (2014) (examining the use of a creativity threshold as an incentive in patent law).

<sup>111</sup> See, e.g., Hersch & Shinall, *supra* note 103, at 80–86 (demonstrating that revealing the reasons for a career break is better than hiding); Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 714 (2013) (demonstrating that knowledge of sexual preferences leads to stereotyping).

<sup>112</sup> See Hadar Aviram & Annick Persinger, *Perceiving and Reporting Domestic Violence Incidents in Unconventional Settings: A Vignette Survey Study*, 23 HASTINGS WOMEN'S L.J. 159, 185 (2012) (finding that “the tendency to report domestic violence to the police declines as the incident diverges from the stereotypical male abuser/female victim scenario”).

<sup>113</sup> See Hersch & Shinall, *supra* note 10 (finding that individuals dividing a marital estate “equitably” in a vignette study favored the husband, regardless of the wife's education level and the level of marital assets).

<sup>114</sup> See Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce*, 37 J. LEGAL STUD. 315, 334–37 (2008) (finding that even in a no-fault system, jurors are influenced by perceptions of fault).

of fault in the breakdown of a marriage, despite being told to ignore fault.<sup>115</sup> In a series of experiments, subjects were asked to evaluate the reasonableness of proposals for division of marital property; even when explicitly instructed that they were evaluating the proposals in a no-fault, equitable division divorce regime, subjects wished to punish the spouse perceived to be at fault for the divorce.<sup>116</sup> Wilkinson-Ryan and Baron thus concluded that no-fault laws were at odds with individuals' moral intuitions, which might contribute to the "impasse and costly litigation" seen in many divorce cases.<sup>117</sup>

Even though this handful of vignette study experiments related to family law exist, absent from the literature is a vignette study on the role of gender bias in family law. Indeed, absent from the literature is any scholarship—experimental or otherwise—on the role of *bias* in family law.<sup>118</sup> This absence is particularly surprising since family law scholars widely agree that divorce under no-fault, equitable division regimes remains "financially devastating for women and the minor children in their households."<sup>119</sup> As discussed in the prior Section, scholars have principally attributed these unequal gender outcomes to adherence to traditional gender roles, and the law's failure to acknowledge or compensate for their prevalence.<sup>120</sup> Scholars have not considered whether these unequal outcomes would persist even if men and women made the same economic choices.

Moreover, there are several reasons to suspect that something other than conformity with traditional gender roles might be responsible for women's relatively poor outcomes after divorce. First, bias against historically disadvantaged groups is increasingly recognized by scholars

---

<sup>115</sup> *Id.* at 320–34.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 337.

<sup>118</sup> Although the present study will focus on the role of gender bias, equally absent from the family law literature is a study on the role of racial bias.

<sup>119</sup> Singer, *supra* note 52, at 1104; *see also* McGraw, Sterin & Davis, *supra* note 55, at 487 ("Despite the best intentions of the drafters of Ohio's marital termination law, all parties involved in marital termination suffer economically, but the wife and children suffer most."); McLindon, *supra* note 55 (finding that in New Haven, Connecticut, divorce settlements received by women declined in the no-fault era).

<sup>120</sup> *See supra* Section I.B.

as widespread, permeating throughout everyday life.<sup>121</sup> Second, prior studies have demonstrated that bias is most pronounced when decision-makers enjoy broad, relatively unsupervised<sup>122</sup> discretion under ambiguous standards.<sup>123</sup> Equitable division regimes fit this description quite well; the charge to divide assets equitably, or fairly, contains no inherent standards or guideposts.<sup>124</sup> Indeed, one scholar has remarked that “[t]he uncertainty of many family law standards is unique.”<sup>125</sup> Third, prior experimental vignette study evidence exists to suggest that gender bias may negatively affect women when a sexual relationship has previously existed between civil litigants. In this study, Joni Hersch and Beverly Moran found that subjects’ knowledge of a prior sexual relationship between litigants after the demise of a short-term business venture negatively affected the damages award to the female litigant.<sup>126</sup> Although the context of their experiment is outside the scope of family law, the result suggests that similar biases—totally unrelated to conformity with traditional gender roles—might be at work against women in the divorce context. The next Part introduces an experimental vignette study to test this hypothesis.

---

<sup>121</sup> See Bornstein, *supra* note 90, at 1056 (“Decades of scientific research have documented how implicit bias and automatic stereotyping affect decision making in discriminatory ways.”); Jolls & Sunstein, *supra* note 93, at 970–71 (“[T]he real world is probably full of such cases of ‘implicit,’ or unconscious, bias. This is likely to be true not only with respect to race, but also with respect to many other traits.”).

<sup>122</sup> Whether decided by a judge, a mediator, or another third party, the only method of supervision in the division of marital property in a divorce is appeal.

<sup>123</sup> See, e.g., Bornstein, *supra* note 90, at 1107 (proposing a legislative model “to prevent [implicit] bias from impacting the way in which . . . discretion is applied” by decision-makers in the workplace); Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1411 (2011) (demonstrating implicit racial and ethnic bias in umpires’ discretionary decision-making regarding strikes in ballparks with little monitoring or supervision); Rachlinski et al., *supra* note 90, at 1230 (recommending that “judges’ discretionary determinations, such as bail-setting, sentencing, or child-custody allocation, . . . be audited periodically to determine whether they exhibit patterns indicative of implicit bias”).

<sup>124</sup> See Wilkinson-Ryan & Small, *supra* note 80, at 111 (“[M]odern family laws are often quite vague, using standards like ‘equitable distribution’ and ‘best interest of the child.’”).

<sup>125</sup> Gary Crippen, *The Abundance of Family Law Appeals: Too Much of a Good Thing?*, 26 FAM. L.Q. 85, 89 (1992).

<sup>126</sup> Hersch & Moran, *supra* note 107, at 944.

## II. THE EXPERIMENT

In this Part, I use an experimental vignette study to examine the effects of traditional gender roles and gender bias in marital asset division within equitable division regimes. After reviewing the experimental subject pool in Section II.A, I describe both the structure and the reasoning behind the vignette's design in Section II.B. Section II.C presents the results.

### A. *Experimental Background*

For decades, family law scholars have lamented the poor, and often desperate, circumstances in which many women find themselves after a divorce.<sup>127</sup> Although these scholars have largely blamed the persistence of traditional gender roles, which lead far more women than men to take a family-related career break, for women's relative economic disadvantage, they have not considered whether gender bias unrelated to women's economic choices also plays a role. In this Part, I present an experimental vignette study designed to test the role of gender bias when determining the division of marital assets under an equitable division regime.

As discussed in the prior Part, experimental vignette studies have been frequently used in legal scholarship (albeit outside the family law context) to examine the role of bias. Still, one might question whether data from real-world divorce cases would be preferable to experimentally generated data for the present study. But data from actual divorce cases, as discussed in Section I.A, raise sample selection bias concerns that extend beyond the typical concerns arising in data from other types of litigation. Sample selection bias arises whenever the sample of cases in a dataset is not representative of those types of cases as a whole.<sup>128</sup> Data drawn from reported cases always give rise to such concerns since many cases settle outside of court, and even cases that go

---

<sup>127</sup> See *supra* Section I.A.

<sup>128</sup> Sample selection bias occurs whenever a sample is drawn nonrandomly from the population intended to be studied. For a discussion of the biases that result from sample selection bias, and an econometric correction for such bias, see James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 *ECONOMETRICA* 153 (1979)

to trial may not be reported. Yet data drawn from reported divorce cases are particularly concerning since the commonality of divorce has led most jurisdictions to adopt minimal filing requirements, and judicial opinions remain rare except in the most contentious matters.<sup>129</sup>

More critically, this study is principally concerned with gender bias. Even if aware of their bias, individuals are unlikely to admit that any kind of bias against a historically disadvantaged group motivated a decision.<sup>130</sup> Moreover, to the extent that bias is unconscious, then individuals, by definition, would not be able to identify its role in their discretionary decision-making.<sup>131</sup> As a result, even the most

---

<sup>129</sup> Particularly for uncontested divorces, a combination of simple filing requirements and the proliferation of online services has made it easier than ever for individuals to file for divorce pro se. For general descriptions of such do-it-yourself divorces, see Ronna L. DeLoe, *How to Get a Quick Divorce*, LEGALZOOM, <https://www.legalzoom.com/articles/how-to-get-a-quick-divorce> [<https://perma.cc/Y2FR-UYMA>] (last visited Feb. 3, 2019); *How to Get a Quick and Easy Divorce*, WIKIHOW, <https://www.wikihow.com/Get-a-Quick-and-Easy-Divorce> [<https://perma.cc/F3K6-BDTV>] (last visited Feb. 3, 2019).

<sup>130</sup> See Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 263 (2007) [hereinafter Sommers & Norton, *Batson*] (“[E]ven if [legal actors] consciously and strategically consider race . . . , they would be unlikely to admit it. Such an admission would have immediate consequences . . . . More generally, psychologists have noted that behavior is often influenced by the desire to appear nonprejudiced and to avoid the social sanctions that can follow from the appearance of racial bias.”); see also Michael I. Norton et al., *Color Blindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949, 951 (2006) (finding that individuals were less likely to use race as a descriptor during a description task when paired with a black partner); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 3 (2004) (theorizing that “most well-educated and liberal whites in the United States” wish to distance themselves from “blatant, ‘old-fashioned’ racism”); E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 818–23 (1998) (examining the relative influences of internal and external motivations to act in an unbiased manner); Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn’t)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 121–30 (2006) (finding that respondents wished to distance themselves from the classification of racist).

<sup>131</sup> See Sommers & Norton, *Batson*, *supra* note 130, at 263 (“Many researchers have demonstrated that people can offer compelling explanations for their behavior even when unaware of the factors—such as race—that are actually influential.”); see also Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004) (finding that “individuals engage in casuistry to mask biased decision making, by recruiting more acceptable criteria to justify such decisions”); Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11, 14–32 (1993) (exploring the justifications

representative observational data are unlikely to yield much insight into gender bias in divorce settlements.

Thus, in order to test whether gender bias plays a role in divorce property settlements, I recruited 3,022 subjects, all voluntary workers who had previously opted in to complete tasks on Amazon's Mechanical Turk (mTurk). Workers eligible for participation had to be at least eighteen years old, speak English, and reside in the United States. Upon successful completion of the experimental study, each worker received \$1.50 in exchange for approximately fifteen minutes of their time.<sup>132</sup> Workers' demographic characteristics are reviewed in Appendix Table 1; in general, mTurk workers are somewhat younger, but more educated and more likely to be employed than is the average person in the United States.

Although the case has already been made for the appropriateness of an experimental vignette study for the present inquiry on gender bias, the chosen subject pool of mTurk workers might present an additional source of concern. This study asks subjects to divide assets between divorcing male and female spouses; this task is arguably not something that most mTurk workers are accustomed to performing in everyday life. While this concern is certainly valid, several factors serve to ameliorate it. First, to the extent that judges divide marital assets between divorcing spouses in real life, prior research has demonstrated that judges may be susceptible to precisely the same biases as other individuals<sup>133</sup>—including bias against historically disadvantaged groups.<sup>134</sup> Second, perhaps more than any other area of law, it is

---

behind biased decision-making); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231–32, 257 (1977) (documenting the limits on individuals' introspective abilities).

<sup>132</sup> mTurk directed workers who signed up for the study to the survey instrument, which was programmed using the survey software Qualtrics. The survey provided four distinct scenarios involving employment and divorce. Here, I confine the discussion to the one scenario of relevance to the present Article.

<sup>133</sup> See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 27–29 (2007) (demonstrating that judges rely heavily on intuition when making decisions); Rachlinski et al., *supra* note 108, at 710–35 (finding that judges are susceptible to the anchoring effect); Wistrich, Rachlinski & Guthrie, *supra* note 108, at 876–97 (finding that judges have difficulty ignoring their emotional reactions to litigants).

<sup>134</sup> See Rachlinski et al., *supra* note 90, at 1208–21 (finding that judges, without training, harbor unconscious racial bias); see also Justin D. Levinson, *Forgotten Racial Equality: Implicit*

increasingly common for nonjudicial actors—and even non-legally-trained actors—to negotiate divorce settlements. Divorce mediators are often trained as social workers or psychologists,<sup>135</sup> not lawyers, which is not wholly surprising given that the equitable division guidelines neither require legal training to understand nor necessarily benefit from legal training in application, given their vagueness.<sup>136</sup> To the extent that assets are divided in divorce by nonjudicial actors, empirical evidence indicates that they, too, are susceptible to the same biases inherent in other individuals.<sup>137</sup> In sum, to the extent that mTurk workers do not divide marital assets for a living, they can still provide valuable insights into the biases and intuitions that influence decision-makers who do divide marital assets for a living.

Third, divorce is incredibly common, such that even individuals without legal training are likely to have a personal experience with divorce or, at the very least, be able to relate. Over 80% of individuals will have been married at least once by the age of forty; of these marriages, over one in five will end in divorce by the five-year anniversary, and more than half will end in divorce by the twenty-year anniversary.<sup>138</sup> To the extent that workers in the mTurk subject pool

---

*Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–405 (2007) (using empirical evidence to argue that judges exhibit unconscious racial bias).

<sup>135</sup> Mediation is a thriving industry for both social workers and psychologists. For articles touting the benefits of a therapist mediator, see Hadassah Fidler, *Should Therapists Mediate?*, SOC. WORK TODAY, [http://www.socialworktoday.com/archive/exc\\_0216.shtml](http://www.socialworktoday.com/archive/exc_0216.shtml) [<https://perma.cc/4LKW-6N2B>] (last visited Feb. 3, 2019); Ilene Diamond, *The Value of a Psychologist Mediator*, MEDIATE.COM (Mar. 2011), <https://www.mediate.com/articles/diamondi1.cfm> [<https://perma.cc/D7QT-ZSZQ>]; *Healthy Divorce: How To Make Your Split as Smooth as Possible*, AM. PSYCHOL. ASS'N, <http://www.apa.org/helpcenter/healthy-divorce.aspx> [<https://perma.cc/G8A8-YFSB>] (last visited Oct. 24, 2018).

<sup>136</sup> See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 307 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973).

<sup>137</sup> In fact, nonjudicial decision-makers may render more biased discretionary decisions than judicial decision-makers. In *Inside the Arbitrator's Mind*, the authors concluded after comparing decision-making results by judges and arbitrators that “arbitrators often made intuitive and impressionistic decisions rather than the fully rational and deliberative decisions that might be normatively desirable.” See Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1166 (2017).

<sup>138</sup> See *Key Statistics from the National Survey of Family Growth—D Listing*, CTRS. FOR DISEASE CONTROL & PREVENTION (2017), [https://www.cdc.gov/nchs/nsfg/key\\_statistics/d.htm#divorce](https://www.cdc.gov/nchs/nsfg/key_statistics/d.htm#divorce) [<https://perma.cc/8WDA-AZ3S>]; *First Marriages in the United States: Data from the 2006–2010 National Survey of Family Growth*, CTRS. FOR DISEASE CONTROL & PREVENTION

have been divorced in the past, or will be divorced in the future, the results will indicate how individuals approach their own divorce negotiations. If individuals harbor gender bias, endorse traditional gender roles, or hold strong views regarding the entitlement of breadwinners to their earnings, they might accordingly demand more or less of the marital property. Fourth, and finally, mTurk workers have been previously and widely used by legal scholars to gain insight into precisely the types of questions of interest here<sup>139</sup>—that is, how decision-makers make discretionary judgments—including questions on family law.<sup>140</sup> Bolstering the validity of using the mTurk worker subject pool is research from the social sciences that has validated their responses against the population more generally.<sup>141</sup> With this subject pool in mind, the next Section turns to discuss the details of the scenario presented to these subjects.

### B. *Experimental Design*

In this experiment, 3,022 subjects were randomly assigned to view one of four variations about a couple, Tom and Sandra, divorcing after a long-term marriage. Regardless of the assigned scenario, all subjects viewed the following information:

Tom and Sandra began dating while attending the same college, where both earned an accounting degree in 1997. They married shortly after they graduated from college. Both worked as accountants until the birth of their first child in 2000.

Subjects then viewed one of four experimental conditions, indicated below by the letters *A* through *D*. In scenarios *A* and *B*, Tom

---

(Mar. 22, 2012), <https://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> [<https://perma.cc/LT9J-PU72>].

<sup>139</sup> See *supra* Section I.C.

<sup>140</sup> See Wilkinson-Ryan & Baron, *supra* note 114, at 320–23, 326–29, 333 (2008) (using a vignette study to gauge decision-makers' reliance on perceptions of fault in no-fault divorce cases).

<sup>141</sup> See Ilyana Kuziemko et al., *How Elastic Are Preferences for Redistribution? Evidence from Randomized Survey Experiments*, 105 AM. ECON. REV. 1478, 1480–81 (2015) (validating the responses of mTurk workers against the responses of more established survey panels).



served as the primary breadwinner for the couple, with the spouse who filed for divorce varying.

*Scenarios A/B (Tom is the breadwinner):*

After college, Tom began working for a large accounting firm, and after steadily advancing in the firm now earns \$400,000 per year. After college, Sandra worked for a small accounting firm. Her salary in 2000 was \$30,000 per year.

After the couple had a child in 2000, they decided that they could live comfortably on Tom's income. Sandra left her job in order to focus on raising their child, and she has never returned to work. In 2013, [A: Sandra/B: Tom] began putting on weight. [A: Sandra's/B: Tom's] weight gain is not related to an underlying health condition; [A: she/B: he] is simply eating more and exercising less. [A: Sandra/B: Tom] has gained 100 pounds over the past two years. After eighteen years of marriage, [A: Tom/B: Sandra] feels that [A: he/B: she] is no longer attracted to [A: Sandra/B: Tom], and [A: he/B: she] believes a marriage without attraction is unsustainable. [A: Tom/B: Sandra] files for divorce from [A: Sandra/B: Tom], citing irreconcilable differences.

In scenarios C and D, Sandra served as the primary breadwinner for the couple, again with the spouse who filed for divorce varying.

*Scenarios C/D (Sandra is the breadwinner):*

After college, Sandra began working for a large accounting firm, and after steadily advancing in the firm now earns \$400,000 per year. After college, Tom worked for a small accounting firm. His salary in 2000 was \$30,000 per year.

After the couple had a child in 2000, they decided that they could live comfortably on Sandra's income. Tom left his job in order to focus on raising their child, and he has never returned to work. In 2013, [C: Sandra/D: Tom] began putting on weight. [C: Sandra's/D: Tom's] weight gain is not related to an underlying health condition; [C: she/D: he] is simply eating more and exercising less. [C: Sandra/D: Tom] has gained 100 pounds over the past two years. After eighteen years of marriage, [C: Tom/D: Sandra] feels that [C: he/D: she] is no longer attracted to [C: Sandra/D: Tom], and [C: he/D: she] believes a marriage without attraction is unsustainable. [C: Tom/D: Sandra]

files for divorce from [C: Sandra/D: Tom], citing irreconcilable differences.

All four versions of the scenario then concluded with the following prompt, intended to mimic the instructions to decision-makers in a no-fault, equitable division jurisdiction:

You should assume that you have been authorized by Tom and Sandra's attorneys to divide their assets, and Tom and Sandra have agreed to abide by your decision.

The couple have net assets valued at \$2 million.<sup>142</sup> All assets were accumulated during their marriage. The assets are liquid and are easily divisible between Tom and Sandra. The only matter to decide is the division of the net assets of \$2 million. All financial and custodial matters involving their child were settled amicably and are separate from the division of marital assets.<sup>143</sup>

The law in their state requires that you divide the \$2 million fairly between Tom and Sandra, but you need not divide the \$2 million equally between them.

What percent of the assets of \$2 million will you award to Sandra?

Subjects responded with an award to Sandra between 0 and 100 percent of the assets; the software was programmed to quantify this percent in dollar terms for subjects in order to avoid any misunderstandings. Subjects were then asked to rate the importance of several motivations in choosing their award to Sandra on a five-point Likert scale; these motivations included Tom's education, Sandra's

---

<sup>142</sup> The size of the marital estate was made intentionally large at \$2 million to push subjects away from automatically defaulting to a 50-50 split and to encourage subjects to consider each spouse's perceived desert and need (to the extent such forces matter in the division of marital assets). Another vignette study experiment on marital asset division suggests that increasing the value of the marital estate above \$2 million will not meaningfully impact subjects' division of assets between spouses. See Hersch & Shinall, *supra* note 10, at 17. Future extensions should consider whether *decreasing* the value of the marital estate below \$2 million might impact subjects' division of assets.

<sup>143</sup> Subjects were explicitly told to ignore any concerns about child custody and child support in order to simplify the analysis. To the extent that subjects still made assumptions about which parent received primary custody or child support after divorce, future extensions of this experiment should explore the effects of such assumptions on marital asset awards.

education, Tom's anticipated future earnings, Sandra's anticipated future earnings, the entitlement of breadwinners to their earnings, the value of staying home to raise children, the role of each party in keeping the marriage together, and the role of each party in breaking the marriage apart.<sup>144</sup> At the conclusion of the experiment, subjects were asked a series of demographic questions.<sup>145</sup>

Before turning to the results, several points regarding the experimental design merit further discussion. First, in all scenarios, Tom and Sandra began their marriage with equivalent levels of education and, presumably, equivalent levels of human capital. This choice was designed to convey that the spouses began their marriage in relative equipoise and to minimize any concern about illegitimate motivations behind the marriage (for example, gold-digging).<sup>146</sup> Of course, as the marriage progressed, the spouses' opportunity costs of staying in (or dropping out) of the labor market diverged, as signified by the income gap at the birth of their first child, leading the spouse with the lower opportunity cost to exit the labor market.

Second, in all scenarios, subjects were provided with a reason for the breakdown of the marriage in order to make the scenario more realistic and less ambiguous. Prior experimental literature suggests that subjects might have exhibited ambiguity aversion if no reason other than "irreconcilable differences" had been provided, which could have confounded this experiment's ability to test for gender bias.<sup>147</sup> Still, great care had to be taken in providing subjects with a reason for the marriage breakdown since, as documented in the Wilkinson-Ryan and Baron

---

<sup>144</sup> In the analysis that follows in Section II.C, subjects are considered to rate these considerations as important if they selected either a 4 (important) or 5 (very important) on the Likert scale.

<sup>145</sup> Subjects reported their gender, race, ethnicity, age, educational attainment, employment status, political party affiliation, religiosity, immigrant status, geographic location, height, weight, and prior service on a jury.

<sup>146</sup> Equivalent educational levels have tended to push subjects closer to a 50-50 split in similar experiments. See Hersch & Shinall, *supra* note 10, at 17 (finding that subjects awarded a greater percentage of assets to wives who began the marriage with equivalent education to the husband).

<sup>147</sup> Ambiguity aversion describes the behavioral phenomenon in which individuals avoid the option perceived as more ambiguous. For a discussion of this phenomenon, which is widely documented in the experimental law and economics literature, see Hersch & Shinall, *supra* note 103, at 65-70.

experiment discussed in Section I.C, decision-makers will punish the party perceived to be at fault, even when explicitly instructed not to punish in a no-fault regime.<sup>148</sup> As a result, in all scenarios, the reason for the marriage breakdown was designed such that both parties were arguably at fault. On one hand, subjects might attribute fault to the spouse who gained a substantial amount of weight; on the other hand, subjects might attribute fault to the spouse who actually filed for divorce due to loss of attraction.

Third, the scenarios were designed to test whether subjects demonstrated attachment to traditional gender roles and how subjects translated any attachment into marital asset awards. Given the reliance in prior scholarship on household roles as an explanation for unequal outcomes along gender lines, the experiment most explicitly tests for subject attachment by including two traditional scenarios (*A* and *B*, in which the high-earning husband works, and the wife drops out of the labor market to care for their children) and two nontraditional scenarios (*C* and *D*, in which the high-earning wife works, and the husband drops out of the labor market). As such, the results will allow for comparison of the awards to breadwinners versus caretakers, to female breadwinners versus male breadwinners, and to female caretakers versus male caretakers. The experiment provides further opportunities to discern the importance of bias towards breadwinners by directly asking subjects about breadwinners' entitlement and the value of staying home to raise children.

Fourth, and most importantly, the parallel nature of the scenarios will allow for testing across subjects for the presence of gender bias unrelated to the spouses' economic choices. If gender bias exists against women, then the results should demonstrate that female breadwinners are awarded less than male breadwinners and/or female caretakers are awarded less than male caretakers. Because the scenarios are otherwise identical, any significant difference in asset awards between men and women must be motivated by gender—whether this motivation was conscious or not. The next Section turns to explore subjects' asset awards in detail.

---

<sup>148</sup> See Wilkinson-Ryan & Baron, *supra* note 114, at 334–37 (finding that even in a no-fault system, jurors are influenced by perceptions of fault).

### C. Results

A summary of the results from the experiment described in the prior Section are described below in Table 1. Table 1 presents the percent of marital assets awarded to the breadwinner, by scenario. From the results shown in Table 1, six principal findings emerge, which are discussed in greater detail below.

*Table 1. Mean Percent of Marital Assets Awarded to the Breadwinner, by Scenario*

Scenario	Spouse Who Filed for Divorce	Spouse Who Is Breadwinner	All Respondents	Male Respondents	Female Respondents
			% of Assets Awarded to Breadwinner	% of Assets Awarded to Breadwinner	% of Assets Awarded to Breadwinner
A	Tom	Tom	55.52	58.77	52.40
B	Sandra	Tom	64.07	66.23	61.86
C	Tom	Sandra	57.93	57.88	57.98
D	Sandra	Sandra	52.43	53.05	51.89
N			3,022	1,466	1,556

Notes: All scenario differences are statistically significant at the 5% level, with the exception of the difference between scenarios A and C for male respondents and the difference between scenarios A and D for female respondents. Statistically significant differences between scenarios are calculated based on a Bonferroni multiple comparison test.

*Table 2. Mean Percent of Marital Assets Awarded, by Party Who Filed for Divorce*

	All Respondents	Male Respondents	Female Respondents
% of Assets Awarded to Breadwinner	57.50	59.12	55.96
When Caretaker Files	61.01	62.20	59.86
When Breadwinner Files	53.97	55.96	52.14
Difference	7.04*	6.24*	7.72*
% of Assets Awarded to Caretaker	42.50	40.88	44.04
When Breadwinner Files	46.03	44.04	47.86
When Caretaker Files	38.99	37.80	40.14
Difference	7.04*	6.24*	7.72*
% of Assets Awarded to Tom	52.32	53.79	50.92
When Sandra Files	55.83	56.97	54.75
When Tom Files	48.79	50.57	47.13
Difference	7.04*	6.40*	7.62*
% of Assets Awarded to Sandra	47.68	46.21	49.08
When Tom Files	51.21	49.43	52.87
When Sandra Files	44.17	43.03	45.25
Difference	7.04*	6.40*	7.62*
N	3,022	1,466	1,556

Notes: An \* denotes a statistically significant difference in share of assets awarded by filer at the 5% level.

*Table 3. Mean Percent of Marital Assets Awarded, by Sex of Breadwinner*

	All Respondents	Male Respondents	Female Respondents
% of Assets Awarded to Breadwinner	57.50	59.12	55.96
When Breadwinner is Male	59.81	62.57	57.07
When Breadwinner is Female	55.18	55.48	54.92
Difference	4.63*	7.09*	2.15*
% of Assets Awarded to Caretaker	42.50	40.88	44.04
When Caretaker is Male	44.82	44.52	45.08
When Caretaker is Female	40.19	37.43	42.93
Difference	4.63*	7.09*	2.15*
N	3,022	1,466	1,556

Notes: An \* denotes a statistically significant difference in share of assets awarded by gender of breadwinner/caretaker at the 5% level.

### 1. Subjects Attribute Fault to the Filing Party

Although either spouse could have been reasonably blamed for the downfall of Tom and Sandra's marriage, subjects consistently punished the spouse who filed for divorce, not the spouse who gained weight. In some ways, this result is surprising, given the great deal of research from psychology, economics, and law on weight-based stigma.<sup>149</sup> Previous empirical evidence overwhelmingly suggests that overweight and obese individuals are blamed for their weight gain and, as a result, assumed to be "unmotivated, lethargic, unfit, lazy, inactive, sluggish, idle, weak, sickly, [and] loaf."<sup>150</sup> The relevant question for the purposes of this experiment, however, is who is at fault for the divorce—not who is at fault for the weight gain—and subjects consistently blamed the filing party. Subjects' punishment of the party who filed for divorce suggests that, consistent with Wilkinson-Ryan and Baron's results,<sup>151</sup> subjects took fault into account when dividing marital assets, in spite of the fact that the scenario presented a no-fault divorce attributed to irreconcilable differences.

Table 2 explores this punishment more thoroughly by breaking down the percent awarded to the litigants by filing party. Regardless of how the results are parsed, Table 2 demonstrates that subjects punished the filing party by docking between 6 and 8 percentage points of the marital asset award, with female subjects punishing the filing party more

---

<sup>149</sup> See, e.g., Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 801 (2001) (concluding that "discrimination against obese individuals is very real. It occurs in key areas affecting health and well-being."); Rebecca M. Puhl & Kelly D. Brownell, *Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults*, 14 OBESITY 1802, 1802-03 (2006) (finding that as BMI increased, so did reported instances of weight stigma and weight discrimination); Tatiana Andreyeva et al., *Changes in Perceived Weight Discrimination Among Americans, 1995-1996 Through 2004-2006*, 16 OBESITY 1129, 1131 (2008) (documenting that discrimination based on weight and height is just as common as discrimination based on race or age).

<sup>150</sup> Tanya Berry & John C. Spence, *Automatic Activation of Exercise and Sedentary Stereotypes*, 80 RES. Q. EXERCISE & SPORT 633, 640 (2009); see also Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 969, 983-85 (1999) (concluding after a review of the psychology literature that stereotypes of obese individuals as lacking self-discipline, lazy, less conscientious, less competent, sloppy, and more likely to have a personal problem were common).

<sup>151</sup> See Wilkinson-Ryan & Baron, *supra* note 114, at 334-37 (finding that the instructions to ignore fault when dividing marital assets were at odds with subjects' intuitions).

than male subjects. Although male subjects punished the filer by 6.24 to 6.40 percentage points, female subjects punished the filer by 7.62 to 7.72 percentage points.<sup>152</sup> To make these figures more concrete in dollar terms, male subjects punished the filer by deducting \$124,800 to \$128,000 of the marital asset award, while female subjects punished the filer by deducting \$152,400 to \$154,400 of the marital asset award.<sup>153</sup> Although subjects did not view the filing party favorably in their asset division awards, as the next result highlights, they did view the economically advantaged party favorably.

## 2. Subjects Reward the Breadwinner

Looking back at Table 2, the analysis reveals that subjects consistently awarded the breadwinner more than 50% of the assets. Subjects' award pattern is consistent with Joan Williams's argument regarding the strength and the pervasiveness of the "he who earns it, owns it" rule.<sup>154</sup> On average, subjects awarded the breadwinner 15 percentage points more of the marital assets than the caretaker, with male subjects awarding more to the breadwinner (18.24 percentage points) than female subjects (11.92 percentage points).<sup>155</sup> In dollar terms, this translates to subjects awarding an average of \$300,000 more of the marital assets to the breadwinner.<sup>156</sup>

Subjects' substantially higher awards to the breadwinner are, on their own, suggestive of their attachment to the norm of breadwinners' entitlement to their earnings. Moreover, as additional analysis presented

---

<sup>152</sup> Both differences are statistically significant at the 1% level.

<sup>153</sup> These results hold in Appendix Table 2, which presents a regression of the share of assets awarded to the breadwinner on an indicator variable equal to one if Sandra is the breadwinner, an indicator variable equal to one if the breadwinner files for divorce, subjects' demographics, and subjects' important motivations. These results suggest that male subjects penalize the breadwinner for filing by 5.08 to 6.21 percentage points of the assets, while female subjects penalize the breadwinner for filing by 6.62 to 7.77 percentage points of the assets. *See infra* Appendix Table 2.

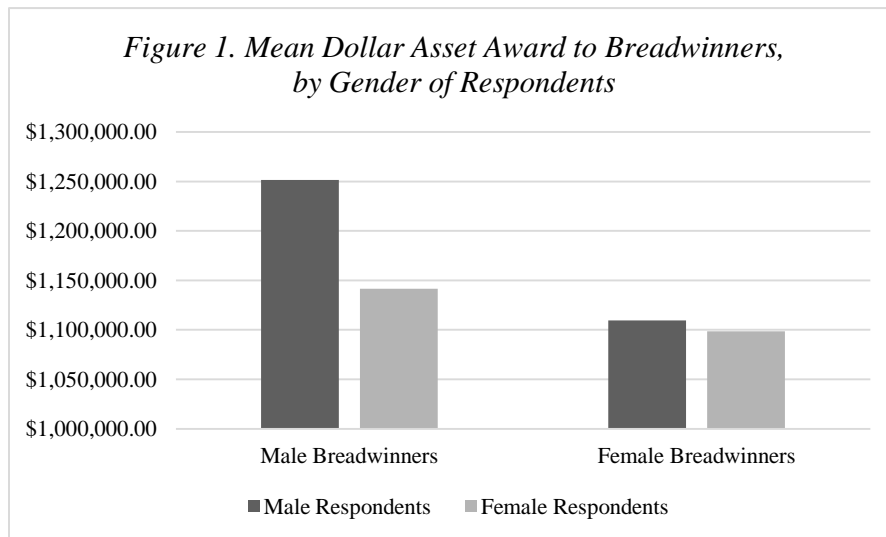
<sup>154</sup> *See Williams, supra* note 22, at 2250–51 (arguing that "[t]he 'he who earns it' rule provides the basic property law framework for the allocation of family wealth after divorce in both community property and equitable distribution states").

<sup>155</sup> All differences are statistically significant at the 1% level.

<sup>156</sup> Male subjects awarded an average of \$364,800 more to the breadwinner while female subjects awarded an average of \$238,400 more to the breadwinner.

in Appendix Table 2 reveals, subjects actually revealed the influence of this norm on their decision-making. Columns 7, 8, and 9 of Appendix Table 2 regress the share of assets awarded to the breadwinner on scenario characteristics, subjects' demographics, and subjects' important motivations. As these regressions reveal, subjects who rated the entitlement of breadwinners to their earnings as an important or very important motivation awarded an average of \$174,800 more to the breadwinner.<sup>157</sup> Although subjects consistently favored the breadwinner in dividing assets, as the next Section will highlight, the gender of the breadwinner also mattered to subjects.

### 3. Subjects Reward the Male Breadwinner More than the Female Breadwinner



On average, subjects awarded more than half of the assets to the breadwinner, regardless of the breadwinner's gender. But returning to Table 1, the results also make clear that Sandra's reward for being the breadwinner (scenarios C and D) was less than Tom's award for being the breadwinner (scenarios A and B). Table 3 explores this differential further by examining the average award to the breadwinner by the

<sup>157</sup> This number is calculated from the coefficient on breadwinner entitlement in Column 7 of Appendix Table 2 (8.74).



breadwinner's gender. When Tom was the breadwinner, both male and female subjects awarded him a greater share of the assets than when Sandra was the breadwinner. On average, Tom received 59.81% of the assets (\$1,196,200), while Sandra received only 55.18% of the assets (\$1,103,600)—a statistically significant difference of \$92,600.<sup>158</sup> These substantial differences in dollar asset awards to breadwinners along gender lines are displayed graphically above in Figure 1.

The above results also hold in the regression analysis presented in Appendix Table 2, which indicate that Sandra received between \$90,600 and \$92,400 less than Tom for being the breadwinner, even after controlling for differences in subjects' demographics and motivations.<sup>159</sup>

These results are certainly suggestive of gender bias independent of economic choices, although the results may also be consistent with the familiarity of traditional gender roles. In the majority of two-parent, heterosexual households, the male spouse, not the female spouse, continues to serve as the primary breadwinner.<sup>160</sup> To the extent that the scenarios in which Tom is the breadwinner reflect that norm, one possible explanation of the gender-based discrepancy might be that subjects found scenarios *A* and *B* more relatable. Nonetheless, when one considers the flip side of these results, the role of gender bias becomes clearer.

#### 4. Subjects Reward the Male Caretaker More than the Female Caretaker

Although stay-at-home dads are increasing in number, they remain relatively uncommon: in 2012, only 2 million dads were out of the labor market and serving as the primary caretaker of their children, compared with 10.4 million moms.<sup>161</sup> Indeed, dads who undertake significant

---

<sup>158</sup> This difference is statistically significant at the 1% level.

<sup>159</sup> These dollar figures are calculated from the lower- and upper-bound coefficients on the "Sandra is the Breadwinner" indicator variable in Appendix Table 2 (4.53 and 4.62). See *infra* Appendix Table 2.

<sup>160</sup> The share of women who are the primary household breadwinner is rising, but it still has not overtaken men. See Glynn, *supra* note 62.

<sup>161</sup> Compare Gretchen Livingston, *Growing Number of Dads Home with the Kids*, PEW RES. CTR. (June 5, 2014), <http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids> [<https://perma.cc/YTG5-5XF8>] (documenting 2 million stay-at-home

childcare responsibilities—whether they stay at home or not—continue to express dismay and stigmatization associated with this role.<sup>162</sup> The perceived stigmatization of stay-at-home dads might have led to a prediction that Tom would be punished in scenarios C and D, when he dropped out of the labor market to care for his children. But instead, subjects *rewarded* Tom for being a stay-at-home parent, relative to Sandra.

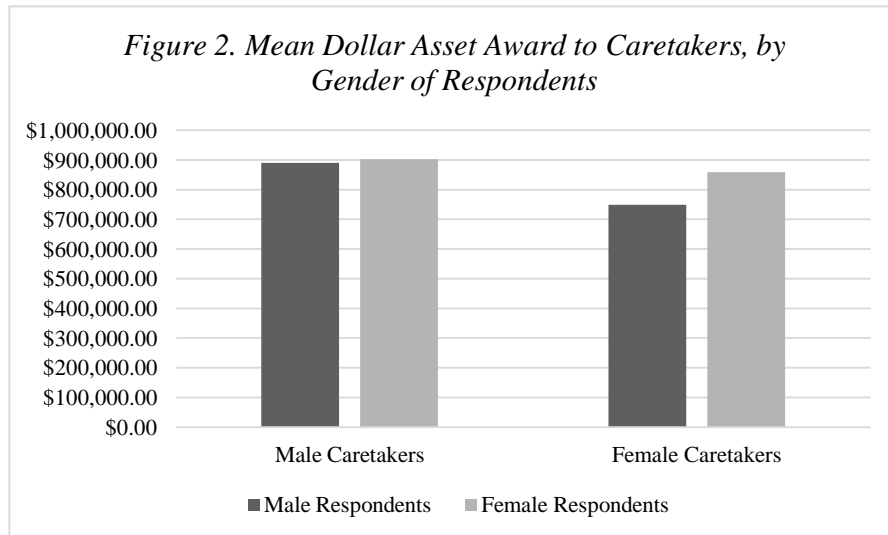
When Tom was the caretaker, both male and female subjects awarded him a greater share of the marital assets than when Sandra was the caretaker. As Table 3 reveals, Tom received an average of 44.82% of the assets (\$896,400) for being a stay-at-home dad, but Sandra received only 40.19% of the assets (\$803,800) for being a stay-at-home mom—a difference of 4.63 percentage points (\$92,600).<sup>163</sup> These differences in dollar asset awards to caretakers along gender lines are displayed graphically below in Figure 2.

---

fathers in 2012), with D’Vera Cohn, Gretchen Livingston & Wendy Wang, *After Decades of Decline, a Rise in Stay-at-Home Mothers*, PEW RES. CTR. (Apr. 8, 2014), <http://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers> [https://perma.cc/EE3M-49WV] (documenting 10.4 million stay-at-home mothers in 2012).

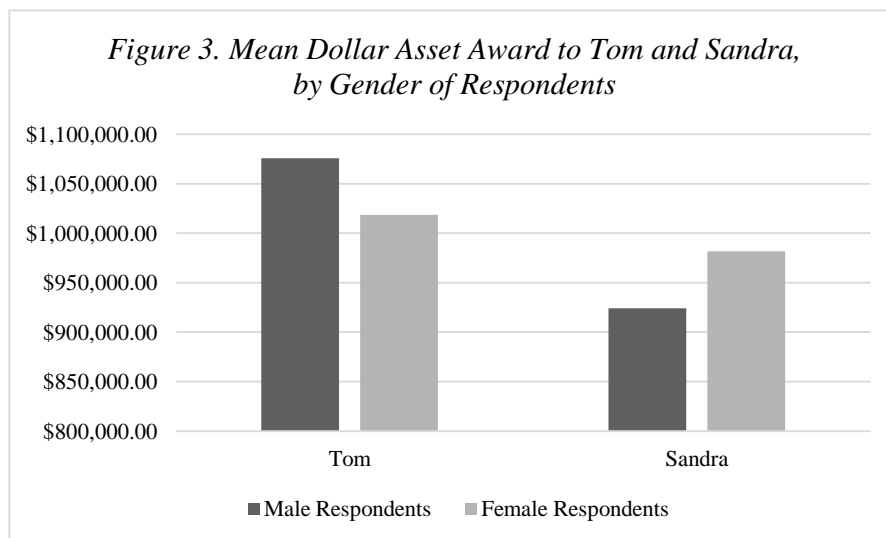
<sup>162</sup> See, e.g., Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279, 279–302 (2013) (finding that men who reduce or eliminate their working hours after becoming a father face a flexibility penalty in the labor market); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Sigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 322–40 (2013), [http://www.rci.rutgers.edu/~rudman/Rudman%20%20Mescher%20Femininity%20Stigma\\_in%20press.pdf](http://www.rci.rutgers.edu/~rudman/Rudman%20%20Mescher%20Femininity%20Stigma_in%20press.pdf) [https://perma.cc/Z9K6-A28L] (concluding that men who request a family leave “may also suffer a *femininity stigma*”). The problem of stigmatization against men who take on childcare responsibilities has been deeply explored in the context of family leave. Men who are entitled to leave often choose not to take it, or to take less than their full entitlement, because of this stigmatization. See *Deloitte Survey: Less than Half of People Surveyed Feel Their Organization Helps Men Feel Comfortable Taking Parental Leave*, DELOITTE (June 15, 2016, 8:30 AM), <https://www.prnewswire.com/news-releases/deloitte-survey-less-than-half-of-people-surveyed-feel-their-organization-helps-men-feel-comfortable-taking-parental-leave-300284822.html> [https://perma.cc/E6E8-F22A] (reporting the findings of a Deloitte survey in which “fewer than half of the respondents fe[lt] their company foster[ed] an environment in which men are comfortable taking parental leave”); see also Claire Cain Miller, *Paternity Leave: The Rewards and the Remaining Stigma*, N.Y. TIMES (Nov. 7, 2014), <https://www.nytimes.com/2014/11/09/upshot/paternity-leave-the-rewards-and-the-remaining-stigma.html> [https://perma.cc/JZ6M-GF3J] (“Even when there is a policy on the books, unwritten workplace norms can discourage men from taking leave.”).

<sup>163</sup> This difference is statistically significant at the 1% level.



Not only do these results negate the popular perception that men are stigmatized for dropping out of the labor market, but they suggest a more general point, explored in the next Section.

##### 5. Subjects Favor the Male Spouse Over the Female Spouse



Whether Tom was the breadwinner or the caretaker, he received an average payout that was relatively greater than Sandra's. This point becomes particularly clear after reviewing the results in Table 2. Averaged across all scenarios, subjects awarded Sandra less than half of

the marital assets, but Tom more than half. The difference is both substantial (4.64 percentage points, or \$92,800) and statistically significant at the 1% level. The difference in the average dollar award to Tom and Sandra across all scenarios is further highlighted graphically in Figure 3 above.

Taken together, these results indicate that subjects, on average, exhibited gender bias against the female spouse when dividing marital assets. Subjects awarded the female spouse less than they awarded an identically situated male spouse. Moreover, this result persists even after all scenario characteristics, subject demographics, and subject motivations are taken into account within the Appendix Table 2 regression analysis. Regardless of Sandra's economic choices, the average subject decided that Sandra deserved less than Tom at the end of their marriage.

#### 6. Male Subjects Favor the Male Spouse More than Female Subjects

How much less Sandra deserved than Tom, as it appears from Table 2, depended on a subject's own gender. Although both male and female subjects favored Tom over Sandra, male subjects' preferences were stronger. Across all scenarios, male subjects' average award to Sandra was 7.58 percentage points (\$151,600) lower than their average award to Tom, but female subjects' average award to Sandra was only 1.84 percentage points (\$36,000) lower.<sup>164</sup> In fact, even when Tom was the spouse who filed for divorce, male subjects still awarded Sandra an average of less than half of the marital assets.<sup>165</sup>

This result that male subjects appear to harbor more gender bias than do female subjects is not entirely surprising. Previous work on implicit bias suggests that members of a majority group exhibit the strongest implicit preferences towards themselves. On average, White people hold the strongest implicit preferences for other White people.<sup>166</sup> So, too, here do males hold the strongest preferences for other males.

---

<sup>164</sup> Both differences are statistically significant at the 5 percent level.

<sup>165</sup> See *supra* Table 2 (demonstrating that male subjects awarded Sandra only 49.43% of the assets on average when Tom filed for divorce).

<sup>166</sup> For an overview of prior implicit bias research, see PROJECT IMPLICIT, <http://www.projectimplicit.net> [<https://perma.cc/8NEU-HY9X>] (last visited Feb. 3, 2019).

Perhaps then what is more striking about the results is the fact that female subjects harbor *any* negative gender bias towards Sandra. Because men favor other men, one might naturally expect women to favor other women. Yet this finding that a historically disadvantaged group exhibits bias against itself (albeit less bias than is exhibited by outsiders to the group) is also consistent with prior implicit bias research. Research on African Americans, for example, reveals that they exhibit a small preference for Whites over members of their own race.<sup>167</sup> So too here do female subjects exhibit a small preference for men over members of their own gender.

Although the magnitude of the gender bias exhibited by males and females may differ, the fact remains that both genders exhibit at least *some* bias against women in the divorce setting. Although the subjects analyzed in this experiment are not necessarily legally trained, they nonetheless reveal a consistent tendency to punish female spouses economically. Given the prior research exposing similarities in the biases held by legal decision-makers and the biases held by the population more generally,<sup>168</sup> the results of this experiment raise serious concerns regarding the legal system's impartiality towards women in the divorce setting. These concerns are only heightened by the long history of women's relative economic disadvantage following a divorce.<sup>169</sup> How the legal system can begin to reverse this trend and to rid itself of gender bias in the family law setting is considered in the next Part.

### III. EQUALIZING OUTCOMES: OVERCOMING BIAS AGAINST WOMEN

The experiment results presented in the prior Part demonstrate a consistent and sizable bias against female spouses. Subjects awarded a greater share of the marital estate to male breadwinners than to female breadwinners who were otherwise identical. Similarly, subjects awarded

---

<sup>167</sup> See Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 105–06 (2002) (finding that white Americans consistently favored other whites, but African-Americans exhibited a more varying range of racial preferences, which averaged to a slight white preference).

<sup>168</sup> See *supra* Section I.C.

<sup>169</sup> See *supra* Section I.A.

a greater share of the marital estate to male caretakers than to female caretakers. The bias exhibited by male subjects was more than three times as large as the bias exhibited by female subjects;<sup>170</sup> still, female subjects also penalized the female spouse, even though, in theory, they should have been empathetic towards the female spouse's position.

Extrapolating these experimental findings to the larger issue—why female spouses continue to be relatively disadvantaged after divorce—the experiment indicates that more than just breadwinner bias may work against women. Judges and mediators may be unconsciously biased towards awarding a greater share of the property to male spouses, regardless of the spouses' breadwinning status. More disturbingly, lawyers and litigants may not demand as great of a share for female spouses as they demand for male spouses due to gender bias.<sup>171</sup> Because litigants are not, for the most part, repeat players in the divorce process, the most promising interventions to counteract gender bias should be directed towards judges, mediators, and lawyers. This Part reviews the interventions that are most promising to reduce both decision-makers' and representatives' gender bias, based on prior bias research.

#### A. *Inducing Empathy to Counteract Bias*

Perhaps one of the least costly interventions against bias involves reforms designed to induce empathy within decision-makers towards disadvantaged groups. Such reforms have been widely studied within the criminal jury context; these studies typically find that jurors who are able to empathize with the defendant are more lenient towards the defendant.<sup>172</sup> The key is to induce jurors to identify the defendant as

---

<sup>170</sup> See *supra* Table 3.

<sup>171</sup> Indeed, there is analogous evidence from the criminal context to cause concern regarding lawyers' implicit biases, and how such biases may impact their advocacy for their clients. See generally Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004) (concluding that criminal defense attorneys trying capital punishment cases hold implicit biases against African-Americans).

<sup>172</sup> See, e.g., Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 591, 598 (2016) ("Social psychologists have found that similar instructions [to imagine oneself in the other person's situation] induce empathy for outgroup members, reduce prejudice and bias toward the outgroup, and improve attitudes toward the out-group as a whole."); see also Krystina A. Finlay &

being like themselves; this feeling of similarity increases jurors' empathy for the defendant and, in turn, reduces their urge to punish.<sup>173</sup> The simplest method of inducing such a feeling of similarity is to ask jurors to imagine themselves in the position of the defendant before making their decision, that instruction alone has been sufficient in the criminal context to induce decision-makers to change—or, at least, to soften—their assessment of the defendant.<sup>174</sup> Most relevant to the present Article is the research finding that such instructions induce greater empathy in decision-makers when the defendant is a member of a historically disadvantaged group.<sup>175</sup>

Along these lines, a straightforward and inexpensive way to address gender bias in the divorce setting might be to provide decision-makers with such an empathy-inducing instruction. Within their equitable division statutes, states could easily add language requiring decision-makers to imagine themselves in the position of each divorcing spouse before rendering a final decision on the assets. States might even explicitly require decision-makers to reflect on whether their asset

---

Walter G. Stephan, *Improving Intergroup Relations: The Effects of Empathy on Racial Attitudes*, 30 J. APPLIED SOC. PSYCHOL. 1720, 1720, 1727–28 (2000) (“[R]eading about discrimination against African Americans or inducing empathy reduces in-group-out-group bias in attitudes toward African American vs. Anglo Americans.”); James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1213–14 (2002) (“[P]revious research . . . has indicated that empathetic induction has a significant impact on subsequent behavioral and judgmental processes.”).

<sup>173</sup> The psychology literature emphasizes the need for identification with a particular person or group in order to empathize with that person or group. See, e.g., John F. Dovidio et al., *Empathy and Intergroup Relations*, in PROSOCIAL MOTIVES, EMOTION, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 395 (Mario Mikulincer & Phillip R. Shaver eds., 2010); Karyn M. Plumm & Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186, 191 (2009); Adam Waytz & Nicholas Epley, *Social Connection Enables Dehumanization*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 70, 71 (2012).

<sup>174</sup> See sources cited *supra* note 172.

<sup>175</sup> The majority of studies focus on empathy-induction instructions when a defendant is a member of a different racial group. See, e.g., Finlay & Stephan, *supra* note 172 (“[R]eading about discrimination against African Americans or inducing empathy reduces in-group-out-group bias in attitudes toward African American vs. Anglo Americans.”); Paola Sessa et al., *Taking One’s Time in Feeling Other-Race Pain: An Event-Related Potential Investigation on the Time-Course of Cross-Racial Empathy*, 9 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 454, 454–55 (2014) (reviewing the literature finding a link between empathy and racial bias).

division decision would change if the gender of each spouse were reversed. Such instructions might be sufficient to prompt decision-makers to reflect on any gender biases they harbor—whether explicit or implicit—and give them a chance to correct for such biases.

In the absence of statutory reform, empathy training courses might also make some progress in counteracting gender bias within the divorce setting. Family law judges, mediators, and lawyers regularly undergo retraining as part of their continuing education requirements; training courses designed to help them identify their biases—and to use techniques such as empathy induction to overcome identified biases—might prove particularly useful. At least one study has demonstrated that judges who are made aware of their own racial bias can subsequently and appropriately correct for it,<sup>176</sup> suggesting that a good training session may go a long way.

Such a session would need to begin by helping trainees self-identify their biases since, as several scholars have noted, both judges<sup>177</sup> and individuals more generally<sup>178</sup> tend “to assume that their judgments are uncontaminated.”<sup>179</sup> One self-identification method readily available to trainers<sup>180</sup> that has been suggested by prior scholars has been to administer the IAT test—which, although designed to reveal implicit bias, would presumably reveal explicit bias as well.<sup>181</sup> For judges, mediators, and lawyers concentrating on family law, the variant of the IAT used would assist trainees in identifying their gender-related biases. After revealing the test results, trainings could then proceed to educate trainees about the prevalence of gender bias generally as well as the long

---

<sup>176</sup> See Rachlinski et al., *supra* note 90, at 1229–30 (finding that judges appropriately corrected for previously identified biases, although admitting that prior studies had found evidence of overcorrection and undercorrection in other subject pools).

<sup>177</sup> See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 814–15 (2001) (finding that judges exhibit egocentric biases).

<sup>178</sup> See Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 185, 190 (Thomas Gilovich et al. eds., 2002) (“The reason for people’s faith in their own judgements can be traced to both motivational and cognitive factors.”).

<sup>179</sup> *Id.*

<sup>180</sup> A variety of free IAT tests are available online, most notably through Project Implicit at Harvard. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> [<https://perma.cc/64DK-S8U6>] (last visited Feb. 3, 2019).

<sup>181</sup> See Rachlinski et al., *supra* note 90, at 1227–28 (discussing and utilizing the IAT test).



history of women's economic disadvantage following divorce. Trainees would then be encouraged to use self-reflection and empathy-induction techniques going forward in the practice of family law. Judges and mediators might be encouraged to question whether they would make the same asset division decision if the genders of the spouses were reversed; lawyers might be encouraged to question whether they would represent their client in the same way if the client's gender was reversed.

Whether through training or through statutory instructions, empathy-induction techniques seem a relatively costless way to counteract gender bias in marital asset division. Still, skeptics may rightly worry whether decision-makers will pay attention to new statutory directives, and whether continuing education trainings can have any meaningful and lasting effect on judges', mediators', and lawyers' everyday practice. For these reasons, additional interventions, discussed in the next two Sections, are likely warranted.

### B. *Auditing for Bias*

Empathy-induction directives will have little effect if judges, mediators, and lawyers ignore them. Particularly for judges and mediators who are responsible for dividing marital assets, introducing a secondary level of review may be one way to identify (and intervene against) the most biased decision-makers. One idea might be to require an automatic second review for bias by an outsider to the case in every marital property division decision—perhaps by another judge or another mediator—almost like an automatic appellate review.<sup>182</sup> Yet given the sheer volume of divorce cases, increased second-level review of individual case outcomes would be quite costly to state judiciaries, both from a monetary and a time perspective. Moreover, since many divorcing spouses want to end the process as quickly and as cheaply as

---

<sup>182</sup> Increasing appellate review, whether through introducing an automatic second review or by heightening appellate review standards (from clear error or arbitrary and capricious to de novo), has been suggested by previous scholars as a way to combat implicit bias. *See, e.g.,* Michel E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 128–134 (2008) (arguing for greater use of three-judge panels, even in trial court decisions); *see also* Rachlinski et al., *supra* note 90, at 1231–32 (discussing possible appellate review interventions against implicit bias).

possible, implementing a mandatory, second review could actually punish litigants more than protect them.

Arguably, instead of reviewing every case individually, a more efficient way to identify biased decision-makers would be to evaluate systematically a multi-case sample of their decisions. Judiciaries, for example, might implement an auditing process, whereby asset-split by gender is regularly evaluated across a random sample of a judge's recent cases.<sup>183</sup> When using a multi-case sample, auditors would not need to get lost in the details of each individual case; instead, their goal would be to determine whether a judge (or other decision-maker) consistently awarded a substantially greater share of marital assets to male spouses. Decision-makers identified as disproportionately favorable to men might then be targeted for further interventions and training.

Auditing interventions are good at identifying biased decision-makers *ex post*, and auditing can be a useful step towards improving these decision-makers' future decisions. Yet auditing, while a cheaper intervention than automatic appellate review, is still costly for jurisdictions in terms of time and money. Furthermore, auditing *ex post* may be of little comfort to wives who have been awarded a relatively low share of marital assets as the result of a biased decision. Consequently, the final—and most promising—intervention, described in the next Section, is aimed at forcing decision-makers to confront any possible gender bias at the time of decision and to justify disproportionate awards to men in a much less expensive manner.

### C. *Introducing a Presumption of Equality*

The final intervention against gender bias is one that is already in place within thirteen equitable division states<sup>184</sup>—introducing a presumption of equal asset division. Currently, decision-makers in the

---

<sup>183</sup> Introducing an auditing process to identify the most biased decision-makers has been previously suggested by other scholars. *See, e.g.,* Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 *FORDHAM URB. L.J.* 315, 320–22 (2007) (arguing for increased review on the multi-case level, rather than scrutinized review of individual cases); Rachlinski et al., *supra* note 90, at 1230–31 (suggesting auditing as a way to “enhance the accountability of judicial decisionmaking”).

<sup>184</sup> *See* Hersch & Shinall, *supra* note 10, App. Table 1 (reviewing marital property division laws in all fifty states).

thirty-four other equitable division jurisdictions have no numerical starting point, or anchor,<sup>185</sup> when dividing assets; they must rely instead on a rather ambiguous set of criteria<sup>186</sup> and a (potentially biased) notion of fairness. Such “indeterminate rules,” as Tess Wilkinson-Ryan and Deborah Small have pointed out, may

leave the parties less constrained in their private negotiations and thus better able to maximize their joint welfare. But if the empirical data suggests that the parties are not maximizing joint welfare or that there is a systematic imbalance between them (and it does), we might question the value of indeterminate rules and their utility for the normative [divorce] model.<sup>187</sup>

As a result, modifying equitable division laws to make them more determinate and definite could help close the economic gap between men and women after divorce.

By establishing a starting point of 50-50 division, most individuals will automatically anchor around that number, which should, by itself, ameliorate unconscious tendencies to award a greater share of assets to men.<sup>188</sup> Moreover, the presumption of equality could be further strengthened by requiring decision-makers to justify in writing all property division awards that deviate from the 50-50 default. Such a requirement would force decision-makers to think twice before favoring one spouse over another and to articulate carefully their reasoning whenever they decide to deviate from equal division. Moreover, the cost of this intervention is relatively low; it costs only some extra time from

---

<sup>185</sup> Anchoring describes the attachment to a suggested numerical reference point. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1128 (1974) (discussing the anchoring effect); see also Rachlinski, Wistrich, & Guthrie, *supra* note 108, at 710–35 (finding that judges are susceptible to the anchoring effect).

<sup>186</sup> See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 307 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1973).

<sup>187</sup> Wilkinson-Ryan & Small, *supra* note 80, at 132; see also James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn’t Equal Equal*, 72 *LA. L. REV.* 21, 24 (2011) (“The use of a broad, standardless version of ‘equitable’ division of the community assets and liabilities is unfortunate.”).

<sup>188</sup> See Ratner, *supra* note 187, at 25 (arguing for equal, instead of equitable, division because “departures [from equal division] do more damage than good”).

decision-makers—time that will be well spent if it forces decision-makers to confront their gender bias.<sup>189</sup>

In sum, the equality presumption arguably holds the most potential for counteracting gender bias in divorce settlements, while remaining complementary to the previously discussed empathy-induction and auditing interventions. Whether implemented alone or in conjunction with other measures, an equality presumption with a written justification requirement may serve as an important nudge for decision-makers to correct any biases they harbor towards female spouses.

#### CONCLUSION

From the time of their advent almost fifty years ago, equitable division laws have disappointed family law scholars. Although these laws were intended to assist women in gaining an economic foothold after divorce, since their passage, women have continued to exit marriages in a state of relative disadvantage when compared to men. To close this economic gap, family law scholars have exclusively focused on legal interventions designed to compensate for the fact that traditional gender roles may render women, as a group, less economically powerful than men.

This Article suggests that the persistence of men as the primary breadwinner within married, heterosexual couples is not the only force to blame for women's poor outcomes after divorce. Using evidence from an experimental vignette study, the Article demonstrates that decision-makers award a smaller percentage of assets to women, relative to similarly situated men, after the dissolution of a two-parent, heterosexual marital relationship. This finding holds true whether the wife occupies the traditional role of caretaker, or the nontraditional role of breadwinner. Although a wife's economic contribution to a two-

---

<sup>189</sup> One additional concern that may arise with respect to the equality presumption is that it may harm female breadwinners—who, according to the results of this experiment, can already expect to receive more than 50 percent of marital assets. But recall that males continue to outnumber females as the primary earners in two-parent, heterosexual households in the United States. See sources cited *supra* notes 62 and 160 and accompanying text. Consequently, this intervention will still help women as a whole, even if this help comes at the expense of the relatively few female breadwinners.

parent, heterosexual household impacts her asset award, so, too, does her gender. Future extensions of this work should examine to what extent these conclusions hold for two-parent, homosexual households.

Family law scholars, by and large, have assumed a position of advocacy when it comes to women and marital asset division. Because women as a whole continue to be economically disadvantaged by divorce—and because this disadvantage shows no sign of improving—scholars have typically taken the normative position that women need additional help in their divorces: help to overcome decision-makers' bias towards breadwinners, help to overcome women's focus on caretaking at the expense of their careers, and help to overcome women's adherence to other traditionally female-dominated roles.<sup>190</sup> In advocating for the need to improve women's economic position after divorce, scholars have inadvertently portrayed women's current state of economic disempowerment as the result of women's own choices.

Yet as this Article suggests, women's own choices are *not* solely to blame for women's economic disempowerment after divorce. Family law scholars should no longer ignore the role of bias against women—bias that has nothing to do with breadwinning, caretaking, or conformity with gender expectations. If scholars and advocates truly wish to improve the economic outcomes of female spouses after divorce, they must change their narrative to reflect that not all gender bias stems from men and women making different choices.

---

<sup>190</sup> See *supra* Section I.B.

## APPENDIX

*Appendix Table 1. Comparison of mTurk Subjects' Demographics to the 2015 U.S. Census Demographics*

Demographic Characteristic	mTurk Workers	U.S. Census Population
Percent Female	51.5	50.8
Median Age	32.0	42.4
Married	38.5	48.8
Hispanic/Latino	7.3	17.4
White	80.6	77.4
Black/African-American	7.5	13.2
Asian	5.3	5.4
Bachelor's Degree or Higher	54.1	28.8
Employment Rate	81.2	59.5
Median Household Income	\$52,500	\$53,545

Notes: Bachelor's degree rate is reported for individuals who are over the age of 24. Employment rate is calculated across the entire sample (including individuals who are not actively participating in the labor market). Race demographics are calculated using individuals who reported a single race.

*Appendix Table 2. Regression Analysis of Percent of Assets Awarded to Breadwinner, by Scenario Characteristics, Subject Demographics, and Subject Motivations*

	Dependent Variable: Share of Assets Awarded to Breadwinner								
	All	Males	Females	All	Males	Females	All	Males	Females
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Sandra is the Breadwinner	-4.62*** (0.60)	-7.05*** (0.93)	-2.18*** (0.76)	-4.53*** (0.59)	-7.10*** (0.93)	-2.05*** (0.75)	-4.60*** (0.57)	-7.14*** (0.90)	-2.19*** (0.72)
Breadwinner Files	-7.02*** (0.60)	-6.18*** (0.93)	-7.73*** (0.76)	-7.07*** (0.60)	-6.21*** (0.93)	-7.77*** (0.77)	-5.88*** (0.58)	-5.08*** (0.89)	-6.62*** (0.73)
<i>Demographics</i>									
Male	---	---	---	2.21*** (0.63)	---	---	0.85 (0.60)	---	---
Age	---	---	---	-0.21 (0.16)	-0.26 (0.26)	-0.17 (0.20)	-0.07 (0.16)	-0.10 (0.25)	-0.03 (0.20)
Age <sup>2</sup>	---	---	---	0.13 (0.19)	0.20 (0.31)	0.08 (0.24)	0.02 (0.18)	0.07 (0.30)	-0.01 (0.23)
Married	---	---	---	-2.69*** (0.66)	-4.23*** (1.04)	-1.35 (0.87)	-2.19*** (0.63)	-3.34*** (0.99)	-1.10 (0.83)
Black	---	---	---	0.21 (1.33)	-0.02 (2.24)	0.38 (1.69)	-0.37 (1.30)	-0.12 (2.15)	-0.37 (1.66)
Asian	---	---	---	-0.44 (1.65)	0.55 (2.14)	-3.09 (2.50)	-0.34 (1.56)	0.26 (2.02)	-2.63 (2.45)
Other Non-White Race	---	---	---	1.17 (1.31)	2.00 (1.99)	0.68 (1.63)	1.12 (1.21)	1.95 (1.80)	0.42 (1.55)
Hispanic	---	---	---	-1.01 (1.28)	-4.05** (1.83)	2.55 (1.71)	-1.13 (1.22)	-3.91** (1.77)	2.18 (1.63)
U.S. Native	---	---	---	-3.07* (1.59)	-1.97 (2.62)	-4.60** (1.79)	-2.42* (1.41)	-1.97 (2.32)	-3.70** (1.59)
Some College	---	---	---	-1.73 (1.21)	-2.53 (1.84)	-1.12 (1.61)	-1.27 (1.16)	-2.21 (1.74)	-0.46 (1.54)
Bachelor's Degree	---	---	---	-1.48 (1.21)	-1.48 (1.78)	-1.37 (1.64)	-1.13 (1.16)	-1.44 (1.70)	-0.64 (1.58)
Graduate Degree	---	---	---	-3.57*** (1.38)	-4.27** (2.06)	-3.02* (1.83)	-2.43* (1.30)	-3.17 (1.96)	-1.75 (1.72)
Religious	---	---	---	-1.76** (0.82)	-1.75 (1.28)	-1.93* (1.05)	-2.08*** (0.78)	-1.95 (1.23)	-2.32** (0.99)
Employed	---	---	---	1.89** (0.81)	2.52 (1.58)	1.86** (0.91)	1.35* (0.77)	1.51 (1.48)	1.60* (0.87)
Prior Jury Service	---	---	---	0.95 (0.87)	0.93 (1.31)	1.23 (1.12)	1.12 (0.84)	1.61 (1.27)	0.99 (1.08)
Republican	---	---	---	0.47 (0.83)	0.75 (1.28)	0.11 (1.06)	-0.27 (0.79)	-0.32 (1.23)	-0.41 (1.01)
City Resident	---	---	---	0.71 (0.82)	0.76 (1.38)	0.62 (1.01)	0.54 (0.79)	1.04 (1.33)	0.19 (0.95)
Suburb Resident	---	---	---	0.14 (0.75)	-0.31 (1.30)	0.44 (0.88)	-0.14 (0.72)	-0.26 (1.25)	0.06 (0.84)
Underweight	---	---	---	2.20 (2.02)	5.66 (4.01)	0.31 (2.27)	1.85 (1.89)	4.93 (3.87)	0.43 (2.05)
Overweight	---	---	---	-0.90 (0.73)	-0.30 (1.08)	-1.64* (0.96)	-0.70 (0.69)	-0.10 (1.02)	-1.38 (0.92)
Obese	---	---	---	-1.34 (0.85)	-2.13 (1.41)	-0.58 (1.04)	-1.13 (0.80)	-1.94 (1.32)	-0.27 (0.99)
Morbidly Obese	---	---	---	-1.07 (1.25)	0.13 (2.13)	-1.53 (1.47)	-1.18 (1.23)	0.16 (1.93)	-1.70 (1.50)
Tom's Education	---	---	---	---	---	---	0.01 (1.71)	0.33 (2.17)	0.18 (2.72)
<i>Motivations</i>									
Sandra's Education	---	---	---	---	---	---	1.47 (1.72)	2.89 (2.19)	0.06 (2.72)
Tom's Future Earnings	---	---	---	---	---	---	-2.31*** (0.63)	-2.63*** (0.97)	-2.14*** (0.81)
Sandra's Future Earnings	---	---	---	---	---	---	-0.54 (0.96)	-0.43 (1.49)	-0.67 (1.18)

Breadwinner	---	---	---	---	---	---	8.74***	10.00***	7.36***
Entitlement							(0.61)	(0.93)	(0.80)
Value of Staying Home	---	---	---	---	---	---	-5.79***	-5.86***	-5.66***
Role in Keeping Marriage Together	---	---	---	---	---	---	0.03	-0.77	0.70
Role in Breaking Marriage Apart	---	---	---	---	---	---	(0.85)	(1.18)	(1.22)
							2.40***	2.36*	2.52**
							(0.85)	(1.21)	(1.19)
R <sup>2</sup>	0.06	0.07	0.07	0.10	0.10	0.10	0.19	0.20	0.18
N	3,022	1,466	1,556	3,022	1,466	1,556	3,022	1,466	1,556

\* significant at 10% level; \*\* significant at 5% level; \*\*\* significant at 1% level

Notes: Dependent variable is a continuous value between 0 and 100, inclusive. Heteroskedasticity-robust standard errors are reported in parentheses below the estimated coefficient. Religious is defined as attending a religious service at least once per month. All motivation variables are dummy variables equal to one if the respondent reported the motivation as important or very important in reaching the asset split decision.