

2014

What Innocent Spouse Relief Says about Wives and the Rest of Us

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WHAT INNOCENT SPOUSE RELIEF SAYS ABOUT WIVES AND THE REST OF US

STEPHANIE HUNTER MCMAHON†

Every time spouses sign joint returns, knowingly or not they accept joint and several liability, meaning that either spouse may be held liable for all of the tax due on the joint return. Although joint and several liability facilitates tax collection, it may conflict with a spouse's claims to have signed the return while being lied to, abused, or manipulated. The question for Congress is how to balance these competing demands. Innocent spouse relief provides some tax relief for spouses Congress does not believe should be jointly and severally liable. The existence of this relief also offers an opportunity to explore how the government views married women, as wives have always composed the lion's share of seekers and recipients of innocent spouse relief. The relief currently provided is both over- and under-inclusive by (1) not offering relief to all spouses or former spouses who are unable to assess the validity of their returns and (2) offering relief to some who both knew of, and helped orchestrate, tax evasion. This Article argues that the existing innocent spouse relief regime should be replaced with one that respects joint filers' agency when signing joint returns and affords relief only when a joint filer was unable to exercise that agency. In the event that a spouse is coerced into signing the return, relief needs to be speedier and less burdensome in application than under today's law. This approach would increase the equity of the tax system and reduce the administrative costs on both the taxpayer and the government.

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†Professor, University of Cincinnati College of Law. The author would like to acknowledge the comments on previous drafts of this Article from Jennifer Bird-Pollan, Samuel Brunson, Lily Faulhaber, Heather Field, Lily Kahng, Leandra Lederman, Shu Yi Oei, Diane Ring, the University of Kentucky College of Law faculty, attendees at the Junior Tax Scholars Conference hosted by University of California at Hastings, her fellow faculty at the University of Cincinnati College of Law, and the financial support of the Harold C. Scott Foundation.

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INTRODUCTION

A core feature of the U.S. tax system is the decision to view married couples as a single filing unit for income tax purposes. This decision is effectuated through the system of joint returns: a single return filed by a married couple reporting all income, deductions, and credits due to the spouses individually or as a unit.¹ Although this is the dominant approach taken by tax filing couples,² an alternative option exists, “married filing separately,” which allows a spouse to file an individual return reporting only her income, expenses, and credits. For the 95% of spouses using a joint return, there is joint and several liability for the taxes due on that return.³ Thus, either spouse can be required to pay the tax due regardless of who prepared the return, who earned the income, or who spent or otherwise benefited from the income.

Why might this joint and several liability pose a problem? To the extent that a spouse knowingly files a false return (such as when the couple fails to list all the income they earned or claims erroneous deductions), it might not be a problem. However, if a spouse submitted a false return as a result of abuse or without knowledge of the missing income because the other spouse hid information, the “innocent” spouse may have an equitable argument that she should not have to pay the tax due even though there is joint and several liability for the return.

Consider a simple example: In year one, Jack and Jill, a married couple, file a joint return. Jack, who has extra income that he has kept secret from Jill, prepares the return (with or without her participation). They sign and file the return. In year two, Jack and Jill divorce. In year three, the Internal Revenue Service (“IRS”) audits the year one return and determines that the couple has underreported income (the income Jack failed to include) and owes additional tax, interest, and penalties. Because of joint and several liability, the IRS can pursue either Jack or Jill for the amounts owed. If Jack cannot be found, the IRS may seek to recover the entire amount from Jill.⁴

¹ I.R.C. § 6013 (2006).

² Over 95% of couples choose to file jointly, at least in part because the tax brackets that apply to joint returns are wider than those that apply to spouses who file separately and because certain credits require joint filing. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME—2011, INDIVIDUAL INCOME TAX RETURNS, PUBLICATION 1304, at 37 (2012). Spouses may not file as “single” taxpayers.

³ I.R.C. § 6013(d)(3) (2006); Treas. Reg. § 1.6013-4(b) (as amended in 2002).

⁴ Legally the IRS does not have to pursue Jack first; however, it is the policy of the IRS to collect from the more culpable spouse first. See Letter from Grant Newman, Director, Office of Field Operations (July 6, 1988), quoted in Marjorie O’Connell, *Innocent*

Jill, in turn, might argue that such liability is inequitable given her lack of knowledge of, access to, or benefit from the income.

The tax system has acknowledged this equitable argument and created “innocent spouse relief” in § 6015 of the Internal Revenue Code that applies three different facts and circumstances tests described more fully in Part I below.⁵ The application of § 6015 relief has generated controversy over its scope.⁶ Some scholars argue that innocent spouse relief should be broadened because liability “itself is unfair”⁷ or that the “principal rationale for joint and several liability—marital unity—is little more than a fiction. . . ,”⁸ but the primary argument made is that wives should not be held liable for joint returns.⁹ Thus, these critics generally prefer fundamental reform to our filing system. Rather than revise § 6015, they suggest we abandon joint filing (with joint and several liability) and move to a system of individual filing in which each individual files a return reflecting her own income and her own deductions. Similar to the option of married filing separately, with mandatory individual filing each spouse is liable only for the taxes due on her own return.¹⁰ Given that there is no indication that such a significant change is likely to occur in the foreseeable future, the analysis of innocent spouse relief provided in this Article operates on the very realistic assumption that joint filing will continue to operate as the standard approach for married couples.¹¹

This Article agrees that the current system of innocent spouse relief is flawed; however, it contends that it is both under- and over-inclusive, and

Spouse Rules Can Avoid Unexpected Liability on Joint Returns with Former Spouses, 17 TAX’N FOR LAW. 226, 229 (1989).

⁵ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201(a), 112 Stat. 685, 734–40 (1998).

⁶ See Shari Motro, *A New “I Do,”* 91 IOWA L. REV. 1509, 1532 (2006); Richard Beck, *The Failure of Innocent Spouse Reform*, 51 N.Y.L. SCH. L. REV. 928, 932 (2006); Lily Kahng, *Innocent Spouses*, 49 VILL. L. REV. 261, 261–62 (2004); Amy Christian, *Joint and Several Liability and the Joint Return*, 66 U. CIN. L. REV. 535, 535 (1998). For students who critique the liability, see Abraham Gutting, Note, *The “Price” is Right*, 2 CHARLESTON L. REV. 751 (2008); Meghan Kerns, Note, *Duress*, 58 HASTINGS L.J. 1123 (2007); Adrienne Hodgkins, Comment, *Getting a Second Chance*, 65 LA. L. REV. 1167 (2005); Svetlana Attestatova, Note, *The Bonds of Joint Tax Liability Should Not Be Stronger Than Marriage*, 78 WASH. L. REV. 831 (2003); Kari Smoker, Comment, *IRS Restructuring and Reform Act of 1998*, 60 OHIO ST. L.J. 2045 (1999). One practitioner recently completed a how-to book for seeking innocent spouse relief. ROBERT B. NADLER, *A PRACTITIONER’S GUIDE TO INNOCENT SPOUSE RELIEF* (2011).

⁷ Beck, *supra* note 6, at 932.

⁸ Kahng, *supra* note 6, at 262.

⁹ Beck, *supra* note 6, at 932; Kahng, *supra* note 6, at 262.

¹⁰ Individual filing would remove the perceived bracket penalty imposed on married filing separately and would allow spouses to claim credits without joint filing.

¹¹ Although I have argued elsewhere that we should retain the joint return, accepting that position is not necessary for accepting the value of the innocent spouse reform proposed in this Article. See Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718 (2011); Stephanie Hunter McMahon, *London Calling: Does the U.K.’s Experience with Individual Taxation Clash with the U.S.’s Expectations?*, 55 ST. LOUIS U. L.J. 159 (2010).

thus mere expansion of its scope would not be the appropriate remedy. Rather, this Article argues that § 6015 should be reformed to provide speedier and less costly relief for a narrower category of spouses who were coerced into signing the joint return.¹² Under this proposal, once a requesting spouse satisfies a relatively low burden of establishing that she was coerced into signing the return, either by being abused or deceived about the return, the spouse wins mitigation of the tax burden unless certain extenuating circumstances discussed in Part III make it equitable for the IRS to collect from the innocent spouse. In the latter case, the burden of proof falls on the IRS or the “guilty spouse” to prove it is equitable to collect from an otherwise innocent spouse.

Why is this reform preferable to both the current system and others’ proposed expansions of innocent spouse relief? Three important reasons, discussed in more detail in Part II, support a reform of § 6015 that addresses both its underinclusiveness and its overinclusiveness. First, the current system of providing innocent spouse relief is costly and difficult to administer. Not only is the relief’s direct cost in terms of tax revenue high, estimated to be \$1.4 billion in § 6015’s first decade, but so is the relief’s indirect cost.¹³ For the last decade, in all but one year § 6015 has been one of the IRS’s top ten litigated issues.¹⁴ Moreover, we should not forget that at least some couples work together to use innocent spouse relief against the IRS to reduce their collective taxes and that some former spouses strategically (or vindictively) use innocent spouse relief to avoid tax and punish their former partner.¹⁵ With the proposal, the IRS can target its efforts on those most likely

¹² As used in this Article, coercion is a lesser standard than legal duress, which requires a specific threatening act by the other spouse at the time of the signing of the tax return. *See infra* note 26. If a spouse signs a joint return under duress, legally there is no joint return. *See In re Hickley*, 256 B.R. 814, 828 (2000); *Wiksell v. Comm’r*, 67 T.C.M. (CCH) 2360, 2368-89 (1994), *rev’d on other grounds*, 90 F.3d 1459 (9th Cir. 1996).

¹³ STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT RELATING TO H.R. 2676, JCX-51-98 (1998). Allowing each spouse to be liable only for her share of liability was estimated to cost \$5.2 billion. STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED REVENUE EFFECTS OF H.R. 2676, JCX-42-98 (1998). Because of the limited reporting, it is unknown how much the provision costs today.

¹⁴ 1 NAT’L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS, § 3, at 587 (2012), *archived at* <http://www.perma.cc/0xWw5P6upiV>; 1 NAT’L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS, at 414 (2011), *archived at* <http://www.perma.cc/0xWw5P6upiV>; 1 NAT’L TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS § 3, at 403 (2010), *archived at* <http://perma.cc/0Wmcyd9DgGm>; 1 NAT’L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS § 3, at 455 (2009), *archived at* <http://perma.cc/0xnZ7r9D7xV>; 1 NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS § 3, at 558 (2008), *archived at* <http://www.perma.cc/0zWf9aJGXfs>; 1 NAT’L TAXPAYER ADVOCATE, 2006 ANNUAL REPORT TO CONGRESS § 3, at 553 (2007), *archived at* <http://www.perma.cc/0rgv6gZ6RaQ>; 1 NAT’L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS § 3, at 471 (2006), *archived at* <http://perma.cc/09kz9TN2kp7>; 1 NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, at 496 (2005), *archived at* <http://perma.cc/08vf7GAu5UV>.

¹⁵ It is impossible to anticipate the extent of this behavior, although the adoption of the income-splitting joint return in 1948 was largely a response to what Congress per-

exploiting innocent spouse relief rather than investigating each relief request as required under current law.

Second, arguments to broaden the existing package of innocent spouse relief conceive of the dilemma as one that pits the “innocent,” or at least the less guilty spouse, against the IRS. Framed that way, the innocent spouse can seem more appealing than the tax collector. However, the more accurate description is that granting innocent spouse relief shifts tax burdens among different taxpayers. If in the hypothetical above we decide not to impose any tax burden on Jill, we have effectively shifted her burden not to Jack, who is judgment proof because he cannot be located, or to the IRS as a government agency, but to other taxpayers, both married and single, who did report all of their income, paid all of their taxes due, and managed their lives on the income left over. This selective lowering of tax burdens should only be permitted if it accomplishes a just objective.

Third, the current system (including changes implemented by the Treasury Department in January 2012)¹⁶ and any expanded version thereof advocated by some scholars would reward spouses who were not coerced but chose to sign the return as prepared. These spouses often benefit from (1) the decision to file jointly and receive certain rate schedule and other tax benefits, (2) the marital division of labor they negotiated with their spouse, and (3) the tax savings from filing the false return or failing to pay the taxes due. For spouses who were not coerced into signing their returns, failing to recognize these benefits dismisses the choices they made. Embedded in some current arguments about innocent spouse relief are visions of spouses’, especially wives’, roles that may not reflect the reality of their individual agency.¹⁷ Moreover, these arguments equate certain divisions of marital duties with presumed incapacity on the part of women as the group most often requesting innocent spouse relief.

The review of this issue’s effect on wives is made difficult because wives are not a cohesive group, and they do not always share economic interests with respect to taxes. Anne Alstott has illustrated how feminist theory does not, and cannot, provide a clear agenda for the development of tax policy.¹⁸ A single feminist position on most tax issues is impossible because of conflicts within the feminist camp.¹⁹ As long as liberal feminists argue for

ceived as inappropriate income shifting. McMahon, *To Have and To Hold*, *supra* note 11, at 723–38.

¹⁶ I.R.S. Notice 2012-8, 2012-4 I.R.B. 309. This notice has been followed by a new Revenue Procedure implementing most of the changes proposed in 2012. Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

¹⁷ The gendered implications of joint and several liability and innocent spouse relief are now more complicated because married same-sex couples can file joint returns. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. This paper does not discuss this added dimension.

¹⁸ Anne Alstott, *Tax Policy and Feminism*, 96 COLUM. L. REV. 2001 (1996).

¹⁹ For discussion of race and sexual orientation bias and the tax laws, see generally Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319

measures to increase equality between the sexes and cultural feminists argue that females and males are simply different, there will be different conclusions on most policy matters.

The form of the debate between protectionist and equality models of feminism has changed over time; however, the options remain largely the same.²⁰ And despite the debate, society has failed to ease women's vulnerability, especially within the confines of marriage. Theories of inequality developed by feminists challenge the legal and non-legal forces that reinforce, either explicitly or implicitly, an economic and power structure that disadvantages women.²¹ Thus, even where women are formally equal under the law, a continuing question for feminist scholars is why women are still disadvantaged relative to men.²² Part of that question for scholars must also be how best to raise the government revenue necessary to help redress that inequality when government action is required. This Article explores these issues and, in doing so, highlights the risks of reinforcing wives' vulnerability.

This Article proceeds as follows: Part I examines existing innocent spouse relief as part of the larger tax system. Innocent spouse relief must be evaluated as one of several relief provisions in the Code that allows taxpayers, such as Jill, to avoid paying the taxes they legally owe. Part II analyzes the administrability concerns of innocent spouse relief, its inter-taxpayer equity, and whether this relief operates in ways detrimental to the group it was intended to help: wives. Innocent spouse relief raises important questions of how the government judges taxpayers; the spouses most often judged are wives as they have always claimed and received the vast majority of relief. Part III proposes a more administrable form of relief for spouses who file joint returns that maintains the strict liability of the income tax and respects filers' agency when signing joint returns. This revised innocent spouse relief provides an easier path to relief but only for those spouses who are coerced into signing a joint return, either through abuse or through deception. The article concludes that this revised relief is part of a necessary balancing of individual equity and administrability that should be undertaken for all aspects of the income tax if the tax system is to function fairly for all taxpayers.

(2010); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

²⁰ Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47, 49–50 (Martha Albertson Fineman ed., 2011).

²¹ Feminists have articulated many theories of inequality including liberal, radical, dominance, difference, and postmodern theories. See generally NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* 15–39 (2006); Martha Albertson Fineman, *Introduction to FEMINIST AND QUEER LEGAL THEORY* 1, 2–4 (Martha Albertson Fineman et al. eds., 2009); Karen J. Maschke, *Introduction to FEMINIST LEGAL THEORIES* vii, ix–xi (Karen J. Maschke ed., 1997).

²² See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

I. STANDARD RELIEF FROM JOINT AND SEVERAL LIABILITY

The taxes due on a joint return are not “his” or “her” taxes but “their” taxes in the same way that if both spouses sign a mortgage, it is their joint obligation.²³ This joint liability for joint returns exists even if only one spouse earns the income reported on the return and even if only one spouse participates in the preparation of the return. The question then becomes how the government collects their taxes.²⁴ Under existing law, either spouse may be pursued for the tax due but not paid on a joint return, whether or not the income is properly reported.

This Part evaluates current innocent spouse relief as a means of accomplishing its congressional objective of selectively mitigating joint and several liability. From a review of its legislative history, the provision was intended to help certain spouses, namely wives, who were thought unfairly burdened by the joint return. In drafting this relief, however, Congress did not parse exactly what it meant by an unfair burden. Although case law demonstrates that many of the spouses Congress intended to relieve of their taxes are, in fact, relieved, the balancing of factors required for relief has led to complexities in the provision’s application when the unfairness of the burden is less clear. Finally, this Part examines innocent spouse relief as one part of the statutory safety net that assists taxpayers unable to pay, or unjustly required to pay, their legally owed taxes. Because innocent spouse relief is only one form of relief a taxpayer might seek, when evaluating the provision, we should consider how it operates within the larger system of tax compliance and tax relief.

A. *The Innocent Spouse Law*

Until the late 1960s, joint and several liability had been imposed on the joint return with little, if any, complaint about the lack of relief for joint filers.²⁵ In the early period of joint filing, the only way to negate joint and several liability was if a spouse successfully claimed to have signed a return under duress, which invalidates the joint return. To win a duress claim, courts require that the victim spouse prove the joint tax return was actually signed under duress.²⁶ In 1971, Congress responded to claims that the duress defense was insufficient after several cases held wives liable for taxes on

²³ See I.R.C. § 6013(d)(3) (2006); Treas. Reg. § 1.6013-4(b) (as amended in 2002).

²⁴ An alternative regime is transferee liability. See I.R.C. § 6901 (2006). However, transferee liability prescribes the order of spouses from whom the IRS may collect and restricts the IRS to collecting in limited circumstances. *Id.*

²⁵ I.T. 1575, 2-1 C.B. 144 (1923); see also T.D. 1882, 15 Treas. Dec. Int. Rev. 203 (1913) (indicating that husband and wife may file as a single unit).

²⁶ See *In re Hickley*, 256 B.R. 814, 828 (2000); *Wiksell v. Comm’r*, 67 T.C.M. (CCH) 2360, 2368–69 (1994), *rev’d on other grounds*, 90 F.3d 1459 (9th Cir. 1996). For an article arguing the duress defense needs to be broadened, see Claire O. Finkelstein, *Duress*, 37 ARIZ. L. REV. 251 (1995).

funds their husbands had embezzled, including one in which the husband embezzled from his wife.²⁷ This new relief was a hardship relief provision for those spouses in serious financial difficulty; it was not intended to apply to all joint filers.²⁸ Although innocent spouse relief was somewhat liberalized in 1984,²⁹ the provision continued to operate as narrowly defined relief until it was greatly expanded to its current form in 1998.³⁰

The 1998 change in innocent spouse relief was enacted as part of a general restructuring of the IRS, during which Congress required the IRS to give renewed attention to taxpayers as customers.³¹ Congress expanded many relief provisions, and late in the process added greater innocent spouse relief.³² The inquiry was no longer whether innocent spouse relief worked for those spouses suffering economic hardship from their tax obligations but whether it provided “*meaningful relief in all cases where such relief is appropriate.*”³³ Unfortunately, however, Congress did not define exactly when relief was appropriate. Moreover, Congress did not attempt to fit this provision within the existing network of tax relief but considered this part of the Code in isolation. One objective of this Article is to push Congress to define exactly what it takes to negate the otherwise strict liability for one’s taxes.

Congress indicated whom it wanted to help in broad strokes but did not make important differentiating distinctions. For example, Congress did not define whether it wanted to help spouses who are truly innocent (which I interpret as coerced into filing the return), spouses who negotiated bad deals with their spouses or former spouses over allocating family tasks, or spouses who are otherwise suffering financial hardship (if the latter, Congress did not explain why measures available to all taxpayers were insufficient). Committee reports and many statements made on the congressional floor did stress that an innocent spouse had no knowledge of his or her spouse’s actions in submitting the false return or failing to pay the taxes due.³⁴

²⁷ Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063.

²⁸ See S. REP. NO. 91-1537, at 3 (1971); H.R. REP. NO. 91-1734, at 3 (1971); STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., PRESENT LAW AND BACKGROUND RELATING TO TAX TREATMENT OF “INNOCENT SPOUSES,” JCX-6-98 (1998); *Treasury Department Report on Innocent Spouse Relief: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 50 (1998) (statement of Lynda Willis, Director, Tax Policy and Administration Issues, General Government Division).

²⁹ Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424, 98 Stat. 494, 801 (1984).

³⁰ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201(a), 112 Stat. 685, 734-40 (1998); I.R.C. § 6013(e)(3) (2006).

³¹ H.R. REP. NO. 105-599, at 252-55 (1998). 144 CONG. REC. 3234 (1998) (statement of Sen. Grassley).

³² H.R. REP. NO. 105-599, at 252-55.

³³ H.R. REP. NO. 104-506, at 7-8 (emphasis added). For more of the legislative history, see Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief*, 12 FL. TAX REV. 629, 636-45 (2012). [hereinafter McMahon, *Empirical Study*].

³⁴ See S. REP. NO. 105-174, at 56-58 (1997); H.R. REP. 105-599, at 251-55; 144 CONG. REC. 8509 (1998) (statement of Sen. Barbara Boxer); 144 CONG. REC. 8509 (1998) (statement of Sen. Dianne Feinstein); 144 CONG. REC. 14,689 (1998) (statement of

Regardless of the unanswered questions, Congress was clearly worried about wives.³⁵ “Nine out of 10 innocent spouses are women. Maybe that is because they are more likely to pay up when confronted by the IRS. Maybe it is because women sometimes have fewer resources available to defend themselves. In either case, singling out women for abusive collection effort is just plain wrong.”³⁶ As I have shown in an earlier article, the resulting tripartite relief provision was cobbled together with the intent of granting relief from liability to divorced or separated wives who were left crushing tax burdens by their nefarious husbands.³⁷ Congress “referr[ed] to wives who were deceived before being left” struggling under large tax bills, “often while caring for the couples’ children.”³⁸ There was no discussion of less sympathetic cases.³⁹

One reason for Congress’s choice not to answer fundamental questions of innocence is the cost of doing so. It is more costly for the government to draft rules that provide those answers with the necessary specificity.⁴⁰ Existing innocent spouse relief does not assume the cost of securing society’s agreement (or even Congress’s) as to when relief should be granted. Instead, the IRS and the courts examine the facts and circumstances of each requesting spouse in order to determine if relief from joint and several liability should be granted under a holistic review.⁴¹ This ex post relief from taxes risks inconsistent application and means that spouses cannot know the consequences of their choices until after they have filed their returns, been found to owe tax, and sought relief.

Section 6015 contains three means of relief that have degenerated into more or less three separate evaluations of equitable standards, each of which contains ambiguity. Two subsections provide standards that expressly call

Sen. William Roth); 144 CONG. REC. 14,715 (1998) (statement of Sen. Carol Moseley-Braun).

³⁵ All but one mention of innocent spouse relief in the *Congressional Record* referred to wives, most often divorced wives. For example, see 144 CONG. REC. 14,711 (1998) (statement of Sen. Max Baucus); 144 CONG. REC. 2045 (1998) (statement of Sen. Bob Graham); 144 CONG. REC. 2043 (1998) (statement of Sen. Al D’Amato); 144 CONG. REC. 8510 (1998) (statement of Sen. Spencer Abraham); 144 CONG. REC. 7694 (1998) (statement of Sen. Mike DeWine); 144 CONG. REC. 8492 (1998) (statement of Sen. Kent Conrad); 144 CONG. REC. 13,968 (1998) (statement of Rep. William Archer). For a rare reference to husbands as victims, see 144 CONG. REC. 8521 (1998) (statement of Sen. Olympia Snowe).

³⁶ 144 CONG. REC. 1417–18 (1998) (statement of Sen. Jon Kyl).

³⁷ McMahon, *Empirical Study*, *supra* note 33, at 636–42.

³⁸ *Id.* at 642.

³⁹ *Id.* at 636–42.

⁴⁰ See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983) (explaining that rulemaking incurs costs of gathering information and of securing agreement among authorities).

⁴¹ One critic of innocent spouse relief argues that Congress should adapt a more refined, equitable standard that provides a “fuller, more textured view of real people’s lives and motivations.” Stephen Zorn, *Innocent Spouses, Reasonable Women and Divorce*, 3 MICH. J. GENDER & L. 421, 426 (1996). This would increase the law’s cost of creation and application.

for the evaluation of the equity of granting relief, but the statute does not define how equity is to be judged.⁴² That power is delegated to the Treasury Department, which has included in Treasury Regulations various factors to be balanced.⁴³ A third subsection provides relief that is meant to function as a clear allocation of liability for divorced, widowed, or separated spouses unless the spouse is proven to have actual knowledge of the tax evasion.⁴⁴ However, this third test is not applied mechanically. Not only do courts consider equitable factors before applying this last form of relief, in 15.4% of reported cases in which a spouse won under this third test the requesting spouse was found to have actual knowledge of the tax evasion contrary to the test's statutory requirement.⁴⁵

With this broad statutory power for granting relief, the IRS is charged with wading through the myriad factors for each of the approximately 55,000 requests submitted each year.⁴⁶ Of those seeking relief, it is not abnormal for taxpayers to prevail, even in part, less than 30% of the time.⁴⁷ The practice of wading through who should and should not be granted relief is a costly practice for the IRS and, unlike in many areas of the law, the IRS cannot ignore § 6015 when its resources are limited because this is not an issue of whether or not the IRS imposes tax but an issue of whether the IRS must mitigate taxes that are legally owed. The IRS must affirmatively grant or deny relief to applicants, creating a minimum amount of resources that must be spent each year.⁴⁸

In addition to the direct cost in lost revenue, estimated to be in the hundreds of millions of dollars annually, processing relief requests commands a considerable amount of government resources.⁴⁹ Although not all of the agency's costs are known, innocent spouse relief is one of the top ten most litigated issues, and there is room for litigation to increase because of the relatively small percentage of denied claims that currently go to court.⁵⁰

⁴² I.R.C. § 6015(b), (f) (2006).

⁴³ I.R.C. § 6015(h) (2006). The Treasury Department's guidance includes: Rev. Proc. 2003-61, 2003-32 C.B. 296; Treas. Reg. § 1.6015-2(d) (2002); Treas. Reg. § 1.6015-4(c) (2002); I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Notice 2013-32, 2013-43 I.R.B. 397.

⁴⁴ I.R.C. § 6015(c) (2006).

⁴⁵ McMahon, *Empirical Study*, *supra* note 33, at 675-76.

⁴⁶ 1 NAT'L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS § 1, at 329 (2006), *archived at* <http://www.perma.cc/0A4XNmhdDf> [hereinafter NTA, 2005 ANNUAL REPORT § 1].

⁴⁷ *Id.*

⁴⁸ See Barton Massey, *IRS Receiving Rising Number of Innocent Spouse Relief Cases*, 83 TAX NOTES 1543, 1543 (1999).

⁴⁹ See sources cited *supra* note 13.

⁵⁰ See reports cited *supra* note 14. Some of these cases were frivolous. See McMahon, *supra* note 33, at 657 (discussing taxpayers filing for innocent spouse relief without having filed joint tax returns). In collection due process, another relief measure, frivolous arguments are raised in between 5% and 37% of cases. STAFF OF THE JOINT COMM. ON TAXATION, 108th Cong., REPORT RELATING TO THE INTERNAL REVENUE SERVICE 15, JCX-53-03 (2003), *archived at* <http://perma.cc/07KfjZ6aVpb>; Bryan Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 104 (2009) [hereinafter Camp, *Failure of Adversarial Process*].

When taxpayers disagree with a denial of relief by the IRS, they have a right to pursue relief in courts even if their claim is frivolous.⁵¹ Despite its cost, there is evidence to show that current relief is satisfying some goals.⁵² The question is whether it is meeting the most goals in the most efficient manner.

For the same reason § 6015 is costly, it is unfair in its application. Because the application of the regulatory factors is so fact intensive, it is hard to predict a priori who will be granted relief. Some winning spouses fit the congressional stereotype, but others do not. From court opinions decided under § 6015, the gender and marital status of successful claimants generally conformed to Congress's expectations but with significant variations. As Congress had anticipated, almost 90% of successful spouses were wives and were separated, divorced, or widowed at the time of trial.⁵³ This is consistent with congressional expectations. However, unlike congressional expectations, 25% of requesting spouses were still married when they sought innocent spouse relief.⁵⁴ Similarly, Congress depicted the spouses it was helping as vulnerable, but how this description is applied varies widely. Although spouses won more often when the court noted that their education level was high school or less, some highly educated spouses nonetheless won relief as did some self-employed spouses and some spouses who controlled family finances and completed the tax returns themselves.⁵⁵

One factor that goes to the heart of whether a spouse was coerced into filing a joint tax return is whether the spouse was abused. Abuse is currently recognized in the regulatory factors and since 2012 has been given greater weight in the balancing of factors; however, the role it plays in securing relief is unclear.⁵⁶ In almost two-thirds of the opinions mentioning abuse, judges mentioned abuse only to state that it was not alleged in the case.⁵⁷ When abuse was alleged, it did not have a consistent impact on the result of the case: in "60.71% of the cases in which abuse was alleged, the judge found that there was no abuse, but in 14.75% of those cases the requesting

⁵¹ Although 71.5% of requests were denied by the IRS, only 1.7% of those not deemed ineligible on their face were litigated. NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329–30.

⁵² McMahon, *Empirical Study*, *supra* note 33, at 705–07.

⁵³ Wives sought relief in 85.4% of cases brought under § 6015 and won 37.4% of their trials and 21.6% of subsequent appeals. *Id.* at 662. Husbands, on the other hand, won 25.4% of their trial cases and 0.0% of their subsequent appeals. *Id.* As a result of the disproportionate number of wives bringing suit, wives won 89.5% of total taxpayer victories. *Id.*

⁵⁴ *Id.* at 663. However, only 14.2% of still married spouses won. *Id.* at 664.

⁵⁵ *Id.* at 666, 670–71. A wife requesting relief when her husband prepared the return won 52.4% of the time, and a husband requesting relief when his wife prepared the return won 75% of the time. *Id.* at 671. However, in 13.3% of cases where both spouses were found to participate in family finances, a requesting spouse won relief; and in 30% of the cases where the spouse seeking relief also prepared the return, the requesting spouse won. *Id.*

⁵⁶ Rev. Proc. 2003-61, 2003-32 I.R.B. 296, 298–99. See also I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

⁵⁷ McMahon, *Empirical Study*, *supra* note 33, at 695.

spouse was, nevertheless, granted relief.”⁵⁸ In 27.3% of the cases in which the judge found abuse, no relief was granted.⁵⁹ Unfortunately for the scholar and policy analyst, there is insufficient information in the opinions to know exactly how abuse influenced these decisions.

Another important factor that, under current law, is impossible to fully examine is when the requesting spouse claims to have been deceived over the joint return because the issue is hidden in questions of whether the spouse knew of the tax evasion. Lack of knowledge of the tax deficiency may or may not equate to deception by the other spouse. Although a claim of deception should aid a requesting spouse’s claim under current law, it does not have to be alleged and is not specifically asked about on the IRS’s form for requesting relief. Until 2012, deception alone was insufficient to cause the lack-of-knowledge factor to weigh in favor of relief and recent changes to the IRS’s factors are unlikely to change this result. In several cases, spouses were even required to exercise greater diligence than requesting information. In *Cheshire v. Commissioner*⁶⁰ and *Wiksell v. Commissioner*,⁶¹ wives noticed either an ineligible deduction or unreported income on the return and asked about the tax consequences of the mistakes but were deceived by their husbands’ responses. Because they asked about the items, the wives were held to have actual knowledge of the deficiency and, ultimately, denied relief.

As an illustration of inconsistencies in the application of the § 6015 factors for relief, courts have struggled to determine whether the requesting spouse significantly benefited from the tax evasion. Judges have not agreed on what it means to create a significant benefit. The example provided in the Regulations is of a spouse receiving life insurance proceeds beyond normal support that is traceable to items omitted from income.⁶² In the two cases involving life insurance, one found there was a significant benefit and the other did not.⁶³ Similarly, improving cash flow, even if the money was reinvested in the tax shelter generating the cash flow, is sometimes, but not always, a significant benefit to both spouses.⁶⁴ Finally, paying for one’s children’s college can be, but is not always, a significant benefit to both.⁶⁵

Thus, the application of the rules is hard to assess definitively. Some relief is granted to those Congress intended but at times the provision is both under- and over-inclusive. As a result of Congress’s overall poor job of explicating what it meant by an innocent spouse, some spouses winning relief

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 282 F.3d 326, 335 (5th Cir. 2002).

⁶¹ 90 F.3d 1459, 1462–63 (9th Cir. 1996).

⁶² Treas. Reg. § 1.6015-2(d) (2002).

⁶³ *Bozick v. Comm’r*, 99 T.C.M. (CCH) 1242, 1244; *George v. Comm’r*, 86 T.C.M. (RIA) ¶ 2004-261.

⁶⁴ *McMahon, Empirical Study, supra* note 33, at 681.

⁶⁵ *Id.*

are clearly not consistent with the stereotype portrayed by Congress when it expanded relief in 1998. Relief has been granted to those whom Congress would likely not have labeled as “innocent” in 1998 and denied to some who would almost certainly be innocent under the congressional analysis.

Recent changes to how the Treasury Department applies the law have not made the application of the law clearer or more consistent with its legislative history. Although the IRS considered questions not answered with its regulatory factors “relatively infrequent situations,”⁶⁶ in January 2012, the IRS announced it was making it easier to qualify for relief.⁶⁷ The new guidelines, interpreted again in 2013, contain additional ambiguities, but the IRS showed a new willingness, consistent with this Article’s proposal, to make abuse or lack of financial control outweigh other factors.⁶⁸ However, the IRS has not gone far enough in reforming the system.⁶⁹ Moreover, the burden imposed by this provision is likely to grow with the broadening of the equitable factors. New, streamlined procedures available to some requesting spouses are likely to allow the IRS to perform a less intensive balancing, but some balancing of factors is still required by the statute.⁷⁰ It will require an act of Congress to get us out of this burdensome balancing test.

Although it is the Treasury Department and the courts that struggle to apply these facts-and-circumstances tests, as discussed in Part II it is other taxpayers who bear the cost of this relief. With the available information it is impossible to know exactly how much revenue is at stake in innocent spouse cases. The Treasury Inspector General for Tax Administration found that for fiscal year 2004, 6,555 requesting spouses were granted relief in the amount of \$117.6 million and 10,439 were denied relief of \$260.8 million.⁷¹ These numbers are not insignificant.

⁶⁶ *Treasury Department Report on Innocent Spouse Relief: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 17 (1998) (statement of Donald C. Lubick, Assistant Secretary for Tax Policy, U.S. Department of Treasury).

⁶⁷ I.R.S. Notice 2011-70 removed the two-year statute of limitations imposed on § 6015(f) applications. Rev. Proc. 2003-61, 2003-32 C.B. 296, § 4.01(3). I.R.S. Notice 2012-8 liberalized many of the factors, which were further liberalized in Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

⁶⁸ I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, § 4.03(2)(c)(i); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(i)(A) and (ii).

⁶⁹ The revised factors are to be considered in their totality and whether relief is to be granted remains a facts and circumstances test. Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2). This increases, not decreases, uncertainty regarding the evaluation of often-murky facts because relief may be granted or denied despite the number of factors weighing for or against relief.

⁷⁰ Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.02.

⁷¹ TREAS. INSPECTOR GEN. FOR TAX ADMIN., Ref. No. 2005-40-075, THE INNOCENT SPOUSE REVIEW FUNCTION ENSURED ACCURATE RELIEF DETERMINATIONS, BUT IMPROVEMENTS COULD INCREASE CUSTOMER SERVICE, at 7-8 (2005) [hereinafter TIGTA, INNOCENT SPOUSE REVIEW].

B. As Part of a Relief System

What happens to those who are not granted innocent spouse relief? First, there are other statutory relief provisions available to all taxpayers, most relief being available if a requesting taxpayer is suffering economic hardship. Second, even if the requesting spouse is not granted mitigation from the government, the spouse can request contribution from the non-tax-paying spouse. Thus, the 71.5% of requesting spouses (only 0.0007% of joint filers) who fail to win innocent spouse relief may still not have to pay the taxes they legally owe.⁷² These relief measures exist outside of innocent spouse relief and provide the backdrop against which we must measure the innocent spouse system. However, there is no assurance that these tax provisions will mitigate every requesting spouse's tax liabilities.⁷³

Congress has created relief measures available to all taxpayers who are unable to pay, or are determined that they should not pay, the taxes they owe. These other relief provisions are not contingent upon the type of return that is filed. The IRS currently administers this relief according to criteria established by Congress and the Treasury Department. Some of this relief is need-based and some is not.⁷⁴ Because these other provisions are broadly applicable, use of these provisions does not carry the same gendered problems as does innocent spouse relief, as discussed in the next Part, and any taxpayer who satisfies the requirements of these provisions may be relieved of liability.

First, taxpayers who are experiencing economic hardship and cannot pay their taxes have collection alternatives available.⁷⁵ We as a society may or may not think these alternatives are sufficient or that the measures may have a disparate impact on vulnerable taxpayers, but that is a matter for another article. This relief from tax collection is limited to those taxpayers Congress deems most burdened. For example, tax levies can be released if the levies are shown to produce an economic hardship for the taxpayer.⁷⁶ Similarly, the National Taxpayer Advocate, an independent office within the IRS tasked with assisting taxpayers, can issue taxpayer assistance orders if it concludes that the taxpayer has suffered or is about to suffer a significant hardship due to collection and if certain other requirements are met.⁷⁷ In

⁷² NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329; INTERNAL REVENUE SERV., SOI TAX STATS—INDIVIDUAL STATISTICAL TABLES BY FILING STATUS, TAX YEAR 2005, Table 1.3, *archived at* <http://perma.cc/0ihhDE4QAtX>.

⁷³ There is insufficient research on the gendered impact of other relief measures to evaluate them from a gendered perspective. This Article is a first step in evaluating taxpayer relief in this manner.

⁷⁴ For a discussion of IRS relief, see Shu-Yi Oei, *Who Wins When Uncle Sam Loses?*, 46 U.C. DAVIS L. REV. 421 (2012); Camp, *Failure of Adversarial Process*, *supra* note 50; Steven R. Mather & Paul H. Weisman, "Federal Tax Collection Procedure – Defensive Mechanisms," 638 Tax Mgmt. (BNA) U.S. Income (2005).

⁷⁵ See Oei, *supra* note 74; Mather & Weisman, *supra* note 74.

⁷⁶ I.R.C. § 6343(a)(1)(D) (2006); Treas. Reg. § 301.6343-1(b)(4) (1995).

⁷⁷ I.R.C. § 7811 (2006).

response to the latter, the IRS must release a levy on the taxpayer's property or cease or refrain from taking collection or other actions.⁷⁸

Additionally, relief is not limited to preventing collection but may come earlier in the audit process. During negotiations with the IRS over payment of tax liabilities, if certain requirements are met taxpayers have three alternatives: installment agreements,⁷⁹ in which a taxpayer pays the full amount of the liability including interest but pays these amounts over time; offer-in-compromise,⁸⁰ in which the taxpayer and the IRS agree to a payment of a percentage of the liability and interest; and designation of the liability as "currently not collectible," in which the liability remains on the books but there is no attempt made to collect from the taxpayer.⁸¹ Taxpayers can have multiple bites at these apples. For example, in 2005, 40% of taxpayer offer-in-compromise submissions were repeat submissions.⁸² Moreover, the amount of taxes relieved is significant. With offers-in-compromise, for example, amounts written off ranged from \$2.15 billion in 2000 to \$1.13 billion in 2004.⁸³

Not all of these relief measures provide absolute relief. If the IRS determines that a tax liability cannot be collected, the IRS may report the account as "currently not collectible"⁸⁴; however, the IRS reserves the right to renew collection efforts should the taxpayer experience a windfall, such as winning the lottery.⁸⁵ On the other hand, the offer-in-compromise procedures release the taxpayer from the obligation by allowing the taxpayer to settle unpaid tax debts for some lesser amount after an assessment has been completed.⁸⁶ The compromise is granted if the claim falls within one of three categories: (1) doubt as to collectability; (2) doubt as to liability; or (3) the promotion of effective tax administration.⁸⁷ Although doubt as to collectability requires economic hardship, for either doubt as to liability and the promotion of effective tax administration, the taxes need not create an economic hardship

⁷⁸ I.R.C. § 7811(b) (2006).

⁷⁹ I.R.C. § 6159 (2006).

⁸⁰ I.R.C. § 7122 (2006).

⁸¹ I.R.C. § 6404(c) (2006); Camp, *Failure of Adversarial Process*, *supra* note 50, at 65.

⁸² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-525, IRS OFFERS IN COMPROMISE: PERFORMANCE HAS BEEN MIXED; BETTER MANAGEMENT AND SIMPLIFICATION COULD IMPROVE THE PROGRAM, 13 Fig. 2 (2006), *archived at* <http://www.perma.cc/0KmmZxFjZP5> [hereinafter GAO-06-525]. *See also* note 89.

⁸³ GAO-06-525, *supra* note 82, at 12.

⁸⁴ I.R.S. Policy Statement 5-71, IRM 1.2.14.1.14 (Nov. 11, 1980) ; I.R.C. § 6343(a)(1)(D) (2006).

⁸⁵ I.R.S., IRM 5.16.1.6 (May 22, 2012), *archived at* <http://www.perma.cc/0b4L9u7e32j>.

⁸⁶ I.R.C. § 7122 (2006). For a discussion of offer-in-compromise, see Shu-Yi Oei, *Getting More By Asking Less*, 160 U. PA. L. REV. 1071 (2012).

⁸⁷ Treas. Reg. § 301.7122-1(b) (2002); GAO-06-525, *supra* note 82; *Information on Selected IRS Tax Enforcement and Collection Efforts: Testimony Before the Comm. on Finance, U.S. Senate* (2001 (statement of Michael Brostek, Director, Tax Issues) [hereinafter Brostek statement]).

for the taxpayer.⁸⁸ Similar to the procedure in cases of innocent spouse relief, the IRS is required to consider the facts and circumstances of each case and independently review all rejections of relief.⁸⁹

As a final backstop to these relief provisions, Congress has imposed a statute of limitations for collecting the taxes that a taxpayer legally owes. This statute of limitations ensures that the IRS cannot collect from taxpayers on a liability that is more than ten years old.⁹⁰ Although the period may be extended in limited circumstances or with the agreement of the taxpayer, it generally operates as a deadline after which taxpayers are released from their tax obligations.⁹¹

Even if a spouse does not satisfy the requirements of the statutory relief provisions, if the IRS collects a couple's taxes from one spouse, that spouse has the right to demand at least a partial payment from the other spouse. The state law right of contribution generally allows the apportionment of liability when one tortfeasor pays more than her appropriate share of liability.⁹² Whether a state court judge would apportion the tax liability according to spouses' relative responsibility for earning the income or committing the tax evasion depends on state law.⁹³ Thus, through the right of contribution, the paying spouse explains to a state judge that the nonpaying spouse is the one who earned or enjoyed the income and, therefore, should pay some portion of the taxes owed. If the state judge agrees, the nonpaying spouse is required to pay the paying spouse whatever portion of the taxes the judge thinks is fair to reallocate. Although there are problems with the right of contribution, taxpayers have won most of the decided cases in which they sought contribution for taxes paid.⁹⁴

⁸⁸ Treas. Reg. § 301.7122-1 (2002).

⁸⁹ Brostek statement, *supra* note 87, at 8–9. In some circumstances, spouses may seek an offer-in-compromise and, if it is denied, request innocent spouse relief, requiring a second analysis of much of the same information by a different department within the IRS.

⁹⁰ I.R.C. § 6502(a) (2006); Treas. Reg. § 301.6502-1(a) (2006). This is in addition to the three-year statute of assessment for the IRS to complete the assessment process. I.R.C. § 6501(a) (2006).

⁹¹ I.R.C. § 6501(c) (2006); Treas. Reg. § 301.6501(c)-1 (as amended in 2000).

⁹² See Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 194 (1955). For a discussion of contribution, see Richard Wright, *Allocating Liability Among Multiple Responsible Causes*, 21 U.C. DAVIS L. REV. 1141, 1182–85 (1988). In addition, I.R.C. § 66(c) may provide relief for community income if married persons did not file joint returns. See also IRS, Pub. 971 (I.R.S.), 2008 WL 1704156.

⁹³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (2013).

⁹⁴ See *Murchison v. Murchison*, 33 Cal. Rptr. 285, 288 (Cal. Ct. App. 1963); *Bormaster v. Bormaster*, 274 P.2d 757, 760 (Kan. 1954); *In re Cooper*, 83 B.R. 544, 547 (1988); *Estate of McClure v. United States*, 288 F.2d 190, 192 (Ct. Cl. 1961); *Richter v. Henningsan*, 42 P. 1077, 1077 (Cal. 1895); *Hanson v. Hanson*, 350 P.2d 859, 860–62 (Wash. 1960); *Strange v. Rubin*, 456 S.W.2d 416, 416–19 (Tex. App. 1970); *Miller v. Miller*, 310 N.Y.S.2d 18, 20–21 (N.Y. Civ. Ct. 1970); *Rocha v. Rocha*, 297 P.2d 505, 507 (Cal. Ct. App. 1956). *But see Gillman v. O'Connell*, 574 N.Y.S.2d 573, 575 (N.Y. App. Div. 1991) (concluding no right of contribution existed because spouse requesting contribution created the liability); *Chappell v. Chappell*, 253 So.2d 281, 287 (Fla. Dist. Ct. App. 1971) (disallowing setoff against alimony for payments of joint tax liability); *McDermitt*

A legitimate complaint about this form of relief, although arguably true of all legal creations, is that the right of contribution is imperfect in its operation. Several problems may motivate paying spouses not to exercise their right even if it is appropriate to do so. Use of the court system means incurring legal fees that may or may not be assigned to the nonpaying spouse, state court judges may be relatively ignorant of federal tax law and taxpayers may fear judicial mistakes, and some nonpaying spouses may be judgment proof.⁹⁵ These and other factors make the right of contribution less than a perfect solution for some spouses.

However, contribution places the cost of equalizing the tax burden between spouses or former spouses on the people signing the incorrect return or failing to pay the taxes due. Through this process, the cost of allocating the liability between spouses is not indirectly placed on other taxpayers as it would be by absolving the less culpable spouse of liability. For spouses who are not coerced into filing joint returns, they are in the best position to prevent the tax evasion in the first place and should bear its cost.

Within this framework of possible relief, not all spouses who sign joint returns will be, or are intended to be, relieved of the taxes that they legally owe. A relatively more innocent spouse who does not suffer economic hardship or meet the requirements of the other relief provisions will still owe 100% of the taxes due on the joint return if the other spouse is judgment proof, and so the right of contribution cannot be exercised. The reason this is a just result is that the spouse is only relatively more innocent as discussed in the next Part. *Vis-à-vis* other taxpayers and the government, the relatively more innocent spouse should pay the taxes on the return unless the spouse qualifies for the relief provided in Part III that absolves taxpayers who were not culpable in the joint filing.

II. THE GROUNDS ON WHICH TO JUDGE

Unlike most laws that are underpinned by a belief in a fundamentally just world, innocent spouse relief is based on the desire to *create* such a world. However, innocent spouse relief's contribution to this endeavor is contingent upon how one frames the issue. One way to look at innocent spouse relief focuses on which spouse is most culpable for a particular bit of tax evasion on a joint return. Alternatively, one can look at the joint return as part of the larger tax system. With the latter perspective, the critical question

v. United States, 67 A.F.T.R.2d 91-324 (S. D. Ohio 1991) (disallowing contribution because spouse requesting contribution was responsible for the penalty); *Gooden v. Wright*, No. 14823, 1991 WL 57230 (Ohio Ct. App. Apr. 18, 1991) (finding separation agreement assigned liability to spouse requesting contribution). For complaints about contribution, see Kahng, *supra* note 6, at 264; Christian, *supra* note 6, at 588. Richard Beck proposes a bad loss deduction if the right of contribution does not result in payment. See Richard Beck, *The Deductibility of a Worthless Right to Contribution for Joint Income Taxes*, 9 VA. TAX. REV. 313 (1989).

⁹⁵ Christian, *supra* note 6, at 588-89.

is not the relative interests of husbands versus wives or the government versus spouses requesting relief. Rather, the interests that must be balanced are those of different taxpayers and recipients of government services when some taxpayers pay their legally owed taxes and others do not. If the government is to raise revenue to fund social policies with a progressive income tax,⁹⁶ that one gender may be the one most often requesting innocent spouse relief from that tax should not protect the relief from critical review in the quest for an improved world.

Interests conflict because innocent spouse relief selectively absolves requesting spouses from the strict liability on their joint returns that is normally imposed on taxpayers.⁹⁷ As discussed in the Introduction, this Article does not debate whether spouses should file jointly (as opposed to married filing separately) or whether the United States should adopt individual filing. Instead, this Part assumes, consistent with the current political and economic environment, that joint returns will be retained and focuses on how we should evaluate the joint and several liability imposed on those returns.

This Part analyzes the consequences of innocent spouse relief from joint and several liability in the quest to make the world more just. First, it examines innocent spouse relief's impact on the administrability of the federal income tax. Only with an administrable tax can the government raise sufficient revenue to fund its operations. Second, this Part analyzes the equity of granting innocent spouse relief. Equity must be separately judged both as between spouses and as between taxpayers. When one spouse is relieved of liability under innocent spouse relief, as opposed to the other forms of relief, the other spouse becomes solely liable, possibly shifting the burden inequitably from one to the other. If the other spouse cannot or will not pay, the couple's effective tax rate is also lowered relative to comparable taxpayers. Finally, this Part looks specifically at innocent spouse relief's impact on wives as they are the spouses Congress intended to request, and win, most innocent spouse relief.⁹⁸ To the extent there are consequences, albeit unintended; that disadvantage wives, the innocent spouse regime is not accomplishing its objective.

A. *Administrability of the Tax System*

The tax system does not operate on paper alone. Taxpayers must comply with the law when filing their returns and the IRS must enforce it. Therefore, the income tax should be judged, at least in part, based on its administrability.⁹⁹ The National Taxpayer Advocate has complained regard-

⁹⁶ Marjorie Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151, 153 (1997).

⁹⁷ I.R.C. § 6151 (2006).

⁹⁸ See *supra* note 35.

⁹⁹ Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568, 572-74 (1965); Leandra Lederman, *Statutory Speed Bumps*, 60 STAN. L. REV. 695,

ing the system's administrability that "tax code complexity [is] the most serious problem facing taxpayers and the IRS alike."¹⁰⁰ Any rules or regulations that add to the law's complexity also increase the administrative burden on taxpayers and the government, and they need to be evaluated in this context. Expansive innocent spouse relief, a complex determination as discussed above, removes a central tenet of the federal income tax system, the strict liability for the taxes a person owes. Thus, current relief makes it harder to collect the taxes owed and increases the cost of administering the tax system.

The numbers of taxpayers and the amount of revenue involved in the federal income tax system require an honest assessment of the workability of any proposed changes to the tax collection process. In 2012, the IRS processed over 237 million tax returns, of which approximately 53 million are likely to be joint returns, and 2.2 billion information returns (such as W-2s and 1099s).¹⁰¹ Most returns were accepted as filed, although the IRS was left collecting the taxes owed on over eleven million returns.¹⁰²

Collection is made easier by imposing strict liability on taxpayers.¹⁰³ As a result of strict liability, the IRS does not have to prove taxpayers were negligent with respect to their failure to pay taxes or to accurately file a return, unless the IRS seeks to collect penalties.¹⁰⁴ Movements away from that liability, such as innocent spouse relief, increase the complexity and cost of the tax system because they provide opportunities for taxpayers to contest the liability based on some factor other than the law.¹⁰⁵ To be clear, innocent spouse relief, and most other forms of relief, does not involve a question whether the liability exists, only whether the contesting spouse should have to pay it.

Although the IRS has powers that other creditors do not possess, taxpayers are not without due process of law when the IRS determines that they owe taxes. If the IRS disagrees with the return a taxpayer files, the IRS assesses all taxes owed through a process within which the taxpayer may

709–10, 742 (2007); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 1 (2006); Steven B. Johnson, *Administrability-Based Tax Simplification*, 4 NEV. L.J. 573, 583 (2004).

¹⁰⁰ 1 NAT'L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS, § 1, at 4 (2012), archived at <http://www.perma.cc/0fhvxe2mJ42>.

¹⁰¹ INTERNAL REVENUE SERVICE DATA BOOK, 2012 PUBLICATION 55B, at 4, 37 (2013). 2012 data is not yet available for the number of joint returns, but 2011 saw more than 53 million joint returns. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME, *supra* note 2, at 37 (2012).

¹⁰² INTERNAL REVENUE SERVICE DATA BOOK, *supra* note 101, at 41.

¹⁰³ I.R.C. § 6151 (2006).

¹⁰⁴ I.R.C. § 6662 (2006).

¹⁰⁵ That there are spouses to whom Congress desires to grant relief does not mean that joint and several liability is bad. It simply means that there are some spouses who do not have the requisite agency over their tax filing document. Moreover, the fact that some spouses win § 6015 relief does not mean that joint and several liability is to blame for creating an unfair tax obligation. Instead, it is an indication that the system works to mitigate the liability of those whom Congress does not want to hold liable for their joint returns.

participate and from which the taxpayer may appeal.¹⁰⁶ The IRS generally has three years to complete this assessment.¹⁰⁷

An assessment of tax liability permits the IRS to pursue three avenues for collecting the taxes owed: (1) to issue a tax lien, (2) to levy taxpayer property, and (3) to offset refunds or other amounts received from the government.¹⁰⁸ Each collection method has requirements aimed to protect taxpayer rights. For example, tax liens arise automatically; however, in order for the IRS's lien to be perfected, and take priority over competing creditors to the extent that it can, the IRS must file a Notice of Federal Tax Lien.¹⁰⁹ Thus, a lien attaches by operation of law to all property but has limited value without further action as to specific property. Moreover, the Code requires the IRS give the taxpayer notice of its intent to use its levy power to seize property and certain types of property are exempted from the IRS's power to levy.¹¹⁰ Except in limited circumstances, the IRS must complete its collection within ten years or the authority to pursue these avenues lapses.¹¹¹

Much of the collection process is automated, largely for reasons of cost.¹¹² A computer performs the audit and makes all contact with the taxpayer for two or three years before an IRS employee enters the process.¹¹³ The queue for field operators is so long that, in 2005, 788,083 delinquent accounts were removed from the queue without payment and without human contact.¹¹⁴

The review of the facts and circumstances necessary for the mitigation of taxes cannot currently be made through an automated process. From a specially created Cincinnati Centralized Innocent Spouse Operation, IRS agents rule on each innocent spouse relief request.¹¹⁵ Unlike in the auditing process, in which the IRS can assume taxpayers are compliant if it does not want to invest the resources to question their liability, the structure of the law requires the IRS perform the balancing of equity or the allocation of liability for each request. This system generally operates well, with the In-

¹⁰⁶ I.R.C. § 6201 (2006). For a discussion of the process of collection and collection due process, see Camp, *Failure of Adversarial Process*, *supra* note 50.

¹⁰⁷ I.R.C. § 6501 (2006).

¹⁰⁸ I.R.C. §§ 6212, 6321, 6331, 6402 (2006). See also *United States v. Munsey Trust*, 332 U.S. 234, 239 (1947); Field Serv. Adv. No. 200213012 (Mar. 20, 2002).

¹⁰⁹ I.R.C. § 6323 (2006). Without perfection, tax liens take precedence over all creditors but for purchasers for value, mechanic's lienors, holders of security interests, and judgment lien creditor.

¹¹⁰ I.R.C. § 6331(d) (2006).

¹¹¹ I.R.C. § 6502 (2006).

¹¹² Camp, *Failure of Adversarial Process*, *supra* note 50, at 68. One may question how well flexibility works in an automated system.

¹¹³ *Id.*

¹¹⁴ TREASURY INSPECTOR GENERAL FOR TAX ADMIN., REF. NO. 2006-30-055, TRENDS IN COMPLIANCE THROUGH FISCAL YEAR 2005, at 26 (2006), archived at <http://perma.cc/0a2hDpNSFMX>.

¹¹⁵ I.R.S., IRM § 25.15.8.2 (2010).

spector General of Tax Administration finding that the IRS properly resolved 94% of the cases it reviewed, but it is a drain on the resources of the IRS.¹¹⁶

When the IRS collects from a spouse as a result of joint and several liability, the spouse is not being held liable for the other spouse's actions or for greater damages than she caused. Instead, this system of liability results in one spouse being held liable for the damages that she caused by filing an inaccurate return. Critics who prefer to split the liability fifty/fifty between spouses, or according to some other proportionate regime, focus on the creation of the income and not its report to the government. The result, however, is that critics are effectively stating that one spouse is 50% negligent or 50% responsible for the return. However, neither spouse's actions in signing an inaccurate return caused the government to miss out on 50% of the revenue owed. Rather, each spouse was 100% negligent with respect to the return and each spouse is therefore fully responsible for the entire tax obligation the return triggers.¹¹⁷ A spouse's full responsibility for an injury to other taxpayers that was an actual and proximate result of her submitting an inaccurate return does not become partial or minimal because the other spouse's behavior seems worse.

If one spouse pays the taxes owed on a joint return and is unable to seek contribution from the other spouse because of the insolvency or unavailability of the other spouse, an unfair result has occurred. However, the government is not a part of and is not responsible for that unfairness. The unfairness results from the taxpaying spouse's unfulfilled equitable claim against the judgment-proof spouse. That claim is secondary to the government's claim against each spouse. Limiting the collection of the taxes legally owed from the *less guilty* spouse unjustifiably shifts the unavailable spouse's immunity (for example, his bankruptcy) to the available spouse, who has no such immunity.

This immunity was estimated to cost \$1.4 billion in its first decade and led to substantial IRS litigation.¹¹⁸ Despite the high cost, those seeking innocent spouse relief are a small subset of all taxpayers. With more than 53 million joint tax returns filed annually, the possible group seeking relief is much larger than those filing approximately 55,000 applications annually

¹¹⁶ TIGTA, INNOCENT SPOUSE REVIEW, *supra* note 71, at 5–6. *See also id.*, at 4.

¹¹⁷ This is the case even if a spouse does not know that the return is inaccurate. Currently there is no good faith or mistake-of-law or mistake-of-fact exception to tax filing. Although people debate joint and several liability in a comparative responsibility regime, most agree that joint and several liability should be retained for defendants acting in concert. *See U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY* 33 n.29, 64–65 (1986) (recommending the elimination of joint and several liability in comparative responsibility context but not when defendants act in concert).

¹¹⁸ *See STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT RELATING TO H.R. 2676, JCX-51-98 (1998); Reports cited supra notes 13–14.*

today.¹¹⁹ Few joint filers are audited and, of those, fewer are assessed a liability, and even fewer contest the liability. Expanding relief risks opening the floodgates even as the IRS awaits potential budgetary cuts.¹²⁰

Innocent spouse relief's more flexible approach to tax collection may well reflect postmodern life, where liability for taxes may actually be a matter for negotiation. If true, we are atop a slippery slope of individualized tax relief. A difficulty with this approach is that the tax system is complicated, and many people rely on accountants or software to prepare their returns.¹²¹ Allowing spouses, or any taxpayer, to limit responsibility for their legally-valid returns on the basis that they did not know or understand what was on the return calls into question holding anyone strictly accountable for their returns, particularly those returns completed by tax return preparers.¹²² Furthermore, if innocent spouse relief increases awareness that tax relief is selectively available, it might increase other taxpayer groups' demands for additional relief or, worse, their tax evasion if relief is not granted.¹²³

Thus, not only are the direct effects of policies at issue but also the public's perception of those policies.¹²⁴ Attempts to assess individual equity in the application of the federal income tax risk undermining the efficient operation of the tax system for the public as a whole. This risk, in turn, may upset the critical balance between administrability and equity that underpins our tax regime. Instead of favoring one good over the other, relief from legally owed taxes should protect the balance of the system by providing relief in ways that are reasonably administrable.

B. Equity as Between Taxpayers

It is not enough for a tax system to be administrable; it must also be equitable. With respect to joint and several liability for joint returns, we must measure equity both as between spouses and as between taxpayers. Successful requesting spouses win mitigation of their taxes vis-à-vis their spouses and other taxpayers who report their income, pay their taxes, and live off

¹¹⁹ See NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329; INTERNAL REVENUE SERVICE, STATISTICS OF INCOME, *supra* note 2, at 37.

¹²⁰ Howard Gleckman, *House GOP's Solution for Short-Staffed, Poorly Trained IRS: Slash Its Budget 24%*, FORBES, July 11, 2013, archived at <http://perma.cc/03fUWw6famK>.

¹²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-297, TAX ADMINISTRATION: MANY TAXPAYERS RELY ON TAX SOFTWARE AND IRS NEEDS TO ASSESS ASSOCIATED RISKS (2009), archived at <http://perma.cc/0Q2KPzUTgrv>.

¹²² Return preparers are liable for penalties for negligent disregard of rules and regulations. I.R.C. § 6694(a) (2006).

¹²³ For a good review of material, see generally Ingrid Wahl, Barbara Kastlunger & Erich Kirchner, *Trust in Authorities to Enforce Tax Compliance*, 32 L. & POL'Y 383 (2010); Marjorie Kornhauser, *A Tax Morale Approach to Compliance*, 8 FLA. TAX REV. 599 (2007).

¹²⁴ Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997).

their remaining income. Thus, innocent spouse relief from that liability is not pitting the requesting spouse against the government, as some black box or blank check, but against other people. That the majority of those winning relief are women does not make it any less necessary to recognize this potential injustice. Considering relief in this light, for spouses who were not coerced into signing joint returns, the selective lowering of their tax burdens produces inequitable results.

First, looking at the equity as between spouses: for a variety of reasons, and a significant one is a reduced tax burden compared to being married but filing separately, joint filers choose to file their tax returns as marital units.¹²⁵ Although this Article does not rehash arguments regarding the equity of the joint return, the Treasury Department's initial justification for the imposition of joint and several liability was that a joint return was a single filing by a couple and not two individual returns on one sheet of paper.¹²⁶ To the extent that the joint return amalgamates both spouses' incomes, the liability reflects the singularity of the return.

Although studies show that most couples pool some amount of their earnings either by choice or because they have no other option, joint filing, and with it joint and several liability, does not mean, or theoretically require, that spouses pool their income.¹²⁷ Instead, joint filing simply accepts that ownership as between spouses is ambiguous. In other words, it is a sufficient justification for the joint and several liability on joint returns to find that within most marriages (if not within most relationships) people who earn income are not always the only ones who feel as though they "own" or "co-own" the income in something other than a strictly legal sense.¹²⁸ When a couple files a single return containing both spouses' incomes, the spouses forgo the burden of defining who owns what within the marriage. Innocent spouse relief, on the other hand, requires that the IRS or the courts determine who "owns" income and should owe tax on that income. That the answers to these questions are often ambiguous as between spouses does not negate the fact that answers must be concluded and that real world economic consequences flow from that determination.

¹²⁵ See *supra* note 2.

¹²⁶ See *supra* note 25.

¹²⁷ PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 96 (1983); JANET STOCKS ET AL., *MODERN COUPLES SHARING MONEY, SHARING LIFE* 49 (2007) (noting that, in Sweden, where economic independence and gender equality are explicit public policy goals, pooling is still overwhelmingly the practice for established couples); Judith Treas, *Money in the Bank*, 58 AM. SOC. REV. 723, 729 (1993); Lawrence Zelenak, *Marriage and the Income Tax*, 57 S. CAL. L. REV. 339, 348–54 (1994). See also JAN PAHL, *MONEY AND MARRIAGE* (1989); Shelly Lundberg, Robert Pollak & Terence Walles, *Do Husbands and Wives Pool Their Resources?*, 32 J. HUM. RESOURCES 463 (1997). But see BARBARA BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 211–12 (1986); VIVIANNA ZELIZER, *THE SOCIAL MEANING OF MONEY* 3–65 (1994); Marjorie Kornhauser, *Love, Money, and the IRS*, 45 HASTINGS L.J. 63, 80–91 (1993).

¹²⁸ But see Dennis J. Ventry, *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459 (2010).

To dismiss this understanding that ownership might be messy risks making the exceptional couple the rule. Focusing the tax on the couple for whom ownership of property is clear and divisible does not mean that the average couple will be better served. Instead, the couple that shares resources or delegates tasks will no longer be recognized as doing so. Their real situations will be dismissed in order to give deference to those couples who keep financial matters separate and either do not perceive themselves as an economic unit or do so in order to game the tax system.

Consider Edith and Frank. Frank works at home caring for the children and Edith works many odd jobs throughout the year to earn the couple's income. When preparing their tax return, the couple fails to notice they did not receive a W-2 from one of Edith's employers, and the accountant fails to properly report the income. At some point the couple divorces. In the divorce, each is given one-half of any amount saved from Edith's wages. If the joint return is ever audited and if Frank did not have reason to know of the omission of the income on the couple's joint return (for example if he could reasonably fail to keep track of the number of her employers), Frank can claim innocent spouse relief, keep the savings, and Edith will owe all of the tax due.

In this example, we may not blame this couple for tax evasion, but they nevertheless failed to pay the taxes that were owed. Holding Edith liable for all of the taxes, even amounts she spends with and even on Frank or transfers to Frank in the divorce, seems inequitable.¹²⁹ However, that is the likely result under the innocent spouse rules. Extending innocent spouse relief further than it exists today as some advocates propose, for example by requiring liability based on who earns the income, would guarantee the shifting of the tax burden from Frank to Edith. Even if the couple shared all the family's earnings and made all financial decisions together, the fact that Edith earned the income would require the government to shift the entire tax burden to her.¹³⁰ This is not unexpected based on the operation of innocent spouse relief; one spouse is more often granted relief while the other remains liable for the entire tax.¹³¹

However, inequitable divisions of resources and burdens do plague many marriages.¹³² Couples do not always view themselves as equal, even if

¹²⁹ This also illustrates how individual filing clashes with the idea of not taxing household labor because the value of the wage earnings is effectively being shifted to the non-wage earning spouse without being taxed as such.

¹³⁰ If the couple lived in a community property state, 50% of the earnings would legally belong to Frank from the time they were earned. Still, if he did not have reason to know of the omission, Edith would be responsible for 100% of the taxes owed. Treas. Reg. § 1.6015-1(f)(1) (2002).

¹³¹ In the context of divorce, there is no notion of unclean hands in the granting of relief. I.R.C. § 6015(c) (2006). A study of innocent spouse relief showed that only 4 of 444 cases involved both spouses seeking relief. McMahon, *Empirical Study*, *supra* note 33, at 662.

¹³² If one spouse has disproportionate control over the other spouse's earnings, a tax system that operates on spouses as individuals is unlikely to change that power dynamic.

they pool some amount of income, which raises questions as to how the income tax system should treat these spouses.¹³³ Spouses are acting as though their income is joint property, that ownership is in some sense combined; however, one spouse might not know the extent of the family's financial situation. The government can recognize the jointness of the couple, and thereby possibly collect tax from a spouse who does not know the couple's financial position, or tax each spouse separately, and possibly create artificial divisions of ownership. This is the fundamental choice before us.

Many spouses, even among those who perceive themselves as equals in their marriages, make the choice to delegate financial obligations and responsibility to one spouse, and in doing so limit the other spouse's awareness of financial information.¹³⁴ For couples for whom this is true, neither spouse genuinely lacks agency in the sense that a spouse desires to exercise a role, is willing to take on the responsibilities and burdens of that role, and is then denied the opportunity. Rather, the spouse not delegated responsibility for financial tasks exercises an element of choice. To the extent Frank in the prior example does not ask the designated return preparer about the couple's tax return, he is culpably failing as a tax-paying member of society. And even to the extent that he cannot know because neither spouse knows, as in the example, he is as culpable as his wife. Frank should not receive a free pass on the legal document that he signed, the tax return, because of the delegation. Of course this does not mean that all spouses have agency over their returns. As discussed in Part III below, the inability to assume the role should result in relief from joint and several liability.

Unless spouses are coerced when they allocate responsibility for joint tasks among themselves, they assume the risk associated with that allocation.¹³⁵ For example, despite the fact that I (the author) am a tax professor in a self-proclaimed equal relationship, as a couple, my husband and I have delegated to him the work of completing our tax returns. Not only do I save the time necessary to complete the forms when I designate my husband as "our" return preparer, but I have exercised a choice. With that choice come

See generally Alicia Brokars Kelly, *Money Matters in Marriage*, 47 U. LOUISVILLE L. REV. 113 (2008). Many marriages do not have two earners and wives produce less than half of most families' total earnings. Sara Raley et al., *How Dual are Dual-Income Couples?*, 68 J. MARRIAGE & FAM. 11, 11 (2006).

¹³³ Amy Kroska, *Examining the Husband-Wife Differences in the Meaning of Family Financial Support*, 51 SOC. PERSP. 63, 65 (2008). The annual division of income necessary for separate liability would also illustrate which spouse is economically better off and which one is not. This might reinforce gendered divisions within the marriage.

¹³⁴ See generally Bryndl Hohmann-Marriott, *Shared Beliefs and the Union Stability of Married and Cohabiting Couples*, 68 J. MARRIAGE & FAM. 1015 (2006).

¹³⁵ An argument has been made that wives do not contest their husbands' actions because of a willingness to forgive or because they wish to preserve the marriage. Therefore, the government should relieve wives of their taxes. Bryan Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability*, 108 TAX NOTES 1307, 1318 (2005). This alleged willingness may be commendable, but why should the cost of that willingness be borne by other taxpayers if husbands do not pay their taxes? Should we not respect a wife's choice and impose the cost on her?

risks. If I trust my husband to cook dinner for me and he is a bad cook, I risk a bad meal or, worse, food poisoning. If I trust my spouse to negotiate the purchase of our house, I risk overpaying if my husband is the weaker negotiator. There is nothing intrinsic to the federal income tax that suggests I should be insured against the risk of allocating my taxpaying responsibility. If a spouse does not want to assume the risk, the spouse does not have to accept the division and can file a return as married filing separately. And if she signs the return because she is coerced, she should have relief available, as described in the next Part.

Some critics argue that requiring both spouses to prepare or understand the return is "wasteful and inefficient" and that we should support the allocation of responsibilities.¹³⁶ It is implied that the allocation of tax responsibility should, therefore, come with an isolation of liability to whomever was allocated the task. However, it is unlikely the critic would say that only one spouse should understand the family's financial position or understand whether the other spouse is committing a crime in both of their names. Requiring the creation of two versions of the same document might be wasteful, but having enough working knowledge of the family's finances to confirm the other's work on the return is just good planning. If a couple chooses not to do so, this is not something the government should encourage or needs to insure.

Thus the reality of joint and several liability is different from how the story is often told. Frequently, spouses who are being held liable are depicted as tragic figures deserving the mitigation of their taxes. However, putting aside spouses who are coerced into signing their returns, spouses who file joint returns have a choice. Those reading this Article might not agree with the choices that any particular couple makes, but that disagreement does not mean these are not legally valid choices. Moreover, that we might not agree with a choice does not mean that those who make a choice to defer proper evaluation of the family's finances or the tax return should be insured against the risk of improper tax filing when those who are aware of family finances and do participate in the preparation of the return are not so protected.

In addition to considering potential inequity as between spouses, it is important to examine the equity of innocent spouse relief as between taxpaying groups. Other taxpaying groups may have equitable claims because innocent spouse relief allows a spouse to enjoy the benefit of filing jointly while avoiding its attendant burdens. With joint filing, spouses avoid potentially erroneously allocating income between themselves. In addition, they are taxed using wider tax brackets so that more income is taxed at lower rates, and they can claim certain tax credits not available to spouses filing separately. With relief, both spouses (the innocent spouse and the one guilty of tax evasion) enjoy lower taxes because they filed jointly, even though with

¹³⁶ Richard Beck, *The Innocent Spouse Problem*, 43 VAND. L. REV. 317, 369 (1990).

relief they will be taxed separately. The innocent spouse is then relieved of liability for the other spouse's income and, in some circumstances, her own.¹³⁷

Thus, not only does innocent spouse relief potentially create inequities as between the spouses who sign the joint return, the taxes that are paid are no longer drawn equitably from all members of society. Spouses who are able to mitigate the taxes they owe pay less in tax than those with the same amount of income who pay their taxes. As a result, the tax rates applicable to different taxpayers are no longer the rates Congress enacted. Consequently, increasing innocent spouse relief benefits some taxpayers at the expense of others by decreasing some people's taxes but not others. Similarly situated taxpayers are not taxed similarly. Whether the spouse given relief is unjustly enriched depends on the spouse's particular facts and circumstances; nevertheless, in all instances issues of inter-taxpayer equity are raised.

Compare two couples: Alice and Ben versus Cathy and David. Both couples earn \$150,000 per taxable year. Ben invests in a tax shelter that generates \$50,000 of unauthorized deductions, reducing Anne and Ben's reported tax obligation by \$12,719. Cathy and David, on the other hand, pay all of their taxes owed, increasing their effective tax rate compared to Alice and Ben by approximately 8.5%. Alice and Ben, with the money that was legally owed to the government, buy a house that they otherwise could not have afforded. Cathy and David, lacking those resources, rent an apartment.

After a number of years, both couples divorce. In their divorce, Alice gets the house and, as a result, Ben owes less in alimony. By contrast, there is no house for Cathy to receive, so she is entitled to more alimony from David. The innocent spouse rules provide that if Alice did not actually know of the tax evasion, she keeps the house, although Ben should owe penalties and interest on his tax evasion.¹³⁸ Therefore, not only do Alice and Ben have years of enjoyment of a house they could not have afforded without the tax evasion, but also, in their divorce, one spouse keeps the house forever and the other spouse benefits by owing less in alimony. Finally, throughout their marriage Alice has no interest in checking their returns because, even if the couple is caught and Ben is judgment proof, she is still better off.¹³⁹

¹³⁷ See, e.g., *Gilbert v. Comm'r*, T.C. Summ. Op. 2007-16 (2007); *Yakubik v. Comm'r*, T.C. Summ. Op. 2008-74 (2008); *Campbell v. Comm'r*, 89 T.C.M. (RIA) ¶ 2006-024 (2006). The availability of relief from taxes on one's own income was expanded in 2012. See I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, § 4.01(7); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01(7).

¹³⁸ I.R.C. §6015(c) (2006).

¹³⁹ Recent changes to the innocent spouse rules by the Treasury Department illustrate inequities in the system. Under the new rules, a requesting spouse only needs to "reasonably expect[]" that the nonrequesting spouse will pay the tax liability "within a reasonably prompt time." Notice 2012-8, *supra* note 16, at § 4.03(2)(c)(ii); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(ii). This changes the rule for when payment of tax is due. All other individual taxpayers must pay by April 15, unless an extension is granted, and a reasonably prompt payment thereafter results in interest due. Not only are innocent spouse recipients not held to the same rule as other taxpayers, they do not have to expect

These rules encourage cheating: keeping the tax evasion from Alice was the best thing Ben could do for his wife and possibly himself.¹⁴⁰ The couple that complied with the law is worse off and might even see their tax rates increase if a sufficient number of couples take the path of Alice and Ben. The unjust enrichment that results from the tax evasion must be minimized to preserve an equitable tax system even if the spouse who benefits the most (by getting the house and being relieved of tax) is more often the vulnerable spouse.

Considering again Jill from the Introduction, she has assets other divorced taxpayers do not have because, during her marriage, Jill's family did not pay the taxes they legally owed.¹⁴¹ It is important that we not cast Jill in the role of a victim of tax oppression simply because she owes taxes. She might be in a hard position and we might justly sympathize with her as a divorced woman, but her position is a better position than it otherwise would be as a result of tax evasion. And if the taxes are too great for Jill to pay, there are generally applicable hardship provisions available to her.¹⁴²

A question that arises from this inter-taxpayer inequity is the extent to which we are comfortable allowing either spouse to benefit from tax evasion. With innocent spouse relief, it is unavoidable that some spouses who benefit from tax evasion will be unjustly enriched after avoiding paying the taxes the couple owes. Critics who want expanded innocent spouse relief often disagree with this characterization of the inter-taxpayer comparison. One critic of joint and several liability on the joint return has argued, "in the tax context, it does not seem particularly unfair that the victim (the government) should bear the burden of collection and the risk of insolvency."¹⁴³ However, although the government receives the tax revenue, other taxpayers are the ones funding the collection process and will bear the loss of government expenditures if the revenue is not collected.

C. *Effect of Relief on Wives*

Innocent spouse relief is gender-neutral in form, as is all of the Internal Revenue Code.¹⁴⁴ Nevertheless, not only was the provision gendered in in-

their spouse to follow the rules either. An innocent spouse is able to avoid interest on taxes that she knew would not be paid on time.

¹⁴⁰ A similar problem troubled Senator Chafee in 1998. Senate Committee on Finance, *Unofficial Transcript of Finance Hearing on Innocent Spouse Tax Rules*, 98 TNT 32-23, 34-35.

¹⁴¹ A nonrequesting spouse can have transferred "disqualified assets" to the requesting spouse, and the requesting spouse will win relief and keep the assets if (i) the nonrequesting spouse abused the innocent spouse or restricted her access to financial information or (ii) the requesting spouse did not have actual knowledge that disqualified assets were transferred. Notice 2012-8, *supra* note 16, at § 4.01(5); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01(5).

¹⁴² See *supra* Part I.B.

¹⁴³ Kahng, *supra* note 6, at 282.

¹⁴⁴ I.R.C. § 7701(p)(1)(3) (2006).

tent as discussed in Part I, it is gendered in its impact: 85.4% of spouses requesting relief and 89.5% of spouses winning relief are wives.¹⁴⁵ Therefore, it is appropriate to examine what innocent spouse relief does for this targeted group. This issue, which intersects wives' public and private lives, offers an opportunity to explore how the government views women in these roles. Moreover, it provides the opportunity to reexamine the complexity of the very question of how best to promote wives' well-being. A significant risk of expansive innocent spouse relief is that, for wives who are not coerced into signing the joint return, the government dismisses wives' valid choices and equates their divisions of marital tasks with presumed incapacity.

Regardless of whether or not one accepts that a goal of the income tax system should be to help the vulnerable, which this author does, it does not necessarily follow that all wives should be relieved of tax liability because of their vulnerability. With respect to tax filing, the question is not as simple as either (1) absolving wives from taxes or (2) treating them as equals with their husbands but (as is often feared) subjecting them to disproportionate liability. A narrower relief draws a line at the degree of vulnerability we as a society accept negates liability.

For Congress to engage in this line-drawing, however imperfect, it must recognize that wives are not in a homogenous position within their marriages. To do so is a positive step for wives because recognizing the different positions of wives validates the gains that have been made by some women while trying to develop those gains further and for more women. To conclude that all wives are sufficiently vulnerable within marriage so as to negate their taxpaying obligations risks reinforcing a culture of dependence that does not hold true for all wives. Although wives are often the more vulnerable spouse within marriage, not all wives are equally vulnerable. The government should recognize some spouses' vulnerability but encourage them, when possible, to minimize the vulnerability, in this case the vulnerability that results from the lack of information about the couple's financial position and inability to perform the civic and legal obligation of filing an accurate tax return and paying their taxes owed.¹⁴⁶

¹⁴⁵ McMahon, *Empirical Study*, *supra* note 33, at 662.

¹⁴⁶ Particularly troubling is that if Congress eliminates joint filing or joint and several liability, spouses will likely lose innocent spouse relief. For example, Bryan Camp argues that the elimination of joint liability "fully resolves the tension" created between spouses. Camp, *Unhappy Marriage*, *supra* note 135, at 1314. However, if spouses allocate tax filing to one spouse, abused and deceived spouses will lose relief without gaining independence. Strangely, even those who recognize that spouses may specialize within marriage think "it is likely" that each will prepare their own return. Larry Jones et al., *For Better, For Worse or For Taxes!*, 6 J. TAX PRAC. & PROC. 35, 38 (2004). If there is a concern that the current system does not properly recognize the plight of some wives, and if for better or worse recognizes that wives are often in vulnerable positions within marriage, we should not expect a system in which the underlying theory is that wives are independent taxpayers and not liable for anything but their own income to give them more sympathy.

Moreover, a limited innocent spouse relief recognizes the complex roles that wives play by reinforcing the idea that wives retain their role as taxpayers even when they marry. If one thinks of marriage as a contract, this view seeks to put each contracting party in the marriage on an equal footing before the government. On the other hand, if one accepts that marriage is more fundamentally a status that spouses assume, the government is expressing its view that wives retain multiple statuses and do not lose these other statuses when they marry. Wives are taxpayers, and as part of their obligation to society they cannot have that obligation subsumed by their husband any more than they can have their obligation to be jurors or voters subsumed.

That Congress has created this type of tax system sends a message to married couples because law has an expressive function.¹⁴⁷ In its best light, the expressive function of joint and several liability holds that wives are equal members in the marriage and capable of being held liable for the couple's debts, as are their husbands. Couples who choose to file a joint return are making the tacit statement that they have such unity, as opposed to spouses who file separately. That equality comes with burdens. Both spouses are deemed to be equally aware of marital finances, at least with respect to the return. Both are deemed to double-check joint tax returns for their accuracy. That this does not always happen is really no different from the fact that taxpayers do not always double-check their tax return preparers' work. In short, simply because the law acts on the principle and expresses a belief that people should be aware of their own tax obligation does not mean that everyone is.

This expression made by the law of joint returns exists even if couples are unaware of the joint return's potential consequences. Taxes and other laws have an expressive function regardless of whether people are aware of how the laws operate. For example, the unrelated business taxable income rule, which taxes otherwise tax-exempt entities engaged in for-profit business, expresses a congressional desire to protect the market from unfair competition.¹⁴⁸ Similarly, the Foreign Investment in Real Property Tax Act, which imposes a withholding tax and reporting obligations on non-U.S. taxpayers who buy U.S. real estate, expresses a congressional desire to minimize foreign holdings of U.S. real estate.¹⁴⁹ Both laws increase the cost of those who want to thwart Congress's expressed will, even if they have not heard of the laws. Therefore, even if only fully understood by Congress, the

¹⁴⁷ See, e.g., Matthew Adler, *Expressive Theories of Law*, 148 U. PA. L. REV. 1363, 1364 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996).

¹⁴⁸ See generally Ethan G. Stone, *Adhering to the Old Line: Uncovering the History and Political Function of the Unrelated Business Income Tax*, 54 EMORY L.J. 1475 (2005).

¹⁴⁹ See generally David J. Herzig, *Rethinking FIRPTA*, 4 COLUM. J. TAX L. (2013) (forthcoming) (proposing ways to increase the amount of tax collected under FIRPTA).

IRS, tax advisors, and academics, the law shapes how the government interacts with people and expresses a vision of how society does (and should) function.

This is not to ignore the fact that wives, and husbands, would benefit from better education of what it means to sign a joint return. The expressive function of the law can be made more salient to taxpayers.¹⁵⁰ Nevertheless, much as joint elections can have “an information-forcing function,”¹⁵¹ so too can the joint return inform married couples of the ideas Congress intends to express with respect to their presumed equality.

Through the expression of jointness, the government encourages both spouses, but particularly wives, to learn about their family’s finances. Studies have found that, regardless of race or class, economic and perceived dependency by wives on their husbands is positively correlated to abuse of those wives.¹⁵² However, it is the economic dependency that keeps wives in these relationships.¹⁵³ For their independence, wives need access to wealth while married, access to marital assets upon divorce, and access to information regarding the wealth to which they might be entitled.¹⁵⁴ The joint return helps fulfill the last function by providing information regarding at least reported income, and the government needs to continue to promote this information sharing.¹⁵⁵

On the other hand, current innocent spouse relief as administered by the IRS and the courts is not conducive to the free flow of information: if wives ask about the family’s economic position but are told nothing, they are more likely to be granted tax relief. For example, in *Wiener v. Commissioner*, the Tax Court granted the wife of the still-married couple innocent spouse relief in part because her husband denied her financial information.¹⁵⁶ One commentator noted, “in general, the more the requesting spouse was kept in the dark regarding the family’s tax and financial matters, the greater the chances

¹⁵⁰ For example, Form 1040 could state above the signature line that, by signing, spouses are assuming joint and several liability.

¹⁵¹ Heather M. Field, *Tax Elections and Private Bargaining*, 31 VA. TAX REV. 1, 39 (2011).

¹⁵² See generally Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359 (1996); Debra S. Kalmuss & Murray A. Straus, *Wife’s Marital Dependency and Wife Abuse*, 44 J. MARRIAGE & FAM. 277 (1982).

¹⁵³ See generally sources cited *supra* note 152.

¹⁵⁴ Spouses who file joint returns have a right to copies of those returns, but no right to see a spouse’s separate return. See I.R.S. Form 4506-T.

¹⁵⁵ Under proportional liability, there is no reason for one spouse to double check the other, and it is reasonable to expect that some spouses would refuse to explain tax items if the other spouse cannot be held liable for them. This cabining of information is risky for wives who might have few other means to financial information.

¹⁵⁶ 96 T.C.M. (CCH) 227, 238 (2008). Although it cannot be known for sure, it is possible that the husband in the case was judgment proof, so that thereafter neither spouse paid the tax.

of gaining relief."¹⁵⁷ Perversely, husbands are doing wives a favor by withholding information.

Those wives with the power to understand their family's finances should do so and government relief programs should encourage them to do so. To undo the consequences of their choices means that society is insuring wives against the risk of not exercising a power they have. This is not to say that all spouses are capable of demanding this information, but spouses who file under duress are already recognized not to have filed a valid joint return. Consequently, the tax system already recognizes spouses as not equally culpable in the case of duress.¹⁵⁸ Moreover, for those who are granted innocent spouse relief, the government holds that the relieved spouse should not be treated as an equal within the marriage, at least with respect to the return. For all other couples who are jointly and severally liable, the government is treating both spouses as equal members of the economic unit.

Much as law has an expressive function, so too does Congress changing the law. A change in the regime would require the federal government to change this law and the message sent by the law. The rhetoric justifying the change is likely to be similar to that used by its critics today. Scholars have claimed that "the current tax system exacerbates dependent spouses' vulnerability"¹⁵⁹; that "it is unfortunately only a slight exaggeration to describe the wife who is assessed with her husband's taxes as doomed to exploitation and abuse"¹⁶⁰; and that the tax system's structure "produces a powerful structural bias against wives."¹⁶¹ This rhetoric states that all wives should not be held liable because of their vulnerable position within marriages, and it risks reinforcing that vulnerable position through its reiteration.¹⁶²

An expansive innocent spouse relief does not simply imply that wives are the more vulnerable spouse but also releases them from an obligation to third parties (the IRS and, subsequently, other taxpayers) because of any degree of vulnerability, whether or not it directly impedes a spouse's ability to meet the obligation. Wives, as the spouses targeted for relief, will be defined as those who lack the ability (either by choice or by force) to accurately file a joint return. As a result, the change signals to the nation the lower value and rights of the country's wives.

¹⁵⁷ William P. Brown, *Recent Cases Expand Potential for Obtaining Innocent Spouse Relief*, 83 PRAC. TAX STRATEGIES 86, 90 (2009).

¹⁵⁸ Some critics argue that Congress should expand procedures for challenging whether a purported joint return was filed jointly or was the product of forgery or duress. See Carlton M. Smith, *How Can One Argue 'It's Not My Joint Return' in Tax Court?*, 124 TAX NOTES 1266 (2009).

¹⁵⁹ Motro, *supra* note 6, at 1533.

¹⁶⁰ Beck, *The Failure of Innocent Spouse Reform*, *supra* note 6, at 939–40.

¹⁶¹ Christian, *supra* note 6, at 537.

¹⁶² This does not mean that we should not call attention to problems of inequality when they arise, but we must be concerned about the message that is sent by the rhetorical and expressive function of proposed changes.

Even if there were a *tabula rasa* upon which to write the tax law, many alternatives to the current regime reinforce the notion that wives, as the lower earning spouse, are not equal within marriage. First, in any regime that imposes the initial tax liability based on earnings, husbands, as the higher earning spouse on average, would have more money reflected on their returns. Annual filings would show who is economically better off and who is not. Second, alternatives also validate those marriages in which husbands do not tell their spouses about the family's finances. This risks providing the state's endorsement of such behavior.

Third, and perhaps most critically, alternatives risk assuming that behavior changes just because the tax law does.¹⁶³ If spouses allocate tasks between themselves based on interest or abilities, an individual filing regime or a regime allocating liability in some fashion is unlikely to result in each spouse completing his or her own return. Moreover, if husbands dominate their families' finances, they may simply fill out their wives' returns or provide their wives' information on joint returns in the new regime, which no longer has a theoretical justification for innocent spouse relief. Thus even the panacea for wives as taxpayers, individual filing, is not a perfect answer for the reasons discussed herein. It is not, and cannot be, a perfect solution for all taxpayers. Although it would likely protect some spouses whose returns only reflect their wages and whose families have no jointly owned assets, for all other spouses the risk is run that a spouse will complete the return improperly, opening the innocent spouse to liability. And with individual filing or allocated liability it is likely to be liability without any innocent spouse relief.

For Congress to isolate liability based on the theory of isolated ownership interests between spouses is also troubling because the nation is moving to valuing both spouses as equal contributors to the marriage in other areas of the law. Proportional liability, under which many wives as the lower-earning spouse would be liable for less than half of the tax due, seems at odds with the movement towards equal divisions of assets at divorce (although the movement is certainly not complete).¹⁶⁴ To the extent we want to move to greater equality of assets, it might be unwise as a political matter to seek protection from the tax liability for those assets.

As a final concern for wives, if wives succeed in having Congress limit their tax liability, it potentially bodes ill for wives in other arenas. Limiting liability signals that wives (or at least increasing numbers of them) are not to be held responsible for the legal documents that they sign. If women want equal access to markets, they must be accountable for their agreements. If Congress legislates that wives cannot be held accountable for the tax returns they sign, it is a small slide on a slippery slope to say that wives should not

¹⁶³ See *supra* note 146.

¹⁶⁴ See AM. LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 815-20 (2008).

be held liable for the mortgages or leases that they sign, if only within the context of marriage.¹⁶⁵ Without their signature and their legal obligation, wives are likely to have less access to markets.

Thus, this movement towards a new coverture is a dangerous message for the government to send, not only to wives and their husbands, but also to third parties. Attempting to protect wives by selectively invalidating their signatures or holding the government to a higher standard when it comes to their signatures as opposed to their mates' is a costly protection, not only in federal revenue but also in women's rights. This dismissal of women's independence may be justified in some cases, but it should be limited with respect to joint filing to the modified innocent spouse relief proposed in the next Part.

III. HOW TO IMPROVE RELIEF BY LIMITING IT

That joint and several liability on a joint return can be a good thing for married couples, society, and even wives, does not mean that spouses should always be made to pay the taxes they owe. As discussed in Part I, there are times when we, as a society, do not want to hold people liable for their taxes. In addition, society agrees that some marriages are sufficiently unequal to relieve one spouse of responsibility for her actions because of the dominance of the other spouse. The question is how to provide relief to those spouses in such a way that relief does not subsume the general rule of strict liability for a taxpayer's return. This Part proposes two forms of relief: a right to implead the other spouse in matters involving the joint return and a revised innocent spouse relief provision.

The IRS's Internal Revenue Manual requires agents to seek taxes from the most culpable spouse first.¹⁶⁶ It is impossible to know for certain whether this process is always applied correctly or that agents can correctly determine a priori which spouse is more culpable. When this process fails, in the period before a paying spouse wins a right of contribution, the nonpaying spouse enjoys the time value of nonpayment. To help joint filers for whom the Manual's ordering does not work appropriately, signers of joint returns should be given a right to implead the other in any proceeding, whether on audit or in litigation, for the liability due on a joint return.¹⁶⁷

¹⁶⁵ This movement has already begun by denying credit cards to non-wage earning wives. See Blake Ellis, *Stay-at-Home Mom Fights New Credit Card Rule*, CNN MONEY (May 16, 2012), <http://money.cnn.com/2012/05/16/pf/credit-cards-stay-at-home-moms/>, archived at <http://perma.cc/0QvaQLCewbP>.

¹⁶⁶ See *supra* note 4.

¹⁶⁷ For a discussion of the right to implead in the context of personal injury torts, see generally W.E. Shipley, *Uniform Contribution Among Tortfeasors Act*, 34 A.L.R.2d 1107 (2011); E.H. Schopler, *Right of Defendant in Act for Personal Injury or Death to Bring in Joint Tortfeasor for Purpose of Asserting Right of Contribution*, 11 A.L.R.2d 228 (2010). Congress has created a similar right, at least in litigation, for taxes due on trust funds. I.R.C. § 6672(d) (2006).

This proposal has broader reach than the right to implead granted in Federal District Courts or the right of intervention in current innocent spouse law.¹⁶⁸ The proposal would apply not only in the U.S. Tax Court, which is not currently governed by the Federal Rules of Civil Procedure, but also before litigation has begun. Moreover, although under current innocent spouse rules, a nonrequesting spouse may intervene in a case involving innocent spouse relief either on behalf of the requesting spouse or opposing the grant of relief,¹⁶⁹ the requesting spouse has no legal power to demand an intervention. If one spouse successfully impleads the other in a proceeding, the requesting spouse compels the participation of the nonrequesting spouse. Thus, this proposal fills in gaps in current law.

An expansive right to implead a spouse with respect to a joint tax return would reduce the collection cost and increase the equity as between spouses or former spouses. Thereafter, payment of the joint liability could be based on relative guilt for the tax evasion or, if there is no culpable conduct, on the relative ownership or benefit of the income. The government would receive its revenue, and the spouses or former spouses, with the aid of the IRS or court as arbiter, could work out how to settle liability between them. Unlike a system of proportional liability that allocates liability for taxes at the time the return is filed, impleading would only apply after the IRS challenges the return and more information is available. Therefore, impleading would not be invoked by the great number of joint filers, reducing its cost of operation. In addition, impleading could be designed to put the burden of locating and allocating the liability on the taxpayer seeking to avoid liability instead of on the IRS or, more accurately, other taxpayers.

Because some spouses will be unable to implead their spouses or former spouses because of the difficulty or expense of locating them, it may be reasonable to require the IRS provide minimal research services to joint filers seeking to implead their spouses, in the form of phone numbers or addresses of last filed tax returns and/or information from driver licenses and passports. This would require amending § 6103 of the Code, which provides that this information is confidential. Congress should evaluate the burden this would impose on the agency and privacy risks to the impleaded spouse before creating this new obligation. Regardless of the IRS's role in the impleading, with this right a greater number of spouses liable for the returns they file should not be left solely responsible for the taxes due.

Relief from the other spouse is unlikely to be sufficient for innocent spouses if the other spouse is judgment proof; therefore, Congress should revise innocent spouse relief for all of the reasons described in Part II. Requesting spouses who win relief under existing innocent spouse relief fall

¹⁶⁸ Fed. R. Civ. P. 14; I.R.C. §§ 6015(e)(4), 6015(h)(2) (2006).

¹⁶⁹ See *Van Arsendalen v. Comm'r*, 123 T.C. 135 (2004); *Fretty v. Comm'r, T.C. Summ. Op.* 2008-76 (2008); *Coleman v. Comm'r, T.C. Summ. Op.* 2004-165 (2004).

into one of two groups.¹⁷⁰ The first group includes spouses who are incapable of validating the information on the joint return because they were coerced in some form. The second are spouses for whom the IRS or the courts show mercy by relieving them of their legally valid tax obligation. The proposal explained in this Part extends greater relief to the former while denying innocent spouse relief to the latter. Under this proposal, this second group who would otherwise be shown mercy is denied relief in order to preserve the fairness of the tax regime. The cases for which relief is to be granted need to be clearly defined if all taxpayers are to be equal under the law.¹⁷¹ Furthermore, to grant a taxpayer reprieve from taxes for reasons unrelated to the act of filing creates arbitrariness in the application of the income tax and "makes it seem more unjust to apply the rule rigidly in the next case"¹⁷²

Thus, this Part proposes that Congress tailor relief to those requesting spouses who were coerced into signing a joint return.¹⁷³ This revision to § 6015 would generally grant relief in the event that the requesting spouse was either deceived about the family's finances as it relates to the tax filing or was abused.¹⁷⁴ Spouses who were not coerced into the filing retain the other generally applicable relief measures discussed in Part I. The critical element of this revised relief is the determination of what it means for a spouse to be coerced and, therefore, innocent of the tax evasion. Not everyone will agree with this proposal's definition of coercion or any other definition of that term. However, even if everyone does not accept this definition, it is for Congress and not the IRS or the judiciary to give meaning to the term "innocent" for congressionally-created tax relief. This proposal pushes Congress to craft a test that measures innocence in an administrable way.

This proposal's definition of coercion derives from situations in which a spouse does not have agency over the joint return. For example, the group of cases that led to the enactment of the current innocent spouse relief involved wives who were held liable for taxes on money that their husbands had embezzled and from which the wives did not benefit.¹⁷⁵ Similarly sympathetic

¹⁷⁰ As mentioned previously, if there is duress as to the signing of a joint return, there is no legally valid joint return. See *In re Hickley*, 256 B.R. 814, 828 (2000).

¹⁷¹ Dan Merkel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004).

¹⁷² Duncan Kennedy, *Form and Substance*, 89 HARV. L. REV. 1685, 1701 (1976).

¹⁷³ Adopting this revised rule, relief would only apply to those who sign a joint return with some degree of freedom. For spouses who sign returns under duress, the returns are, and remain, invalid. See *In re Hickley*, 256 B.R. at 828.

¹⁷⁴ If society chooses to give greater aid to the abused, that aid should be available to all abuse victims and not just those whose spouses cheated on their taxes.

¹⁷⁵ *Wissing v. Comm'r*, 54 T.C. 1428 (1971); *Abrams v. Comm'r*, 53 T.C. 230 (1970); *Sharwell v. Comm'r*, 419 F.2d 1057 (6th Cir. 1969); *Huelsman v. Comm'r*, 416 F.2d 477 (6th Cir. 1969); *Scudder v. Comm'r*, 48 T.C. 36 (1967); *Scudder v. Comm'r*, 405 F.2d 222 (6th Cir. 1968); *Davenport v. Comm'r*, 48 T.C. 921 (1967); *Wenker v. Comm'r*, 25 T.C.M. (CCH) 1237 (1966); *Hackney v. Comm'r*, 24 T.C.M. (CCH) 655 (1965); H.R. REP. NO. 91-1734, at 2 (1970). The innocent spouse relief laws were amended again in 1984 and 1998. See *supra*, text accompanying notes 29-30.

are the cases of spouses who signed returns as a result of physical or emotional abuse from their mates that was not directly related to their signing of the tax returns.¹⁷⁶ Relief from joint and several liability on the joint return should be tailored to these two instances because the inequality in the relationship between the spouses makes it impossible for a requesting spouse to verify the information on the return. However, under existing law, these issues are often overshadowed by others in the determination of relief as a result of the complex balancing of factors that is required.¹⁷⁷ This proposal more appropriately confines relief to its original purpose by focusing on the causes of the inequality that troubled Congress.

The result is also a simpler provision. Focusing on the causes of spouses' inability to meet their tax-filing and tax-paying obligations allows Congress to eliminate the complex weighing of factors that has been created to evaluate the innocence of a requesting spouse. By narrowing the group that can win relief, revised innocent spouse relief provides specific rules for those situations in which there is sufficient inequality of power between spouses to make it impossible for the requesting spouse to have control over the joint return.

Therefore, in the event of a threshold showing of abuse or deception by a requesting spouse, this Article proposes shifting the burden of proof to the IRS to either disprove the claim or to prove an exception discussed below if the IRS seeks to collect from the requesting spouse.¹⁷⁸ To disprove the requesting spouse's claim, the IRS does not need to prove a happy marriage existed, only that the requesting spouse did not meet the requirements provided below regarding abuse or deception at the time the joint return was filed. This shifting of the burden is unusual for most civil tax litigation in which the burden of proof is on the taxpayer, where the taxpayer must prove by a preponderance of the evidence that the IRS's determination of liability is erroneous.¹⁷⁹

There has been a movement away from this traditional allocation of the burden of proof. For example, in the Tax Court, the most frequent location of § 6015 litigation, if the taxpayer proves that the IRS's determination was arbitrary and excessive, the burden to show the correct amount of tax liabil-

¹⁷⁶ Some critics of joint and several liability argue that abuse should be given greater weight than other factors. Gary Fleischman & Sean Valentine, *How to Improve Equitable Relief for Innocent Spouses*, 96 TAX NOTES 874, 877 (2002).

¹⁷⁷ Only 12.6% of cases requesting relief alleged abuse, and it is impossible to determine how many contained claims of deception. McMahon, *Empirical Study*, *supra* note 33, at 695.

¹⁷⁸ For a discussion of the burden of proof in tax cases, see Janene Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT. TAX REV. 61 (2008); John Gardner & Benjamin Norman, *Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases*, 38 WAKE FOREST L. REV. 1357, 1364 (2003).

¹⁷⁹ Tax Court Litigation Detailed Analysis, VII. Trials, D. Burden of Proof, BNA 630-4th T.M. VII-D.

ity shifts to the IRS.¹⁸⁰ Also, § 7491 provides that if the taxpayer introduces credible evidence relevant to ascertaining the taxpayer's liability, the burden of proof shifts to the IRS.¹⁸¹ In this latter instance, however, there are questions regarding whether the burden is shifted in practice.¹⁸² For this Article's proposal to operate justly, a true shifting must occur so that, if someone makes the threshold showing, the default position is tax relief.

A tension exists as to the requirements of the threshold showing. If the threshold is high, few spouses will meet the burden, even if they are the victims Congress intends to relieve of taxes. If the showing is low, common behaviors may qualify for relief and more taxpayers may be induced to commit fraud in order to mitigate their tax obligations. Recognizing these risks, this proposal favors a minimal showing that includes specific allegations of the behaviors targeted for relief that meet the definitions described below. This accomplishes the twin goals of granting relief to deserving applicants while improving the administration of relief.

To be clear, under this proposal, the initial showing by the requesting spouse is minimal. When this initial showing is made, the burden of persuasion shifts to the IRS. For example, a requesting spouse would meet the burden by submitting an affidavit signed under penalties of perjury that claims deception about the facts of the return or abuse at the time of the filing. However, it is insufficient for a spouse to claim a power differential in the marriage at the time the return was filed. Something more specific is necessary to demonstrate that the requesting spouse could not be expected to know or seek to know about the accuracy of the return the spouse signed.

For purposes of this threshold showing, the claim of abuse should be defined broadly to include physical and non-physical abuse, a position the Treasury Department recently endorsed.¹⁸³ Congress should define abuse to include efforts to control, isolate, humiliate, and intimidate the requesting spouse or to control family finances by preventing the requesting spouse from gaining access to financial information through reasonable channels. Under existing relief, it is hard to decipher from the cases what claim or level of abuse is sufficient to outweigh other considerations weighing against relief. Details of abuse are necessary and, preferably, result in police involvement, although the opinions rarely note a significant amount of detail

¹⁸⁰ Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 417 (1999). The burden is higher on the taxpayer in a refund case. *Id.* at 417–18. For more information on the burden of proof, see Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183 (1996).

¹⁸¹ The taxpayer must have substantiated items, maintained records, and cooperated with the IRS. I.R.C. § 7491 (2006).

¹⁸² Johnson, *Dangers of Symbolic Legislation*, *supra* note 180; Philip N. Jones, *The Burden of Proof 10 Years After the Shift*, 121 TAX NOTES 287 (2008).

¹⁸³ Notice 2012-8, *supra* note 16, at § 4.03(2)(c)(iv); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(iv).

regarding the abuse.¹⁸⁴ This lack of guidance for abuse victims puts undue pressure on them in weighing their chance of success before seeking relief.¹⁸⁵ For purposes of the threshold showing for this proposal, details of abuse at or before the time of the filing should be sufficient to shift the burden of proof to the IRS.

Although the Treasury Department recently adopted a broad definition of abuse, under the current balancing required to win innocent spouse relief, abuse can be outweighed by other factors.¹⁸⁶ Thus, despite a taxpayer having been coerced into signing the return, relief might be denied. This denial is more likely if a requesting spouse is not experiencing economic hardship. From a theoretical perspective, it is unjust to say that wealthier abused spouses are less victims of abuse than poor abused spouses, even though wealthier victims may have some amount of economic resources to leave the abusive relationship. The issue of coercion over the joint return is the same for each victim. That judgment should be taken out of the equation at least with respect to this issue; if abuse is the trigger for relief it should trigger relief for everyone equally.¹⁸⁷

Potentially the more troubling showing from Congress's perspective is the deception showing, because spouses looking to escape liability might be more willing to claim deceit than abuse. To minimize the number of taxpayers who exploit the provision, deception must be framed in terms of whether a spouse was coerced into signing a faulty return or into believing the tax obligation was paid when it was not. For this showing, the requesting spouse must have reviewed the return and the guilty spouse must have made an overt statement with respect to specific items on the return that was inaccurate, except in the limited context that the nonrequesting spouse committed fraud without the requesting spouse's knowledge. In the case of fraud, the requesting spouse must deny knowledge of the fraud. It is insufficient for the nonrequesting spouse to have stated that the return was accurate because this would absolve the requesting spouse from her obligation to review the return.

Some additional restrictions should be imposed before allegations of deception shift the burden of persuasion. First, the nature of the deception

¹⁸⁴ See, e.g., *Knorr v. Comm'r*, 86 T.C.M. (RIA) ¶ 2004-212 (2004); *Collier v. Comm'r*, 81 T.C.M. (RIA) ¶ 2002-144 (2002); *Fox v. Comm'r*, 89 T.C.M. (RIA) ¶ 2006-024 (2006).

¹⁸⁵ The initial showing may present a difficult choice for some abused spouses who are deciding whether to seek relief. Even though the threshold is purposefully low, a requesting spouse with children who lives with an abuser risks losing her children if she admits the abuse. There is no equitable alternative if joint and several liability is to be retained. If spouses want mitigation of their taxes under a regime that does not require economic hardship, they must admit the problem.

¹⁸⁶ Notice 2012-8, *supra* note 16, at § 4.03(2); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2).

¹⁸⁷ The IRS may collect from a wealthy abused spouse if the spouse has property that is traceable to the evasion. This source of liability eliminates the class-based judgment of who is abused.

must be such that it would cause a reasonable person to think the return was accurate as filed. The default is that the IRS accepts the requesting spouse's determination of reasonable reliance; however, using the same common law theories of reasonable reliance as otherwise apply, the IRS must be allowed to challenge the reasonableness of the reliance. Second, the deception must be as to fact and not to law. Although the tax law is complicated, and some may complain unknowable, for our tax system to work people cannot be allowed to claim ignorance of the law as an excuse for tax evasion.¹⁸⁸

At this time, only a small subset of the 55,000 annual cases involve abuse or deception, although either allegation would improve a taxpayer's chance of winning under the current balancing of factors for relief.¹⁸⁹ Therefore, although it is possible that there would be an increase in requests alleging abuse and deception if the proposal is enacted, the increase should not be large. So that Congress can learn whether joint filers are likely exploiting this provision, Congress should require that the IRS calculate how many requests have included these allegations in the past three to five years and compare this data to future requests. If the number of requests grows significantly, there is a greater chance that people are inappropriately claiming these factors; and the definitions of abuse and deception may need to be refined.

Of course, there remains a chance for the exploitation of this provision as it exists under current innocent spouse relief and any mitigation provision. However, under the proposed regime, the IRS will be able to devote its resources to those who are inappropriately claiming relief instead of evaluating every request under the myriad facts and circumstances tests. This proposal's categorization of ruled relief frees the IRS from the burden of determining for all requesting spouses whether relief should be granted. Instead, the IRS must engage in substantial fact-finding only when it seeks to challenge a claim for relief. Only if the facts raise questions regarding the validity of the request should the IRS invest the resources to confirm or deny relief. The default position would no longer demand government action. This does mean that some premium in the form of unwarranted tax relief will be paid to requesting spouses who complete a good affidavit and that some inequity will be created. This is, however, similar to the current premium for those completing the relief form requesting existing innocent spouse relief.

To the extent that the IRS chooses to expend its resources seeking unpaid taxes from a requesting spouse, this proposal provides the IRS two avenues to do so. The IRS could challenge the initial showing by disproving the existence of abuse or deception at or before the filing of the joint return. Alternately, the IRS could prove one of the following three situations in which it is equitable to collect from an otherwise innocent spouse. First, the

¹⁸⁸ This is not currently an excuse in other types of tax cases because of strict liability. See *supra* note 103.

¹⁸⁹ See *supra* note 63.

IRS should be able to collect from a spouse who successfully passes the initial threshold to the extent that it can prove that the requesting spouse earned the income and that the nonrequesting spouse did not abusively control the family's finances. Second, the IRS should be able to collect to the extent that it can prove that the requesting spouse significantly benefited from the tax evasion through the acquisition or retention of property. Finally, the IRS should be able to collect to the extent that it can prove that the requesting spouse created the error on the return or caused the underpayment of tax.

The first exception to relief is self-evident. A strict liability tax system requires that taxpayers pay taxes on their own income. However, under this proposal, some requesting spouses will avoid tax on income they have earned themselves if the other spouse abusively controlled the family's finances. Although this negates strict liability for one's taxes, all relief measures do this when their criteria are satisfied. In this version of innocent spouse relief, the exception is created for abused spouses on the grounds that the requesting spouse had insufficient agency to make a choice with respect to taxes for the period covered by the return. Unless there is property or the proceeds of property from that period, the greater social good is produced by offering relief, even from taxes on the spouse's own income.

The second exception to relief is in the event the requesting spouse significantly benefited from the tax evasion through the acquisition or retention of property. This exception reduces the unjust enrichment enjoyed by requesting spouses who would otherwise be relieved of the taxes they legally owe. If a spouse benefits from the evasion of tax, the spouse's property that is traceable to that tax period is collectible as long as the spouse has the same property or property that was purchased with the proceeds from the sale of the property. Because money is fungible, the requirement of tracing is suspect. However, to allow the IRS to collect in every case unless the nonrequesting spouse absconded with the funds seems unjust as well as politically infeasible.

A balance is therefore necessary between the desire to prevent unjust enrichment to ensure that all taxpayers are treated the same and the two desires to make relief administrable and to relieve coerced spouses who either did not choose or did not enjoy the prior consumption. Therefore, even though a requesting spouse might have benefited from expensive dinners or European vacations, this Article's proposal would relieve that spouse from paying the taxes on those benefits. On the other hand, if a requesting spouse owes taxes for a given year and, during that year, made house payments, the IRS would be able to exercise its normal collection powers against the house. Whether the IRS can force the sale of the house depends on the generally applicable rules for collection discussed in Part I. To the extent that a requesting spouse receives property that is necessary to maintain a basic level of income, protection of that property is available with the other relief measures also discussed in Part I.

Third, under the proposal, the IRS can collect from an abused or deceived spouse if the spouse instigated the tax evasion or underpayment of tax. The purpose of this exception is to recognize that the requesting spouse may perform the culpable conduct. An empirical study of innocent spouse cases decided between 1998 and 2011 found that in seventeen cases wives prepared the return and sought relief (six winning) and in thirteen cases husbands prepared the return and sought relief (three winning).¹⁹⁰ It is not the intention of this exception to require a requesting spouse to pay taxes if the spouse completed the return incorrectly because the nonrequesting spouse forced the requesting spouse to do so. Instead, this exception, like the others, focuses on the spouse's level of control over the completed return.

Even with the three exceptions to relief, some spouses will misuse this revised innocent spouse relief. That this proposal shifts the burden of proof onto the IRS increases the cost to the IRS of collecting from spouses inappropriately requesting relief. As a result, it creates an incentive for some who are not abused or deceived to claim abuse and deception.¹⁹¹ This proposal also makes it unlikely that, except in blatant cases of taxpayer misuse, the government would pursue spouses who make the threshold showing, especially if the IRS can pursue the other spouse. Therefore, some spouses who should not win relief under a complete facts-and-circumstances review will avoid liability. To the extent that we accept the need for administrable relief, this is a cost that we must accept, the goal being to minimize the ease with which the relief provision can be cheated. There is also no reason to think that similar, or even worse, cheating does not occur under the current relief system.

To reduce the amount of cheating under the proposal, nonrequesting spouses must retain the right to intervene.¹⁹² Because one of the objectives of the proposal is to get the IRS out of the job of contesting abuse or deception, the burden of proving or disproving the existence of the factors should rest on the nonrequesting spouse when possible and not the IRS. This is despite the tension in allowing potentially abusive and deceptive spouses an arena to further abuse or deceive their spouses or former spouses. Although the Tax Court has held that granting innocent spouse relief does not impose a burden on the nonrequesting spouse because he was jointly and severally liable,¹⁹³

¹⁹⁰ McMahon, *Empirical Study*, *supra* note 33, at 671.

¹⁹¹ Admittedly, it is unfortunate that some unscrupulous tax evaders will claim abuse when they have not been abused while some who are abused will not be willing to claim relief.

¹⁹² After *Villela-Wilcox v. Comm'r*, T.C. Summ. Op. 2009-75 (2009), it is questionable whether an intervenor can prevail once the government concedes relief. In *Villela-Wilcox*, the court found the intervenor to be the more credible witness and the "intervenor's evidence show[ed] petitioner's connection and involvement with intervenor's participation" in the tax shelter. *Id.* Nevertheless, the court concluded that "intervenor's evidence is persuasive, but it is not so compelling to require that the settlement between respondent and petitioner be disregarded." *Id.*

¹⁹³ See *Holloway v. Comm'r*, 322 Fed. Appx. 421, 423 (6th Cir. 2008); *Baranowicz v. Comm'r*, 432 F.3d 972, 974 (9th Cir. 2005).

relief can shift the taxes on the income enjoyed by the requesting spouse onto the nonrequesting spouse as discussed in Part II. The result of shifting the tax burden is just, if in fact the nonrequesting spouse abused or deceived the requesting spouse. It is not just if a spouse fabricates the necessary showing. If the nonrequesting spouse does not have the opportunity to present evidence that the requesting spouse is fabricating a claim for relief because there is no right to intervene, the injustice cannot be avoided.¹⁹⁴ When the nonrequesting spouse is judgment proof and therefore has no incentive to intervene, it is up to the IRS to devote the resources it currently spends investigating all innocent spouse claims to preventing this injustice.

Finally, revised innocent spouse relief should completely negate the joint return for both spouses, instead of the current allocation of the liability on that return.¹⁹⁵ Each spouse's liability would be recalculated as though the spouses filed as married filing separately, which has less favorable tax filing brackets and at the cost of certain tax credits.¹⁹⁶ Because joint and several liability is a cost imposed on those couples who file jointly, eliminating joint and several liability should come at the cost of the joint return. Therefore, if a spouse chooses after the fact to claim not to support the joint return, the couple suffers the consequences of that choice.¹⁹⁷ Eliminating use of the joint filing brackets may mean that an innocent spouse has a larger tax obligation for her share of income, but this would have been the result if she had the ability to refuse to sign the incorrect return *ex ante*.

The mechanics of this rule-based relief are significantly simpler administratively than those of current relief. Requesting spouses simply make a threshold showing that they were abused or deceived to win relief unless the IRS disproves their claims or there are extenuating reasons to collect from the requesting spouse. This process makes the method to obtain relief clear to potential requesting spouses and frees the IRS from investigating every claim for relief.

¹⁹⁴ Of course, couples might collude (for example, a wealthy spouse could claim abuse if the other spouse is judgment proof). That the IRS has the ability to collect from the requesting spouse in certain circumstances reduces this risk.

¹⁹⁵ The IRS tried to equate innocent spouse relief with married filing separately but the Tax Court disagreed. *Wiest v. Comm'r*, 85 T.C.M. (CCH) 1082, 1085 (2003). At least one person within Congress objected to this idea in 1998. 144 CONG. REC. 2045 (1998) (statement of Sen. Bob Graham).

¹⁹⁶ This may raise the aggregate tax liability and an abuser might offer to reimburse the abuse victim for the tax bill if she does not go forward with her innocent spouse claim. These results do not thwart the objective of the proposal.

¹⁹⁷ This does mean that a non-income earning spouse might "stick it" to the income earning spouse after a divorce, but that risk primarily exists if the income-earning spouse did not pay the taxes owed on that income and abused or deceived the spouse. Those factors should reduce the sympathy we have for the income-earning spouse.

CONCLUSION

Joint and several tax liability raises the issue of whether Congress should value equity for individuals over administration of the tax system. This issue pervades the income tax and is one that society is loath to answer. Should the tax system be made to work for the greatest number, understanding that some people will be treated inequitably based on their individual circumstances, or should we aim for individualized equity, understanding that the system will cost more to operate and open itself to greater tax evasion?

In the case of innocent spouse relief, in the attempt to help wives, relief might well cause more harm than good. For those spouses targeted for relief, we are creating a dangerous double standard. The reason for a more protective tax regime is that advocates worry that it is unfair to presume that wives can meaningfully evaluate the returns they sign. It is hard to see how this fails to send a signal to the nation that wives are not, or are at least not considered to be, equal members in marriage. This is not a message that we want Congress to send.

More streamlined rules can provide relief in instances in which Congress seeks to provide protection because of the inequality within some marriages. The result balances the objectives of recognizing wives' agency, protecting coerced wives, and defending federal revenue. In the process, it also encourages wives to become educated about the couple's finances. Unfortunately, as will always be the case with tax laws and tax relief, there will be stories of inequity in the application of the proposed relief, both by the government and taxpayers. And, although the proposal would fix many of the difficulties that arise when couples file joint returns, it cannot be the end of this debate. As people adapt both their behavior and their claims for relief to the law, the law may need to change. For now, however, if the government introduces this new policy by providing proper information to joint filers, taxpayers can understand the consequences of their actions and, as a result, move to a more perfect union.

DOUBLE JEOPARDY? AN EMPIRICAL STUDY WITH IMPLICATIONS FOR THE DEBATES OVER IMPLICIT BIAS AND INTERSECTIONALITY

JOAN C. WILLIAMS^{1*}

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I think gender biases work differently for women of different groups—race/ethnicity, immigration status, class of family of origin, and language. It’s not just heightened for “other” women. For

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* Because the consent form used in the NSF study imposed strict confidentiality requirements for the protection of the interviewees, JLG editors were not permitted to review the NSF interview transcripts during the cite-checking process. Although all quotations were double-checked by an authorized member of the author’s research team, the Harvard Journal of Law & Gender cannot independently attest to the content of the cited material.

example, the stereotype that women of certain groups have “too many babies” affects perceptions of which women take time for family leave. (Focus group participant, 2007)

INTRODUCTION

This Article reports on an empirical study undertaken with funds from the National Science Foundation, which involved interviews of sixty women of color in science, technology, math, and engineering (hereafter, the “NSF study”).² My research started with an extensive literature review of experimental social psychology studies of gender bias, which I have organized into the Four Patterns of Gender Bias and will explicate further later in the Article.³ Then, I ran two studies. In the first, I interviewed sixty-seven women whom I met through my networks and who had impressed me with their professional savvy (hereafter, the “Wise Women study”). Of these, fifty-six were white women and eleven were women of color. I then obtained a grant from NSF to do a similar study of women of color. The NSF study interviews, conducted by Erika R. Hall, then a graduate student at Northwestern University’s Kellogg School of Management, included twenty interviews of Africans or black Americans, twenty of Asians or Asian Americans, and twenty of Latinas or women born in Spanish-speaking countries. The methodology used for both studies was designed to build a bridge between experimental social psychology and women’s everyday workplace experience. While this Article focuses on the NSF study, the Wise Women study is the focus of a forthcoming book, *What Works for Women at Work: Four Patterns Working Women Need to Know*, co-written by Rachel Dempsey and myself.⁴

The NSF study has important implications for two ongoing debates within the literature: the controversy over implicit bias and the ongoing investigations of intersectionality. Regarding the first, the implicit bias debate explores a particular strain of research in cognitive psychology that measures bias by using the implicit association test, or IAT.⁵ The IAT measures the existence and strength of racial, gender, and other biases by measuring “response latency” (i.e., how long it takes to make a stereotype-consistent association, such as “black men” and “crime,” as compared with the time

² The author gratefully acknowledges the generous support of the NSF through NSF Grant #EHR 1106411, which funded the research reflected in this Article. The views expressed here are those of the author, not those of the NSF.

³ For more on the Four Patterns, see GENDER BIAS LEARNING PROJECT, <http://www.genderbiasbingo.com> (last visited Nov. 25, 2013), *archived at* <http://perma.cc/OYBVVUS67L>; THE NEW GIRLS’ NETWORK, <http://www.newgirlsnet.com> (last visited Nov. 25, 2013), *archived at* <http://perma.cc/0yJeE4BPgj4> (including an extensive bibliography of the social science behind the Four Patterns).

⁴ WILLIAMS & DEMPSEY, *supra* note 1 (discussing both the Wise Women Study and the NSF Study).

⁵ See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit> (last visited Nov. 8, 2013), *archived at* <http://perma.cc/0j8QDxGPxun>.

needed to make a stereotype-inconsistent association, such as “black men” and “crochet”).⁶ IAT advocates often stress that, while discrimination used to be open and explicit, today it is subtle and unconscious.⁷ In fact, IAT critics take this claim at face value. To illustrate, Gregory Mitchell and Philip Tetlock assert that “prejudice, once overt, is now largely covert, indeed, so covert that possessors of the new prejudice are themselves unaware both of the contents of their own minds and of how these contents bias their judgments of protected-category groups.”⁸ Another prominent critic, Amy Wax, asserts that unconscious discrimination is the “most pervasive and important form of bias operating in society today.”⁹ Wax further argues that the law should not allow for recovery on the basis of bias that is subtle and unconscious, contending that it incentivizes employers to expend resources to eliminate bias without yielding any benefits to employees.¹⁰ After all, people cannot change behavior of which they are not even aware.¹¹

While the IAT is an important tool, it has significant weaknesses as applied to the law that can be remedied by a deeper qualitative examination of how bias plays out in everyday life. The NSF study is designed to accomplish this goal. It remedies some key problems posed by law reviews’ recent over-emphasis of the IAT. Perhaps most importantly, the NSF study provides a succinct answer to a central question raised by those who have challenged the use of implicit bias evidence in court cases. These critics have worried that experimental studies, either performed online or in university labs, do not reflect actual experiences in workplaces.¹² The NSF study suggests, however, that they do. This implication is shown by the fact that when the NSF study asked working women whether they had encountered any of the previously mentioned patterns of gender bias, 96% reported they had.

The NSF study also draws into question the common assertion that most gender and racial bias is now subtle. As this Article will show, some of

⁶ See, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006) [hereinafter Eberhardt et al., *Looking Deathworthy*] (finding that a defendant who is perceived as more stereotypically black is more likely to be sentenced to death in cases involving a white victim); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 880 (2004) [hereinafter Eberhardt et al., *Seeing Black*] (finding that subjects primed with “black face” were faster to recognize crime related-objects than those primed with “white face”).

⁷ See, e.g., Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 316–17 (2000) (stating that while racism in America has declined, subtle forms of prejudice remain); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 845 (2001) (stating that “overt” forms of prejudice have declined while subtle forms of prejudice continue).

⁸ Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023–24 (2006).

⁹ Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999).

¹⁰ *Id.* at 1180–91.

¹¹ *Id.*

¹² See, e.g., *id.* at 1140–41; Mitchell & Tetlock, *supra* note 8, at 1028–34.

the bias women reported was subtle, but much was not subtle at all. Furthermore, the NSF methodology addresses problems that have resulted from IAT advocates' tendency to blur the distinction between the relatively few and recent studies that use the IAT and the much larger universe of experimental social psychology.¹³ Conflating these two quite different universes has had negative consequences for the development of equality law. Most notably, IAT critics Mitchell and Tetlock have attacked the use of stereotyping evidence in general through a critique of the methodology (i.e. the IAT).¹⁴ Their attack has been influential.¹⁵ By reconnecting IAT studies with earlier stereotyping studies and by presenting experimental social psychology as a long-established field of study that has well-replicated findings, the NSF methodology has obvious advantages. These advantages are especially pungent given the law's reliance on precedent and its stringent rules for the admittance of expert testimony.

Regarding the intersectionality debate, the approach to stereotyping evidence developed in this Article has important implications not only for the debate about implicit bias, but also for the debate about how the experience of women of color differs from that of white women.¹⁶ An early contribution to this debate was the "double jeopardy" hypothesis, which posits that minority women's membership in two subordinated groups adds or multiplies their disadvantage.¹⁷ The double jeopardy metaphor, having originated in the 1970s, has been largely replaced by "intersectionality" theory, first advanced by law professor Kimberlé Crenshaw in 1989.¹⁸ Intersectionality theorists have further argued that the double jeopardy model is too simple¹⁹

¹³ See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1182 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006).

¹⁴ Mitchell & Tetlock, *supra* note 8, at 1029–34.

¹⁵ See *infra* text accompanying notes 166–78.

¹⁶ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143 (1989), for discussion of the lack of protection black women endure when their experience of discrimination differs from that of both white women and black men.

¹⁷ See, e.g., Cynthia Fuchs Epstein, *Black and Female: The Double Whammy*, 7 PSYCHOL. TODAY 57 (1973); Elizabeth Almquist, *Untangling the Effects of Race and Sex: The Disadvantaged Status of Black Women*, 56 SOC. SCI. Q. 129 (1975); Pamela Trotman Reid, *Feminism versus Minority Group Identity: Not for Black Women Only*, 10 SEX ROLES 247 (1984); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988). Similarly, expectation states theory in social psychology posits that women of color face the aggregated performance expectations for race plus gender, weighted by relevance to the task at issue. Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637, 642 (2001).

¹⁸ See Crenshaw, *supra* note 16, at 140.

¹⁹ See, e.g., Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSP. ON POL. 63, 70 (2007); Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Dis-*

with two basic points emerging: one, that gender bias is a common experience for women of color, and two, their experience of gender bias often differs from that of white women. The NSF study suggests that the first point is indeed correct: 100% of the women of color who were interviewed recognized one or more patterns of gender bias. The NSF methodology also confirms that the experiences of women of color differ from those of white women. Yet, the NSF study goes further and allows us to identify some specific ways in which the experience of gender bias differs for blacks, whites, Latinas, and Asian Americans. This new level of specificity shows the promise of a turn to social science in critical race theory.

This Article proceeds in three parts. Part I presents the findings of the NSF study, explicating how women in each group experienced gender bias, often in ways that differed from each other. Part II examines the implications of these findings for the debate in the legal scholarship over the use and value of evidence of implicit bias in employment discrimination cases. Part III then discusses the implications of the NSF study for the ongoing debate on intersectionality, a discussion that has particular implications for women of color who sue their employers for employment discrimination.

I. THE NSF STUDY

A. *Methodology*

The NSF study involved interviews of sixty women of color in science, each lasting about one hour and fifteen minutes. Most of the interviewees were professors in science, technology, engineering, or math, also known as “STEM.” Of the women interviewed, twenty were black, twenty were Asian American, and twenty were Latina.

The interview protocol was based on an extensive literature review of over 100 studies of gender bias, most of them involving paper-and-pencil studies performed in a lab. These studies were organized into four basic patterns of gender bias: Prove-It-Again!, the Tightrope, the Maternal Wall, and Tug of War.

Prove-It-Again! refers to the fact that women as a group must provide roughly twice as much evidence of competence as men in order to be seen as equally competent.²⁰ As a result, women often find they have to prove themselves over and over again. Prove-It-Again! lumps together many forms of descriptive bias that reflect assumptions about how women will behave, in-

tinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities, 59 *SEX ROLES* 377, 380 (2008).

²⁰ Karen S. Lyness & Madeline E. Heilman, *When Fit Is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 *J. APPLIED PSYCHOL.* 777, 778–79 (2006).

cluding leniency bias,²¹ attribution bias,²² and casuistry.²³ Because the typical occupant of a high-powered job is and has always been a man, women often are not seen as good a "fit" for high-powered jobs.²⁴ This "Lack of Fit Model"²⁵ means that women often have to provide more evidence of competence than men in order to be seen as equally competent.²⁶ The Prove-It-Again! pattern has been documented by scores of studies that show, for example, that people often perceive men's successes are attributable to skill and women's to luck,²⁷ that women's mistakes tend to be noticed more and remembered longer,²⁸ that objective requirements tend to be applied rigorously to women but leniently to men,²⁹ that women tend to receive polarized evaluations,³⁰ and that people tend to value more highly whatever qualifications men have.³¹ To illustrate, for jobs requiring both education and experience, subjects will choose a man over a woman, citing experience as the reason, if he has more experience and she has more education.³² Conversely, subjects will also choose the man over the woman, citing education, if he has more education and she has more experience.³³

It is important to recognize that Prove-It-Again! stems from status differentials.³⁴ Consequently, it is triggered by race as well as gender. Blacks,

²¹ See Marilynn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS TACTICS 160, 166 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

²² See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161 (1995), for a comprehensive introduction to attribution bias.

²³ See Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 817 (2004). See generally Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665 (1999).

²⁴ See Peter Glick, *Trait-Based and Sex-Based Discrimination in Occupational Prestige, Occupational Salary, and Hiring*, 25 SEX ROLES 351, 353 (1991).

²⁵ Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORGANIZATIONAL BEHAV. 269, 269 (1983).

²⁶ See Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANNUAL REV. SOC. 21, 28 (2000) (classic study of double standards); Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 550 (1997) (women have to provide roughly twice the evidence of competence as compared to men in order to be seen as equally competent).

²⁷ Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507, 508 (1996).

²⁸ Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. SOC. BEHAV. & PERSONALITY 6, 6 (1995).

²⁹ Brewer, *supra* note 21, at 166.

³⁰ Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Out-Group Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 695 (1980).

³¹ Norton et al., *supra* note 23, at 821.

³² *Id.*

³³ *Id.*

³⁴ For a discussion of how gender functions as a status differential, see Cecilia L. Ridgeway, *Status in Groups: The Importance of Motivation*, 47 AM. SOC. REV. 76 (1982).

too, must provide roughly twice as much evidence of competence as whites in order to be seen as equally competent.³⁵ The same may well be true of Latinos, although I am not aware of any studies. With Asian Americans, the situation is somewhat more complicated, as will be discussed further later.³⁶

The Tightrope is prescriptive in nature in that it stems not from assumptions about how women do behave but from assumptions about how they *should* behave.³⁷ The Tightrope reflects that high-status jobs, including that of scientist, are seen not only as male but also as masculine.³⁸ As competence in such work overlaps heavily with traits coded as masculine, women must behave in traditionally masculine ways in order to be seen as competent. However, women who behave too masculinely often are seen as “aggressive” or, more generally, as lacking social skills.³⁹ Consequently, women have to “walk a tightrope” between appearing too feminine (liked-but-not-respected) or seen as too masculine (respected-but-not-liked).⁴⁰ Of course, in order to thrive professionally, professionals typically must be both liked *and* respected.⁴¹

The Tightrope actually consists of two quite different types of problems. First, women face “too feminine” problems when they behave in ways that display undervalued feminine traits, whether because that is the way they were brought up or because they face gender-normalizing pressures within the workplace to conform to traditionally “feminine” standards. Women who contest pressures to remain in service roles, or who otherwise resist gender pressures to adhere to narrowly cabined feminine roles, may well walk straight into the second type of problems. These problems consist of being perceived as “too masculine,” including allegations that they are “not team players” or are “prima donnas” (i.e. not as selfless as women are expected to be),⁴² or that they are “too aggressive” or have “sharp elbows”

³⁵ Biernat & Kobrynowicz, *supra* note 26, at 554.

³⁶ See *infra* text accompanying notes 109–38.

³⁷ See Burgess & Borgida, *supra* note 23, at 665–66. See generally Deborah A. 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 Gender Stereotypes*, 26 PSYCHOL. WOMEN Q. 269, 279–80 (2002) (providing an informative introduction to prescriptive bias); Laurie A. Rudman et al., *Status Incongruity and Backlash Effects: Defending the Gender Hierarchy Motivates Prejudice Against Female Leaders*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 165, 166 (2012) (discussing gender stereotypes as “gender rules”).

³⁸ See Glick, *supra* note 24, at 364.

³⁹ See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35, 251 (1989) (describing the “catch-22” that women face as “out of a job if they behave aggressively and out of a job if they do not”).

⁴⁰ See Susan T. Fiske et al., *(Dis)respecting versus (Dis)liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. SOC. ISSUES 473, 476–77 (1999).

⁴¹ See generally Susan T. Fiske et al., *Universal Dimensions of Social Cognition: Warmth and Competence*, 11 TRENDS COGNITIVE SCI. 77 (2007).

⁴² See, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175, 1188 (E.D. Pa. 1990) (referring to discrimination plaintiff as a “prima donna”).

(i.e. are not as amiable and yielding as women are expected to be).⁴³ Women leaders, in particular, often encounter “too masculine” problems because the attributes expected of leaders do not overlap with the attributes expected of women.⁴⁴ One particularly striking study found that women described as effective managers were also seen as bitter and selfish despite the lack of signals of such qualities in the scenarios presented to experimental subjects.⁴⁵ Women of color walk a Tightrope that differs from that walked by white women in complex ways.⁴⁶

The Maternal Wall consists of both descriptive and prescriptive bias. The descriptive bias aspect reflects the perception that if women in general do not seem a good fit for the “hard driving professional,” mothers seem an even poorer one. Consequently, motherhood triggers powerful negative competence and commitment assumptions.⁴⁷ When subjects were given identical resumes and one but not the other was a mother, the mother was 79% less likely to be hired, only half as likely to be promoted, offered an average of \$11,000 less in salary, and held to “harsher performance and punctuality standards.”⁴⁸ If women encounter descriptive bias based on the assumption they will behave like “typical” mothers, they also face strong prescriptive bias if they do fail to behave as mothers “should.” Consequently, mothers who are indisputably competent and committed face more workplace backlash than mothers who portray ambiguous information regarding their level of competence and commitment.⁴⁹

The Tug of War occurs when gender bias against women turns into conflicts among women. The most obvious example is when women perceive that there is room for only one, or a few, women at the top. They may well end up undercutting each other to be that one woman. As a result, the Tug of War can play a role in shaping office politics, especially considering women who experience gender bias early in their careers tend to distance themselves from other women and resist identification based on their gen-

⁴³ See Williams & Dempsey, *supra* note 1 (manuscript at 70–72); Pamela J. Bettis & Natalie G. Adams, Nice at Work in the Academy 2, 16 (Feb. 3, 2010) (unpublished manuscript) (on file with author). Alice Eagly and Stephen J. Karau describe the Tightrope, which they define somewhat differently than I do, as two types of prejudice facing women: negative evaluations of women’s potential for leadership and negative reactions to actual leadership behavior by women, due to the conflict with expectations for women’s behavior. See Alice Eagly & Stephen J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 *PSYCHOL. REV.* 573, 576 (2002).

⁴⁴ See Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 *PSYCHOL. BULL.* 3, 16–19 (1992).

⁴⁵ Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 *J. APPLIED PSYCHOL.* 935, 941 (1989).

⁴⁶ See *id.*

⁴⁷ See *infra* note 49 and accompanying text.

⁴⁸ Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 *AM. J. SOC.* 1297, 1316–17 (2007).

⁴⁹ Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 *GENDER & SOC.* 616, 639 (2010).

der.⁵⁰ At a subtler level, as each woman tries to navigate her own path between assimilating into masculine traditions and resisting them, women's different strategies divide them. While some women are "tomboys" who just want access, to play the game the boys play, others are "femmes" who want to preserve more of the traditions of femininity.⁵¹ These varying strategies often pit women against each other. So, too, can motherhood, as reflected in "mommy wars" in which women often engage in conflict about the "right" way to be a mother.

Some provisos: the analysis that follows is an exploratory study that simplifies the experience of women of color in many ways. It lumps them into three groups—Latinas, Asian Americans, and black women—that erase many important differences within each group. This erasure is easiest to see with Asian Americans, a group that includes descendants of people from China, Japan, Korea, and India, to name just a few of the highly diverse Asian countries from which individuals have emigrated to the United States.⁵² Latinas include women from a wide range of racial and ethnic identities, ranging from Americans in Puerto Rico to Portuguese-speaking Brazilians. The group of black women includes everyone from recent immigrants to women whose ancestors were brought to the United States in the seventeenth century.⁵³ The categorization of minorities into categories like Asian American, Latina, and black often does more to describe stereotypes white people have of people of color than it does to describe identities experienced by individual people; although, of course, it is complicated considering the role that the experience of stereotypes can play in the shaping of identity. Nonetheless, these categories are widely used in the study of race bias, and I will be using them here.

In addition, because the study interviewed scientists, it involved not only Americans but also immigrants and foreigners teaching in American universities. For reasons of confidentiality, we do not distinguish between Americans and non-Americans even though the two groups' experiences are often very different. Furthermore, because the climate for women is particularly chilly in science, some of the findings reported here may not hold for women in other professions. Of course, the workplace climate for hourly

⁵⁰ See Belle Derks et al., *Do Sexist Organizational Cultures Create the Queen Bee?*, 50 BRIT. J. SOC. PSYCHOL. 519, 530 (2011).

⁵¹ Williams & Dempsey, *supra* note 1 (manuscript at 196–99).

⁵² Compare Nazli Kibria, *The Construction of 'Asian American': Reflections on Intermarriage and Ethnic Identity Among Second-Generation Chinese and Korean Americans*, 20 ETHNIC & RACIAL STUD. 523 (1997) (examining the development of a Pan-Asian identity among Chinese and Koreans Americans), with Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, in CONTEMPORARY ASIAN AMERICA: A MULTIDISCIPLINARY READER 505 (Min Zhou & J.V. Gatewood eds., 2007) (exploring the dynamics of Asian American experiences).

⁵³ While the drawbacks of lumping immigrants in with Americans are obvious considering the experiences of the two groups may well differ in important ways, there are so few women of color in science that this aggregation was necessary to protect the confidentiality of my informants.

workers no doubt differs in important ways from the situations faced by salaried professionals.

B. No Surprise: Women of Color Encounter Racial as well as Gender Bias

Although our focus is on gender bias that women of color share with white women, women of color also share similar experiences of bias with men of color that they do not share with white women. The centrality of race is highlighted by the fact that although the interviews specifically focused on gender, the informants also reported experiences of racial bias. A black woman recalled being deeply offended when a college professor joked that she must know all about rats because she came from the inner city. An Asian American woman born in the United States described a "forever foreign" experience commonplace among Asian Americans in which she keeps being asked what country she grew up in and complimented on her English. A Latina commented, "There seems to be this stereotype that, if you are from Mexico, you are lazy, and you only like to either sleep by a cactus or party. And I have battled extremely hard [against] all of these stereotypes." Another Latina recalled raising her voice only to have a colleague joke, "Oh, be careful, she's Puerto Rican, and she may be carrying a knife in her purse."

Again and again, women of color described their interactions as "demeaning" or "disrespectful," words that did not come up in the interviews with white women. One woman recounted hearing that a white male senior professor threw a board eraser at a colleague of color and said, "Hey, you, why don't you write this down?" She also heard from students that other professors in her department did not believe she would make tenure. "It was just like somewhere somebody sitting in the back and making armchair comments like that to a student. And it just—it felt so wrong." Although racial bias was not the focus of the NSF study, it is important not to erase this disrespect, which was most commonly reported by black women; no white woman interviewed for *What Works for Women at Work* reported feeling demeaned, a feeling bound to have a profound effect on one's experience at work.⁵⁴

Another distinctive theme that emerged was that many women of color reported feeling a sense of isolation. "This has been a very lonely life," said one black woman. Another reported "feeling inadequate, some depression" because "you really don't have the support you need." The most striking story was of an Asian American woman whose department chair put up on the blackboard a diagram with three circles depicting the interrelations within the department. She was way out, isolated, on the extreme edge. "I said, 'You know, if I was a little bit to the right, I'd be out of the department,'" she quipped. But, she admitted, "It gets to me. It's hurtful." A black

⁵⁴ Williams & Dempsey, *supra* note 1 (manuscript at 224–25).

woman explained why she avoided socializing with her colleagues: “If it’s too social, then I think there’s a great risk of you being put in that subservient position and being looked at that way.” No white woman from *What Works for Women at Work* reported a similar sense of anxiety that socializing with her colleagues would threaten her authority, or the same tone of desolate isolation.⁵⁵

Racism is an important factor in the lives of women of color. Nevertheless, the focus in this Article is on the experiences women of color share with white women. The interviews show they share quite a bit. As one black woman stated upon hearing the description of the four types of gender bias, “I can identify with each of the four buckets. I can identify with each.” All informants identified with one or more of these patterns.

C. *Black Women*

Prove-It-Again! and *Again and Again and Again*. Studies have documented the stereotype that blacks are generally perceived as less competent than whites.⁵⁶ According to experimental social psychology studies, more generic racist stereotypes of blacks—that blacks are lazy, ignorant, stupid—may also work against them in employment.⁵⁷

A complex picture emerges when one throws gender into the mix. Black women often trigger two sets of negative competence assumptions: one because they are women and another because they are black.⁵⁸ One striking study found that a job candidate with a black-sounding name needed *eight* additional years of experience in order to get the same number of callbacks as someone with an identical resume but a white-sounding name.⁵⁹

In one 2006 study, some black women responded to the study survey with comments about strong “expectations for their failure.”⁶⁰ Another study found that black women are punished more harshly than white women or black men for making a mistake.⁶¹ A study of black professional women

⁵⁵ See *id.*

⁵⁶ See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004).

⁵⁷ See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 379, 385 (Daniel T. Gilbert, Susan T. Fiske, Gardner Lindzey eds., 4th ed. 1998).

⁵⁸ See Biernat & Kobrynowicz, *supra* note 26, at 554.

⁵⁹ Bertrand & Mullainathan, *supra* note 56, at 998; see also M.A. Hitt et al., *Discrimination in Industrial Employment: An Investigation of Race and Sex Bias Among Professionals*, 9 WORK & OCCUPATIONS 217, 223–27 (1982) (showing that employer expectations vary based on prospective employees’ race and gender).

⁶⁰ See Isis H. Settles, *Use of an Intersectional Framework to Understand Black Women’s Racial and Gender Identities*, 54 SEX ROLES 589, 595 (2006).

⁶¹ See Ashleigh Shelby Rosette & Robert W. Livingston, *Failure is Not an Option for Black Women: Effects of Performance on Leaders with Single Versus Dual-Subordinate Identities*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1162, 1165–66 (2012).

found that they often felt stereotyped as incompetent and unqualified.⁶² One black woman responded to the survey by saying, “It is difficult being a black woman because everyone expects you to fail, or if you didn’t fail, they think it was because of charity. Not your own merit.”⁶³

The NSF study confirmed these findings. “I absolutely agree with the statement that for African American women it is prove it again, and again, and again, and again. It’s interesting—I have to say, I’ve always thought about it more just as being African American as opposed to being a woman,” said one lawyer. Another woman agreed: “I think people expect that I got here by some fluke, by some series of affirmative action things and set-aside programs and that I may not be as strong a scientist as others.” A scientist noted that at the two yearly conferences in her field,

When I go to give presentations, it’s not that I feel like the audience doesn’t necessarily believe my results, but I do feel as though I have to, at times, defend it before I can even present it. I really don’t think it’s just because I’m a female. I think that that’s secondary to my race.

This sense that Prove-It-Again! problems stemmed from race but not gender was only expressed by black interviewees but not by Latinas or Asian Americans.⁶⁴

A black doctor who originally had been an engineer contested the “race, not gender” interpretation. She highlighted the importance of context. As a doctor, she felt that people’s initial reluctance to take her seriously was more because of her race than her gender. She attributed this reluctance to the fact that, in medicine, women are common but black people are rare. When she was in engineering, though, where women are rare, she felt her Prove-It-Again! problems stemmed from gender. Perhaps the conviction that race, not gender, explains black women’s Prove-It-Again! problems reflects that black women scientists feel more isolated as blacks than as women.

Black women’s experience of Prove-It-Again! differs significantly from that of both white women and black men. A study by social psychologists Ashleigh Shelby Rosette and Robert W. Livingston found that black women are rated more harshly when things go awry than either black men or white women.⁶⁵ “There’s just no room for error,” said a highly respected and accomplished lawyer. “It’s just so deeply ingrained in you that I don’t even

⁶² ELLA L.J. EDMONDSON BELL & STELLA M. NKOMO, *OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* 145 (2001).

⁶³ See also Anita Jones Thomas et al., *Gendered Racial Identity of Black Young Women*, 64 *SEX ROLES* 530, 537–38 (2011) (describing the pressure of overcoming stereotypes).

⁶⁴ Accord Isis H. Settles, *supra* note 60, at 598 (citing earlier studies that establish a “stronger relationship . . . between black and black-woman identity importance than between woman and black-woman identity”).

⁶⁵ Rosette & Livingston, *supra* note 61, at 1165–66 (confirming that black women are disproportionately sanctioned for mistakes).

think about it anymore. To the extent that other folks might feel that they can have a bad day . . . I never feel I have that luxury. You're just always on, and if you're not on, you'd better make people think you're on." I commented that that sounded exhausting.

"It is. It absolutely is," she replied.

A black woman lawyer echoed similar sentiments in the outstanding report *Visible Invisibility: Women of Color in Law Firms*: "'White associates are not expected to be perfect. Black associates . . . have one chance and if you mess up that chance, look out. There is no room for error.'"⁶⁶

A vice president at a major company felt the same way:

You need to be on your A game, and when you are, you can turn the liability of stereotyping into an advantage. Frequently enough, some white men do not expect someone who looks like me—or so visibly different from them—to speak the way I speak or show up the way that I do. They seem initially disarmed by the common ground that we may share. Frankly, I just don't observe the same reaction with women or people of color for the most part. If they [the white men] can see a common history or experience, you get extra brownie points. But if you're not showing up with your A game, the consequences seem more severe given the scrutiny and presumptive challenge of your intellect, vocabulary, and background. I don't have that margin for error," she continued. "And, on the other hand, to be frank, I recognize that I'm probably given more kudos than your average male or, perhaps, white woman, because I am relatively eloquent, presentable, and articulate. Regardless, the stakes are big."⁶⁷

This pattern is documented in what social scientists call "shifting standards": when we perceive that someone does well *for a woman* or *for a person of color*. Most women of any race have heard some variation of "You climb [or throw or negotiate] well for a girl."⁶⁸

Since success is so precarious for women of color, performance pressure becomes "a self-fulfilling negative prophecy," to quote a company vice president. This paradigm is called stereotype threat: when one's knowledge of the stereotype leads to decreased performance.⁶⁹ Another black NSF interviewee said, "In my more cynical moments, it's an unrealistic expectation to think that one can consistently be as good as you feel you need to be." Such

⁶⁶ JANET E. GANS EPNER, AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 25 (2006).

⁶⁷ Williams & Dempsey, *supra* note 1 (manuscript at 228–29).

⁶⁸ Cf. Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579, 584–87 (1993) (documenting shifting standards in perceptions of mothers versus fathers).

⁶⁹ CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 11 (2010).

sentiments were similarly expressed by other interviewees: "I've been doing this now for almost 20 years. You never feel as though you have a comfort level where you're not on your toes because you have to prove it and prove it," said a lawyer. A vice president added:

The Prove-It-Again! is, I think, exponentially increased when you have double minority status. I certainly feel like that is the reality of my experience. Notwithstanding the 'halo' effect, you're as good as your last . . . trial, deal, or novel. Women and people of color may face the additional obstacle of a presumption of less-than-competency. More precisely, white men may have an unwarranted presumption of legitimacy. For many of our well-intentioned 'white' brothers, this presumption is not promoted or self-created. It's deeply embedded within our culture.

She recounted her experience with the 'stolen idea':

Typically, in my experience, it tends to be a male who will speak over the point, rather than allowing for the question to be addressed and attributed to you. Someone may bring up the same issue later in the conversation and restate precisely, or close enough, what you offered up to the audience, without attribution or acknowledgment that . . . they were parroting you or adding on to your thesis.

My instinctive internal reaction to these events is "Was I not clear? Was there something deficient in my communication? Was I not forceful or authoritative enough? Did I not speak with sufficient authority? Was it me? Or was it them?"

She said it gets easier to be more forceful and commanding if you work with enough men and whites "to realize they're as much of a nincompoop as you are."

Similarly, the scientists interviewed reported Prove-It-Again! problems both with colleagues and with students. As one said, "I have always had the impression when I start a class, a course, it is always an uphill kind of battle. I get the impression that students don't believe that I know what I'm supposed to know."⁷⁰ Another scientist recalled that when she was a student and assigned to work in a group, her contributions fell on deaf ears. "And it wasn't until the professor came around and said, 'Are you guys listening to what [she] is saying?' where it hit home to me that, you know, it didn't

⁷⁰ Accord Caroline Sotello Viernes Turner, *Women of Color in Academe: Living with Multiple Marginality*, 73 J. HIGHER EDUC. 74, 83 (2002) ("Faculty women of color perceive that they are more likely to have their authority challenged by students than are White male professors.").

matter what I was saying. But it was just the fact that it was coming from my mouth.”

Colleagues, too, often assumed the worst. One scientist recalled that when a student called to complain about a professor, an administrator automatically assumed that the problem professor was her. She further reported a classic Prove-It-Again! Pattern, “Even when I get really good evaluations, then the next thing that follows is, ‘Well, you’re an easy grader, and so that must be why.’” Note how casually her success was discounted and written off.

The Tightrope. The bad news is that black women are in double jeopardy on the Prove-It-Again! axis. The good news is that black women may experience fewer Tightrope problems than other groups of women. The evidence, however, remains tentative and somewhat contradictory.⁷¹

Black women may have more leeway to behave in masculine ways because black people, as a group, are seen as more masculine than whites.⁷² Thus, masculine-type behavior may seem less jarring when presented by a black woman. Another explanation may rest in the idea that black women might be less threatening to the power structure simply because they are so marginalized. As noted by a black academic, “When a black woman speaks up and asserts herself—that’s cute.”

No matter the reason, many black interviewees felt that the option of “walking the tightrope” was not even available. When, as part of the NSF study, I asked a focus group of black women scientists whether they had felt they had to choose between being liked-but-not-respected or respected-but-not-liked, several women looked at me pityingly. The option of being liked but not respected, they said, was never open to them. Their only choice was to be respected-but-not-liked. These interviewees’ observations are consistent with what has been found to be the case more broadly in the context of interracial interactions; blacks in general seek to be respected more than whites, who are more likely to seek to be liked.⁷³

However, this is not to say that black women do not face any Tightrope problems. A black woman in medicine described it in classic terms:

I’ve learned how to speak my mind without pissing people off. I don’t come across as too masculine, that bitch with the chip on her shoulder. I’ve just figured out how to hold my ground and not be pushed over but, at the same time, not be considered a witch.

⁷¹ An important question, upon which I have found no systematic evidence, concerns whether women of color face different gender norms and biases depending on whether they are interacting with white men or men of other racial groups. I can only encourage more study of this crucial issue.

⁷² See Phillip Atiba Goff et al., “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 *SEX ROLES* 392, 400 (2008) (finding a correlation between perceived “blackness” and perceived “masculinity”).

⁷³ Hilary B. Bergsieker et al., *To Be Liked Versus Respected: Divergent Goals in Interracial Interactions*, 99 *J. PERSONALITY & SOC. PSYCHOL.* 248, 261 (2010).

Additionally, like white women, the scientists of color interviewed reported feeling tremendous pressure to do committee work, a classic example of office housework. Such committees play an important role in academic governance, but service on them is severely undervalued. What gets professors tenure and accolades is research, not serving on committees. The most poignant story was of a black scientist whose mentors were “very adamant” that she did not “need to sit on every blasted committee.” So, in a meeting with her respective provost, she pointed out that whites as well as people of color could be tapped to serve on diversity committees. The provost cluelessly responded by inviting her to serve on another committee. “Of course I’m not going to say no to the provost. This is the man who basically has my tenure in his hands.”

Office “housework” aside, black women interviewed in the NSF study were less likely than white women to report feeling that they could not be their authentic selves because of their loyalty to feminine traditions, with two exceptions. One was self-promotion, which may present an even bigger hurdle for black than white women. A lawyer pointed out that black people are taught as children to be humble: “You do not boast because it’s not humble. And it’s important to be humble.”⁷⁴ She continued, “You hear over and over again, nobody is better than anyone else.”⁷⁵ A scientist agreed: “Even those who do it eventually, it takes a very long time to learn that. And you pay a price for it.”

The second “too feminine” problem black women commonly faced concerned clothes. If “you come from a culture—Latino, black southerner—where your grandmother wore a hat every Sunday and/or like [sic] a lot of loud, flashy colors and big, bling jewelry, there can be a dilemma about how to fit in and yet be your most authentic self,” noted a black professional in San Francisco.

Black women also reported fewer problems on the “too masculine” end of the spectrum. This result is not surprising given a truly fascinating study by Robert Livingston, Ashleigh Shelby Rosette, and Ella F. Washington, which found that black women are allowed to behave in more assertive and dominant ways than white women.⁷⁶ They found that assertive black women were not evaluated more negatively when they expressed dominance, although both white women and black men were.⁷⁷ Similar results have been found in other studies, such as one in which it was found that black women

⁷⁴ Williams & Dempsey, *supra* note 1 (manuscript at 232).

⁷⁵ *Id.*

⁷⁶ Robert W. Livingston, Ashleigh Shelby Rosette & Ella F. Washington, *Can an Agentic Black Woman Get Ahead? The Impact of Race and Interpersonal Dominance on Perceptions of Female Leaders*, 23 *PSYCHOL. SCI.* 354, 357 (2012).

⁷⁷ *Id.* at 356.

who displayed dominance were judged as more likable and more hireable than identical white women.⁷⁸

The NSF study interviews revealed many examples in which black women used an assertive, non-deferential style at work. A woman lawyer noted that black women at her firm “are actually lauded for that sort of assertiveness, aggressiveness,” but said she was “sure it isn’t the same for some of the Caucasian female associates.” A scientist agreed: “I’ve never really dealt with being thought of as a bitch, but I kind of aspire to that a little bit because I see, at this university at least, that actually it’s a very effective perception [to create].” Noting that she is “very outspoken in meetings,” she said she felt she was rewarded for assertive behavior. Said a black lawyer, “I think there’s a certain amount of sassiness, if you will, that is oddly enough even expected.” She continued, “I’ve certainly never been accused of being too feminine.”⁷⁹ “I’ve been rewarded and praised for dominance,” said another lawyer. “It’s something people admire about me.”⁸⁰

A black doctor said she was confrontational when a male doctor of color attempted to take over a room she needed for patients.

I was using three rooms. He had two. He basically walked up to me and he said, “I need three, so I’m going to take room three. You can use two.” I basically turned around and said, “No, you’re not. I’m using three rooms.” He goes, “I can’t have the third room?” I said, “No, I’m using it.” I just turned around and kept working.

Two nurses nearby said, “You should have seen the look on his face.”

Black women’s room to be more assertive, however, is not without limits. One black scientist told a truly hair-raising story that occurred after she had suffered a traumatic brain injury. The people at the hospital observed one interaction she had with people who worked for her and said that she was “unnecessarily brusque, undeferential.” “Let’s remember that these people worked for me. They were white males.” The hospital staff said, “[I]t was obvious that I needed to stay in rehabilitation longer until I started acting like a woman.” She recalled wryly, “This was in [the South]. I don’t know how to be the southern belle. I’m from [a Northern city].” She felt she had little choice but to play along. “I dropped my IQ by several points and started looking for little things to decorate myself with.”

⁷⁸ Erika Richardson, Katherine Phillips, Laurie Rudman & Peter Glick, *Double Jeopardy or Greater Latitude: Do Black Women Escape Backlash for Dominance Displays?* 2 (May 23, 2011) (unpublished manuscript) (on file with author); see also Kathryn A. Adams, *Who Has the Final Word? Sex, Race, and Dominance Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 1, 6 (1980) (suggesting that black women exhibited more “dominance” than white women).

⁷⁹ Williams & Dempsey, *supra* note 1 (manuscript at 233).

⁸⁰ *Id.* Another black woman explained in *Visible Invisibility* that her white co-workers “expect a Black woman to be extremely aggressive and to do really well on trial.” EPNER, *supra* note 66, at 26.

Many women of color noted their awareness of the need to avoid being seen as an “angry black woman.” One black woman in medicine noted “the stereotype that if you’re aggressive, then you’re definitely the B word.” A lawyer also noted the risks of anger. “I am allowed to be passionate, even to demonstrate some level of anger, but it better not be personal. It better not be about me. If I become angry about anything personal, then that is perceived as being an angry black woman.” This quote perfectly illustrates the findings of a still-unpublished follow-up study by Robert Livingston, which found that African American women are allowed more “get it done” agency—but not more “get ahead” agency.⁸¹ Our interviews confirmed this proposition. Black women can use a direct, assertive style, but not to act in ambitious, self-promoting, or power-seeking ways. Black women have license to be assertive in achieving the goals of the group but not in seeking power for themselves.

The Maternal Wall. Black women definitely face the Maternal Wall. A 2006 survey by the American Bar Association found that the same proportion of both women of color and white women—nearly three-quarters—felt their career commitment was questioned after they gave birth to or adopted a child.⁸²

Women we spoke with reported both hostile and benevolent prescriptive bias. A black scientist recalled an incident in which a colleague was told to go home and have more babies. Another black scientist recalled her boss saying, “Wow, why are you here so early? You should be home with the baby.” He meant well, she recognized, but still it troubled her.

One black lawyer told us her boss was telling other people he was not sure she was going to come back after she had her baby:

I finally had to talk to him about that. I had to tell him, “Please stop telling people that you’re not sure I’m coming back. I’m coming back. I want to come back. I like to do the work. I need to work, and having a child really puts more pressure on me to be successful at work so that he can have the opportunities I want him to have.” He was creating problems for me that he probably wasn’t aware of.”

At the same time, the contours of Maternal Wall bias are slightly different for black women than they are for white women. Some differences stem from different family patterns. If white women’s work-family conflicts typically stem from motherhood in two-parent families, black women’s conflicts may reflect that they find it harder than white women to find a partner. “I

⁸¹ Robert Livingston, Assistant Professor, Kellogg School of Management, Northwestern University, Presentation at a Working Group on Diversity and Inclusion for All at Columbia University (Nov. 30, 2012) (study conducted with Ella F. Washington and Ashleigh Rosette, to be titled *What is Agency? An Examination of Why Black Women Can Have Moxie but Not Power*).

⁸² EPNER, *supra* note 66, at 27.

think it's easier for people to understand work-life balance issues in the context of kids, right? As opposed to 'I'm single and I want to find a mate, so that's the balance I'm trying to achieve,'" said a lawyer. Among those who were surveyed for *Visible Invisibility*, women of color were more than four times more likely to be single than were white women: 35% of women of color reported being "single, never married," as compared to 8% of white women.⁸³ Only 56% of women of color reported being married, as compared with 81% of white women.⁸⁴

Family structures of black women are often different from those of white women. "A lot of women of color don't have husbands or partners, or their husbands could be in a different kind of career with less flexibility," said one informant. Another observed that at her workplace there is a significant difference between a man with three kids and a single black woman with three kids. "The man will be treated like a breadwinner and the woman like shit," she said bluntly.

The bright side is that wider circles of care offer some women of color resources unheard of within most white families. A black woman in medicine met a family through her church.

They said, "We'll be your family away from home," and they were very true to their word. They kind of adopted themselves as my surrogate mother and father. . . . When my daughter was born, they were like, "Oh, we have another grandchild." I can say really that, for me, I've been really blessed.

One woman noted that women of color have historically not had nannies, leading to a distinctive form of prescriptive bias in which some women felt criticized for their reluctance to take this path. "We haven't done the nanny thing a lot. That's kind of new for black folks," said one scientist. One black woman scientist told us that when colleagues have asked questions about why she doesn't get a nanny so she can work more, she felt her parenting style was being questioned. In sum, black women's experience of the Maternal Wall appeared to be profoundly influenced by family patterns and traditions of family caregiving that differed from those of white women.

Tug of War. African American scientists reported a wide variety of classic gender wars. "I have seen females trying to be very accommodating and playing a certain role that made them more likable. I tended to be very professional, straightforward, and not stroking people's egos or whatnot," said a black woman. She recalled "woman wars" where someone strives to prove "she is better; she can give more, she can do more, and there were games played along those lines." "That happened over and over again," she said. Another black scientist noted that at a monthly meeting, the only other woman in her group "pretty much focuses attention on the men." She added,

⁸³ *Id.* at 72.

⁸⁴ *Id.*

"Rarely she'll look at me. I'm thinking she might be one of those type of women where, okay, there's only room for one."

The classic "tokenism effect" was also in evidence. Said a black scientist, "I have been in an organization where there was room for one woman, but one woman decided that she was it and would simply sabotage her colleagues, which unfortunately included me." The limitations placed on women as a group affected the dynamic between them.

Sometimes Tugs of War arise between black and white women based on different understandings of womanly behavior. One scientist noted strain with white administrative assistants because, she felt, black women do not share white women's habit of bonding by sharing personal information. She expressed relief that black assistants "just do not expect [her] to want to know anything about their personal business." The same was not true of their white counterparts. "I think white women share a lot of personal business, and it's a bonding with them," she said. This sharing of "personal business," what Deborah Tannen calls "troubles talk," evidently is a tradition among white women but not black women.⁸⁵

In addition to this race-specific tension, a few women we interviewed reported other kinds of pushback from administrative assistants that sounded very similar to what happens to white women. One noted that administrative staff took longer to complete work given by women than men. Another's response concurred: "My stuff won't get done first."

Another dimension of the Tug of War can emerge between older and younger women in the workplace. An African American scientist reflected on the femmes-versus-tomboys dynamic as she mused about her treatment of a younger woman. "I would always tell her, 'You need to man up, stop all that crying, because they are going to keep walking over you and keep criticizing your research and your papers if you don't stand up and take charge.'" She added, "Probably I could have told her in a different way."

Sometimes these tensions take on a disquieting racial dimension. "I went to my first job, and it was fine. I never got any feedback on my personality," remarked a lawyer. "When I came to my current company, the culture was so completely different. I immediately got feedback about being a more empathetic person and being a person who would be easier to relate to." She continued,

I certainly think that if I was a white man, I would never have been given so much feedback about being an empathetic person and how important it would be to try to make people more comfortable with me. I also think that part of what has been interpreted as my "hard edges" are attributable to me being a black woman.

⁸⁵ DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND 100 (1990).

She said, "The feedback I've gotten about being nicer, more empathetic, all come from white women. No black woman has ever told me that, and no white man has ever told me that."

As previously discussed, racial conflict is often less subtle. One lawyer recounted a white female supervisor who, when a white colleague said she was leaving early one Friday, cordially told the colleague to go get a pedicure and enjoy herself. But when the lawyer, who is black, said she was leaving too, her supervisor bristled and started cross-examining her about whether she had gotten all her work done. This interaction was one of many instances of hyper-scrutiny and hostility by her supervisor. The interviewee ended up leaving the firm. It is hard to know whether the supervisor's behavior reflected racial hostility, but that is a key point about racism; it is often hard to tell exactly why someone is acting negatively toward you.

As will be further discussed below, a final key difference between black and white women in the experience of Tug of War bias is that the black informants judged older women who offered advice, even unwelcome advice, far less harshly than was typical of white women. One woman, in discussing some particularly off-putting advice received from older colleagues, put it gently. "They didn't mean any harm," she said. "They were trying to protect me from grief."

D. Latinas

Prove-It-Again! And Again and Again? Latinas also suffer from negative competence assumptions, and in fact one study quantifying bias indicates that they may be ranked even lower in competence than blacks.⁸⁶ Commonly held stereotypes are that Latinos "have tendencies to be lazy and to party" and that they "have a tendency to lose their temper."⁸⁷ Latina professionals sometimes feel they operate in an "immigrant shadow" in which they must counter the assumption that they have recently immigrated.⁸⁸ As one professional in an alternative study said, "I've had people say, 'I didn't know that there were any educated people in Mexico that have a graduate degree.'"⁸⁹

Adding gender into the equation primes additional race-specific stereotypes. Today, one of the most prevalent stereotypes of Latinas is that

⁸⁶ See Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 891-92 (2002) [hereinafter Fiske et al., *A Model*].

⁸⁷ See Andrew W. Bribiesco, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373, 381 (2010).

⁸⁸ Min Zhou & Jennifer Lee, *Becoming Ethnic or Becoming American? Reflecting on the Divergent Pathways to Social Mobility and Assimilation Among the New Second Generation*, 4 DU BOIS REV. 189, 200-01 (2007).

⁸⁹ Denise A. Segura, *Chicanas in White-Collar Jobs: "You Have to Prove Yourself More,"* 35 SOC. PERSP. 163, 173 (1992).

“[t]hey make good domestics.’”⁹⁰ “María, the housemaid or counter girl, is now indelibly etched into the national psyche. The big and the little screens have presented us with the picture of the funny Hispanic maid, mispronouncing words and cooking up a spicy storm in a shiny California kitchen.”⁹¹ Latino men are subject to parallel but distinct stereotypes: “‘Spanish is the language of doormen, dishwashers, and fruit pickers . . . [and English is] the language of doctors, dentists, and lawyers.’”⁹² Recall from the introduction of this Article the story of the scientist who had “battled extremely hard” against the stereotype that Mexicans are lazy and “only like to either sleep by a cactus or party.” The same scientist listed the dynamics within the stereotype: “the friendly Mexican or the passive Mexican or the disorganized Mexican.”

Whereas black women tended to attribute their Prove-It-Again! problems to race, Latinas may be more likely to place gender before race in the employment context. “[Y]ou have to prove yourself more just because you are—number one—a woman, and then [because] you are Latino,” noted a Chicana professional in another study.⁹³ Another woman put the emphasis less clearly on gender over race: “Some people have these knee-jerk reactions that people of color or women of color aren’t as competent.” She recalled coming upon a group of her colleagues discussing her own experiment—without her. “Guys, are you talking about my project? Then I should probably be involved,” she said to them. She observed, “And it was a surprise to them that I should be involved in the discussions of my project because I was not considered to be able or capable of offering any useful information.”

The examples offered by interviewees of situations where they felt as though they were presumed incompetent go on and on. A scientist had her success in an experiment discounted by male colleagues who attributed her success to the fact she was using their protocol, as if the precision with which she had carried out the protocol was of no consequence. A Latina scientist remembered when audience members actually interrupted her during a presentation. A Latina lawyer recalled that she wrote a brief for a supervisor who gave her a bad review and never gave her a second chance, although he championed a male associate “who time and time again completely annoyed him and produced substandard work product. He didn’t write that person off.” The same woman recalled with rueful amusement a somewhat soused colleague telling her she had given a really good presentation at a meeting:

⁹⁰ Judith Ortiz Cofer, *The Myth of the Latin Woman: Just Met a Girl Named Maria*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 295 (Paul S. Rothenberg ed., 1998).

⁹¹ *Id.*

⁹² STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 107–08 (2003).

⁹³ Segura, *supra* note 89, at 163.

He said, "Yeah, but I mean you were just so authoritative, and like you really knew your stuff," and went on and on, probably four times. . . . And then he said, "You were just really articulate." . . . It was the funniest thing, and I mean, funny in a sad, sad way.

The clear and painful assumption was that it was completely astonishing that a Latina could be so accomplished.

The Tightrope. In some ways, Latinas get the worst of both worlds. They face enhanced Prove-It-Again! bias similar to black women, but unlike black women they face major Tightrope problems. "How do you portray yourself?" asked a Latina doctor. "I mean, you are a woman, you don't have to be a man. But at the same time, if you want to fit in, do you have to behave like the men?"

Latinas' Tightrope problems cluster predominantly on the "too feminine" side.⁹⁴ Clothing is a particularly charged issue, said one scientist, who "toned down" her style so that people would take her more seriously. "I don't want them to be distracted by my earrings or by the loud print in my shirt or by my hair or whatever. I want them to concentrate on what I am saying," she said. Another scientist found this issue confusing: "So if you dress well, sometimes you get less respect."

By far the most common "too feminine" problem is the pressure Latinas feel to play the office housewife. One scientist described herself as "the mother of our research group." Another Latina scientist found herself in a similar role:

On the too feminine side of things, I think there are times when I am asked to be kind of the mother of the group. I'm the one who has to make sure that everybody fills out their paperwork, and I'm the one who takes care of things, sets up the meetings and things like that. I mean, I play many roles that could be done by a competent administrative assistant if we happen to have had a competent administrative assistant, which we don't. . . . It's assumed that I'll take care of it because nobody else will.

One of the women who found herself doing administrative work encountered difficulties in trying to escape this role. "I'm like, 'I told you I'm not going to be doing that for everybody anymore.' And everybody just kind of throws up their hands, and simple things like scheduling a conference room become my problem." She blamed herself, saying that she had trouble delegating. However, from my perspective, she did not appear to have much choice. "I mean, these kind of administrative duties eat into my time," she

⁹⁴ Other studies document that Latinas' "too feminine" problems often include sexual harassment. See, e.g., Cortina, *infra* note 119, at 167–68; cf. Isabel Molina Guzmán & Angharad N. Valdivia, *Brain, Brow, and Booty: Latina Iconicity in the U.S. Popular Culture*, 7 COMM. REV. 205, 218–19 (2004) (discussing the commodification of Latina sexuality).

said. This kind of treatment came from all kinds of sources. Not only colleagues, but students also “treat you like their mother,” said one Latina scientist, “like they can get whatever they can from you and there’s no limit.” She mused, “It’s natural to go ask for help to Mom.” But, she explained, “I have noticed that if I act like too much of a mommy, I get a lot of kids.” She suggests they go ask someone else, often to little effect. Of one student, she commented, “I think he is embarrassed, sometimes, by showing lack of knowledge to a guy but not to a girl.” Said another Latina, “Students may think they could get away with not doing certain things because you’re a woman.”

“Too masculine” problems appear less common among Latinas than “too feminine” ones. However, this overall tendency should not suggest that they do not exist. One attorney reported losing her temper with a colleague just once. “I basically chewed him out at work and, unfortunately, lost all [the] respect of my colleagues. After that, I’ve been very, very careful about that.” She said, “I just feel like you’re never going to get ahead by getting angry.” Men could get angry, she said, but women could not. “I have one partner who is known to scream and yell at his assistant, and everyone just says, ‘Oh well, that’s him.’ They’ve replaced assistant after assistant after assistant for him.” One assistant filed a complaint, and instead of addressing the problem, people around the office just said, “Well, that’s too bad she couldn’t cut it because he’s very high maintenance.” A female partner at the same firm would “get really irritated with her assistant and yell at her, and the interesting thing is that she was perceived as a bitch. . . . There was less tolerance for her behavior.”

A Latina professor iterated similar sentiments. “I got angry because there was something being done that I thought was inappropriate, and I was called to the principal’s office, to use a metaphor. And I am absolutely sure that none of my [male] colleagues that get angry at faculty meetings get called.”

It may be that the stereotype of the fiery Latina means that anger is even more perilous for Latinas than it is for women in general. One woman certainly thought so:

I’m Latin, so I’m passionate and I could go there. I do rein that in and make sure that I’m more placid with my responses. I usually, if someone says something inflammatory to me, will take a few seconds before I respond, or if it’s via e-mail, I will wait a couple of hours before I respond, just because that is such a feminine stereotype to have this emotional response to something. . . . For those that know my specific background, they’ll make comments about that: “Oooh, she’s a fiery Latina.”

The Maternal Wall. Latinas not only face high levels of Prove-It-Again! and Tightrope concerns, but they also face reported lots of Maternal Wall problems. Qualitative studies have documented the close association of La-

tinas with motherhood within people's perceptions. Interviewees in other studies have articulated their sense that being Latina meant that people assumed that they would have children, lots of them:

"[W]e like to be pregnant. We don't like to take birth control. We're 'mañana' [tomorrow] oriented. We're easy."⁹⁵

"Usually people take over the countries with wars but you Mexicans are doing it by having lots of babies."⁹⁶

Interviewees also reported experiencing the assumption that Latinas will drop out of educational and professional opportunities once they have children.⁹⁷

A Latina lawyer interviewed for the Wise Women study said she sensed, after she had triplets, "fixed expectations that I would not resume my career and not return to work."⁹⁸ The assumption struck her as odd.⁹⁹ "My career was not as disposable as other people might have seen it," she said.¹⁰⁰

Ironically, I worked at the time for a woman who was a Latina, and it was she who made the most disturbing comments about, "Oh, honey, I know you're not coming back, are you?" I think she genuinely intended to be supportive, but as my supervisor, it came across as an out-of-hand dismissal of what I knew I was capable of.¹⁰¹

She continued:

We know the workplace will have evolved when instead we hear, "Wow, your professional accomplishments are being achieved *in addition* to all the additional personal responsibilities you have. Incredible leadership skills at work there! We are going to nurture your career, because if you can do all this now, you are going to be a rock star around here in the future."

Latina scientists reported intense family pressures to have children, to have them early, and to play traditional family roles. "You're supposed to have kids in your 20s. Every good Mexican woman has kids in their 20s," said one. "We have a very firm and entrenched culture of family, of big

⁹⁵ Segura, *supra* note 89, at 173.

⁹⁶ Jody Agius Vallejo, *Latina Spaces: Middle-Class Ethnic Capital and Professional Associations in the Latino Community*, 8 CITY & COMMUNITY 129, 146 (2009).

⁹⁷ See generally *id.*

⁹⁸ Williams & Dempsey, *supra* note 1 (manuscript at 242–43).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

family, and everyone's connected to everyone's last cousin and grandma and whatever."

"Hispanic women are mothers—we take care of our families. Women are considered the matriarchs," another scientist said. She continued:

I feel like I have a very specific role in keeping the family running. And here's another complication for many women of color I know, particularly those in immigrant families; the cultural expectations that define family can extend to a caring (sic) for extended family members, such as elderly parents or grandchildren. At least one reason for that may be that our values are informed by cultural expectations, and this is even more true in immigrant families like mine. On [the] one hand, it's a beautiful thing to live out our strong family ties; on the other hand, what does this imply for women of color advancing to leadership in the workplace, especially when the period for serious career advancement tends to overlap with the 'sandwich generation' years? Whether it's an issue of feminism or not, I think you see more women of color juggling additional cultural expectations. Do we embrace them all and exhaust ourselves in the process, or distance ourselves from these multifaceted roles while risking a loss of important cultural values?

Interviewees expressed that Latina women sometimes internalized such pressures. "I think a lot of it is self-imposed," said one scientist. However, this result is not always the case. A Latina professional in another study placed the pressure firmly outside herself: "'In order to be valued we have to be wives and mothers first. That cultural pressure is the most difficult to overcome.'" ¹⁰²

For Latina women, the assumption that professionals do not have family obligations beyond their nuclear family can lead to particularly negative reactions due to the sense that these obligations are not important enough to miss work for. A Latina attorney, as quoted in a Catalyst report, described having to go to the funeral of a cousin's baby.¹⁰³ "'One partner was like, 'Who was this?'" the attorney remembered.¹⁰⁴ "'I don't think she understood.'" ¹⁰⁵

Tug of War. Some Latina scientists spoke warmly of the relations among women in their department. "We bond together. We support each other a lot. . . . And we're always rooting for each other. We're always hoping there's more of us. So the 'room for one' I definitely have not exper-

¹⁰² Segura, *supra* note 89, at 177.

¹⁰³ DEEPALI BEGATI, WOMEN OF COLOR IN U.S. LAW FIRMS—WOMEN OF COLOR IN PROFESSIONAL SERVICES SERIES 45 (2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

enced,” said one. “We have quite a large number of women in my department, and we try to have a good collegiality among us,” said another.

Others’ impressions, however, were not as positive. “I would say that there’s definitely a kind of divide or separation between the female faculty members, young and old. Those older ones feeling that ‘I worked to make this happen,’ whereas the younger ones are reaping the benefits, if that makes sense,” said a Latina scientist. She continued, “And there is a change, at least in my field, where women are very comfortable with being mothers as well as go-getters and being great scientists and starting out their labs.” One woman reflected on the interpersonal dynamics that fuel competition among women as she worried about being compared to another woman in her department. “She’s funded, she’s publishing in high-impact journals. I’m not right now. And I’m jealous and I’m fearful that if we were compared on the same scale, that I’ll come up way short.” Similarly, another woman commented:

I was probably mad at the women who had children, thinking, ‘Why should I, who does not have children, pick up the slack for the women who do have children? It’s a choice.’ And then, of course, you think about this for ten minutes and you realize that it’s not the women you need to be pissed off at. It’s the men who make the assignments.

Scientists who participated in the NSF study were asked specifically about conflict between support staff and scientists. Latina scientists in particular reported more of it than other groups. “Female bosses have a lot more resistance from the other females in the group, from everybody, but it happens especially if there’s a difference in race,” said one. “They say the bosses are too demanding,” said another, recalling a conversation with administrative assistants who worked with her. She said to them, “Well, the boss that you had before was equally demanding. The guy that you were working under was equally demanding.” The assistants’ reaction: “Yeah, but that’s different.” Mused another woman, “If a male boss asks, ‘Can you bring me a copy?’ they will, and if you ask the same thing, they will say, ‘Well, why am I going to bring you the copy?’” Some women just laughed this kind of treatment off. “The staff call the females by their first names, but they talk about ‘Doctor Such-and-Such’ and ‘Professor Such-and-Such’ when they refer to the men, which I find very funny,” said another Latina scientist.

Another’s statement provides an apt example of how the experience of gender bias differs by race. “I am absolutely sure that my male colleagues don’t get this type of treatment,” she said, describing the pushback she encountered from administrative staff about how files should be kept. She attributed the problem both to gender and race. “It may be an overall issue of respect. For them, having female bosses, it’s a whole new thing.” But she felt that there was a racial component as well. “Here they have this Mexican

woman telling them what to do.” She seems to be saying that neither a white woman nor a “Mexican” man would have the same experience.

The Latinas interviewed were particularly thoughtful about the advantages of being a Latina, pointing out how their heritage helped them negotiate the complexities of being women in traditionally male careers. “I think I have a huge advantage in having a very refined cultural radar,” said a Latina scientist. A Latina lawyer agreed: “I can read the cultural landscape pretty quickly and automatically discern the dynamic that’s going on and what I need to address.” She felt her cross-cultural background had sharpened her political radar. “Just reading the dynamics of a room and how you, and others, are being perceived is very helpful,” she said. Said another scientist, reflecting on her close cultural ties to another country, “You have to be like context switchers . . . reading the context and then doing what’s appropriate for that context at any point in time.” She mused, “It’s the same thing switching between masculine and feminine roles.”

E. Asian American Women

Prove It Again? Descriptive biases regarding Asian and Asian American women differ from descriptive biases regarding black women and Latinas in that, while there is generally an assumption of negative competence regarding blacks and Latinas, the stereotypes regarding Asian people are “ambivalent” (i.e. they lump positive and negative qualities).¹⁰⁶ Furthermore, there is significant overlap between the qualities associated with leaders and with Asian people.¹⁰⁷

On the one hand, Asians are seen as a “model minority” that does well educationally and economically and “stays out of trouble.”¹⁰⁸ As a whole, Asians are seen as equally (or more) competent as whites.¹⁰⁹ Common stereotypes include that Asians are quiet, law-abiding, hardworking, and intelli-

¹⁰⁶ See Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34, 44 (2005). Note that Asian Americans come from very different cultures. Much of this is lost on most Americans; how much is an empirical question to which there is, as yet, no clear answer. I have embraced the operating assumption that Americans do not distinguish between Asians of different heritages not because I believe it is true, but because the reality is no doubt complicated; some Americans no doubt do distinguish between Asians of different heritage some of the time. The fact that we know so little about which Americans distinguish between different Asian heritages, and when Asians are seen in one global stereotype, and when subtypes enter in, just highlights once again the need for more empirical studies.

¹⁰⁷ Beth G. Chung-Herrera & Melenie J. Lankau, *Are We There Yet? An Assessment of Fit Between Stereotypes of Minority Managers and the Successful-Manager Prototype*, 35 J. APPLIED SOC. PSYCHOL. 2029, 2046–47 (2005).

¹⁰⁸ Paul Wong et al., *Asian Americans as a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOC. PERSP. 95, 95–96, 113–14 (1988) (describing how Asian Americans, as well as other racial and ethnic groups, view Asian Americans through a “model minority” lens).

¹⁰⁹ See Fiske et al., *A Model*, *supra* note 86, at 892.

gent,¹¹⁰ all qualities that make them peculiarly suited to high-status careers. If an Asian American is seen through this lens, perhaps he or she may even need to provide *less* evidence of competence than a comparable white person. This dynamic described the experience of one scientist, who said:

There's conflicting stereotypes, if you will, that come into play as an Asian American woman in STEM fields because there's an overall sort of, oh, Asians, Asians are naturally talented in STEM fields, right, bias, and then yet, a different set of sort of norms or expectations about women . . . [T]here's kind of a play off between those two different traits and so that in some sense, I have—I'm more acceptable, if you will, as an Asian woman scientist rather than a woman scientist.

Yet the results are not always so positive. Asians also are often seen as cold and lacking in social skills,¹¹¹ and this low-sociability stereotype of Asian Americans is stronger than the high-competence stereotype.¹¹² Moreover, one underlying facet of the model minority stereotype is that Asians are suited for backroom technical work but not for leadership positions.¹¹³ Thus, even the apparently complimentary aspects of the model minority stereotype ultimately end up disadvantaging Asians as compared with whites.

Gender further complicates things. In addition to stereotypes of Asians and women, there exist a third set of stereotypes specific to "Asian women." The "Lotus Blossom Baby" stereotype, which paints Asian women as sexualized and demure, sets up stereotypes of Asians as exotic "property" of white males,¹¹⁴ removing Asian American women from the realms of competence and appropriate authority in the workplace. Asian American women reported to one researcher that white employers and co-workers expected them to be "passive and deferential," and expressed surprise when they "spoke up and resisted unfair treatment."¹¹⁵ Like other women of color,

¹¹⁰ See Fiske, *supra* note 57, at 379; Grace Kao, *Group Images and Possible Selves Among Adolescents: Linking Stereotypes to Expectations by Race and Ethnicity*, 15 *SOC. F.* 407, 417–19 (2000); Colin Ho & Jay W. Jackson, *Attitude Toward Asian Americans: Theory and Measurement*, 31 *J. APPLIED SOC. PSYCHOL.* 1553, 1553–54 (2001); Amy J.C. Cuddy et al., *Warmth and Competence as Universal Dimensions of Social Perception: The Stereotype Content Model and the BIAS Map*, 40 *ADVANCES EXPERIMENTAL PSYCHOL.* 61, 77–78 (2008).

¹¹¹ Ho & Jackson, *supra* note 110, at 1564.

¹¹² Lin et al., *supra* note 106, at 44.

¹¹³ See Albert H. Yee, *Asians as Stereotypes and Students: Misconceptions That Persist*, 4 *EDUC. PSYCHOL. REV.* 95, 124–125 (1992).

¹¹⁴ See Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 *B.C. L. REV.* 771, 801–02 (1996); Minjeong Kim & Angie Y. Chung, *Consuming Orientalism: Images of Asian/American Women in Multicultural Advertising*, 28 *QUALITATIVE SOC.* 67, 75–76 (2005).

¹¹⁵ Karen D. Pyke & Denise L. Johnson, *Asian American Women and Racialized Femininities: "Doing" Gender Across Cultural Worlds*, 17 *GENDER & SOC.* 33, 46 (2003).

Asian women who trigger the “Lotus Blossom Baby” stereotype probably have to provide more evidence of competence than white women or Asian American men in order to be judged equally competent. Implicit in the racialized gender stereotypes of women of color is the notion of insatiable sexuality; Asian women are “desirous of sexual domination,”¹¹⁶ Latinas are “naturally sexual,”¹¹⁷ and African American women, if not the asexual “Mammy,” are the promiscuous “Jezebel.”¹¹⁸ Such stereotypes are particularly harmful in the context of sexual harassment and sexual assault.¹¹⁹

The “Lotus Blossom Baby” stereotype, however, does not appear to be universal. Some evidence exists that the model minority stereotype may result in Asian women needing to give *less* evidence of competence than white women. “In some sense, I’m more acceptable, if you will, as an Asian woman scientist rather than a woman scientist,” one woman observed. Which stereotype reigns may well be situational. One study showed that when Asian American subjects’ Asian identity was made salient, they performed better on a test, whereas when their gender identity was activated, they performed worse.¹²⁰

Yet those among women interviewed who felt they had been helped by the model minority stereotype were rare. Many more reported Prove-It-Again! problems. An Asian American lawyer recalled a situation in which a white man and woman both got promotions in a context where the rules didn’t allow them. “You know that the rule only applies to the people it applies to,” she observed. “Generally speaking, women, and women of color, would be strictly held to rules and then some.”

Other Asian interviewees reported that their successes were discounted in a variant of the “he’s skilled, she’s lucky” pattern. One described her department chair saying that she got grants not due to merit but to politics. “You have to be ten times better than everyone else; you always have to be more prepared,” said an Asian American lawyer. “My mentors, those practicing lawyers who have observed my growth in the profession, often say to

¹¹⁶ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 191 (1997).

¹¹⁷ Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

¹¹⁸ Andrea L. Dennis, *Because I am Black, Because I am Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996).

¹¹⁹ See Martha Chamallas, *Jean Jew’s Case: Resisting Sexual Harassment in the Academy*, 6 YALE J.L. & FEMINISM 71, 85 (1994); Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 HOW. SCROLL SOC. JUST. REV. 1, 16 (1993); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–70 (1992); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS. L. REV. 1235, 1244 (2006); Lilia M. Cortina, *Assessing Sexual Harassment Among Latinas: Development of an Instrument*, 7 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 164, 177–78 (2001).

¹²⁰ Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 81–82 (1999).

me, ‘One day hopefully you’re going to just trust your gut.’” She continued as follows:

I feel men are raised to just basically go with instinct and not even question it. As an Asian American woman growing up in my household, I had to validate everything, unlike my brother, and this experience has transferred to my practice of always explaining my decisions and actions before diving in. I feel women often feel that they have to validate their actions before taking them.

“I don’t know if it’s an Asian thing or a woman thing, but it was definitely a combination where I felt like I had to get [approval] on different things. I was definitely less comfortable about going rogue,” said another woman.

The Tightrope. An attorney quoted in the ABA’s *Visible Invisibility* report articulated the very thin Tightrope that Asian American women walk:

I am frequently perceived as being very demure and passive and quiet, even though I rarely fit any of those categories. When I successfully overcome those misperceptions, I am often thrown into the “dragon lady” category. It is almost impossible to be perceived as a balanced and appropriately aggressive lawyer.¹²¹

While Asian American women who are seen as too masculine risk being called dragon ladies, the default stereotype remains that Asians are quiet, obedient, and courteous.¹²² Whereas black women are seen as more masculine than white women, Asians tend to be seen as more feminine.¹²³ Thus, it is not surprising that Asian American women in the NSF study reported “too feminine” problems at a higher rate than “too masculine” ones. An Asian American lawyer noted, “There’s a mystique about the Asian woman; we’re so cute and so delicate. . . . You get to the point where you try to ‘mannify’ yourself.” An Asian attorney remarked to the authors of *Visible Invisibility*, “‘I’ve had opposing parties, opposing counsel, treat me like a little girl and part of that is the Asian thing, because they see a little Asian doll. . . . It’s really annoying and I’m tired of it.’”¹²⁴

Furthermore, Asian American women interviewed for the NSF study reported “too feminine” problems manifesting in a wide range of ways. Some problems stemmed from expectations that they would do the office housework, like the consistent reports we heard from Asian women that they were treated like perennial lab assistants even as postdocs. As with Latinas, expectations about office housework have a particular flavor; women of color are expected to perform ministerial tasks in a subservient manner.

¹²¹ EPNER, *supra* note 66, at 25.

¹²² Ho & Jackson, *supra* note 110, at 1554.

¹²³ Clara L. Wilkins et al., *Racial Stereotypes and Interracial Attraction: Phenotypic Prototypicality and Perceived Attractiveness of Asians*, 17 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 427, 429 (2011).

¹²⁴ EPNER, *supra* note 66, at 10.

Asian women also reported particular difficulty with self-promotion. "You're taught to be humble and not boast about your achievements and give credit to others," said one scientist.¹²⁵ This Asian cultural norm can feed into the perception that Asian women are too passive. "All my mentors have told me, 'You have to be more aggressive because they're not going to respect you if you're not aggressive,'" said an Asian American scientist. "But I don't like to be aggressive. I like to get along with everybody." Another said, "I'm not particularly assertive. . . . I might be a more assertive version of a stereotypical Asian woman but a less assertive version of a generic woman." One self-described "dark-complexioned" Indian graduate student was undercut when a fellow student made negative comments about her work. The head of the lab "never bothered to actually address that with her or talk to her about it or actually watch her in the lab. He just took the word of the male grad student in that lab." The negative competence assumptions seem clear, and the graduate student involved ended up leaving without getting her doctorate. Different cultural traditions sometimes meant that what Asian Americans saw as due respect for seniority was read by their colleagues as a lack of self-confidence. "In our culture, we're raised with the idea of respecting culture and seniority," said an Asian American lawyer. "How it plays out at work, for me, is that I always felt that if I was rendering an opinion, it had to be clearly supported." The result often appeared, she felt, as a lack of self-confidence. "Self-confidence just seems so second nature to some people, while it is always something I have to build and maintain consistently."

As previously mentioned, Asian women reported far fewer "too masculine" problems, which is not surprising, given that whites see Asians in general as more feminine. Yet, it is clear that Asians who do not conform with "China Doll" submission stereotypes often encounter pushback. "I was never part of the in group," said an Asian American scientist. "I'm very candid and I do not hesitate to open my mouth, and that was probably not the submissive female [they were expecting]. . . . I immediately started, I guess, having the reputation of being a dragon lady."

Within the context of this study, it is important to note that Asian American stereotypes have changed markedly over time. The model minority stereotype emerged after 1965.¹²⁶ Older stereotypes were that Chinese and Japanese were strange, dirty, tricky, crafty, and sly.¹²⁷ Today, Asian women are sometimes seen as a "conniving, predatory force,"¹²⁸ triggering pre-

¹²⁵ Accord Pyke & Johnson, *supra* note 115, at 42 ("I feel like when I'm with other Asians that I'm the *typical* passive [Asian] person and I feel like that's what's expected of me and if I do say something and if I'm the *normal* person that I am, I'd stick out like a sore thumb.").

¹²⁶ Lin et al., *supra* note 106, at 34.

¹²⁷ See Harry H.L. Kitano & Stanley Sue, *The Model Minorities*, 29 J. SOC. ISSUES 1, 6 (1973).

¹²⁸ Cho, *supra* note 116, at 185.

model minority stereotypes of Asians. My own informal explorations of the topic suggest that the dragon lady stereotype could indicate that assertive Asian women are still seen as untrustworthy and conniving, mobilizing pre-model-minority stereotypes.

Contemporary stereotypes are mixed. Asian Americans tend to be viewed as nerdy and lacking in social skills and therefore, unsuited to leadership;¹²⁹ rather, or in addition, they can be viewed as competent but disliked.¹³⁰ One study found that the more unsociable subjects felt Asians were, the more negatively subjects viewed them.¹³¹ Furthermore, the low-sociability stereotype was stronger than the high-competence stereotype.¹³²

Does this cause the “dragon lady” stereotype to be triggered sooner than the “bitch” epithet? A 2012 study found that all Asian Americans, men as well as women, tend to encounter workplace harassment if they act dominantly.¹³³ This phenomenon, of course, reinforces Asian stereotype conformity by discouraging them from acting dominant. Interestingly, the study also found that Asian Americans also tend to trigger workplace harassment if they act warm, a classic double bind.¹³⁴ Asian women face this double bind along both a race and a gender axis, which may make it particularly difficult for them to “walk both ropes.”

The Maternal Wall. Asian mothers, like other mothers, are likely to hit the Maternal Wall. “If you had a full-blown career, that’s inconsistent with being a mother. I certainly feel that sentiment,” said an Asian American scientist. One scientist commented, “I feel like people think that Asian women, they are caring, and then they will give up their professions for their children.”

Yet the model-minority stereotype might help shield some Asian American mothers from negative assumptions about their work commitment. As one lawyer quoted in *Visible Invisibility* said:

They have a very positive stereotype of Asians, and especially Asian women. They see us as hard-working; we’ll work seven days a week, 24 hours a day. We’re very smart, very dedicated. One of the Asian women who recently made partner just had twins, and

¹²⁹ See Nazli Kibria, *College and Notions of “Asian Americans”: Second-Generation Chinese Americans and Korean Americans*, in *THE SECOND GENERATION: ETHNIC IDENTITY AMONG ASIAN AMERICANS* 183, 186–87 (Pyong Gap Min ed., 2002); Bob H. Suzuki, *Revisiting the Model Minority Stereotype: Implications for Student Affairs Practice and Higher Education*, 97 *NEW DIRECTIONS FOR STUDENT SERVICES* 21, 28 (2002); Roli Varma, *Asian Americans: Achievements Mask Challenges*, 32 *ASIAN J. SOC. SERVICES* 290, 300–01 (2004).

¹³⁰ Lin et al., *supra* note 106, at 35 (Asian Americans “respected as competent but disliked”).

¹³¹ *Id.* at 43.

¹³² *Id.* at 44.

¹³³ See Jennifer L. Berdahl & Ji-A Min, *Prescriptive Stereotypes and Workplace Consequences for East Asians in North America*, 18 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 141, 146–48 (2012).

¹³⁴ *Id.* at 149.

they're sure she'll keep working, while they think other women would quit.¹³⁵

Although Asian Americans are stereotyped as being family oriented, the alternative stereotype regarding their work ethic may trump that one.

The assumption that Asian mothers will continue to be dedicated to their jobs does not always reign, however. One lawyer said:

The problem I see is that they really don't understand what you're doing here. They may prize you as a lawyer, they may think you're a heck of a litigator, but deep down they're wondering, "What's she doing here? Why isn't she home with the kids like my wife is?" It's a real problem when people just don't get what you do.

Several scientists interviewed in the NSF study who are immigrants from Asia had their parents come from abroad to help take care of their children so they could work full-time. One stated:

I think Asian parents [are] more willing to come over to really provide this kind of day-to-day help. So, right now, like in [my university], we really have quite a lot of Chinese faculty. And I saw many of them do have their parents come over to help them [in] much, much higher frequency than the Caucasian faculty.

First one parent will come and stay the six months his or her visa permits. Then the other parent will come, she explained.

As with minorities from other groups, assumptions that Asian families of color conform to the nuclear pattern common in white professional families sometimes disadvantage Asian women. An Asian woman lawyer said she hesitated to ask for time off to care for her mother's cousin: "I don't know if they'd understand that context, which I know is normal within the Asian community, or at least the South Asian community, to always support extended family."

Tug of War. Asian interviewees reported fewer Tug of War experiences than other groups of women. "No, no, this is not a pattern I can relate to," commented an Asian American scientist. She had always been in groups with very few women, she said, "but we've stuck together to fight; not to fight [each other] but to actually share and be a cohort of peers with my female friends."

Another woman's comment may help explain why Tug of War experiences may be rare among Asian women. She had defused conflict with an older female faculty member by communicating the importance of the efforts of the older generation: "[Without them], I wouldn't be here. I wouldn't have made it. So I'm continuously humble." She continued, "It's the same in general when you express respect and gratitude to your grand-

¹³⁵ EPNER, *supra* note 66, at 11.

parents or even your great-grandparents if they are still alive.” This perspective illustrates a potential explanation for why Asian women reported fewer Tug of War problems than black women and Latinas: the respect for elders that is emphasized in so many Asian cultures might lead to an established means in which to navigate these relationships.

II. IMPLICATIONS FOR THE DEBATE OVER IMPLICIT BIAS

The debate over implicit bias was first spurred by Linda Hamilton Krieger’s influential 1995 article, followed by a germinal symposium issue of the *California Law Review* in 2006.¹³⁶ Since then, a flood of articles has explored implicit bias in criminal, employment, bankruptcy, and other areas of law.¹³⁷

A sustained and successful public education campaign has accompanied the attention lavished on the IAT in various law reviews. Implicit bias has been presented as a new breakthrough in social psychology.¹³⁸ IAT advo-

¹³⁶ See Krieger, *supra* note 22, at 1161; Linda Hamilton, *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

¹³⁷ See, e.g., Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 95 (2012) (studying the success rate of race-based hostile work environment claims depending on the plaintiff’s race and judge’s race); A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 626 (2012) (noting that lawyers steer black families toward Chapter 13 bankruptcy at a higher rate than they do white families); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) (reporting on an empirical study that found that participants who read about a black story character were more likely to remember facts denoting aggression than those who read about a white story character); Justin D. Levinson, *Superbias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591, 596 (2012) (studying the ways racial stereotypes influence economic phenomena); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (finding significant associations between “Black” and “guilty” relative to “White” and “guilty”); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310–11 (2010) (finding that participants were more likely to view evidence as indicative of guilt in the case of a dark-skinned perpetrator); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 3 (2010) (finding that law students associated judges with men instead of women and women with the home and family); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 249 (2012) (finding that Muslims are significantly disadvantaged in Religious Free Exercise and Accommodation claims).

¹³⁸ See, e.g., *Ten Minute Test Could Spot Killers*, BBC NEWS (May 28, 2013, 6:59 PM), <http://news.bbc.co.uk/1/hi/health/2943160.stm> (last visited Nov. 27, 2013), archived at <http://perma.cc/0RC5oEb6kWB>; Melinda Henneberger, *Hidden Biases—Mindbugs—Infect Everyone’s Brain*, PRESS OF ATLANTIC CITY, Feb. 13, 2013, at A11; Shankar Vedantam, *What Does Modern Prejudice Look Like*, NPR (Apr. 22, 2013 5:45 PM), <http://www.npr.org/blogs/codeswitch/2013/04/22/177455764/What-Does-Modern-Prejudice-Look-Like> (last visited Nov. 27, 2013), archived at <http://perma.cc/0xqGZbJAbc1>; Matthew Hutson, *Only If You Dare, Learn Your Level of Close-Mindedness*,

cates such as Mahzarin Banaji and Jerry Kang often portray themselves as offering a fresh approach to the entire field of discrimination.¹³⁹ In retrospect, implicit bias advocates have framed their message in response to academic imperatives in ways that ultimately undercut their own effectiveness as agents of change in the law. More specifically, they announced highly ambitious claims with considerable rhetorical flourish, intimating that implicit bias was a newly discovered form of bias that left prior approaches in the dust.¹⁴⁰ IAT critics are fond of citing a speech in which Banaji appeared to liken the IAT's influence on psychology to that of Galileo on astronomy.¹⁴¹ These claims represented sincere enthusiasm coupled with a successful attempt to shift the focal point away from social psychologists, trained as either sociologists or psychologists, towards cognitive psychologists whose focus is on the brain. The common "story line" was articulated by Anthony G. Greenwald and Linda Hamilton Krieger, who spoke of "the new science of unconscious mental processes" replacing an older view that human behavior is under conscious control.¹⁴²

These kinds of claims reflect a tradition within academia of somewhat mischaracterizing what has gone before in order to make one's claim for the startling originality of the Next Big Thing. No judgment: I have used this traditional ploy myself. However, such histories bear about the same relationship to what actually happened that the American Law Institute Restatements bear to the law on the ground. Both are tales told to achieve a strategic goal.

In fact, the studies and methodologies that preceded the implicit bias strain of research did not focus only on conscious-as-opposed-to-unconscious bias. Instead, prior research typically was not that interested in

STAR-LEDGER, Feb. 24, 2013, at 006; Molly McElroy, *Racial Attitudes Play Large Role in Presidential Vote*, BOSTON BANNER, May 31, 2012, at 6; Anna Mikulak, *An Intergenerational Conversation Between Mahzarin R. Banaji and Rebecca Saxe*, OBSERVER, Nov. 2013, archived at <http://perma.cc/OKAG19eHwyh>; Christopher Shea, *Ideas Market: Week in Ideas*, WALL ST. J., Oct. 29, 2011, at C.4; Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12.

¹³⁹ See, e.g., Kang & Banaji, *supra* note 13, at 1064 ("We believe that new facts recently discovered in the mind and behavioral sciences can potentially transform both lay and expert conceptions of affirmative action.").

¹⁴⁰ See, e.g., Jill D. Kester, *A Revolution in Social Psychology*, APS OBSERVER ONLINE (July/Aug. 2001), <http://www.psychologicalscience.org/observer/0701/family.html> (last visited Nov. 27, 2013) (reporting on a speech likening the IAT's influence on psychology to that of Galileo on astronomy), archived at <http://perma.cc/0cNahUyUr9Q>.

¹⁴¹ See, e.g., Kester, *supra* note 140.

¹⁴² Greenwald & Krieger, *supra* note 13, at 946-47; see also Banks, Eberhardt & Ross, *supra* note 13, at 1182 (discussing the movement away from studying explicitly endorsed beliefs about race towards indirectly measuring racial bias); Kang & Banaji, *supra* note 13, at 1064 ("We believe that new facts recently discovered in the mind and behavioral sciences can potentially transform both lay and expert conceptions of affirmative action. Specifically, the science of implicit social cognition (ISC) can help us revise the very meaning of certain affirmative action prescriptions by updating our understanding of human nature and its social development.").

whether the subjects exhibiting the bias in question were self-aware or not. Arguably, as will be discussed below, lawyers should not be either.

What the IAT offered is less a revolution in psychology than a new tool to measure bias by measuring response latency times.¹⁴³ Furthermore, it is only one tool among many for measuring bias; others include more traditional paper-and-pencil tests such as comparing matched resumes¹⁴⁴ and setting up social interactions.¹⁴⁵ Indeed, the IAT is sometimes used by psychologists who also use more traditional methodologies.¹⁴⁶

IAT advocates' presentation of implicit bias as something revolutionary reflected not only its academic ambitions but also its social change goals. IAT advocates aimed to influence not just the law but also the public. Gaining press coverage was crucial to their social change project and, again, the best strategy for doing so was to announce a scientific revolution. Their public education campaign has been very successful as implicit bias and the IAT received widespread press attention as a chic new thing.¹⁴⁷ This interest is part of a larger neurological trend¹⁴⁸ that includes such influential books as *Blink* and *Thinking, Fast and Slow*.¹⁴⁹ As anyone who has talked with reporters knows, they need to report something fresh and new rather than something dowdy and old.

The incentives in the law are very different. Because law is based on precedent, the strongest rhetorical position is to present one's arguments as long-established rather than brand new. Dowdy is the name of the game.

¹⁴³ See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998).

¹⁴⁴ See, e.g., Bertrand & Mullainathan, *supra* 56, at 991–92; M.A. Hitt et al., *supra* note 59, at 221 (sending resumes and cover letters to corporations while varying applicant sex and race); Jaihyun Park et al., *Subtle Bias Against Muslim Job Applicants in Personnel Decisions*, 90 J. APPLIED SOC. PSYCHOL. 2174, 2178–79 (comparing employment decisions for resumes with typical Muslim or European American applicant names).

¹⁴⁵ See generally Cecilia Ridgeway, GENDER, INTERACTION, AND INEQUALITY (1992) (citing many studies based on social interaction).

¹⁴⁶ Compare Laurie A. Rudman & Julie E. Phelan, *The Effect of Priming Gender Roles on Women's Implicit Gender Beliefs and Career Aspirations*, 4 SOC. PSYCHOL. 192, 194–95 (2010) (using the IAT), and Laurie A. Rudman, et al., *Reactions to Gender Egalitarian Men: Perceived Feminization Due to Stigma-by-Association*, 16 GROUP PROCESSES & INTERGROUP REL. 1, 4 (2012) (using the IAT), with Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004, 1006 (1999) (having subjects evaluate job applicants), and Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 630 (1998) (analyzing interactions between subjects to study motivational influences on impression formation).

¹⁴⁷ See Kester, *supra* note 140.

¹⁴⁸ See Adam Gopnik, *Mindless: The New Neuro-Skeptics*, THE NEW YORKER (Sept. 29, 2010), http://www.newyorker.com/arts/critics/books/2013/09/09/130909crbo_books_gopnik, archived at <http://perma.cc/0eEJe4yLbh7>.

¹⁴⁹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

Thus, the strongest rhetorical framework within which to introduce evidence of bias in court is to insist that courts have always accepted such evidence. In light of this framework, the obvious tactic is to tie evidence from social and cognitive psychology to case law stretching back to *Reed v. Reed*.¹⁵⁰ Justice Ruth Bader Ginsburg in particular spent a lot of time and energy in the 1970s inserting insights of stereotyping into equality case law. As early as 1973, in a brief for *Kahn v. Shevin*, Justice Ginsburg and her co-authors criticized a tax exemption available to widows but not widowers, arguing that the tax “perpetuates sex stereotypes and thereby retards women’s access to equal opportunity in economic life.”¹⁵¹ This language soon found its way into Supreme Court decisions from *Orr v. Orr*, which held that states could not limit alimony to women,¹⁵² to *Nevada Department of Human Resources v. Hibbs*, which upheld the application of the Family and Medical Leave Act to state officials on the theory that “Congress sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes.”¹⁵³ The goal in linking social psychological evidence to this line of precedent is to signify to courts that they have embraced stereotyping evidence in assessing claims of discrimination for decades.

Confusion is widespread about the relationship between implicit bias and the older language of stereotyping. Schemas (e.g., the “good mother” who is always available to her children)¹⁵⁴ drive stereotyping (e.g., “mothers lack commitment to their jobs”),¹⁵⁵ which in turn drives both explicit prescriptive bias (e.g., “mothers should not work long hours”)¹⁵⁶ and descriptive bias that may well be unconscious (e.g., the automatic assumption that a mother who arrives late was held up by child care responsibilities).¹⁵⁷ Discussion of “stereotyping” lacks the pizzazz of announcing a new, exciting development in brain science, but it may be a wiser strategic move within the law.

The NSF study seeks to help remedy the confusion between implicit bias and the larger field of social psychology. The Four Patterns of Gender Bias approach reaches beyond IAT studies to summarize findings from decades of social science studies, using a variety of methodologies.¹⁵⁸ It is, of

¹⁵⁰ *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

¹⁵¹ Brief for Appellants at 18, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78); see also Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 *HASTINGS L.J.* 1267, 1271 (2012).

¹⁵² *Orr v. Orr*, 440 U.S. 268, 283–84 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”) (citing *United Jewish Org. v. Carey*, 430 U.S. 144, 173–174 (1977)).

¹⁵³ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734 n.10 (2003).

¹⁵⁴ Kobryniewicz & Biernat, *supra* note 68, at 584–87.

¹⁵⁵ Correll et al., *supra* note 48, at 1316.

¹⁵⁶ See Benard & Correll, *supra* note 49, at 639.

¹⁵⁷ Correll et al., *supra* note 48, at 1302–03 n. 2.

¹⁵⁸ See, e.g., Amy J. C. Cuddy & Susan T. Fiske, *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 *J. Soc. ISSUES* 701, 711 (2004) (finding women

course, a lot harder to master decades of studies than the brief history of the IAT. This Article attempts to provide a primer that may prove useful not only to legal scholars but also to employment lawyers. Because the Four Patterns, along with interview findings, track the ways gender bias plays out *in everyday workplace interactions*, the hope is that the Four Patterns approach will prove helpful to employers' lawyers when they do investigations or design gender bias trainings, and to employees' lawyers when they interview clients or design discovery questions.¹⁵⁹

The revolutionary-new-idea framing around the IAT had concrete negative effects concerning its use in courts due to the rules of evidence. In the line of cases represented by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that, in order to introduce scientific evidence into court, the evidence needs to be supported by appropriate validation.¹⁶⁰ "General acceptance" by the relevant scientific community is one factor that strengthens the validity of a scientific technique.¹⁶¹ For this reason, too, IAT advocates would have been far better off presenting the IAT as simply a new assessment tool that was validating findings long ago established by other methods, particularly given the IAT is a relatively new tool having only been invented in 1998.¹⁶²

The best-known attack against the IAT as an evidentiary basis for discrimination lawsuits was put forth by Gregory Mitchell and Philip Tetlock in their article, *Antidiscrimination Law and the Perils of Mindreading*.¹⁶³ Their article does just what IAT advocates did; it elides the difference between "implicit bias" (i.e. bias measured by the IAT) and the much larger and more established literature on bias and stereotyping.¹⁶⁴ This move allows Mitchell and Tetlock's article to launch an attack on the IAT and intimate that methodical flaws which they attribute to the IAT prove that stereotyping evidence *in general* should not be allowed in employment discrimination cases.¹⁶⁵ For example, Mitchell and Tetlock cite an IAT study by Laurie Rudman and Peter Glick, critiquing it on the grounds that it does not show a link

were perceived as warmer but less competent after becoming mothers, similar to the Maternal Wall); Derks et al., *supra* note 50, at 530 (finding women who began their careers with low gender identity and experienced gender discrimination distanced themselves from other women more and engaged in more gender stereotyping, similar to The Tug of War); Susan T. Fiske et al., *supra* note 86, *A Model*, at 879, 897 (finding out-groups are often viewed as "warm but not competent" or "competent but not warm," similar to The Tightrope); Lyness & Heilman, *supra* note 20, at 781 (finding women had to receive higher performance ratings before being promoted than men, similar to Prove-It-Again!).

¹⁵⁹ Although outside the confines of this Article, there is an obvious need to extend the Four Patterns approach beyond gender to race and other categories.

¹⁶⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

¹⁶¹ *Id.* at 594.

¹⁶² Greenwald et al., *supra* note 143, at 1464.

¹⁶³ See Mitchell & Tetlock, *supra* note 8, at 1030–34.

¹⁶⁴ See *id.* at 1030–35.

¹⁶⁵ See *id.* at 1056–115.

between IAT scores and judgments about “hireability.”¹⁶⁶ Perhaps their assertion is true, but many other studies using more traditional methodologies do show such a link; a famous example gave people identical resumes, one of which had an African-American-sounding name (e.g., Jamal) and one of which had a white-sounding name (e.g., Greg).¹⁶⁷ The study found that applicants with white-sounding names received 50% more callbacks for interviews than those with black-sounding names,¹⁶⁸ that both males and females experienced this racial gap,¹⁶⁹ and most troubling, that blacks needed eight additional years of experience in order to receive the same number of callbacks as whites.¹⁷⁰ Another matched-resume study found that fathers who take parental leave were less likely to be recommended for workplace rewards (“a leadership role, a promotion, a raise, a fast-track executive training program, and a challenging, high-profile project”) and more likely to be recommended for workplace penalties (“a salary reduction, a demotion, termination if the company is downsized, decreased responsibilities at work, and [encouragement] to work for another organization”).¹⁷¹

Mitchell and Tetlock also argue that lab studies are not dependable because they are not evidence of what happens in actual workplaces.¹⁷² To quote them, “[T]hose eager to import [IAT] research into the law still must establish that the correlations between IAT scores and discriminatory conduct found in artificial laboratory settings reliably predict behavior in real-world settings”¹⁷³ The NSF study, and the larger interview project of which it is a part, provide evidence that long-documented patterns of bias are, in fact, commonplace in today’s workplace. Of the sixty women interviewed for the NSF study, *every single one* reported gender bias of the types documented in laboratory studies. The interview aspect is important because it is very difficult and expensive to gather this kind of evidence through experimental methods, although some studies do.¹⁷⁴ For example, one study of mothers versus non-mothers presented the matched resumes both to college students (the “class lab” study) and sent them to businesses (the “audit” study), finding that the employers exhibited even stronger bias than the college students did.¹⁷⁵

Mitchell and Tetlock further argue that the IAT, and, by extension, experimental studies in general, are not valid evidence of bias in actual work-

¹⁶⁶ *Id.* at 1070 (citing Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 756–57 (2001)).

¹⁶⁷ Bertrand & Mullainathan, *supra* note 56, at 992.

¹⁶⁸ *Id.* at 998.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 992.

¹⁷¹ Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?* 69 J. SOC. ISSUES 322, 329 (2013).

¹⁷² Mitchell & Tetlock, *supra* note 8, at 1033–34.

¹⁷³ *Id.* at 1033.

¹⁷⁴ Correll et al., *supra* note 48, at 1330.

¹⁷⁵ *Id.* at 1309–10, 1315–17.

places because they don't involve people who know each other well.¹⁷⁶ Again the interview study provides evidence that contradicts the claim that stereotyping does not occur when people know each other well. This claim may be true in some contexts. For example, the assumption that a black worker conforms to the stereotype that blacks are lazy or violent might well be attenuated by familiarity. Yet women often encounter bias and stereotyping by people who know them very well, as the NSF shows. For one thing, there is no reason to suspect that prescriptive bias is attenuated by familiarity. For example, a supervisor who believes that a good mother is always available to her children can be expected to judge a mother who works long hours harshly whether or not he knows her.¹⁷⁷ Another example: if a co-worker only feels comfortable when women are modest and self-effacing, even a woman whom he knows well will likely encounter backlash if she is a "go-getter" rather than a "helpmeet."

Familiarity might seem to have more influence in the descriptive bias context. However, the NSF study found that Prove-It-Again! bias was commonplace among the colleagues of women scientists, even by people they knew well. I encourage social scientists to further investigate the interaction between familiarity and preexisting biases.

After first publishing their research, Mitchell and Tetlock went on to found a company that provides expert testimony in case after case for employers.¹⁷⁸ In effect, they led a movement attacking the approach championed by sociologist William Bielby, who had testified for plaintiffs about stereotyping and bias in many major class action cases.¹⁷⁹ Mitchell and Tetlock mention Bielby by name without noting that Bielby's testimony typically does not focus on IAT evidence but instead on the larger social psychological literature, using a variety of different methods.¹⁸⁰

The attack on stereotyping evidence has been remarkably successful. Mitchell and Tetlock have been part of the sweeping, and quite successful, attack on the use of stereotyping evidence in the federal courts.¹⁸¹

¹⁷⁶ See *id.*; accord David Copus, *A Lawyer's View: Avoiding Junk Science*, in *EMPLOYMENT DISCRIMINATION LITIGATION: BEHAVIORAL, QUANTITATIVE, AND LEGAL PERSPECTIVES* 450, 453 (Frank J. Landy ed., 2005).

¹⁷⁷ See Benard & Correll, *supra* note 49, at 621, 639.

¹⁷⁸ Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 39 n.1 (2009).

¹⁷⁹ See, e.g., Expert Report of William T. Bielby at 1, *Nelson v. Wal-Mart Stores, Inc.*, 2009 WL 196567 (E.D. Ark. Jan. 27, 2009), (No. 04CV00171); Expert Report of William T. Bielby at 1, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (No. 05CV06583); Expert Report of William T. Bielby at 1, *Satchell v. Fedex Express*, 2007 WL 1114010 (N.D. Cal. April 13, 2007), (No. 03CV02878).

¹⁸⁰ Mitchell & Tetlock, *supra* note 9, at 1055; Bielby reports, *supra* note 179.

¹⁸¹ See generally Christine A. Amalfe, *The Limitations on Implicit Bias Testimony Post-Dukes*, Gibbons PC (2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommitteemidwintermeeting/1_amalfe.authcheckdam.pdf (stating that courts have been less receptive to implicit bias evi-

The other most influential article in the backlash against IAT is Amy Wax's *Discrimination as Accident*.¹⁸² As this Article has noted, Wax argues that the law should not allow for recovery on the basis of unconscious bias as it will incentivize employers to spend money to no good purpose given that people cannot change the behavior of which they are not aware. Her arguments stem from an understandable confusion regarding implicit bias methodology and theory. The first problem stems from Wax's claim, adopted from IAT advocates, that all bias today is subtle.¹⁸³ What these commentators mean by this assertion is that modern bias typically is not of the "pernicious, overt," "no-blacks-allowed" variety.¹⁸⁴ However, what Wax fails to recog-

dence in recent years, especially following *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), archived at <http://perma.cc/RSG5-GR2W>. For examples of cases in which evidence of stereotyping was unsuccessful, see *Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996 (D. Minn. 2011) (granting employer's motion to exclude implicit bias expert testimony that age stereotyping was a factor in employer's decision to terminate employees because expert did not analyze whether age stereotypes existed at employer); *E.E.O.C. v. Wal-Mart Stores Inc.*, 2010 WL 583681 (E.D. Ky. Feb. 16, 2010) (holding testimony of sociologist was irrelevant and inadmissible because testimony about subconscious gender stereotyping did not shed light on whether discriminatory effects were intentional); *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370, at 17 (S.D.N.Y. October 25, 2010) (excluding expert testimony about gender stereotyping, finding such testimony did not meet the requirements for expert testimony because "[g]ender stereotypes are the stuff of countless television situation comedies and are the focus of numerous media treatments on nearly a daily basis. It is unarguable that virtually all adults in our society know about gender stereotypes," and therefore such evidence did not meet the requirements for expert opinion testimony). *But see* *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 500–01, 520, 530, 544 (N.D. Cal. 2012) (granting employees' motion for class certification based in part upon implicit bias expert testimony that employer's culture fostered and reinforced stereotyped thinking, which permitted gender bias to infuse the promotion process from the top down). One Iowa state court opinion, *Pippen v. Iowa*, No. 107038, slip op. at 1–3 (Iowa Dist. Ct. Polk Cnty. Ct. Apr. 17, 2012), was sharply critical of plaintiffs' proffered social science testimony. The *Pippen* court granted judgment in favor of the employer on employees' discrimination claims based in part on the fact that employees' implicit bias expert testimony failed to prove causation. *Id.* The court noted that plaintiffs' expert "conceded that he would not use the phrase 'implicit bias' in writing a scientific article," and rhetorically asked, "How, then, should it import more gravamen in a court of law?" *Id.* at 53. The court discounted the testimony because it did not establish any connection between alleged implicit bias and the discretionary subjective employment decisions at issue in this particular workplace and was simply an "opinion of conjecture, not proof of causation." *Id.* at 54.

¹⁸² Wax, *supra* note 9.

¹⁸³ See, e.g., Dasgupta, *supra* note 7, at 316–17 ("National surveys indicate that racism in American society has declined steadily over the past 50 years. Despite this optimistic finding, other research using indirect measures suggests that subtle and implicit forms of prejudice and discrimination remain pervasive.") (citations omitted); Dovidio, *supra* note 7, at 845 ("[A]lthough overt expressions of prejudice have declined steadily and significantly over time, subtle—often unconscious and unintentional—forms continue to exist."); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) ("These frameworks suggest that, whereas traditional forms of prejudice are direct and overt, contemporary forms are indirect and subtle.").

¹⁸⁴ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

nize is that just because many examples of modern bias are less overt does not mean that it is not real.

Moreover, while IAT advocates may be primarily focused on subtle bias, any employment lawyer can tell you that subtle bias is not, alas, all that exists today. For example, the strongest form of gender bias—bias against mothers—is often open and explicit.¹⁸⁵ “‘You don’t get people like you down here in Monroe, Louisiana, who have as much telecom experience and advertising agency experience that you do with a Master’s degree from Northwestern,’” one Louisiana employer told a mother in a 2011 case.¹⁸⁶ “‘But you’ve got a lot of personal distractions right now; you have a new baby at home and I don’t think you have the fire in you to be one of my leaders.’”¹⁸⁷

The all-bias-is-now-subtle line of argument places IAT advocates in the weak argumentative position of disputing the potential significance of milli-second differences in automatic associations.¹⁸⁸ The citation of experimental studies that document concrete workplace penalties or interview studies that show how bias plays out in everyday workplace interactions places advocates of change in a much more persuasive position. That is what paper-and-pencil studies typically do. As a single example, take Adam Butler and Amie Skattebo’s study, in which subjects filled out a survey in which they assessed the performance of men who experienced a work-family conflict; the study found that such men received lower overall performance ratings and lower reward recommendations than men who did not experience work-family conflict, and women who did.¹⁸⁹

What is defined as “subtle bias” depends on the public’s education regarding how bias works. The Four Patterns approach documents how gender bias shapes everyday office politics for women in ways that, once named, are easy to spot. For evidence of this proposition, one need not look farther than the interviews in which 96 percent of the women interviewed immediately recognized one or more of the patterns of bias that have been so painstakingly documented by decades of social science.¹⁹⁰ Regardless, the subtlety of the bias is irrelevant. Forcing an employee from a protected group to provide more evidence of competence than employees from a non-protected

¹⁸⁵ See, e.g., *Krull v. Centurytel, Inc.*, 829 F. Supp. 2d 474, 476 (W.D. La. 2011); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (describing situation where manager admitted plaintiff was passed over for promotion because she had children and manager assumed she would not want to relocate); *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997) (describing administrator statement that employee would not be considered for promotion because job involved too much travelling for a married mother and that a woman should stay home with her family).

¹⁸⁶ *Krull*, 829 F. Supp. 2d at 476.

¹⁸⁷ *Id.*

¹⁸⁸ See Mitchell & Tetlock, *supra* note 8, at 1032, 1039 n.49, 1047–48, 1092, 1117.

¹⁸⁹ Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings*, 77 J. OCCUPATIONAL & ORG. PSYCH. 553, 559 (2004).

¹⁹⁰ Williams & Dempsey, *supra* note 1 (manuscript at xxiii).

group in order to succeed is precisely the kind of discrimination Title VII should prevent.¹⁹¹ Proving discrimination by pointing to a “comparator,” such as to a similarly situated man not subject to the same adverse employment action encountered by the plaintiff, is perhaps the single most established way of proving a Title VII case.¹⁹²

Wax’s second confusion underlies her contention that people cannot control bias that is subtle and totally unconscious, which stems from IAT advocates’ message that “implicit bias” is often unconscious. Although her confusion is understandable, so is this conflation. In workplace trainings, minimizing the sense of responsibility for bias by describing it as unconscious can be used as means to increase acceptance of the material, thus reducing the likelihood that the training will increase bias rather than decrease it.¹⁹³ In court, however, this kind of “unconscious” framing proves confusing and counterproductive. From a legal standpoint, it would be more productive to describe implicit bias as “unexamined bias” rather than “unconscious bias.” After all, from the plaintiff’s viewpoint, whose fault is it if the perpetrator is clueless?¹⁹⁴

The third issue with Wax’s argument arises in her claim that unconscious bias is an “intermittent” and “elusive” phenomenon¹⁹⁵ that only occurs “sporadically in social interactions.”¹⁹⁶ No support or explanation is given for this assertion.¹⁹⁷ Perhaps what she means is that the bias literature describes *tendencies*, not inevitabilities (e.g., subjects are 79% more likely to hire a non-mother than the mother). However, a tendency does not necessarily mean that bias is sporadic; someone who has a tendency toward bias may well act on it again and again. Moreover, even if a supervisor acts on her bias only once in a way that results in an adverse employment action based on sex, that “one instance” of bias is sufficient to show sex discrimination under Title VII.¹⁹⁸

¹⁹¹ Civil Rights Act, 42 U.S.C. § 2000e (2012).

¹⁹² For a thorough discussion, see Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 832 (2002); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193 n.1 (2009); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011).

¹⁹³ Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 611 (2006).

¹⁹⁴ Nevertheless, cluelessness should not be a defense. See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 448 (2003) [hereinafter, Williams, “Cluelessness” Defense]. Under Title VII, employers must not discriminate “because of . . . sex.” Civil Rights Act, *supra* note 191. It says nothing of exemptions for “subtle discrimination,” *id.*, and employers have a legal duty to recognize and correct disparate treatment regardless.

¹⁹⁵ Wax, *supra* note 9, at 1133.

¹⁹⁶ *Id.* at 1134.

¹⁹⁷ *Id.*

¹⁹⁸ Civil Rights Act, *supra* note 191.

Despite the other issues, the most critical problem with Wax's work remains her conflation of "unconscious bias" with "unconscious disparate treatment."¹⁹⁹ As previously discussed, this conflation denotes the challenges of translating between the language of the law and the language of social psychology. Take the aforementioned Jamal/Greg study in which it was found that employment applicants with "ethnic-sounding" names must provide eight additional years of experience in order to be perceived as on par with applicants with white-sounding names.²⁰⁰ If an employer requires eight additional years of experience for equally qualified blacks as compared to whites, that is disparate treatment. Self-aware, malicious intent to discriminate should not be required.²⁰¹ For a Title VII claim to be cognizable under a theory of disparate treatment, all that should be required is that less-qualified whites are hired over more-qualified blacks.

The term "unconscious disparate treatment" makes no sense. Disparate treatment entails an adverse employment action based on sex, not a psychotherapy session. To take another example, if an employer is only half as likely to promote a mother as an identical woman without children, then the employer is discriminating based on the gender stereotype that women are less competent and committed to their jobs after they have children. This act is disparate treatment whether she is conscious or not of her underlying motivations.²⁰²

Wax's final mistake is evidenced in her contention that imposing liability on employers for unexamined bias is inappropriate as people unaware of their own biases cannot possibly correct them.²⁰³ Thus, the imposition of liability is inefficient as it increases costs for employers without improving the workplace for employees.²⁰⁴ This argument rests on quotes from actual studies to the effect that implicit bias cannot be controlled.²⁰⁵ However, other studies contradict these conclusions through evidence that implicit bias is

¹⁹⁹ Wax, *supra* note 9, at 1138.

²⁰⁰ Bertrand & Mullainathan, *supra* note 56, at 998 (discussing "matched resumes" studies with identical resumes of a black and white candidate).

²⁰¹ See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 756–57 (2005); Krieger, *supra* note 22, at 1164.

²⁰² Cf. *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118–19 (2nd Cir. 2004); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), archived at <http://perma.cc/0mKkJV1voXV>.

²⁰³ Wax, *supra* note 9, at 1196.

²⁰⁴ *Id.* at 1191.

²⁰⁵ See Mitchell & Tetlock, *supra* note 8, at 1035 n.36 (citing John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOL. 462, 463–64 (1999)); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 144 n.2 (2004); Wax, *supra* note 9, at 1158–60 (quoting John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effect*, in DUAL-PROCESS THEORIES IN SOC. PSYCHOL. 361–62, 370–71 (Shelly Chaiken & Taacov Trope eds., 1999); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 117, 119–22 (1994)).

malleable.²⁰⁶ However, this debate is not simply a citation war. IAT advocates' tight focus on implicit bias again disserves us. The IAT measures automatic association, such as the automatic association of women with an apron and men with a suit. Disrupting these automatic associations—this “implicit bias”—may well be very difficult. But the issue on the ground is not whether automatic associations *occur* but whether, once made, the stereotyping that results can be *overridden*.

Stereotypes are reversed all the time. Many whites, myself included, might experience greater fear upon encountering a black male stranger in a dark alley than upon an identical encounter with a petite, white woman.²⁰⁷ Personally, I override that reaction, telling myself that to respond that way is prejudiced. I override my automatic association by focusing my attention on the behavior of the man in question, at which point I typically recognize that the individual is in no way a threat. To say that it is going to be difficult to eliminate white people's automatic association between black men and crime does not mean that we as Americans need to resign ourselves to a society where we shoot innocent black men whose only crime is to remove their wallet from their pockets.²⁰⁸ Though stereotype *activation* is automatic, stereotype *application* can be controlled.²⁰⁹ Yet the proposed methods of controlling bias explored by IAT researchers tend to reflect cognitive psychology's intensely individualistic focus, a focus that is an uneasy match when the goal is to change working conditions in organizations. Thus, IAT researchers propose using de-biasing screensavers, displaying images of outgroup members in unfamiliar roles, and focusing on counter-stereotypical mental imagery.²¹⁰

²⁰⁶ See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 257 (2002) (arguing that the force of automatic stereotypes can be influenced by context, as well as the perceiver's motives and approach to the situation); Nilanjana Dasgupta, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 808 (2001) (finding that exposure to images of admired black and disliked white individuals weakens automatic pro-white preferences); Tiffany A. Ito et al., *The Influence of Facial Feedback on Race Bias*, 17 PSYCHOL. SCI. 256, 259 (2006) (finding that implicit racial bias of subjects was lessened when they were repeatedly exposed to black faces while being induced to smile); Laurie A. Rudman et al., “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding implicit bias was reduced after participants attended a multicultural training course).

²⁰⁷ See generally Craig St. John & Tamara Heald-Moore, *Fear of Black Strangers*, 24 SOC. SCI. RES. 262 (1995) (discussing fear of black strangers).

²⁰⁸ Amadou Diallo was an immigrant from Guinea, shot 19 times by four plainclothes police officers who claimed to have mistaken his wallet for a gun. Susan Sachs, *U.S. Decides Not to Prosecute 4 Officers Who Killed Diallo*, N.Y. TIMES, Feb. 1, 2001, archived at <http://perma.cc/0FLY3TLC>CamA. Andre Burgess, a 17-year-old student, was shot by a Federal agent who mistook the candy bar Burgess was carrying for a handgun. David Kocieniewski, *Agent Mistakes Candy Bar for Gun and Shoots Youth*, N.Y. TIMES, Nov. 8, 1997, archived at <http://perma.cc/0wKydpkEDCN>.

²⁰⁹ Blair, *supra* note 206, at 248–50.

²¹⁰ See, e.g., Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001) (finding that mental imagery can moderate stereotype applications); Billy

At a more basic level, we need to re-design basic business systems—hiring, assignments, evaluations, and compensation—to interrupt bias.²¹¹ It is well established, for example, that bias is less likely to be influential in structured rather than unstructured interviews.²¹² In addition, incentives matter; people who are held accountable if their decisions are influenced by bias are simply less likely to act on that bias.²¹³ Moreover, organizational and social psychologists have documented extensively that ambiguity in criteria leaves the door open to stereotyping.²¹⁴ These are just a few ways business systems can be designed to interrupt bias. Others exist, but I will limit myself to discussing two.

One stems from a study of “casuistry” in which subjects are given a scenario in which they had to choose someone for a job that required both education and experience.²¹⁵ The study found that if the man had more experience, subjects tended to choose the man and cite his experience, whereas if the man had more education, they still tended to choose the man, then citing his education.²¹⁶ The study also found that subjects’ gender bias could be controlled if subjects were required to pre-commit by saying that they considered *either* education *or* experience to be most important for the job. The important point, again, is that although bias may be automatic, its effects can be overcome.

Another approach to overcoming bias involves revisiting the enormous amount of literature on the “women don’t ask” phenomenon,²¹⁷ including the

Baker, *She Explores Inner Workings of Bias*, BOSTON GLOBE, Oct. 20, 2008, at 14 (“[Mahzarin Banaji] uses the screensaver on her office computer to display images of people from far-flung places, or in unfamiliar roles (a female construction worker, say), in an effort to rewire her associations.”); Shaki Asgari et al., *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCHOL. 203, 208 (2010) (showing frequent quality interaction with ingroup member professors reduced self-stereotyping).

²¹¹ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 489–518 (2001). See generally MICHAEL ARMSTRONG, A HANDBOOK OF HUMAN RESOURCE MANAGEMENT PRACTICE (9th ed. 2003) (listing best practices for analyzing bias).

²¹² See Allen I. Huffcutt & Philip L. Roth, *Racial Group Differences in Employment Interview Evaluations*, 83 J. APPLIED PSYCHOL. 179, 186 (1998).

²¹³ See Madeline E. Heilman & Alice H. Eagly, *Gender Stereotypes Are Alive, Well, and Busy Producing Workplace Discrimination*, 1 INDUS. & ORG. PSYCHOL. 393, 396 (2008); Madeline E. Heilman & Michelle C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 127, 143 (Eugene Borgida & Susan T. Fiske eds., 2008).

²¹⁴ VERONICA F. NIEVA & BARBARA A. GUTER, *WOMEN AND WORK: A PSYCHOLOGICAL PERSPECTIVE* (1988); Henry L. Tosi & Steven W. Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis*, 28 ACAD. MGMT. J. 712, 721 (1985); SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1991).

²¹⁵ Norton et al., *supra* note 23, at 817

²¹⁶ *Id.* at 821.

²¹⁷ See, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE*, at ix (2003) [hereinafter *WOMEN DON’T ASK*] (arguing

claim that the wage gap between men and women stems not from discrimination, but from the fact that men negotiate their salaries whereas women don't.²¹⁸ But a deeper look at the "women don't ask" literature reveals a study that finds that when women *do* negotiate their starting salaries, they are seen as less likable and they are less likely to be hired.²¹⁹ I suggest that the reason women do not ask is that they correctly sense that they will be penalized if they do. It's the Tightrope paradigm; whereas a man who negotiates hard may be seen as "knowing his own worth," a woman who does the same thing may well be seen as pushy and unlikable.

Once again, this bias can be controlled by a redesign of business systems. For example, one study found that if both men and women are told that they are expected to negotiate, then the gender difference in negotiation all but disappears.²²⁰ Why? Once people are told that the expectation is that they will negotiate, women who negotiate are not seen as pushy and inappropriate. They are good girls, just following the rules.

In conclusion, law reviews' excessive focus on the IAT has derailed the debate over the use of social science to document gender and race bias. The NSF study reintroduces a distinction between the IAT and the decades of social psychology that preceded it. In this Article, and in other work,²²¹ I have sought to provide an introduction to that larger literature, which is decades old and uses a range of methodologies.²²² Many of its findings are "dowdy," "dusty," and long-documented; perfect for a legal system based on precedent. Law professors would be well advised to stop conflating de-

that women are much less likely to negotiate than men); Allyce Bess, *The Biggest Hurdle for Women that Want a Raise? They Don't Ask for One*, ST. LOUIS POST-DISPATCH, Oct. 26, 2003 (discussing WOMEN DON'T ASK, *supra*); Alan B. Krueger, *Economic Scene: Women Are Less Likely to Negotiate, and It Can Be Costly to Them*, N.Y. TIMES, Aug. 21, 2003 (also discussing WOMEN DON'T ASK, *supra*); Tessa Mayes, *Selfless Women Too Backward in Coming Forward for Promotion*, LONDON TIMES, Aug. 24, 2003 (finding that women start negotiations less often and ask for less than men); Susan Schwartz, *Women Could Get More, Just by Asking*, THE GAZETTE, Dec. 15, 2003, at D3 (discussing Babcock's theories on women's unwillingness to negotiate); UC Irvine Graduate School of Management, *Ground-Breaking Study: Women's Negotiating Style Leads to Lower Pay Offers than Men Receive*, ASCRIBE NEWSWIRE, July 21, 2003 [hereinafter *Women's Negotiating Style*] (discussing research by Lisa A. Barton on women's requested salaries).

²¹⁸ See, e.g., *Be a Man*, THE ECONOMIST, June 28, 2003; Schwartz, *supra* note 217; Bess, *supra* note 217; Krueger, *supra* note 217; *Women's Negotiating Style*, *supra* note 217; Mayes, *supra* note 217; Denise Kersten, *Women Need to Learn the Art of the Deal: Pay Gap Linked to Negotiation Skills*, USA TODAY, Nov. 17, 2003, at B07.

²¹⁹ Hannah R. Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 960–62 (2005).

²²⁰ ANDREAS LEIBBRANDT & JOHN A. LIST, NATIONAL BUREAU OF ECONOMIC RESEARCH, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment* 10 (2012).

²²¹ See, e.g., Williams, "Cluelessness" Defense, *supra* note 194, at 405–447; JOAN C. WILLIAMS & CONSUELA A. PINTO, AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* (2nd ed. 2008); Williams & Dempsey, *supra* note 1.

²²² See generally Peter Suedfeld, *Racism in the Brain; or Is It Racism on the Brain?*, 15 PSYCHOL. INQUIRY 298 (2004) (providing a historical summary of measurement techniques).

cares-old literature on gender and racial bias with recent literature on implicit bias and the IAT, and to delve into the research in social psychology in a more serious way. This study is designed to help with the initial jump.

III. IMPLICATIONS FOR THE INTERSECTIONALITY DEBATE

The literature on intersectionality is more than a decade older than the literature on implicit bias. The first major scholarly work on intersectionality was Kimberlé Crenshaw's groundbreaking 1989 *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*.²²³ The "tendency to treat race and gender as mutually exclusive categories of experience and analysis," Crenshaw wrote, leads black women to be "theoretically erased."²²⁴ The key insight of intersectionality theory: disadvantage is not simply additive as complex identities lead to complex, and distinct, types of discrimination.²²⁵

Traditionally, critical race theory, of which the intersectionality debate is an important strain, has focused on analysis of legal cases or on methods drawn from the humanities.²²⁶ Critical race scholars have often questioned

²²³ Crenshaw, *supra* note 16; see also Aída Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, 14 SIGNS 833 (1989).

²²⁴ *Id.* at 139.

²²⁵ The social psychological literature on complex social identities posits that sometimes such identities are additive while sometimes they are not. See, e.g., Galen V. Bodenhausen & Destiny Peery, *Social Categorization and Stereotyping In Vivo: The VUCA Challenge*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 133, 136 (2009) (arguing that perceptions of individuals are altered in an additive fashion based on number of identity dimensions shared); Sonia Roccas & Marilynn B. Brewer, *Social Identity Complexity*, 6 PERSONALITY & SOC. PSYCH. REV. 88, 99–104 (2002) (exploring the complexity of social identity).

²²⁶ See generally Hurtado, *supra* note 223 (discussing the need for intersectional analysis); Pamela Trotman Reid & Lillian Comas-Díaz, *Gender and Ethnicity: Perspectives on Dual Status*, 22 SEX ROLES 397 (1990) (also discussing the need for intersectional analysis); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357 (Kimberlé Crenshaw et al. eds., 1995) (discussing the need for intersectional analysis specifically with respect to domestic violence); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004) (historical analysis highlighting the need for intersectional analysis); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991) (discussing legal approaches to employment policies prohibiting cornrows); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) (discussing identity performance as a basis for discrimination); Cho, *supra* note 116 (discussing the relationship between stereotypes of Asian American women and sexual harassment); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (discussing criminal penalties meted out against drug-addicted mothers); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using humanistic methods to approach race and the law).

whether one can use the master's tools to dismantle the master's house, criticizing empirical methods as weighted against the voices of people of color.²²⁷ More recently, several critical race scholars have begun to embrace empiricism,²²⁸ a movement catalyzed by the annual Critical Race Theory and Empirical Methods workshop founded by law professor Osagie Obasogie and anchored by a special issue of the UC Irvine Law Review.²²⁹

The NSF study begins from social science²³⁰ and ends by confirming that the "double jeopardy" hypothesis is too simple. Of course, studies, including the NSF, reveal that some women do suffer "double jeopardy" along one axis of gender bias, Prove-It-Again! For example, because black women trigger two sets of negative competence assumptions, their mistakes tend to have even more negative consequences when compared to black men than mistakes by white women when compared to white men.²³¹ However, the double jeopardy hypothesis oversimplifies the complex dynamics of race and gender. For example, one study has found that black women in fact have somewhat more room to display dominant behaviors than white women do,²³² a finding that is confirmed by the NSF study. Note that black women's experience may differ not only from white women's, but also from that of other women of color.

As has been discussed, another important message of the NSF study is that gender bias is commonplace, perhaps nigh universal, among professional women of color. The finding that all of the women interviewed reported gender bias is important because several recent studies have documented both that an increasing proportion of gender bias litigation is brought by women of color²³³ and that women of color virtually never win discrimination suits.²³⁴ While courts have often shown themselves unwilling to create a new protected category specifically for women of color,²³⁵ the NSF study suggests an alternative approach. Women affected by one of the four patterns of discrimination can simply allege gender bias. The fact that gender bias differs somewhat for women of color does not mean that it is not

²²⁷ See, e.g., Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67, 74 (2008).

²²⁸ See Gómez, *supra* note 226; Leslie McCall, *Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences*, 66 AM. SOC. REV. 520, 521 (2001).

²²⁹ Symposium on Critical Race Theory and Empirical Methods, U. CAL. IRVINE L. REV. (forthcoming 2014).

²³⁰ For another approach to intersectionality that begins from social science, see Ange-Marie Hancock, *Intersectionality as a Normative and Empirical Paradigm*, 3 POL. & GENDER 248, 248-49 (2007).

²³¹ See Rosette & Livingston, *supra* note 61, at 1165.

²³² Livingston, Rosette & Washington, *supra* note 76, at 357.

²³³ See *infra* note 260 and accompanying text.

²³⁴ See *infra* notes 253-60 and accompanying text; see also David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 549 (2003).

²³⁵ See *infra* note 238 and accompanying text.

gender bias. After all, all gender bias is racialized, including gender bias perpetrated against white women. Surely the law does not protect against gender bias as experienced by white women but not against gender bias as experienced by women of color.

A. *Intersectional Plaintiffs' Fate in Courts*

Crenshaw first pointed out that intersectional plaintiffs tend to have less success in court in *Demarginalizing the Intersection of Race and Gender*, where she discussed the case of *DeGraffenreid v. General Motors Assembly Division*.²³⁶ The black women plaintiffs in that case alleged that General Motors' seniority system discriminated against them.²³⁷ The court refused to allow them to sue *as black women* on the grounds that that would "create a new 'super-remedy'"²³⁸ that was not within the intent of the statute. The court analyzed the plaintiffs' race and sex discrimination claims separately and found that the plaintiffs lost the race claim because the company hired black men, and the sex discrimination claim because the company hired white women.²³⁹ The erasure of experiences as women of color was very explicit.²⁴⁰

A black woman plaintiff was more successful in a subsequent case, *Jefferies v. Harrison County Community Action Association*,²⁴¹ when a court used the sex-plus theory first introduced in *Phillips v. Martin Marietta*.²⁴² The sex-plus theory allows women to sue based on sex plus another characteristic, such as in *Martin Marietta* in which the "plus" characteristic was having school-age children.²⁴³ The *Jefferies* court reversed a grant of summary judgment for the employer, and affirmed that "discrimination against black females can exist even in the absence of discrimination against black men or white women."²⁴⁴

Despite this success, study after study has found sharply lower rates of success in employment discrimination cases brought by women of color than those brought by plaintiffs in general.²⁴⁵ For example, a 2003 study by law

²³⁶ Crenshaw, *supra* note 16, at 141–42 (discussing *DeGraffenreid v. General Motors Corp.*, 413 F. Supp. 142 (E.D. Mo. 1976)).

²³⁷ *DeGraffenreid*, 413 F. Supp. at 143.

²³⁸ *Id.*

²³⁹ *Id.* at 144–45.

²⁴⁰ *See id.* at 145 ("The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male.").

²⁴¹ *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033–35 (5th Cir. 1980).

²⁴² *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969).

²⁴³ *Id.* at 3–4; see Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1463–81 (2009).

²⁴⁴ *Jefferies*, 615 F.2d at 1032.

²⁴⁵ In addition to the studies discussed below, see Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (discussing the case of an arts and crafts instructor who was fired for "negative role modeling" after she became pregnant out of wedlock); Cald-

professor David Oppenheimer examined a sample of 334 employment discrimination and wrongful discharge cases decided by California courts between 1998 and 1999, finding that black women had low win rates in discrimination cases.²⁴⁶ Similarly, a small 2009 study by law professor Minna Kotkin of twenty-six employment discrimination summary judgments in the Southern and Eastern Districts of New York in the one-year period beginning in June of 2006 found that intersectional plaintiffs virtually always lost.²⁴⁷ Employers won summary judgments 96% of the time, higher than the 73% success rate that is commonly reported in employment discrimination cases in general.²⁴⁸ Likewise, a 2012 study by law professor Emma Reece Denny examined all 162 of the employment discrimination cases appealed to the Eighth Circuit between 2008 and 2010.²⁴⁹ It found that intersectional plaintiffs won summary judgments in 7.5% of the cases, as compared to a 30.3% plaintiff win rate in Eighth Circuit employment discrimination cases in general.²⁵⁰ Like the New York study, the finding was that employees virtually always lose intersectional cases; employers won in 92.5% of cases.²⁵¹ Denny also found that cases involving intersectional plaintiffs are dramatically less likely to be published than cases by non-intersectional plaintiffs (66.1% compared to 28.3 %).²⁵² In other words, the loss rate of intersectional plaintiffs is probably even higher than what has been reported in Denny's and other studies.

The most elegant study on the lower success rates of women of color who bring employment discrimination suits is by Best, Krieger, Edelman, and Eliason, among whom are both lawyers and sociologists.²⁵³ They drew upon a 2% random sample of district and circuit court opinions in federal discrimination cases between 1965 and 1999, yielding 328 circuit court opinions and 686 district court opinions.²⁵⁴ Once again, they found strong

well, *supra* note 226 (providing an overview of cases where black plaintiffs challenged workplace restrictions on particular hairstyles); Carbado & Gulati, *supra* note 226 (using hypothetical employment discrimination cases to discuss legal theories based on identity performance discrimination); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991) (using anecdotes to illustrate the differences between interactive and double discrimination); Wei, *supra* note 114 (using two cases to illustrate how Title VII can be used to convince judges that elements of an individual's identity cannot be separated when analyzing alleged employment discrimination).

²⁴⁶ Oppenheimer, *supra* note 234, at 549.

²⁴⁷ Kotkin, *supra* note 243, at 1458; see also Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQUALITY 339, 354 (2012).

²⁴⁸ Kotkin, *supra* note 243, at 1440.

²⁴⁹ Denny, *supra* note 247, at 354.

²⁵⁰ *Id.* at 355.

²⁵¹ *Id.*

²⁵² *Id.* at 356.

²⁵³ Rachel Kahn Best, Linda Hamilton Krieger, Lauren B. Edelman & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011).

²⁵⁴ *Id.* at 999.

support for intersectionality theory: “[P]laintiffs making intersectional claims are less than half as likely to win” as compared with nonintersectional plaintiffs (15% compared to 31%);²⁵⁵ and they are only half as likely to obtain at least a partial victory and one-third as likely to win completely.²⁵⁶ Holding other factors equal, intersectional plaintiffs will win only 13% of the time; non-intersectional plaintiffs win 28% of the time.²⁵⁷ While white women are most likely to have a full victory (38%), nonwhite women are the least likely (11%), with nonwhite men much closer to nonwhite women than to white women (15%).²⁵⁸ The study suggested that the claims of intersectional plaintiffs are not intrinsically weaker than those of discrimination plaintiffs in general.²⁵⁹ Best and her co-authors also found that intersectional claims represent an increasing proportion of discrimination claims. In the 1970s and 1980s, they represented only about 10% of all discrimination claims, a number that climbed to more than a quarter once they began rising around 1990.²⁶⁰

One strategy for improving the success rate for women of color is to exhort courts to allow intersectional claims.²⁶¹ This approach is attractive in many ways. First, a key tenet of the intersectionality debate is that women of color should not have to carve their identities up by gender and race. As the Ninth Circuit determined in a 1994 case, “[T]he attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experience.”²⁶² This distortion should not occur. Furthermore, the fact that women of color are women does not mean that they should join with (white) feminists based on their commonalities, and forced to leave their race behind.²⁶³ For one thing, women of color experience discrimination based on race (i.e. the kind of discrimination they share with men of color) in addition to discrimination based on gender (i.e. the kind of discrimination they share with white women).

In addition, the NSF study shows, even the gender discrimination faced by women of color is subtly, or not so subtly, different from that experienced by white women.²⁶⁴ Yet the insistence that intersectional plaintiffs should not

²⁵⁵ *Id.* at 1009.

²⁵⁶ *Id.* at 1011.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1012.

²⁵⁹ *Id.* at 1012 n.27.

²⁶⁰ *Id.* at 1008.

²⁶¹ See Denny, *supra* note 247, at 349–50.

²⁶² Lam v. Univ. of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994); see, e.g., Denny, *supra* note 247, at 339 (“‘The identity cannot be compartmentalized; it cannot be split in halves or thirds, nor have any clearly defined set of boundaries. I do not have several identities, I only have one, made of all the elements that have shaped its unique proportions.’” (quoting Amin Maalouf, *Les Identités Meurtrières* [Deadly Identities], 4 *Al Jadid* (1998))).

²⁶³ See CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 86–90 (2005).

²⁶⁴ Many stereotypes often operate at the subgroup level. Indeed, social psychologists have found that “perceivers sometimes evaluate others on the basis of one dominant categorization and ignore or even inhibit alternative categorizations, sometimes evaluate

have to carve up their identities often disserves them in court. As previously discussed, some courts have, rightly or wrongly, been reluctant to create a "new super-remedy" for fear of endlessly proliferating new protected categories.²⁶⁵ Moreover, when a plaintiff alleges discrimination based on membership in two protected categories, this manner of pleading compounds the already-difficult problem of finding a suitable comparator. A growing literature documents that courts increasingly dismiss plaintiffs' employment suits by insisting on comparator evidence and that comparators be the near twin of the plaintiff.²⁶⁶ The comparator problem is even worse in the case of intersectional plaintiffs. Said one court, "The more specific the composite class in which the plaintiff claims membership, the more onerous the ultimate burden" of proving discrimination.²⁶⁷ Problems arise when plaintiffs try to show that the employer discriminated based on the individual's particular combination of traits. As one court explained in a case brought by an Asian American woman, "Asian women are subject to stereotypes and assumptions shared neither by Asian men nor by white women."²⁶⁸ By this analysis, evidence of discrimination against Asian men or white women would not help in proving the plaintiff's claim.²⁶⁹

Alleging discrimination based on only one protected characteristic might help some plaintiffs overcome these barriers. The NSF study highlights that the gender bias experienced by women of color is gender bias, *pure and simple*. The fact that the gender bias is racialized does not disprove that it is gender bias. After all, gender bias against white women is racialized, too, it is just racialized by whiteness. Surely Title VII does not mean that white women can sue for sex discrimination while women of color cannot. Nor does it allow only men, not women, of color to sue for race discrimination. Carving up the identities of women of color is not ideal, but in court it may be strategically advisable. Further studies of how the experience of

others on the basis of an additive combination of the different category memberships, and sometimes create a compound category with emergent properties that are not predicted from contributing categories considered separately." Roccas & Brewer, *supra* note 225, at 88 ("Social identity complexity reflects the degree of overlap perceived to exist between groups of which a person is simultaneously a member When a person acknowledges, and accepts, that memberships in multiple ingroups are not fully convergent or overlapping, the associated identity structure is both more inclusive and more complex.").

²⁶⁵ Degraffenreid v. General Motors Corp., 413 F. Supp. 142, 143 (E.D. Mo. 1976).

²⁶⁶ See, e.g., Goldberg, *supra* note 192, at 754–55; see also Lewis v. Metro. Atlanta Rapid Transit Auth., 343 Fed. Appx. 450, 454 (11th Cir. 2009) (holding that, to succeed in a discrimination claim, a plaintiff fired for misconduct must show that the employer retained another employee who engaged in "nearly identical" conduct) (quoting Burke-Fowler v. Orange County, 447 F.3d 1319, 1323 (11th Cir. 2006)); Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. 1982) (holding that plaintiff fired for misconduct must show that an employee outside the protected class was retained despite "nearly identical" conduct).

²⁶⁷ Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

²⁶⁸ Lam v. Univ. of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994).

²⁶⁹ Goldberg, *supra* note 192, at 765–66.

gender discrimination differs by race, and how the experience of race discrimination differs by gender, would be most helpful.²⁷⁰

Lawyers litigating discrimination cases on behalf of women of color ought to allege, and courts ought to allow, women plaintiffs of color to recover *both* for their experiences of gender bias *and* for their experiences of racial bias.²⁷¹ Title VII did not forbid adverse employment actions based on sex and race against everyone else but declare open season on women of color.

B. How Does the Experience of Gender Bias Differ by Race?

The NSF study confirmed the basic hypothesis of intersectionality: being a woman of color is different from being a white woman. Not only do women of color experience racial bias white women do not face, their experience of gender bias differs from that of white women. The NSF study methodology offers a fuller understanding of how women experience gender bias, complementing experimental studies that often yield information chiefly about white women.

The NSF study also suggests that the types of bias women encounter differ according to their race. The biggest gap between white women and women of color concerned Tug of War bias, reported by 59% of women of color but only 50% of white women. The next biggest gap concerned the Tightrope, reported by 77% of women of color and 68% of white women. The Maternal Wall came third, reported by 63% of mothers of color and 56% of white mothers. Prove-It-Again! bias showed the smallest gap: 70% of women of color reported it, as compared with 64% of white women. One caveat: as previously mentioned, most of the interviewees were scientists, and as such, it is impossible to tell to what extent these differences stem from race and to what extent they stem from their particular professional environment.

Another important finding is that women of color within racial categorizations have dramatically different experiences of discrimination than other women within the same category. For example, to the extent that Asian women trigger the model minority stereotype, they may well have fewer Prove-It-Again! problems when compared not only to Latinas and blacks, but also to white women. However, to the extent that they trigger the China Doll stereotype, their experience may be closer to that of other women of color than to white women. In other words, Asian women's experiences at work may depend on whether co-workers see them as Asians or as wo-

²⁷⁰ When black women allege Prove-It-Again! bias, they are alleging a kind of bias they share both with black men *and* with white women. In a comparator context, therefore, the proper comparator groups are white men and a combined group of all women and black men.

²⁷¹ In particular, black women and Latinas should be allowed to allege Prove-It-Again! bias as to both race and gender bias.

men.²⁷² Which aspect of complex identities is triggered may well be context-dependent.

My initial hypothesis regarding the study was that black women and Latinas would experience more Prove-It-Again! bias than white women, given that they trigger two sets of negative competence assumptions (that blacks are lower in status than whites and that women are lower in status than men).²⁷³ However, there was actually a *smaller* difference between the percentages of women of color who experience Prove-It-Again! bias as compared with white women than any other type of bias. Nevertheless, the NSF study confirmed other studies reporting that Prove-It-Again! bias, once triggered, is stronger for black women who make mistakes than for white women who do the same.²⁷⁴ To that extent, the double jeopardy hypothesis seems partly true. It rings true in another way as well: Latinas and Asian Americans appear to have more “too feminine” problems than white or black women. As has been noted, studies suggest that Asians of both sexes are seen as less masculine—i.e. more feminine—than whites.²⁷⁵ The NSF study also suggests that Latinas have more “too feminine” problems than whites, raising the question of whether Latinos, like Asian Americans, are, as a group, seen as more feminine than whites.

Moreover, the “too feminine” problems experienced by all groups of women of color differed in important ways from the challenges faced by white women. White women reported being expected to take notes, bake cupcakes, answer the phone, mother students, do emotional work, and remain as “service partners” in law firms—but not one of the professional white women interviewed had been asked to do the work of an administrative assistant or mistaken for a janitor. In broad brush, it appears that women of color encounter gender pressures not only to assume under-valued feminine roles, but also to assume lower-status support roles—something not reported in the interviews with white women. In addition, women of color often are under even more pressure than white women to do one particular type of office housework: service on diversity and women’s initiatives.

Though the double jeopardy hypothesis does cover some aspects of the experience of women of color, it does not fully capture the complexities at the intersection of race and gender. Most notably, black women are less likely than white women to be penalized for having a direct, no-nonsense, don’t-suffer-fools-lightly style.²⁷⁶ That comes at a cost, of course; black women are not eligible for the cherished status reserved solely for white women. And God forbid they use an authoritative style to advocate for

²⁷² See Shih et al., *supra* note 120, at 81–82 (assessments of Asian-American women change, depending on whether racial or gender identity is made salient).

²⁷³ See Biernat & Kobrynowicz, *supra* note 26, at 552, 554.

²⁷⁴ See Rosette & Livingston, *supra* note 61, at 1165.

²⁷⁵ Adam D. Galinsky et al., *Gendered Races: Implications for Interracial Marriage, Leadership Selection, and Athletic Participation*, 24 *PSYCHOL. SCI.* 498, 501 (2013).

²⁷⁶ Livingston, Rosette & Washington, *supra* note 76, at 354.

themselves; it is accepted only when they are furthering the goals of the company or institution.²⁷⁷ Moreover, as shown by the study, black women do encounter “too masculine” problems, particularly around self-promotion, but they appear to encounter fewer such problems than do the other three groups of women. The same is not true of Asian Americans and Latinas, who appear to face “too masculine” problems much like those of white women, except that they are sanctioned not only by being called “bitches,” but also by racialized epithets such as “dragon lady” and “fiery Latina.”

Perhaps the least variation emerged around the Maternal Wall. Women of all groups reported bias triggered by motherhood. Asian women may face fewer negative competence and commitment assumptions based on motherhood but then run smack into backlash against hard-driving mothers. Different groups of women of color also face quite different expectations around motherhood by other members of their own racial groups, with blacks and Asians more likely than whites to face the expectation that they will continue their careers. Latinas, by contrast, are more likely than whites to face the expectation that they will stay home full time.

Women of color faced every type of Tug of War bias known to woman, but again the experience differs somewhat by racial group. In general, women of color were more likely than whites to be understanding and forgiving of older women who judged them for not doing womanhood “right.” The angry tone often heard from white women was, for women of color, typically replaced by understanding and empathy. Asians were less likely than any other group of women to report Tug of War problems. Conflict between administrative personnel and professionals, though it was reported by white women, may well be even more of a problem for Latinas. Finally, a disturbing finding is that Tugs of War between black and white women often take on a racial dimension, ranging from white women policing black women into the conventions of femininity to outright racism.

CONCLUSION

This Article reports on an initial study,²⁷⁸ but it suggests that the NSF study’s marriage of experimental social psychology with narrative sociology can deepen our understanding of gender bias. Too often, reliance on studies that compare “men” and “women” have led scholars to confuse “gender” with “the way white women experience gender.” The NSF study, along with the types of lab studies now being performed by Robert Livingston,²⁷⁹ Kath-

²⁷⁷ See Livingston, *supra* note 81.

²⁷⁸ The Center for WorkLife Law has formed an Advisory Committee, chaired by Judge Bernice Donald of the 6th Circuit, to help launch a study titled “Double Jeopardy?: How Gender Bias Differs by Race for Women in the Law.”

²⁷⁹ Rosette & Livingston, *supra* note 61; Livingston, Rosette & Washington, *supra* note 76; Livingston, Washington & Rosette, *supra* note 81.

erine Phillips,²⁸⁰ and Jennifer L. Eberhardt²⁸¹ hold the promise of a much more complete and nuanced understanding of the operation of gender in American society. The NSF study opens up the intriguing possibility of exploring the complex ways in which the experiences of different groups of women emerge, converge, and diverge.

The NSF study also has two important messages for the law. The first is that women of color share some experiences of bias with men of color (“racial bias”) and other experiences with white women (“gender bias”). Instead of insisting that women of color find “near twins,” courts should allow women of color plaintiffs to plead and prove gender discrimination when they are describing experiences they share with white women, race discrimination when they are describing experiences they share with men of color, and both race and gender discrimination when women of color describe experiences (as will often be the case with Latinas and black women on the Prove-It-Again! axis of gender bias) they share *both* with white women *and* with men of color.

The NSF study’s second major implication is that lawyers need to understand the difference between research based on the IAT and the much larger universe of experimental social psychology. The IAT is only about ten years old, whereas experimental social psychology is much older, giving the latter obvious advantages considering the law’s reliance on precedent and its rules concerning admission of expert testimony. The NSF study seeks to help educate lawyers about the larger experimental literature, and also to provide a methodology that helps bridge the gap between lab studies and the workplace, and provides strong evidence that patterns described time and again in experiments do, in fact, describe the experience of many women at work.

²⁸⁰ See Richardson et al., *supra* note 78.

²⁸¹ Eberhardt et al., *Looking Deathworthy*, *supra* note 6; Eberhardt et al., *Seeing Black*, *supra* note 6; Banks, Eberhardt & Ross, *supra* note 13.