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Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining

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Introduction

Family law has become increasingly dependent on private contracts to determine the allocation of entitlements before, during, and after marriage. Ideally, prenuptial contracts, divorce settlements, and child custody agreements each require the parties involved to negotiate effectively in order to maximize the joint welfare of the spouses, ex-spouses, and children. Evidence suggests, however, that this contractarian ideal is not borne out by the current reality in which women are at a financial disadvantage to their male counterparts after divorce. Women, with or without children, experience an average decline in standard of living of about one-third upon divorce.[1] Men experience a slight increase in standard of living because their family size decreases while they maintain their personal income.[2]

Both legal scholars and economists have posited a link

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1. Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (finding "an average change in economic status of [minus] 33 percent" for women post-divorce); *see also* Richard V. Burkhauser et al., *Economics of Divorce*, 28 DEMOGRAPHY 353 (1991) (finding "pretax and transfer living standards fell for the median woman by 37%" following divorce or separation).

2. *See* Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (finding that women experience a 27% decline in standard of living, and men experience a 10% increase); *see also* Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, *in* ADVANCE DATA at 2 (Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, No. 323, 2001) ("The economic consequences of divorce can be severe for women. . . . For men, the retention of income combined with decreased family size may actually result in an increase in his new household's income per capita.").

between negative outcomes for women and the current system of divorce bargaining.[3] Legal scholars have couched this in terms of women's preference for cooperation[4] or an "ethic of care."[5] Thus, even if private ordering is theoretically desirable, questions remain. Are private negotiations an effective means to attain a mutually beneficial contract? What background legal rules might support such a regime? Why do women fare worse in these private negotiations? This Article reviews empirical evidence suggesting that men and women bargain differently. We hope to shed light on the implications of current trends in family law that have transpired in the wake of the changing status of women in American society.

In keeping with current social-psychological research and theory, we conceptualize gender as a cultural or situational variable, rather than sex per se, which is a biological categorization.[6] This approach examines the psychological variables (i.e., low entitlement, low power, relational construal) that underlie gender differences in bargaining. With this Article, we hope to contribute to a broader conversation about the role of gender research in legal theory without invoking simplistic stereotypes about men and women. We consider both motivational and cognitive factors that affect men's and women's bargaining behavior, asking not only *how* gender affects behavior, but also *when* and *in what conditions* gender effects are likely to emerge.

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3. *See* Penelope Eileen Bryan, *"Collaborative Divorce": Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1002 (1999) (arguing that divorce bargaining under conditions of power disparities, gender bias, and indeterminate laws yields negative outcomes for women); *see also* Lenore J. Weitzman, *Gender Differences in Custody Bargaining in the United States*, *in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE 395, 404 (Lenore Weitzman & Mavis Maclean eds., 1992) (arguing that bargaining over custody agreements yields negative results for women after divorce).

4. *See* Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 423–33 (1992) (arguing that women are disadvantaged at divorce because they have a greater "taste for cooperation" than men); *see also* Trina Grillo, *The Mediation Alternative: Progress Dangers for Women*, 100 YALE L.J. 1545, 1603–04 (1991) (arguing that women's propensity for cooperation makes them vulnerable in a divorce mediation).

5. Grillo, *supra* note 4, at 1601; *see also* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 488 (1992) (noting that a wife's care orientation can interfere with her ability to negotiate effectively with her husband); Nancy Ilman Meyers, *Power (Im)Balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 880 (1996) (arguing that mediation has the potential to "enhance the threat that women's care orientation already poses for them in financial negotiations").

6. *See, e.g.*, Hannah Riley Bowles et al., *Constraints & Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 963 (2005) (finding that the effects of gender "are situationally bound").

Men and women may differ in the kinds of goals and the levels of engagement that they bring to a negotiation, as well as their beliefs and mental models of the negotiating situation.

Empirical research on gender and negotiation offers insight into the differences between men and women at the bargaining table and the situational variables that exacerbate or eliminate the differences. The relationship between gender and bargaining is complicated. For instance, many studies show that women perform poorly in negotiating tasks when gender is made salient, i.e., when women are made more conscious of gender before the task.[7] In contrast, women actually outperform men when gender is salient *and when* the stereotype that women are not good negotiators has been explicitly invoked.[8] Thus, the same stereotype (women are not good at negotiating) elicits different behavior depending on how it is invoked. Given the heterogeneity of gender effects, we expect that gender effects in divorce bargaining could vary importantly as a result of the legal context.

Following a brief review of legal scholarship on economics, psychology, and family law (Part I), we consider three trends in modern family law (Parts II, III, and IV), and discuss research on the psychology of gender and negotiation that relate to each trend. While there are a number of different potential bargaining situations, we focus here on divorce settlement agreements, though it is clear that many of the issues raised in that context would apply to prenuptial agreements or custody arrangements. The first trend we review is the increasing preference for private, face-to-face negotiations rather than judge-made settlements. We review literature suggesting that women and men may bring different goals to the bargaining table, which may produce different behavior and outcomes for men and women in these negotiations. The second trend is that modern family laws are often quite vague, using standards like "equitable distribution"[9] and "best interest of the child."[10] Since gender differences are typically larger when situations are ambiguous, indeterminate

7. *See* Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 946 (2001) (offering empirical results to support the theory of stereotype threat by demonstrating that implicitly making a negotiation task "with gender-linked expectations . . . diagnostic of ability" negatively affected the performance of women in that negotiation).

8. *See, e.g.*, *id.* at 955 (showing that women performed better when the stereotype was explicitly activated while men's performance suffered).

9. *See, e.g.*, FLA. STAT. ANN. § 61.075 (West 2002).

10. *See, e.g.*, ALA. CODE § 30-3-150 (1996).

legal standards may provide a context where gender is most likely to matter. Finally, we discuss the trend toward complete financial separation at the time of divorce, which decreases the possibility of alimony.[11] Research indicates that women are more comfortable *asking* for things than *negotiating* for things.[12] 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.

Christine Jolls and Cass R. Sunstein have recently suggested that the utility of behavioral law and economics is that psychological research can both highlight instances of limited rationality *and* suggest frames or approaches to help reduce reasoning errors.[13] In the final Part, we make some preliminary suggestions for new directions in legal scholarship and empirical research.

I. Legal Scholarship on Economics, Psychology, & Family Law

The law and economics movement has changed the way that legal scholars think about family law.[14] Drawing on the work of University of Chicago economist Gary Becker, legal theorists have conceptualized the decision to marry as essentially a consumer decision, one that involves a comparison of the costs and benefits of marriage versus single life.[15] Similarly, divorce is also a kind of good, chosen if it offers an increase in welfare.[16] Once marriage is couched in the language of the market, it is easier to see the appeal of contract-based family law, offering individuals the chance to optimize their personal and joint welfare by designing exactly the kind of relationship that they find most beneficial.[17]

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11. Many states refer to alimony as "spousal maintenance." *See, e.g.*, MINN. STAT. § 518.552 (2003).

12. *See* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK 3 (2003).

13. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2005).

14. *See, e.g.*, Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 517–29 (2001) (summarizing legal scholarly thinking on economics and divorce).

15. *See* Richard A. Posner, *Gary Becker's Contributions to Law and Economics*, 22 J. LEGAL STUD. 211, 213 (1993) (summarizing Becker's argument for the application of economic principles to marriage and divorce law).

16. *See* Elizabeth S. Scott, *Rational Decision-Making About Marriage and Divorce*, 76 VA. L. REV. 9, 44–45 (1990).

17. *See* Barbara Stark, *Marriage Proposals: From One-Size Fits All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1520–26 (2001).

This is, of course, a fairly controversial shift.[18] Traditionally, marriage and divorce were regarded as moral commitments, and breach of the marriage contract, most notably adultery, was illegal.[19] The law and economics approach to marriage takes individual liberty and the maximization of welfare as its normative basis rather than religious or moral dictates about marriage as a lifetime commitment.[20]

This Article mainly considers a less controversial application of economic theory to family law because we are interested in contracts allocating property after divorce. Most state divorce laws rely to some extent on a conceptualization of the marriage agreement as a personal contract;[21] laws governing separation of property at divorce no longer specify financial penalties for the at-fault party,[22] and spousal support is on the decline.[23] Tradition may view with skepticism a system that conceives of marriage and divorce as goods, but a divorce settlement is in fact about assets,

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18. *See, e.g.*, Carl E. Schneider, *Marriage, Morals, and Law: No Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 555–81 (1994) (discussing the negative costs of removing morality from the marriage/divorce discourse).

19. *See, e.g.*, Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1295–96 ("The understanding that adultery, physical and mental cruelty, and desertion are unacceptable spousal behavior was captured under traditional law in fault grounds for divorce which gave a right to terminate the marriage to the 'innocent and injured' spouse."). Twenty-three states still have laws against adultery. *See* ALA. CODE § 13A-13-2 (2005); ARIZ. REV. STAT. ANN. § 13-1408 (2001); COLO. REV. STAT. § 18-6-501 (2006); FLA. STAT. ANN. § 798.01 (West 2007); GA. CODE ANN. § 16-6-19 (2003); IDAHO CODE ANN. § 18-6601 (2004); 720 ILL. COMP. STAT. ANN. 5/11-7 (West 2002); KAN. STAT. ANN. § 21-3507 (2006); MASS. ANN. LAWS ch. 272, § 14 (LexisNexis 2007); MICH. COMP. LAWS ANN. § 750.30 (West 2004); MINN. STAT. § 609.36 (2006); MISS. CODE ANN. § 97-29-1 (2003); N.H. REV. STAT. ANN. § 645:3 (LexisNexis 2007); N.Y. PENAL LAW § 255.17 (McKinney 2000); N.C. GEN. STAT. § 14-184 (2005); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. ANN. tit. 21, § 872 (West 2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (2003); UTAH CODE ANN. § 76-7-103 (2003); VA. CODE ANN. § 18.2-365 (2004); W. VA. CODE ANN. § 61-8-3 (LexisNexis 2005); WIS. STAT. ANN. § 944.16 (West 2005).

20. *See* Lloyd R. Cohen, *Marriage: The Long-Term Contract*, *in* LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 10, 12 (Antony W. Dnes & Robert Rowthorn eds., 2002) ("Marriage, despite being the culmination of romantic love, can be fruitfully analyzed employing the tools of rational choice.").

21. *See, e.g.*, Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998) ("Marriage . . . is a civil contract.").

22. UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 288–89 (1998) (providing that property division should be determined "without regard to marital misconduct").

23. *See* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 697–724 (1991) (citing statistics showing that alimony awards are less frequent, for less money, and less often permanent since the adoption of New York's equitable distribution law).

earning capacity, and other things easily understood as part of an economic transaction. We do not make any fundamental challenge to the notion of economic efficiency in divorce bargaining as an appropriate normative goal. Rather, our intention in this Article is to address human behavior in divorce negotiations. Specifically, we review the empirical literature on negotiation, with an eye toward how differences in bargaining behavior between men and women might systematically affect the success of private divorce agreements given the dominant principles of modern family law.

There are strong efficiency arguments supporting the modern divorce regime. For example, the parties may be in a much better position than the judge to determine how best to divide their property to maximize the total utility of the distribution. Though a couple's two cars may be of equal value, the husband may prefer one and the wife the other; individual or idiosyncratic preferences are best determined by the parties rather than by an assessment of market value, which is used by judges. It is important to note that there is considerable counterevidence to suggest that divorce negotiations are not particularly efficient.[24] In fact, it has been the role of behavioral economics to document many of the common heuristics and biases that impede efficient negotiating, including self-serving biases,[25] the fixed-pie bias,[26] and the endowment effect.[27]

When talking about divorce bargaining in this Article, though, we are always referring to a gendered negotiation in the sense that a divorcing couple has historically been comprised of one woman and one man.[28] Given this fact, it is important to also

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24. *See* Peterson, *supra* note 2, at 534 (showing a 27% decline in women's standard of living after negotiated divorce settlements).

25. *See* Linda Thompson & George Lowenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION PROCESSES (SPECIAL ISSUE) 176 (1992) (describing experiments in which subjects' assessments of fairness are consistently in line with their own self-interest).

26. *See* Max H. Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, *in* NEGOTIATING IN ORGANIZATIONS 51, 62–63 (Max H. Bazerman & Roy J. Lewicki eds., 1983) (reviewing evidence that negotiating parties overlook opportunities for joint gain, instead focusing on a "fixed pie of resources" where one side's gain is the other's loss).

27. *See* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, *in* BEHAVIORAL LAW AND ECONOMICS 211, 211 (Cass R. Sunstein ed., 2000) (showing empirical evidence that entitlements affect parties' valuation of a good).

28. This has begun to change as same-sex marriages and civil unions grow more popular. The Massachusetts divorce statute applies to the dissolution of same-sex marriages. *See* Salucco v. Alldredge, 17 Mass. L. Rptr. 498, No. 02E0087GC1, 2004 WL 864459, at *4 (Mass. Super. Ct. Mar. 19, 2004) ("Opposite-sex couples who marry are afforded the opportunity to extinguish their legal

consider psychological variables associated with gender.

II. Law: Private Bargaining, Not Judge-Made Settlement

Modern divorce law favors private negotiations to determine the allocation of assets after divorce.[29] Couples can, for example, draft a contract individually, as a couple, or with their lawyers.[30] Couples who are unable to reach an agreement with their lawyers alone may be ordered by the court to go through mediation before the judge will hear the case.[31]

The next Section considers four areas of psychological research showing systematic gender differences in bargaining behavior that are likely to be manifest in such private settlements: communal goals, impression management, stereotype threat, and power dynamics.

A. Communal Goals

In bargaining research, two general kinds of goals have been identified: "task-specific goals" and "interaction goals."[32] Task-specific goals are normally tangible goals that negotiators set for themselves, including getting a good deal, obtaining the desired goods, and perhaps minimizing transaction costs.[33] Interaction goals reflect the interpersonal dimension of negotiations.[34] Considerable research suggests that women, more than men, place a great weight on interpersonal goals in negotiation relative to task-specific goals, and that women are more attuned to the relational component of a negotiation.[35] They are more likely than

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relationship through the mechanism of divorce. Reasoning follows there from that same-sex couples who enter into legal relationships should also be allowed to dissolve their legal relationships."). In states that recognize civil unions, dissolution proceedings for same-sex civil unions may be very similar to divorce. *See* William C. Duncan, *Survey of Interstate Recognition of Quasi-Marital Statuses*, 3 AVE MARIA L. REV. 617, 622–23 (noting that a Massachusetts court decision treated a Vermont civil union dissolution substantially the same as marital dissolution).

29. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

30. *See id.* at 952–56 (discussing private ordering in divorce).

31. Jessica Pearson, *Family Mediation*, *in* NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 51, 55 (Susan Keilitz ed., 1994).

32. Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, *in* NEGOTIATION THEORY AND RESEARCH 203, 205–09 (Leigh L. Thompson ed., 2006).

33. *Id.*

34. *Id.*

35. Deborah M. Kolb & Gloria C. Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation*, *in* NEGOTIATION THEORY AND

men to report concern for an opponent's feelings, and they are motivated to maintain a good relationship during negotiations.[36] This stems from the general finding that women are more communally-oriented than men[37] and that their self-concept is more dependent on their relationships with others,[38] which may in turn make them focus more on interpersonal goals and less on task-specific goals.

It is possible that this general gendered pattern is less applicable to the divorce context because motives to maintain a good relationship or to attend positively to the opponent's feelings may be less evident, even for women, when a relationship is being terminated.[39] Conversely, there are reasons to suspect that gender differences will persist in this context. In many cases the relationship is not completely terminated; the divorce may be amicable or the couple may have children for whom it is important to remain on good terms.[40]

It may appear foolish for women to have these goals at the expense of maximizing their financial welfare, but relational goals make good sense if both parties have them because cooperation typically increases joint gain.[41] The situation is much like the famous prisoners' dilemma in which two interrogated players must choose *independently* whether to cooperate by agreeing to say nothing or defect by betraying the other.[42] If they both cooperate,

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PRACTICE 261, 264 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

36. Wesley C. King, Jr. & Thomas D. Hinson, *The Influence of Sex and Equity Sensitivity on Relationship Preferences, Assessment of Opponent, and Outcomes in a Negotiation Experiment*, 20 J. MGMT. 605, 611 (1994).

37. *See* Susan E. Cross & Laura Madson, *Models of the Self: Self-Construals and Gender*, 122 PSYCHOL. BULL. 5, 5 (1997).

38. *See, e.g.*, Serge Guimond et al., *Social Comparison, Self-Stereotyping, and Gender Differences in Self-Construals*, 90 J. PERSONALITY & SOC. PSYCHOL. 221, 221 (2006) (finding that "women define themselves higher in relational interdependence than men").

39. *See* Anne-Marie Ambert, *Relationships Between Ex-Spouses: Individual and Dyadic Perspectives*, 5 J. SOC. & PERS. RELATIONSHIPS 327, 343 (1988) (describing an experiment in which divorced men and women expressed no interest in relationship repair).

40. *See* Elizabeth E. Graham, *Turning Points and Commitment in Post-Divorce Relationships*, 64 COMM. MONOGRAPHS 350, 361 (1997). For an example of what might happen if a divorced couple does not act amicably, see Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209, 212 (1995), which describes "ultimatum game" experiments in which subjects reject a monetary award in order to deprive an unfair player from a reward.

41. *See* JAMES N. WEBB, GAME THEORY: DECISIONS, INTERACTIONS AND REVOLUTION 62–63 (2007) (describing the optimal solution of the prisoners' dilemma).

42. *Id.*

they each receive a short prison sentence.[43] If they both defect, they each receive a medium prison sentence.[44] If, however, one cooperates and the other defects, the cooperator receives a very long sentence and the defector gets off scot-free.[45] Divorce settlements similarly benefit from cooperation. In the "divorcée's dilemma," if one party acts selfishly and the other cooperates, then the cooperator fares worse than if that person had also acted selfishly.[46] Hypothetically, if a woman cooperates (i.e., tries to maintain a positive relationship at the expense of maximizing financial gains) and a man defects (i.e., tries exclusively to maximize financial gains), then the woman ends up poorer for it.

B. Impression Management

A somewhat different type of interpersonal goal is impression management. Impression management is the straightforward concept that people's behavior is affected by how they want others to perceive them.[47] In general, people want others to judge them favorably,[48] meaning that behavior is affected by others' expectations. Since different expectations exist for men's and women's behavior,[49] such expectations may contribute to divergent behaviors. Women are typically expected to play nice and to not be aggressive,[50] whereas expectations for men are quite the opposite.[51] Studies show, for example, that women's competitive behavior differs as a function of who is watching; women behave less competitively when they are in public than when they are in private.[52] Furthermore, women's personal entitlement or self-evaluation is also greater in private than in public. In one study,

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43. *Id.* at 62.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See, e.g.*, Andrew DuBrin, *Sex Differences in the Use and Effectiveness of Tactics of Impression Management*, 74 PSYCHOL. REP. 531 (1994) (discussing different impression-management strategies and comparing men's and women's uses and perceptions of these strategies).

48. *See, e.g., id.* at 532 (describing the different impression-management strategies used to create favorable impressions in others).

49. *See, e.g.*, Laurie Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629 (1998) (describing the different ways men and women have been socialized to act).

50. *See, e.g., id.* at 630 (explaining that women are expected to be more "community oriented").

51. *See, e.g., id.* at 629 (explaining that men are expected to be more aggressive in order to compete for economic resources and attention from women).

52. *E.g., id.* at 630.

experimenters offered participants a fixed amount of money and told them to work on a task until they believed they had earned the money.[53] Women worked longer on the task when they believed that they were being monitored than when they were being unmonitored.[54] Men, on the other hand, worked the same amount in each condition.[55]

As mentioned in the previous Section, women care more about other goals beyond maximizing their share of assets. Relational goals can be functional for both parties in negotiation,[56] but there are strategic reasons why women in particular *should* bargain in a more cooperative manner given the social environment they inhabit. Research indicates that women who negotiate aggressively or behave in a self-interested manner suffer adverse consequences.[57] Discrimination plays an important role in reinforcing gender norms of bargaining behavior. Sex roles are stereotyped. Words typically used to describe women in negotiation include "childlike," "eager to soothe hurt feelings," and "gullible."[58] For men, typical descriptors are "aggressive," "competitive," and "forceful."[59] Not only are these traits descriptive, but they are also prescriptive, which is to say that society thinks that women *are* sensitive and also that a woman *should be* sensitive.[60] Laurie Rudman and Peter Glick have found that agentic women—meaning those displaying self-interested and autonomous traits—are rated as less socially skilled and likeable than identically presented men.[61] A subset of agentic traits related to social dominance elicit negative responses when a

53. Brenda Major et al., *Overworked and Underpaid: On the Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCHOL. 1399, 1405–10 (1984).

54. *Id.* at 1409.

55. *Id.* Interestingly, in both conditions, women worked longer than men. *Id.*

56. *See supra* text accompanying notes 41–46.

57. *See* Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416 (2004) (describing experiments where women were disliked after displaying aggressive behavior, which led to detrimental effects in work settings).

58. Sandra Bem, *The Measurement of Psychological Androgyny*, 42 J. CLINICAL & CONSULTING PSYCHOL. 155, 156 tbl. 1 (1974).

59. *Id.*

60. Deborah Prentice & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed to Be, and Don't Have to Be: The Contents of Prescriptive Stereotypes*, 26 PSYCHOL. WOMEN Q. 269 (2002); *see also* Bem, *supra* note 58, at 156–61 (explaining an experiment in which stereotypical female traits were considered more socially desirable when associated with women).

61. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001).

woman expresses them,[62] but women can avoid being judged negatively by showing community-oriented behavior.[63] Other researchers have found that women who succeed in a male arena are penalized; they are rated as less likeable.[64] For a man, likeability may not actually be important in terms of advancement,[65] but this is not true for women. Research has shown that when a woman is disliked, she elicits negative evaluations and lower reward allocations.[66]

Negotiation, as we have discussed, is a masculine-typed task.[67] Thus, female negotiators face a double-bind: aggressive negotiations may be punished with a lower reward allocation, but weak negotiation strategy is *also* likely to yield a low reward.

C. Stereotype Threat

There is also an important cognitive response to face-to-face bargaining in which gender is a salient dimension. A robust finding in social psychology termed "stereotype threat" documents that the salience of a negative stereotype about one's group hinders performance on tasks relevant to the stereotype.[68] As an illustration, one famous study showed that Asian girls performed better than baseline on a math test if ethnicity was salient (they answered questions about ethnicity right before the test) and worse than usual if gender was salient.[69] In other words, their performance conformed to the more salient stereotype: Asians are good at math, but girls are not.[70]

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62. *Id.* at 758.

63. *Id.*

64. Heilman et al., *supra* note 57, at 420 ("[W]hen success was made explicit, there was a differentiation between women and men . . . with women deemed to be far less likable and more interpersonally hostile.").

65. *See* Janet M. Stoppard & Rudolf Kalin, *Gender Typing and Social Desirability of Personality in Person Evaluation*, 7 PSYCHOL. WOMEN Q. 209, 216 (1983) (noting that even though women were judged to be more likable, men were rated as doing better). *But see* Heilman et al., *supra* note 57, at 425 ("The fact that an unlikable individual is not viewed to be as worthy of salary increases or promotions . . . was found to be true regardless of whether the individual is a man or a woman . . . .").

66. Heilman et al., *supra* note 57, at 426.

67. *See supra* text accompanying notes 35–38.

68. Nalini Ambody et al., *Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance*, 12 PSYCHOL. SCI. 385, 388 (2001) ("[B]oth positive and negative self-relevant stereotypes are insidious and can affect the performance of even very young children.").

69. *Id.* at 387.

70. *Id.*

Stereotype threat, also called stereotype confirmation,[71] is another mechanism by which gendered expectations and stereotypes affect women's bargaining behavior.[72] The stereotype about women and negotiation is that women are less comfortable and less effective than men in negotiation.[73] Laura Kray, Leigh Thompson, and Adam Galinsky asked fifty Master's in Business Administration ("MBA") students to write an essay about whether men or women have the advantage in negotiation.[74] More participants said that men would have the advantage, invoking traditional gender stereotypes like men's assertiveness and strength.[75] Kray, Thompson, and Galinsky found that men were more successful than women when stereotypes were subtly or implicitly activated.[76] One method of implicit activation is simply the presence of a member of the opposite sex;[77] the authors found that in mixed-gender dyads, gender is more salient and stereotype threat is more likely to occur.[78] The authors argue that when stereotypes are *implicitly* activated, people are more likely to make judgments or otherwise act in ways consistent with the stereotype.[79] Divorce bargains, by definition, *always* involve mixed-gender dyads, so gender norm expectations are likely to be activated.

D. Power

Women typically hold less power in society and in marital relationships than men.[80] Power has shown to be a critical

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71. Kray et al., *supra* note 7, at 954–55.

72. *See id.* at 946 (discussing an experiment in which the mere mention of negotiation skills as necessary in order for success and career advancement caused women to perform worse in negotiations).

73. *Id.* at 943.

74. *Id.* at 944.

75. *Id.*

76. *Id.* at 955.

77. *Id.* at 946.

78. *Id.* at 948 (finding that stereotype activation had a greater effect on performance in mixed-gender negotiating dyads).

79. *See id.* at 955 (finding that activating implicit stereotypes positively impacted men's performance in negotiations, but had little effect on women). Interestingly, this effect does not hold true for explicit activations, which actually decrease the effects of negative stereotypes about women. *Id.*; *see also infra* Part IV.

80. *See* Nancy M. Henley & Marianne LaFrance, *Gender as Culture: Difference and Dominance in Nonverbal Behavior*, *in* NONVERBAL BEHAVIOR: PERSPECTIVES, APPLICATIONS, INTERCULTURAL INSIGHTS 351, 361–65 (Aaron Wolfgang ed., 1984) (discussing different nonverbal behaviors among men and women and arguing that the difference relates more to power than gender).

variable in negotiation.[81] First, power affects the use of language. In a seminal doctrine about social language, Penelope Brown and Steven Levinson argue that politeness was intricately linked with social power.[82] Low-power individuals are more inclined to use polite speech (such as carefully worded requests rather than direct demands) in order to avoid imposing on others, given their lack of status to do so.[83] They are less prone to criticize, disagree, or attempt to get something from another person.[84] Accordingly, women who lack power are intimidated by what is perceived as competitive or aggressive behavior in negotiations,[85] and they tend instead to use weaker, but more polite, strategies of communication.[86]

Second, power is associated with perceived freedom, control, and influence.[87] That association leads individuals to seek out resources and to take action in competitive situations.[88] In experiments, individuals who are given power are more likely to negotiate.[89] Therefore, women's lack of power may inhibit them from taking any action at all.

III. Divorce Law: Indeterminacy

Another critical feature of the modern divorce law is indeterminacy, which exists on two levels. First, the law itself—that which governs a judge's decision-making—permits enormous discretion on the part of the court.[90] The section on Disposition of

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81. *See* Joe C. Magee et al., *Power, Propensity to Negotiate, and Moving First in Competitive Interactions*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 200, 209 (2007) ("[P]ower affects the initiation of negotiation and the making of first offers, as well as a positive effect of moving first on objective outcomes.").

82. PENELOPE BROWN & STEVEN C. LEVINSON, POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE 59–60 (1987).

83. David A. Morand, *Language and Power: An Empirical Analysis of Linguistic Strategies Used in Superior-Subordinate Communication*, 21 J. ORG. BEHAV. 235, 238 (2000).

84. *See id.* ("Verbal hedges . . . enable speakers to avoid committing themselves to the intent of their own speech act . . . .").

85. *See* BABCOCK & LASCHEVER, *supra* note 12, at 113–14 (2003) (describing a web survey in which women expressed great anxiety about negotiating).

86. *See supra* text accompanying note 83.

87. *See* Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265, 279 (2003); *see also* David Kipnis, *Does Power Corrupt?*, 24 J. PERSONALITY & SOC. PSYCHOL. 33, 39 (1972) ("[P]ower increases the likelihood that the individual will attempt to influence and manipulate others.").

88. Adam Galinsky et al., *From Power to Action*, 85 J. PERSONALITY & SOC. PSYCHOL. 453, 462 (2003) ("[T]he possession and experience of power leads directly to the taking of action.").

89. Magee et al., *supra* note 81, at 208.

90. *See* UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 288 (2007)

Property in the Uniform Marriage and Divorce Act ("UMDA") asks the court to "equitably apportion" property between the spouses by taking into account several factors, many of which are broad and undefined.[91] These include the liabilities and needs of each of the parties, the contributions of each party to the joint assets, and the contribution of a spouse "as a homemaker or to the family unit."[92] Clearly, the law is intended to be a guide rather than a strict rule. In fact, courts often consider a case in its entirety rather than factor by factor.[93] At least one legal commentator has noted that outcomes in court have varied more and more under the new law; they have been both less predictable and more difficult to achieve.[94]

The second layer of indeterminacy is caused by the common practice of determining divorce outcomes through private negotiation between the parties.[95] As such, the distribution that would result from a judge-made agreement is useful as a point of comparison, or as the threat-point.[96] In other words, the more that parties know about how a judge would allocate their property, the more clearly the bounds of the negotiation are set.[97] Rational parties would not agree to a distribution in which they receive less than they would get from a judge (minus the cost of litigation).[98] "[B]argaining in the shadow of the law"[99] presents various problems from a decision-making perspective. Parties need to predict not only how the other will respond to each proposal, but also how a judge would decide the case. Even when the law is clear, there is evidence to suggest that biased decision-making

(discussing the ways in which courts may apportion property).

91. *Id.*

92. *Id.*

93. *See, e.g.*, Lightburn v. Lightburn, No. 2445-97-2, 1998 WL 169499, at *1 (Va. Ct. App. Apr. 14, 1998); Thomas v. Thomas, No. 1619-95-4, 1996 WL 679985, at *1 (Va. Ct. App. Nov. 26, 1996); Masri v. Masri, 48 Va. Cir. 5 (Cir. Ct. 1999).

94. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 739 (1991). For example, the proceedings require longer durations before decisions are made. *Id.* at 651 (stating that the average case duration in New York has increased from 1.3 years to 1.5 years).

95. *See* Mnookin & Kornhauser, *supra* note 29, at 951 ("[T]he overwhelming majority of divorcing couples resolve distributional questions . . . without bringing any contested issue to court for adjudication.").

96. *See id.* at 968 (discussing the role of background legal rules as a baseline for private divorce negotiations).

97. *Id.* at 968.

98. *Id.* at 968–69.

99. *Id.* at 969, 997.

hinders the efficiency of bargaining with the law as a backdrop.[100] In this Section, we review four relevant phenomena—situational ambiguity, risk aversion, personal entitlement, and anchoring—for evidence of that bias.

A. Situational Ambiguity

The first issue—ambiguity—is indeterminacy itself. In empirical studies, ambiguous negotiating terms have resulted in better outcomes for men than women.[101] Certain situations are highly structured with clear demands, limitations, and expectations about appropriate behavior; others are more ambiguous, with the appropriate response unclear.[102] Psychologists refer to these two general categories of situations as strong versus weak situations.[103] A number of studies indicate that gender differences and other individual differences decrease in stronger situations, assuming the appropriate response is not gendered.[104] In one study, John Dovidio and colleagues videotaped men and women in mixed-sex pairs discussing a gender-neutral topic and found that men were more verbally dominant than women were.[105] However, when the experimenters manipulated social expectations, thereby strengthening the situations, participants of both sexes behaved in conformity to the salient expectation.[106] Other researchers have found that the gender gap in pay expectations decreases with explicit performance feedback.[107]

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100. *See* Tess Wilkinson-Ryan & Jonathan Baron, *The Effects of Marital Misconduct on No-Fault Divorce Bargaining*, 37 J. LEGAL STUD. (forthcoming Jan. 2008) (finding that subjects tend to disfavor marital wrong-doers in divorce negotiations, even under clear instructions about the no-fault law); *see also* Linda Babcock & Geoge Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 114–15 (1997) (finding that people analyzing legal materials find arguments supporting their own preferred outcome to be more important and convincing).

101. *See, e.g.*, Hannah Riley Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 957 (2005) ("Under high ambiguity, . . . male buyers walked out of the negotiation paying 27% less than did female buyers.").

102. *Id.* at 952.

103. *Id.*

104. *See, e.g.*, *id.* at 962 ("[G]ender effects on negotiation performance were significantly greater under conditions of high [weak situations] as compared with low structural ambiguity [strong situations].").

105. John Dovidio et al., *Power Displays Between Men and Women in Discussions of Gender-Linked Tasks: A Multichannel Study*, 55 J. PERSONALITY & SOC. PSYCHOL. 580, 583 (1988).

106. *Id.*

107. *See, e.g.*, Wayne H. Bylsma & Brenda Major, *Two Routes to Eliminating*

Hannah Riley Bowles, Linda Babcock, and Katherine McGinn have recently demonstrated that gender differences emerge when ambiguity is present in negotiations.[108] In one empirical demonstration, the researchers surveyed graduating MBA students, asking for information about each student's starting salary and industry.[109] The team compared gender differences in starting salaries in industries for which MBA students had vague salary expectations (i.e., telecommunications and health care/human services), as compared to industries for which most students had clear information and expectations (i.e., investment banking and consulting).[110] They found that the gender wage gap was more than twice as high for the high-ambiguity industries.[111] Although this study cannot alone prove that gender differences in negotiation in the "ambiguous" salary industries cause the gender wage gap, it is certainly consistent with the hypothesis.

Experimental results have also demonstrated a causal effect between ambiguity and gender differences in negotiation. In one experiment, participants were given a negotiating scenario and asked to play the roles of the negotiators, with a monetary reward as a function of the outcome of the negotiation.[112] In the low-ambiguity condition, participants had a limit as well as a target price, whereas in the high-ambiguity condition, participants had only a limit, but no target price.[113] Thus, the experiment explicitly manipulated the situational ambiguity through the parties' target and reserve prices.[114] In the high-ambiguity condition, male buyers came out of the negotiation paying 27% less than female buyers; however, in the low-ambiguity condition, there were no significant sex differences.[115] The implications of this research for divorce bargaining and divorce policy are clear: the indeterminacy of the current law may put women at a disadvantage by making it unclear exactly what they should be trying to achieve in the divorce negotiations. As long as women fulfill the gender

Gender Differences in Personal Entitlement: Social Comparisons and Performance Evaluations, 16 PSYCHOL. WOMEN Q. 193, 193 (1992) (finding that absent feedback or wage comparison information, women felt they deserved less pay than men, but with feedback, women felt they deserved as much pay as the men).

108. Bowles et al., *supra* note 101, at 951.

109. *Id.* at 954.

110. *Id.*

111. *Id.* at 955–56.

112. *Id.* at 956.

113. *Id.*

114. *Id.*

115. *Id.* at 957.

expectation by asking for and receiving less than men, ambiguous cues are likely to elicit behaviors in congruence with those norms. The *result* of the modern, multi-factor law is thus in stark contrast with its *purpose*, which was to make the notions of ownership and contribution more flexible in order to move away from a regime in which the male breadwinner was entitled to all of the property in his name or purchased with his income.[116]

B. Risk Aversion

Indeterminacy may also interact with different preferences for risk. Bargaining aggressively under a vague standard is a riskier tactic: it is not clear what distribution will result if the other party decides to take the case to the judge, and the litigation costs alone are often quite high.[117] As such, it may be possible for the more risk-averse party to be pressured into a lower settlement, as long as litigation does not necessarily guarantee a better outcome. Indeed, evidence suggests that women tend to perceive greater risk for most negative outcomes, have higher levels of fear and worry, and behave more cautiously.[118]

C. Judgment Calls: Personal Entitlement

The very nature of indeterminacy requires the divorce parties to make judgment calls about how much they are entitled to in the settlement and how much they need to live on. There are two reasons why we might expect women to make lower estimates of both of these: differential entitlement and differential anchoring.

Women and men differ on measures of personal entitlement, especially when information is limited[119]—as it is in divorce. Because the law includes so many factors and because the standard appears so subjective, it may be quite difficult for either party to determine how much of the marital estate he or she deserves. Brenda Major and colleagues asked male and female

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116. *See* Mary A. Throne, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194, 195–97 (noting that one of the most important drivers of modern divorce reform, including the trend toward equitable distribution, is to ratify the partnership view of marriage, a view not supported by the common-law title regime of marital property).

117. *See* Mnookin & Kornhauser, *supra* note 29, at 971–72.

118. *See* BABCOCK & LASCHEVER, *supra* note 12, at 135, 138 (noting that "women . . . see the world as more dangerous" than men and that "women's fear of taking social risks prompts them to behave more cautiously than men").

119. *See* Major et al., *supra* note 53, at 1410 ("[S]ex differences in self-pay do not occur when information about the pay of other men and women is readily available.").

college students to pay themselves (out of the view of other experimenters) after performing a task, and they also asked another group to do as much work as they thought fair for a fixed amount of money.[120] Women paid themselves less and worked longer than men, although their work was more efficient and more accurate than that of the male participants.[121] In one variant on this experiment, Major and her colleagues left participants a list of the amounts that (bogus) previous participants paid themselves.[122] In this trial, when participants had pay information, men and women did not differ on self-pay.[123]

Lisa Barron has identified two methods by which people might determine how much they should be paid.[124] In her study, most men said that their salary should be determined by their worth, i.e., skills, capacities, and experiences.[125] Women, on the other hand, were more likely to indicate that their worth as employees was determined by how much the organization was willing to pay.[126]

The aforementioned research on gender and entitlement has primarily been discussed in reference to the gender wage gap. It need not be so limited; this could be an important difference in the divorce context when parties are determining entitlements in the settlement. Barron's research suggests that men would be likely to ask the questions: "What did I contribute? What do I deserve?"[127] For women, the questions—impossible to answer with specificity—are: "What do the rules say that I should get? What does the legal system establish as my entitlement?"[128] As Barron notes in her study of pay entitlement, self-determined worth is almost always higher than externally-derived worth.[129] As a result, we would expect that men would generally feel entitled to more of the resource pool than would women.[130]

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120. *See id.* at 1401, 1405–06.

121. *Id.* at 1409.

122. *Id.* at 1402.

123. *Id.* at 1404.

124. Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. REL. 635 (2003).

125. *Id.* at 647, 654.

126. *Id.* at 646 ("[T]hese negotiators regard the organization as the final arbiter of their value.").

127. *See id.* at 647, 654.

128. *See id.* at 646, 654.

129. *Id.* at 651 (noting that those who know their worth request higher salaries than those who are unsure of their worth and thus use external factors to determine their worth).

130. To be sure, men make more financial contributions to most marriages,

D. Judgment Calls: Anchoring

A related problem in negotiating in an indeterminate setting is the problem of "anchoring," a robust source of judgment bias discussed in psychology literature.[131] The idea of the anchoring effect is that when people make a judgment—say, estimate the value of something—they look for other relevant judgments to aid in their decision-making.[132] So, if you are trying to judge how much a used car is worth, one number you might take into account is the asking price. Knowing that the asking price will probably be inflated, you adjust your own estimate downward to come up with a number as a counteroffer. This seems fairly reasonable, but anchoring studies show that people rarely adjust adequately from the anchor.[133] Even irrelevant anchors (demonstrated through random number generators in experiments) have an impact on negotiation outcomes.[134] Thus, counteroffers and final outcomes of negotiations are highly affected by starting offers which act as anchors for the opposing party.[135]

In the divorce context, this raises the concern that women who need to evaluate both their contributions to the marital assets and their needs post-divorce will anchor to lower figures than will men. In fact, research has shown that women's wage satisfaction is determined by their relative success compared to other women rather than to men, even if they have information about the wages of both sexes, since the female wage anchor is more salient and relevant to them.[136] Another possibility is that women will focus on their own earning power, either on their wages from a time

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whereas women tend to be responsible for non-market labor, which is more difficult to cast in monetary terms. *See generally id.* at 652 ("[R]esearchers have speculated that men and women traditionally have achieved their worth from different sources with men deriving worth from the market and women from the home.").

131. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty*, 185 SCI. 1124, 1128 (1974) (describing anchoring as "mak[ing] estimates by starting from an initial value that is adjusted to yield the final answer").

132. *Id.*

133. *Id.* (noting that anchoring "adjustments are typically insufficient").

134. Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision-Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 198 (finding that judges' sentencing decisions "were influenced by random numbers even if [the judges] determined these numbers themselves by throwing dice").

135. Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 657 (2001) ("[W]hichever party . . . made the 1st offer obtained a better outcome. In addition, 1st offers were a strong predictor of final settlement prices.").

136. Wayne H. Bylsma & Brenda Major, *Social Comparisons and Contentment: Exploring the Psychological Costs of the Gender Wage Gap*, 18 PSYCHOL. WOMEN Q. 241, 247 (1994).

when they worked at full earning capacity or on their current salary. Married women earn much less than married men. In 2004, the average income for married males was almost $58,000; for married women, it was less than $30,000.[137] Other research indicates that when these factors are salient, women take them into account when determining appropriate pay for a new job or task.[138] Note that it is likely that these factors are important for men as well. As a descriptive matter, however, anchors to current salary or even to friends' salaries will be more informative for men because married men and their friends are more likely to be working full-time at full earning capacity already.[139] Women, on the other hand, must make a bigger adjustment insofar as they more likely need to shift attention from in-home labor to market labor.[140] It is thus likely that men's anchors for all of these relevant figures are higher than women's given their salary advantage, their greater sense of entitlement, and the information they have about others like them. These differential anchors should benefit men in the divorce negotiation.

IV. Divorce Law: No More Alimony

Historically, marriage entitled a wife to lifetime support by her husband, even if the couple divorced.[141] Given that a woman was expected to eschew market labor in favor of home-making, this arrangement made contractarian sense—if the woman was to dedicate herself to her family, at the expense of investing in her own earning capacity via education or work experience, she would want to be assured of financial support even if her husband left

137. BUREAU OF LABOR STATISTICS & BUREAU OF THE CENSUS, ANNUAL DEMOGRAPHIC SURVEY (2004), *available at* http://pubdb3.census.gov/macro/032005/perinc/new02_050.htm.

138. Serge Desmarais & James Curtis, *Gender and Perceived Pay Entitlement: Testing for Effects of Experience with Income*, 72 J. PERSONALITY & SOC. PSYCHOL. 141, 147 (1994).

139. *Id.* at 141 ("Men are more likely to draw comparisons with other men who they understand to receive better pay.").

140. *See* Phillip Cohen & Suzanne Bianchi, *Marriage, Children, and Women's Employment: What Do We Know?*, 122 MONTHLY LAB. REV., Dec. 1999, at 22, 27–30 (citing 1998 statistics that 46.1% of married women and 34.7% of married mothers with young children worked full time, and arguing that "women have reached the point where marriage in itself has relatively little effect on their labor supply, although access to other income, which, for married women, is primarily earnings from their spouse, continues to exert a downward pressure on women's allocation of time to paid work").

141. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 41 (2006) ("[S]tates' laws have historically treated marital obligations of support (usually a husband's duty to support his wife) as enduring.").

her.[142] More recently, as we have discussed to some extent, the law has shifted its focus from family values to individual autonomy.[143] Under the UMDA, spousal support is granted only as a result of financial hardship, and the more common remedy is rehabilitative alimony.[144] Rehabilitative alimony is a short-term obligation intended to help the wife get on her feet, through job training or education, so that she can support herself.[145] The goal of the current law is to separate the spouses financially, terminating their financial relationship at the same time they are terminating their emotional and legal relationship.[146]

The movement away from long-term spousal support has enormous financial implications for women, which we will only briefly review here. Because most married women do not work at full earning capacity,[147] usually due to household and family care responsibilities,[148] at divorce they are at a significant disadvantage in the labor market.[149] Furthermore, as long as women are more likely than men to have custody of children[150] (and, even with joint custody arrangements, more likely to be providing for the day-to-day care of the children[151]), they are at a further disadvantage in the labor market because their work schedules are constrained by their child care obligations.[152]

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142. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 721–23 (1993) (noting that previous rules protected spouses who committed themselves to family care rather than to employment).

143. *See id.* at 723.

144. UNIF. MARRIAGE & DIVORCE ACT § 308(a), 9A U.L.A. 446 (1998).

145. *See* 24A AM. JUR. 2D *Divorce* § 853 (1998) ("The concept of rehabilitative alimony is based on the premise that the divorced spouse has a potential for self-support that needs development.").

146. *See id.* ("An award of rehabilitative alimony is also designed to permit former spouses to develop their own lives free from obligations to each other."). This is not, of course, possible in the case of child support.

147. *See* Cohen & Bianchi, *supra* note 140, at 30.

148. *See* Glenna Spitze & Karen Loscocco, *Women's Position in the Household*, 39 Q. REV. ECON. & FIN. 647, 648 (1999) (arguing that women's market labor supply is constrained by their disproportionate share of household labor).

149. Matthew McKeever & Nicholas H. Wolfinger, *Reexamining the Costs of Marital Disruption for Women*, 82 SOC. SCI. Q. 202, 215 (2001) (finding that, although the costs of divorce have lessened as a result of married women's increased participation in the labor market, women still fare worse than men after divorce because their work is not as lucrative).

150. *See* Judith Seltzer, *Consequences of Marital Disruption for Children*, 20 ANN. REV. SOC. 235, 240–41 (1994) (noting that mothers often have primary responsibility for children after divorce).

151. *See generally id.* at 242 (citing the most common form of joint custody to be when children spend the majority of their time with their mother).

152. Many commentators question the adequacy of the child support awards assisting women with these obligations. *See, e.g.*, Mark Lino, *Do Child Support*

A. Initiation of Negotiation

There are also reasons to believe that the new arrangement is disadvantageous for women at the bargaining table. Linda Babcock's book, *Women Don't Ask,* reveals the tendency for women to eschew negotiating for things for themselves.[153] A series of studies by Deborah Small, Michele Gelfand, Linda Babcock, and Hilary Gettman showed that women were much less likely than men to negotiate for themselves, even when they were cued that negotiating was acceptable.[154] In one task, participants were told that they would be paid between three and ten dollars for playing a word game as part of a study.[155] At the end of the session, experimenters offered the participants three dollars and asked: "Is that OK?" Few participants requested more money, but all but one of those who did were men.[156] Typical negotiation tasks explicitly inform participants they are in a negotiation and examine the targets, tactics, and outcomes of the negotiation; in contrast, this task was unique in that it examined if and when people negotiate when the negotiation is not prescribed.[157]

In another condition, participants were offered three dollars and explicitly informed that they could negotiate for more money.[158] Here, many men asked for (and all who asked, received) the full ten dollars. Still, very few women opted to negotiate.[159] Finally, in the third condition, participants were offered three dollars and told that they could ask for a higher payment.[160] At last, gender differences disappeared; as many women as men asked for, and received, the higher payment.[161]

Why did women respond to the cue to ask, but not the cue to

Awards Cover the Cost of Raising Children?, 11 FAM. ECON. & NUTRITION REV. 29 (1998) (arguing that child support levels are inadequate due to both underpayment by non-custodial spouses and insufficient awards from courts).

153. BABCOCK & LASCHEVER, *supra* note 12, at 2–4 (citing studies "which suggest that men are asking for things they want and initiating negotiations much more often than women").

154. Deborah Small et al., *Who Goes to the Bargaining Table: Understanding Gender Variation in the Initiation of Negotiation,* 93 J. PERSONALITY & SOC. PSYCHOL. 600, 600–13 (2007).

155. *Id.* at 603–04.

156. *Id.* (reporting that 23% of the men studied asked for more money without receiving a cue).

157. *Id.* at 604.

158. *Id.* at 604–05.

159. *Id.* at 605 (finding that 17% of women and 59% of men negotiated for a higher payment). In the control portion of this condition, where no cue to negotiate was given, no women asked for more money. *Id.*

160. *Id.* at 607.

161. *Id.* (finding that 73% of women and 69% of men asked for more money).

negotiate? The authors argued—and found evidence—that the prospect of "negotiating" evokes negative thoughts and feelings in women more so than men, but asking does not.[162] They further suggested (and offered empirical evidence in support of their contention) that the crucial difference between asking and negotiating has to do with power.[163] Asking is something people in low-status positions do: children ask for an allowance, for example. Asking is *polite*. Negotiations, on the other hand, tend to be the province of the powerful: political figures, lawyers, and business leaders negotiate with one another. Survey studies have shown that women rate negotiating as being as enjoyable as trips to the dentist, whereas men actually find negotiating to be kind of fun.[164]

B. Judgment Calls: Alimony vs. Property Division

The alimony laws may have also helped to reduce the indeterminacy in divorce negotiations simply by providing a metric of negotiating success that is easy to understand. Most people can figure out how much money they need to make in a month or even in a year in order to get by or live normally. Thus, a wife who needs a total of $3,000 per month in order to maintain a modest lifestyle, and who makes $2,000 per month at her job, knows she needs an additional $1,000 in alimony. In essence, because the monthly requirement is concrete and may be obvious, it may provide a more useful anchor than the anchors available in property division negotiations. Her calculations help her to set a reserve and target price. In property-division negotiations, it is more difficult to define a successful negotiation.

Implications and Conclusions

It is beyond the scope of this essay—and beyond the reach of the evidence we have cited—to draw bold policy conclusions based on gender differences in negotiating style and tactics. There are good normative arguments against alimony or judicial scrutiny of separation agreements, whatever we may report on the empirical data regarding women in bargaining situations. Nonetheless, this is important research for legal scholars and policymakers alike. Empirical research can help us evaluate the extent to which the current system is justified given its goals, and, where it is not,

162. *Id.* at 610.
163. *Id.* at 608–10.
164. *See, e.g.*, BABCOCK & LASCHEVER, *supra* note 12, at 114.

behavioral research like this may suggest why the system is not meeting its goals. We might assume, for example, that indeterminate rules 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 model.

We are not the first legal scholars to focus on the importance of the default rule. Divorce laws are essentially default rules that couples are permitted to contract around, with special latitude for contracts made before the marriage (as opposed to contracts negotiated at the time of divorce). The reason Donald Trump obtains prenuptial agreements is so that he need not comply with the rules of equal or equitable distribution in his state. The default is psychologically important, and today, the no-spousal-support default rule is increasingly difficult to contract around. Oren Bar Gill and Chaim Fershtman have suggested that contract law in particular instantiates a kind of learning process by which people internalize the rules by interacting with them.[165] When, for example, the law shifts its focus away from alimony and toward individual autonomy, people are more likely to think that this is not simply true in a positivist sense but also right in a moral or political sense. Thus, the default rule has importance for its expressive content and for its effects on people's learning about the legal system.

Richard Thaler and Cass Sunstein have suggested that behavioral research can have normative implications without being paternalistic in the traditional sense of the concept.[166] Their "libertarian paternalism" is essentially the idea that we can use behavioral research to inform our formulation of the default rule, leaving parties free to make their own choices but, should they opt to simply follow the norm, subject to a kind of wealth-maximizing default rule. In the realm of divorce laws, it would be a useful exercise to evaluate the effects of the current default rules, and to question how they distribute goods between the parties and, more broadly, among different groups in American society.

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165. Oren Bar Gill & Chaim Fershtman, *Law and Preferences*, 20 J.L. ECON. & ORG. 331 (2004).

166. Richard Thaler & Cass Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 177 (2003) (arguing that an employer who runs an "opt out" 401K plan is acting paternalistically but is not interfering with employee preferences).