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## Negotiating While Female

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# NEGOTIATING WHILE FEMALE

Andrea Schneider\*

## ABSTRACT

*Why are women paid less than men? Prevailing ethos conveniently blames the woman and her alleged inability to negotiate. This article argues that blaming women for any lack of negotiation skills or efforts is inaccurate and that prevailing perceptions about women and negotiation are indeed myths. The first myth is that women do not negotiate. While this is true in some lab studies and among younger women, more recent workplace data calls this platitude into question. The second myth is that women should avoid negotiations because of potential backlash. Although women in leadership do face an ongoing challenge to be likeable, it is clear that not negotiating has long-term detrimental effects. The third myth, based on the limited assumption that a good negotiator must be assertive, is that women cannot negotiate as well as men. However, the most effective negotiators are not just assertive, but also empathetic, flexible, socially intuitive, and ethical. Women can and do possess these negotiation skills. This article concludes by proposing an action plan which provides advice on how women can become more effective negotiators and identifies structural changes that might encourage negotiation and reduce the gender pay gap.*

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## INTRODUCTION

**W**HY are we all so fascinated by perceived differences between men and women? And more specifically, how do these perceived differences affect a woman's ability to negotiate successfully? We know that women earn less on average than men, are less represented in business and in politics, and are still seen as a "minority" even though they outnumber men in the general population. This article summarizes the latest findings in gender differences while also underscoring what we know—and what we do not know—about negotiation effectiveness overall.

The first section will address the perception that women do not negotiate—that they are less likely to ask for something in the first place. The second section addresses the issue of backlash and why women (and men) worry about levels of assertiveness in negotiation. The third section will deal with the actual skill level of women in negotiation and the perception that women cannot negotiate on par with men. Finally, the article will outline steps that individual women can take as well as the structural changes that are needed to reduce the gender pay gap.

Why do we have these perceptions about women in negotiation? Well, if you want to explain why women are still paid less<sup>1</sup> or why women do not have leadership roles in law firms<sup>2</sup> or Fortune 500 companies<sup>3</sup>—the prevailing ethos conveniently blames the woman. Women's alleged inability to negotiate has been offered to explain the gender wage gap.<sup>4</sup> Blaming women for income inequality fails to hold employers responsible for payroll decisions and minimizes the employer's role.<sup>5</sup> And, therefore, nothing needs to change. No company needs to do anything or think about basic issues of equity.<sup>6</sup> No laws need to be changed. We end up focusing on women's purported deficiencies, instead of on their abilities, while searching for individual "cures" to this inequality instead of struc-

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1. Linda Babcock et. al., *Nice Girls Don't Ask*, HARV. BUS. REV., Oct. 2003, at 14; Jessica A. Kennedy & Laura J. Kray, *A Pawn in Someone Else's Game: The Cognitive, Motivational, and Paradigmatic Barriers to Women's Excelling in Negotiation*, 35 RES. IN ORG. BEHAV. 3, 3 (2009); see AM. ASSOC. OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 4 (2017), [http://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The-Simple-Truth](http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth) [<https://perma.cc/M3KY-DR5K>].

2. *Pyramid: Women in S&P 500 Companies*, CATALYST (Aug. 22, 2017), <http://www.catalyst.org/knowledge/women-sp-500-companies> [<https://perma.cc/G8D7-B98B>].

3. Babcock et al., *supra* note 1, at 14; *Statistical Overview of Women in the Workforce*, CATALYST (Aug. 11, 2017), <http://www.catalyst.org/knowledge/statistical-overview-women-workforce> [<https://perma.cc/R6KV-CT62>].

4. Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. UNIV. L. REV. 893, 898 (2014).

5. *Id.* at 903.

6. *Stereotypes Do Reinforce Status Quo*, INSIGHTS BY STAN. BUS. (June 15, 2003), <https://www.gsb.stanford.edu/insights/stereotypes-do-reinforce-status-quo> [<https://perma.cc/G666-AKWJ>].

tural solutions.<sup>7</sup>

While this article will not delve into the different types of unfair treatment faced by women in the workplace, it will strongly argue that to blame the woman for any lack of negotiation skills or efforts is inaccurate and that prevailing perceptions about women and negotiation are indeed myths.

## I. MYTH #1: WOMEN DON'T NEGOTIATE

The first myth is that “women don’t negotiate.” Where does this myth come from? Studies have shown that men initiate salary negotiations four times as often as women;<sup>8</sup> and that when women do negotiate, they ask for thirty percent less money than men.<sup>9</sup> Yet, there is a disconnect between the artificial experimental settings in which we typically study negotiation and the reality of negotiation in the workplace. While this disconnect does not explain the entire misperception, it can help put the perception into context as we examine the other myths later in this article.

### A. WE BASE OUR MYTH ON LIMITED STUDIES

Conceptual and methodological problems in the study of negotiation have contributed to this myth in three ways. First, we study the wrong thing: we only measure confidence and competitiveness rather than a host of other equally important negotiation skills. And we study this in distributive negotiations over money. Second, we study the wrong time frame: we study one-off interactions in which quick decisions are required without the ability to research or reflect—the workplace rarely operates that way. Third, we study the wrong people: we examine undergraduate or young graduate students and draw conclusions for how adults in the workplace negotiate.

#### 1. *We Study the Wrong Thing*

Negotiation research has, in the past, tended to use settings with low stakes and a competitive model to assess how people react to short-term, material gains.<sup>10</sup> These studies often focus on what are traditionally seen as masculine characteristics of negotiation—aggressiveness and confidence (or overconfidence)—which often translate into an ask for something, whether or not one is qualified or deserving of it. Since these characteristics are the variables that are being measured, the games themselves are rigged to show men as more effective. For example, Linda Bab-

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7. Travis, *supra* note 4, at 918; see Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a “Factor Other Than Sex” Under the Equal Pay Act*, 10 GEO. J. OF GENDER & L. 1, 3–4 (2009).

8. Linda Babcock & Sara Laschever, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 3 (Princeton University Press 2003).

9. *Id.* at 20.

10. Kennedy & Kray, *supra* note 1, at 13.

cock and colleagues ran a now well-known experiment with the game *Boggle* that paid participants \$3 at the end of the game.<sup>11</sup> Participants could earn more but only if they actually asked about compensation rather than note its unfairness.<sup>12</sup> The study found that men would ask for more compensation nine times more than women.<sup>13</sup> On the other hand, women were more likely to complain, but not make a specific request.<sup>14</sup> So, the difference—that men would ask directly while women would voice their displeasure more indirectly—is used to show propensity to negotiate.

Furthermore, these studies often only focus on salary negotiations and then treat salary as the sole measure of success, thus ignoring other elements that could be measured. There are other components of a job besides salary that are negotiated, and women, not surprisingly, are much more likely to negotiate about family issues than men.<sup>15</sup> This ability to negotiate the myriad of issues that contribute to worker satisfaction could make women more satisfied with their jobs in the long run. The underlying point here is that gender differences in negotiation may be context-specific.<sup>16</sup> For example, studies have shown no gender difference when the object of the negotiation was something “feminine” such as jewelry.<sup>17</sup> Additionally, when the negotiation simulation was viewed as a learning tool, rather than a test of negotiation ability, women performed equally well.<sup>18</sup> The framing of the negotiation matters.

## 2. *We Study the Wrong Time Frame*

Since simulations often are limited in their time frame, they miss longer-term, ongoing negotiation interactions between the parties. These scenarios tend to test quick response versus long-term thinking. Researchers have noted that women’s natural inclination to spend more time thinking about the impact on relationships and connection means that women will spend more time thinking about problems and process before arriving at a solution.<sup>19</sup> For example, the famous Amy versus Jake example might be read as an example of a woman dwelling on a problem

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11. BABCOCK & LASCHEVER, *supra* note 8, at 6–7.

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. See Deborah Kolb & Kathleen L. McGinn, *Beyond Gender and Negotiation to Gendered Negotiations* 1 (Harv. Bus. Sch. Division of Res., Working Paper 09-064, 2008); Julia B. Bear & Linda Babcock, *Negotiation Topic as a Moderator of Gender Differences in Negotiation*, 23 PSYCH. SCI. 743, 743 (2012).

16. Kennedy & Kray, *supra* note 1, at 6 (citing Laura J. Kray & Michelle J. Gelfand, *Relief Versus Regret: The Effect of Gender and Negotiating Norm Ambiguity on Reactions to Having One’s First Offer Accepted*, 27 SOC. COGNITION 418, 418–436 (2009)).

17. Kennedy & Kray, *supra* note 1, at 6.

18. *Id.*

19. See generally Katty Kay & Claire Shipman, *Do More, Think Less, in THE CONFIDENCE CODE: THE SCIENCE AND ART OF SELF-ASSURANCE—WHAT WOMEN SHOULD KNOW* 104–05 (HarperCollins 2014).

to find a creative solution.<sup>20</sup> Carol Gilligan tells the story of two kids who, when asked how to resolve the dilemma of a life-saving drug that is priced too high to purchase, have two different answers.<sup>21</sup> Jake suggests theft.<sup>22</sup> After all, a life is worth more than money. Amy takes her time, suggesting that perhaps this could be negotiated with the druggist.<sup>23</sup> While this propensity to ponder might be exceedingly helpful in other areas of business or negotiation (for example, in thinking about creative solutions), this will not be reflected in limited time frame lab experiments.

The limited time frame of negotiation tests also limits outside research or information and relies on gut feelings. This too can reflect socialized gender differences and exacerbate the differences noted above. For example, women have a lower sense of personal entitlement than men.<sup>24</sup> This lack of awareness as to the market value of their skills stems from traditional labor divisions.<sup>25</sup> Until recently, a woman's worth was determined by her ability to maintain a domestic environment,<sup>26</sup> which has made women unaccustomed to thinking of their work in terms of monetary value.<sup>27</sup> So, in salary or monetary negotiations, women expect others to determine the value of their work and in turn, their salary.<sup>28</sup> Without the time to research market rates, women's self-assessment might be lower.

### 3. *We Study the Wrong Age*

Most studies of negotiation behavior, conducted before the availability of online tools, used undergraduate students as guinea pigs to test the male and female propensity to negotiate. The *Boggle* game is one such example.<sup>29</sup> We know that men have tended to feel more comfortable than women in these types of simulations.<sup>30</sup> And the difference between men and women when it comes to competitive behavior, particularly at the college level, is well documented.<sup>31</sup> Other research focuses on salary negotiations at the time of graduation. As Professor Babcock outlined, male graduate students were more likely than their female counterparts to negotiate their salaries upon graduation.<sup>32</sup>

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20. CAROL GILLIGAN, IN *DIFFERENT VOICE* 49–50 (Harv. Univ. Press 1982).

21. *Id.*

22. *Id.*

23. *Id.*

24. BABCOCK & LASCHEVER, *supra* note 8, at 51.

25. *Id.* at 46.

26. *Id.*

27. *Id.* at 47.

28. *Id.* at 52.

29. *Id.* at 6.

30. Kennedy & Kray, *supra* note 1, at 6, 13.

31. *See* BABCOCK & LASCHEVER, *supra* note 8, at 4.

32. *Id.* at 42.

## B. REALITY IS MORE NUANCED THAN A LAB

So why are these negotiation studies problematic in terms of drawing lessons for women? First, the age and experience of the negotiator matters. Second, the professional training of the negotiator matters. And, finally, the context of the negotiation matters.

### 1. Age and Experience Matter

These college-age studies fail to recognize the difference that age and experience make. More recent negotiation research utilizes online and other techniques to analyze adults. For most of us—male or female—we presumably mature between college and adulthood. Therefore, in all likelihood, we are able to bring more nuanced and effective skills to the table by the time we are in a position to negotiate on behalf of our companies, clients, and ourselves.

#### a. Girls Have Lower Confidence in Adolescence

To underscore this conclusion, let's look first at the research that has been done regarding adolescent women.<sup>33</sup> As we know, girls begin elementary school with longer attention spans and greater social adeptness.<sup>34</sup> Young girls' brains detect emotional cues at an earlier age than young boys, making it easier for adults to teach girls to behave well.<sup>35</sup> Girls learn they are most valuable to authority—their teachers and parents—when they are compliant and well-behaved.<sup>36</sup> And historically, girls have actively avoided behaviors necessary for confidence building such as taking risks and making mistakes.<sup>37</sup> In addition, girls' lower testosterone production correlates with a lower inclination to take risks.<sup>38</sup> This serves women well, for example, in stock trading.<sup>39</sup> When a young boy fails at a task, he attributes the failure to lack of effort; whereas, a girl may attribute it to lack of skill or a reflection of her character.<sup>40</sup> This pattern continues into adolescence, where girls suffer a greater drop in self-esteem than boys and take longer to get over demoralization.<sup>41</sup> For example, girls are more likely to quit sports teams during adolescence.<sup>42</sup> Yet, learning to survive defeat in sports is one of the best methods of learning to survive setbacks in personal and professional life.<sup>43</sup> Ironically, by avoiding fail-

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33. See generally BABCOCK & LASCHEVER, *supra* note 8; see generally Bear & Babcock, *supra* note 15, at 743–44; see generally Kennedy & Kray, *supra* note 1, at 5.

34. KAY & SHIPMAN, *supra* note 19, at 87.

35. *Id.*

36. *Id.*

37. *Id.*

38. See generally Sheelah Kolhatkar, *What If Women Ran Wall Street? Testosterone and Risk*, N.Y. MAG., Mar. 21, 2010.

39. See Therese Huston, *Men Are So Hormonal*, N.Y. TIMES, June 25, 2017, at SR3.

40. KAY & SHIPMAN, *supra* note 19, at 88.

41. BROOKE DE LENCH, HOME TEAM ADVANTAGE: THE CRITICAL ROLE OF MOTHERS IN YOUTH SPORTS 61 (HarperCollins 2006).

42. *Id.*

43. KAY & SHIPMAN, *supra* note 19, at 90.



ure, girls can deprive themselves of some of the best methods of building their confidence.<sup>44</sup> By the time girls reach adulthood, they have deeply internalized what society has taught them to be their proper role. And women can believe these qualities are part of their innate personality, as opposed to just learned behaviors.<sup>45</sup>

b. Lower Confidence Leads to Less Assertive and Lower First Demands

An additional argument related to negotiation behavior is that lower first demands or lack of assertiveness can come from less of a sense of control of the situation. Commenters have argued that, throughout history, most aspects of women's lives have been controlled by others, and as a result, they have been taught to view their circumstances as beyond their control.<sup>46</sup> On the other hand, men are more likely to believe they can control their circumstances and take advantage of opportunities.<sup>47</sup> Women's perceived lack of control results in them having lower confidence than men.<sup>48</sup> This can lead to their hesitancy to act and to make less aggressive demands during negotiations.<sup>49</sup>

2. *Assumptions and Training Matter*

These assumptions about negotiation can be changed. Perhaps women do not negotiate for salary in equal numbers to men because they have been socialized not to. The backlash effect is discussed below. However, when women are trained to negotiate, evidence shows that differences between men and women evaporate.<sup>50</sup> The undergraduate management students, who, in the Babcock studies above did not negotiate,<sup>51</sup> started to negotiate in equal rates after being trained.<sup>52</sup> Additionally, in studies of law students<sup>53</sup> who self-select into this field of advocacy and have three years of training, there is absolutely no difference in their propensity to negotiate salary<sup>54</sup>—or in the amount of money received when they do

44. *Id.*

45. BABCOCK & LASCHEVER, *supra* note 8, at 76.

46. BABCOCK & LASCHEVER, *supra* note 8, at 18.

47. BABCOCK & LASCHEVER, *supra* note 8, at 23.

48. Women tend to feel less confident in their abilities to complete tasks that draw on "male" traits. Sandra R. Farber & Monica Rickenburg, *Under-Confident Women and Overconfident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J. L. & FEMINISM 271, 283 (1999).

49. See generally Zachary Estes & Sydney Felker, *Confidence Mediates the Sex Difference in Mental Rotation Performance*, 41 ARCHIVES OF SEXUAL BEHAV. 557, 557 (2012).

50. Andrea Kupfer Schneider, Catherine H. Tinsley, Sandra I. Cheldelin & Emily T. Amanatullah, *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL'Y 363, 381 (2010).

51. See Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt To Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84, 85 (2007).

52. *Id.*

53. See Schneider et al., *supra* note 50 at 381.

54. *Id.* at 381 (citing Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 320–21, 346–47 (1999)).

negotiate.<sup>55</sup>

Another interesting element of negotiation to follow is the expectations around negotiation (we return to this subject in the next section). In situations where it is clear that the salary is negotiable, studies show no gender differences in the person's likelihood to negotiate.<sup>56</sup> Interestingly, these differences in propensity to negotiate, even salary, might be changing over time. To whatever extent we think there might be differences in older generations on which some of these stereotypes are based, these differences may be evaporating.<sup>57</sup> In a study of the workplace from Australia conducted in 2013-2014, there is no difference in the likelihood to ask for a raise based on gender.<sup>58</sup> This study also showed that when women did not negotiate, it was not based on the fear that asking would harm the relationship.<sup>59</sup>

### 3. Context Matters

As we assess negotiation skills, we should understand that “the meaning of conflict to the various parties, the nature of the parties' relationships, the gender of the negotiators or representatives as distinct from the principals, the parties' relative social status or perceived power, their expectations, and their feelings about third parties” all impact behavior.<sup>60</sup> As outlined above, these negotiation games that are written about in academic studies do not mirror real world negotiations in which skills such as preserving the relationship and problem-solving techniques are seen as important.<sup>61</sup> Leadership guides and business bestsellers, for example, often focus on the importance of relationships, emotional intelligence, and integrity.<sup>62</sup> Indeed, many have argued that women actually excel in real negotiation settings where other skills are valued.<sup>63</sup> Women in the workplace tend to exhibit cooperative behavior, to contribute to collective knowledge, and display high ethical standards. We will return to these skills in the section below. These strengths are eclipsed by the current negotiation paradigm which either ignores these assets or considers

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55. See generally Schneider et al., *supra* note 50 at 363–84.

56. Kennedy & Kray, *supra* note 1, at 7 (citing Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large-Scale Natural Field Experiment*, 61 MGMT SCI. 2016, 2016 (2015)).

57. Artz et al., *Do Women Ask?* 5 (Warwick Economics, Working Paper No. 1127, July 2016).

58. *Id.*

59. *Id.*

60. Farber & Rickenburg, *supra* note 48, at 287.

61. Kennedy & Kray, *supra* note 1, at 14; Deborah Kolb & Kathleen L. McGinn, *supra* note 15, at 3.

62. See, e.g., DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (Bantam Books 1995); LARRY JOHNSON & BOB PHILLIPS, ABSOLUTE HONESTY: BUILDING A CORPORATE CULTURE THAT VALUES STRAIGHT TALK AND REWARDS INTEGRITY (AMACOM 2003); RICHARD BOYATZIS & ANNIE MCKEE, RESONANT LEADERSHIP: KNOWING YOURSELF AND CONNECTING WITH OTHERS THROUGH MINDFULNESS, HOPE, AND COMPASSION (Harv. Bus. Sch. Pub. 2005). The titles of these books indicate the focus on the importance of relationships, emotional intelligence, and integrity.

63. Kennedy & Kray, *supra* note 1, at 14.

them irrelevant or unproductive.<sup>64</sup> Perhaps more experiments that better replicate adult reality would showcase the importance of women's strengths.<sup>65</sup> We need to examine situations where long-term relationships matter.<sup>66</sup> If done that way, women's strengths, such as communal sharing, would be evident.<sup>67</sup> Finally, we need to note the dearth of research regarding gender differences in the long-term context, other than in representing clients. For example, in studies of attorneys, which implies repeated interactions with another attorney, women had equal skills.<sup>68</sup> Additional studies in other areas would give us a broader set of tools to measure effectiveness.

## II. MYTH #2: WOMEN SHOULDN'T NEGOTIATE BECAUSE OF BACKLASH

Of course, even when women do negotiate, there are instances where others respond poorly. The myth that women should not negotiate comes from the idea that women will not be liked if they are "pushy" (an adjective, like "bossy," that is almost exclusively used about women).<sup>69</sup> So some have argued that, even when women themselves might want to negotiate, the rational choice is to refrain.<sup>70</sup> This section discusses how this myth is created, its limits, and how it matters in terms of advice for when to negotiate.

### A. MYTH CREATION

#### 1. *Any Negotiation is Assertive (and Negative) Behavior*

To make this myth logical, we have to assume that negotiation, particularly on one's own behalf, is seen as assertive behavior. In other words, negotiating for a higher salary is consistent with the masculine "breadwinner" norm and inconsistent with the care-giving expectations of women.<sup>71</sup> This assumption is supported by studies that show both men and women evaluators viewed women who negotiate for higher pay as unlikeable and too aggressive. These evaluators also expressed an unwillingness to work with them in the future.<sup>72</sup> Colleagues prefer not to work with women whom they know to have negotiated for higher pay because such an act of self-advocacy makes the woman appear too demanding and not

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64. *Id.* at 17.

65. Kennedy & Kray, *supra* note 1, at 14; Hannah Riley Bowles, *Psychological Perspectives on Gender in Negotiation*, in *THE SAGE HANDBOOK OF GENDER AND PSYCHOLOGY*, 465, 479 (Oct. 2012).

66. Kennedy & Kray, *supra* note 1, at 17.

67. *Id.* at 19.

68. See Schneider et al., *supra* note 50, at 381–82.

69. Joan C. Williams & Vita Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 *HASTINGS L. J.* 597, 652 (2011).

70. Travis, *supra* note 4, at 917–18.

71. Hannah Riley Bowles & Linda Babcock, *How Can Women Escape the Compensation Negotiation Dilemma? Relational Accounts Are One Answer*, 37 *PSYCHOL. WOMEN Q.* 80, 86 (2013).

72. Travis, *supra* note 4, at 917–18.

agreeable.<sup>73</sup> This hesitation does not exist when employees are presented with the opportunity to work with men who negotiated a higher salary.<sup>74</sup>

## 2. *Assertiveness Results in Being Unlikeable*

Unfortunately, we have many studies and real-world examples that examine the issue of likeability in the workplace. Studies have shown that women who behave in a confident and strong manner are viewed more negatively than men who behave similarly.<sup>75</sup> Women were penalized if they acted too much like men because they were seen as too aggressive and unlikeable.<sup>76</sup> Female managers who adopt a direct and assertive style receive negative evaluations and are less popular among their employees.<sup>77</sup> Moreover, female leaders are evaluated negatively when they take on historically-male dominated leadership positions.<sup>78</sup> Women who are successful at traditionally masculine jobs are criticized for their lack of likeability.<sup>79</sup> Another study showed that, when presented with a talkative, fictional female CEO, both sexes viewed this woman as a less suitable leader in comparison to a man who talked the same amount.<sup>80</sup> The recent studies of interruption rates on the Supreme Court<sup>81</sup> and the focus on female Senators talking or being interrupted<sup>82</sup> are noteworthy in bringing these issues to the forefront. Perceptions of women talking more (and being unlikeable) are not the reality when we actually examine the data of who is talking and who is interrupting.

## 3. *Being Unliked Leads to Less Money and Fewer Friends*

Early cases of sex discrimination in the workplace also showed the impact of likeability.<sup>83</sup> For example, as outlined in the 1989 Supreme Court case, *Price Waterhouse v. Hopkins*,<sup>84</sup> Ann Hopkins was denied partnership at the firm Price Waterhouse because she was seen as not sufficiently

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73. Travis, *supra* note 4, at 918. Note that both men and women value jobs that are “feminine” lower than jobs labeled “masculine.” See Melissa Williams, Elizabeth Levy Paluck & Julie Spencer-Rodgers, *The Masculinity of Money: Automatic Stereotypes Predict Gender Differences in Estimated Salaries*, 34 *PSYCHOL. WOMEN Q.* 107, 118 (2010).

74. Bowles & Babcock, *supra* note 71, at 90.

75. Williams & Richardson, *supra* note 69, at 637.

76. Williams & Richardson, *supra* note 69, at 638.

77. Williams & Richardson, *supra* note 69, at 637.

78. Bowles, *supra* note 65, at 480.

79. Timothy A. Judge, Beth A. Livingston & Charlie Hurst, *Do Nice Guys—and Gals—Really Finish Last? The Joint Effects of Sex and Agreeableness of Income*, 102 *J. PERSONALITY & SOC. PSYCHOL.* 390, 392 (2012).

80. See Victoria Brescoll, *Who Takes the Floor and Why: Gender, Power, and Volubility in Organizations*, 56 *ADMIN. SCI. Q.* 622, 635 (2011).

81. See generally SCOTUSBLOG, <http://www.scotusblog.com> (last visited Oct. 8, 2017).

82. See, e.g., Matt Flegenheimer, *Senator, (Un)Interrupted: Kamala Harris's Rise Among Democrats*, *N.Y. TIMES* (Jul. 6, 2017), <https://www.nytimes.com/2017/07/06/us/politics/senator-kamala-harris-democrats.html> [Perma link unavailable]; Daniel Victor, *'Nevertheless, She Persisted': How Senate's Silencing of Warren Became a Meme*, *N.Y. TIMES* (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/elizabeth-warren-republicans-facebook-twitter.html> [Perma link unavailable].

83. Travis, *supra* note 4, at 896–97.

84. 490 U.S. 228 (1989).

feminine. She was told that she needed to attend “charm school” and that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>85</sup> The Supreme Court held that when gender (and violation of those gender stereotypes) plays a motivating part in employment decisions, the company is liable for discrimination unless the company can prove it would have made the same decision regardless of whether the plaintiff was a man or a woman.<sup>86</sup>

When women negotiate, they may lose both social and economic capital,<sup>87</sup> as in not being liked at work nor being hired or promoted.<sup>88</sup> Other studies, as noted earlier, show that if a woman successfully negotiates a higher wage, she risks alienating her colleagues, which in turn jeopardizes her long-term earnings.<sup>89</sup> Said differently, a woman who is disagreeable (possibly because she does not conform to typical “feminine behavior”) will earn less than a man who is seen as equally disagreeable.<sup>90</sup> This disagreeableness is only associated with masculine behavior, and translates into an advantage of greater earnings only for men.<sup>91</sup>

## B. LIMITS OF THE MYTH’S APPLICATION TO EVERYDAY NEGOTIATION

### 1. *Likeability is a Loaded Measure*

Much like the negotiation studies noted above that only measure confidence or high first offers, studies (and popular press) that examine likeability are also limited by the language that they use. As the studies on disagreeableness show, we have not been socialized to expect that men need to be likeable in order to succeed. And, in fact, men’s choices at the workplace seem to matter little to their perception as likeable. For example:

Catherine Tinsley and her colleagues constructed a series of videos in which a finance director (alternatively a man or a woman) has to choose between tending to a work crisis (an IT system crash) and a family emergency (a sick child).<sup>92</sup> Respondents watched one of these

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85. *Id.* at 235.

86. *Id.* at 258.

87. Judge et al., *supra* note 79, at 392.

88. Kennedy & Kray, *supra* note 1, at 9; Williams & Richardson, *supra* note 69, at 638.

89. Bowles & Babcock, *supra* note 70, at 81.

90. Judge et al., *supra* note 79, at 398–99.

91. Judge et al., *supra* note 79, at 392. Note that these stereotypes do work in both directions. Men are punished for not talking enough. Research shows self-promoting women and self-effacing men are both seen as less professionally competent and less socially attractive than self-promoting men and self-effacing women. *Id.* And when one adds race to the mix, these assumptions can be even more nuanced. In an experiment looking at lending practices, both black men and white women were seen as needing to play down their assertiveness; black women, on the other hand, were seen as permissibly assertive (like white men). See Sarah K. Harkness, *Discrimination in Lending Markets: Status and the Intersections of Gender and Race*, 79 SOC. PSYCHOLOGY QTR. 81, 81-93 (2016).

92. Cathy Tinsley et al., *Should I Stay or Should I Go?, Work-Life Crisis, and Predictability* (2008) (unpublished working paper, on file <http://guwli.georgetown.edu/research/>).

four videos (male or female director; choice to stay at work or go home) and then rated the director on a series of questions measuring both competence and likeability. When the finance director was female and chose to stay at work, she was seen as competent but unlikeable. When the female finance director went home, she was rated as incompetent but likeable. On the other hand, the choices that the male finance directors made did not matter—they were always judged reasonably likeable and competent. In other words, the same behaviors (staying or going) evoked different judgments when enacted by a female versus a male director. Moreover, the female director was essentially forced to choose between being seen as likeable or competent. Assuming both competency and likeability are necessary for career progression, we see how a gendered work environment might create unique barriers for women.<sup>93</sup>

This pressure to be likeable has been even clearer in politics.<sup>94</sup> Going back to the 2008 election with two women in the election cycle—Hillary Clinton and Sarah Palin—you could either be liked or you could be competent, but you could not be both.<sup>95</sup> And the 2016 election and post-election coverage has had an extraordinary focus on whether Clinton was likeable or not likeable enough to be elected. But outside of the spotlight or limited studies, it is unclear that regular negotiation interactions result in a persistent “unlikeability” that would result in harm. And, to the extent that this focus on likeability is a socialized construct, that can be changed over time.<sup>96</sup> As Susanna Schrobsdorff noted in June 2017, “*Wonder Woman* seems suited to the moment. She does the impossible, and I don’t mean the stunts. She leads without seeming to be unlikable.”<sup>97</sup>

As noted above, over time women have been socialized (by both men and women) to get along, to make nice, and to be team players.<sup>98</sup> Women are rewarded for pro-social behavior and punished when not engaging that way.<sup>99</sup> In adulthood, this means that women have been conditioned to pay attention to the impressions that they make—and are well-aware of penalties that can occur when these expectations are violated.<sup>100</sup>

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93. Schneider et al., *supra* note 50, at 370–71.

94. See Tara Mohr, *Learning to Love Criticism*, THE N.Y. TIMES (Sept 27, 2014), [https://www.nytimes.com/2014/09/28/opinion/sunday/learning-to-love-criticism.html?\\_r=0](https://www.nytimes.com/2014/09/28/opinion/sunday/learning-to-love-criticism.html?_r=0) [<https://perma.cc/L5WM-Z67L>].

95. See Catherine H. Tinsley, Sandra Cheldelin & Emily T. Amanatullah, *Leadership and Lawyering Lesson from the 2008 Election*, 30 HAMLINE J. OF PUB. LAW & POL’Y 586–87 (2009); see also Diana B. Carlin & Kelly L. Winfrey, *Have You Come a Long Way Baby? Hillary Clinton, Sarah Palin, and Sexism in the 2008 Campaign Coverage*, 60 COMMS. STUD. 326, 327 (2009).

96. See Tina Fey, *SNL - Bitch is the New Black*, VIMEO (Oct. 7, 2014), <https://vimeo.com/108275843> [<https://perma.cc/WNX3-VSME>].

97. Susanna Schrobsdorff, *Wonder Woman: A Perfect Paradox for the Generation That Expects To Have It All*, TIME (Jun. 1, 2017), <http://time.com/4800810/wonder-woman-paradox> [<https://perma.cc/N9U6-U2KX>].

98. Williams & Richardson, *supra* note 69, at 616.

99. Bowles & Babcock, *supra* note 71, at 81.

100. BABCOCK & LASCHEVER, *supra* note 8, at 111.

## 2. *The Language Used in Negotiation Matters*

Interestingly, current research shows that the fear of backlash for assertiveness is perhaps overblown and should be closely linked to the language used.<sup>101</sup> Instead of viewing assertiveness as an either-or proposition in negotiation, we should recognize degrees of assertiveness along a continuum where high assertiveness is aggression, and this aggression is punished. On the other hand, the “sweet spot” of assertiveness looks like collaboration and integrative negotiation. And this middle ground receives positive feedback.

In a review of earlier studies on assertiveness, new researchers closely examine the language used. Responses of “this offer is insulting” or “you would be foolish not to take this” had been coded as assertiveness (and, not surprisingly, faced backlash). In fact, Nazli Bhatia and her colleagues argue that this is mixing aggression with assertiveness.<sup>102</sup> When the language is toned down, no negative response ensues.<sup>103</sup> In fact, a closer look at studies suggesting women face a backlash show that negotiation expectations and punishments are similar for both men and women.<sup>104</sup> All negotiators are rewarded for their amiable, firm, pleasant, and assertive demeanors<sup>105</sup> while all are punished for aggressive, obnoxious, and overly competitive demands.<sup>106</sup> These updated studies provide perhaps both hope that expectations are shifting and a roadmap for negotiation skills in the future. All of this points to the fact that *how* we communicate and use our negotiation skills matters.

### C. WOMEN SHOULD AND NEED TO NEGOTIATE

So women arguably face an untenable choice between being likeable or competent depending on their willingness to negotiate.<sup>107</sup> Some women do not negotiate because they correctly perceive the very real threat of professional backlash that both men and women risk by behaving in counter stereotypical ways.<sup>108</sup> The result is that women, who have senior positions, tend to downplay their power—the opposite of how men

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101. See Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women’s Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 J. PERSONALITY & SOC. PSYCHOL. 256, 263 (2010).

102. Nazli Bhatia, Robin Pinkley, Zoe Barsness & Julia Bear, *Assertiveness Versus Aggression in Negotiation* (manuscript in preparation, forthcoming 2018); see also Nazli Bhatia, Robin Pinkley, Zoe Barsness & Julia Bear, *Assertiveness Versus Aggression in Negotiation* (Presentation at the 30th Annual Conference of the International Association for Conflict Management on July 11, 2017).

103. *Id.*

104. See Amanatullah & Morris, *supra* note 101, at 257–58.

105. *Id.*

106. *Id.*

107. Schneider et al., *supra* note 50, at 383.

108. See Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. PERSONALITY & SOC. PSYCHOL. 157, 158 (2004).

behave.<sup>109</sup>

And we should not pretend that this backlash will magically evaporate over time or with different socialization. On the other hand, this fear of backlash has perhaps led some to conclude that no negotiation is possible. Yet, the choice to remain passive is neither workable nor does it lead to career success. In other studies, women have been penalized if they acted too feminine because they were seen as lacking leadership skills and competence.<sup>110</sup> To the extent that negotiation skill is seen as part of the job, women need to demonstrate their ability to do it. When women are “traditionally feminine” and are not asking much for themselves, they do not get much.<sup>111</sup> And even though they may be likeable or agreeable, they are not taken seriously.

### III. MYTH #3: WOMEN CAN'T NEGOTIATE

This myth that women can't negotiate comes from the notion that women inherently cannot be assertive—and that assertiveness is the only skill needed to be effective. In fact, there are many skills that can make women effective negotiators.<sup>112</sup>

#### A. NEGOTIATORS NEED MORE THAN ASSERTIVENESS TO BE EFFECTIVE

The multiple skills that make us effective negotiators can be grouped into five categories—assertiveness, empathy, flexibility, social intuition, and ethicality.<sup>113</sup> The most effective negotiators—regardless of gender—use all of these skills.<sup>114</sup> As noted earlier, business and leadership books rarely focus on assertiveness alone. Even negotiation best-sellers note the importance of being able to maneuver and switch approaches, styles, and skills as needed.<sup>115</sup> We will review them in reverse order.

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109. See Brescoll, *supra* note 80, at 626.

110. Williams & Richardson, *supra* note 69, at 638.

111. Judge, et al., *supra* note 79, at 404.

112. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 184 (2002).

113. Andrea Kupfer Schneider, *Teaching a New Negotiations Skills Paradigm*, 39 WASH. U. J. L. & POL'Y 13, 35 (2012).

114. *Id.* at 27; see also Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217, 218 (1996); see generally Roger Fisher & Wayne H. Davis, *Six Basic Interpersonal Skills for a Negotiator's Repertoire*, 3 NEGOT. J. 117, 117–122 (1987).

115. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Penguin Books 1983); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (Penguin Books 1999); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (Simon & Schuster 1986); MICHAEL WHEELER, *THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD* (Simon & Schuster 2013) (All the above books discuss negotiations strategies and imply or explicitly discuss the importance of changing up negotiation styles and tactics).



### 1. *Ethicality*

Ethicality refers to reputation and trustworthiness in a negotiation. A good reputation is crucial for long-term and integrative negotiation.<sup>116</sup> Trust and trustworthiness are seen as key factors in successful negotiations in the workplace.<sup>117</sup> In fact, women's greater interest in social capital and building relationships can be an advantage.<sup>118</sup> Additionally, women are generally seen as more moral and ethical in negotiations (sometimes to their detriment in negotiation simulations).<sup>119</sup> Yet, over time and in the real world, this higher level of ethical behavior can lead to better reputations and better outcomes. Women perform just as well, if not better, than men during negotiations which extend over a longer term.<sup>120</sup> Women's ability to use candor allows everyone's voices to be heard and improves decision making.<sup>121</sup>

### 2. *Social Intuition*

Social intuition relies on self-awareness, ability to read your negotiation counterpart, and then using these cues to smooth the social interaction of the negotiation.<sup>122</sup> It includes non-verbal factors like eye contact and body language, para-verbal factors like tone of voice and pace of conversation, and verbal factors like use of humor and metaphor to build connection. For many of these factors, women are usually rated better than men.<sup>123</sup> Women are more effective at reading mood and body language, and they tend to give important non-verbal cues that they are listening to their counterpart.<sup>124</sup> This connectedness between the negotiators is important during the exchange of information and to build trust.

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116. See Nancy A. Welsh, *The Reputational Advantages Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 138; see also Tinsley et al., *infra* note 162; Judge et al., *supra* note 79, at 391.

117. See generally R.J. Lewicki & C.J. Wiethoff, *Trust, Trust Development, and Trust Repair*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Peter T. Coleman, et al. eds., Josey-Bass 2014).

118. See Kennedy & Kray, *supra* note 1, at 14.

119. A study showed that varying the gender of a counterpart's name, negotiators assume women will be more easily misled than men. Kennedy & Kray, *supra* note 1, at 8. In a simulation, women's lower perceived competence explained why they were more easily misled than men. See Laura J. Kray, Jessica A. Kennedy & Alex B. Van Zant, *Not Competent Enough to Know the Difference? Gender Stereotypes About Women's Ease of Being Misled Predict Negotiator Deception*, 125 ORG. BEHAV. & HUM. DECISION PROCESSES 61, 63 (2014).

120. Kennedy & Kray, *supra* note 1, at 17.

121. *Girl Power: The Costs of Sexism*, THE ECONOMIST (Aug. 20, 2015), <https://www.economist.com/news/americas/21661804-gender-equality-good-economic-growth-girl-power> [<https://perma.cc/AS6M-RCR6>] [hereinafter *Girl Power*].

122. Stacy M. Roberts, *Gendered Differences in Negotiation: Advancing an Understanding of Sources, Effects, and Awareness*, 18 CARDOZO J. CONFLICT RESOL. 71, 73 (2016). See generally, THE NEGOTIATOR'S DESK REFERENCE (Chris Honeyman & Andrea Schneider eds., ABA Publishing 2006); see also GOLEMAN, *supra* note 62.

123. Marjorie Corman Aaron, *Strategy at the Negotiation Table: From Stereotypes to Subtleties*, 30 HIGH COST OF LITIG. 83, 91-92 (2012); *Girl Power*, *supra* note 121.

124. Marjorie Corman Aaron, *supra* note 123, at 91.

### 3. Flexibility

Flexibility in a negotiation refers to both process and outcome flexibility. Process flexibility refers to the ability to shift styles or approaches in order to get what you want out of the negotiation.<sup>125</sup> In other words, if a direct and more assertive approach is not effective, one can switch to a more compromising approach. If avoiding the situation has only inflamed it, one can switch to more collaborating to see how to fix it. At this point, gender differences in this ability to gauge the situation and change approaches are unclear.

Outcome flexibility is often described in negotiation literature as creativity or finding integrative solutions.<sup>126</sup> More effective negotiators will be able to find different ways to meet their interests.<sup>127</sup> There do not appear to be gender differences in this particular skill.<sup>128</sup>

### 4. Empathy

Empathy refers to your understanding of the other side in a negotiation—the cognitive ability to see where they are coming from even when you do not agree, and to understand their emotions.<sup>129</sup> This is perhaps the skill in negotiation most written about after assertiveness and yet women’s seeming advantage in this skill is often underplayed. Empathy, while not measured in the one-off negotiation scenarios often tested in empirical studies, is hailed in the real world as a crucial skill for success.<sup>130</sup> More particular, in a negotiation, the ability to understand what is going on with your counterpart makes it possible to persuade your counterpart on his or her own terms.<sup>131</sup> The famous dictum by Winston Churchill comes to mind: “Diplomacy is the art of telling people to go to hell in such a way that they ask for directions.”<sup>132</sup> Empathy in a negotiation can also serve as a catalyst for creativity by finding out joint interests or integrative solutions.<sup>133</sup> Again, women are usually seen as having an advantage here.<sup>134</sup> Finally, women are more likely to admit mistakes than men—clearly empathizing with their counterpart’s position. And this too is seen as an effective leadership trait.<sup>135</sup>

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125. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 101 (2011); see also Jennifer Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 703 (2004).

126. Brown, *supra* note 125, at 697.

127. See Menkel-Meadow, *supra* note 125; see also Brown, *supra* note 125; see also MICHAEL GELB, *HOW TO THINK LIKE DA VINCI* (Penguin House 1998).

128. See generally Bowles, *supra* note 65.

129. See Schneider *supra* note 113, at 29.

130. See generally GOLEMAN, *supra* note 62.

131. See ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 6, 32 (Penguin Books 1994).

132. Reza Marashi, *In Geneva, U.S. and Iran Near the Finish Line*, THE WORLD POST, <http://www.huffingtonpost.com/reza-marashi/in-geneva-us-and-iran-nea-b-4254766.html> [<https://perma.cc/NS7C-33Z3>].

133. *Girl Power*, *supra* note 121.

134. See Bowles, *supra* note 65, at 469.

135. *Girl Power*, *supra* note 121.

### 5. Assertiveness

Assertiveness is the ability to prepare on the substance of the negotiation and then make strong, persuasive arguments in defense of your point of view.<sup>136</sup> This requires both expert knowledge of the negotiation matter and the presentation skills (and confidence) to make that argument. And we can see how women comparatively could be at a disadvantage when this is the only skill being measured.<sup>137</sup> First, if women lack data about the market—from lack of networks or good inside information—then their knowledge about an appropriate salary will be more limited than men. Second, if confidence is required to speak up, this lack of knowledge could transform an otherwise persuasive speaker into someone less assertive.

#### B. LOWER ASSERTIVENESS COMES FROM FEAR OF BACKLASH, NOT LACK OF SKILL

Why else might women not be as assertive in negotiation? As explained above, this likely comes from socialization and fear of backlash. We know this because of three things. First, when women negotiate on behalf of others, as is socially expected through our “mother bear” stereotype, women do not face or fear backlash. Second, when women understand that negotiation is expected—that negotiation is the norm—they negotiate. Finally, when women are trained to negotiate, there is no gender difference in likelihood to negotiate.

#### 1. Mother Bear Allowance

From negotiation studies, we know that it is only when women negotiate for themselves that they fear the reaction of the other side.<sup>138</sup> When negotiating for others (behavior that fits within the norm), women do not worry about violating the society-mandated norm of selflessness.<sup>139</sup> This difference reflects their internalization of social expectations rather than gender differences.<sup>140</sup> For example, in studies of lawyers, where assertiveness on behalf of clients is socially expected and rewarded, there is no difference in perceived levels of negotiation effectiveness.<sup>141</sup> Additionally, professors measuring negotiation skills in law school classes also have not found a gender difference.<sup>142</sup> Differences in a woman’s negotiation approach are caused by variances in workplace experience and socie-

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136. See Schneider, *supra* note 113, at 18; see also Andrea Kupfer Schneider, *Aspirations: Aspirations in Negotiation*, 87 MARO. L. REV. 675, 680 (2004).

137. Amanatullah & Morris, *supra* note 101, at 257.

138. Williams & Richardson, *supra* note 69, at 641.

139. *Id.*

140. Kennedy & Kray, *supra* note 1, at 6–7 (citing Laura J. Kray & Michelle J. Gelfand, *Relief Versus Regret: The Effect of Gender and Negotiating Norm Ambiguity on Reactions to Having One’s First Offer Accepted*, 27 SOC. COGNITION 418, 418–36 (2009)).

141. See Schneider et al., *supra* note 50, at 363–64.

142. Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 13 CARDOZO J. CONFLICT RESOL. 339, 359 (2013).

tal expectations.<sup>143</sup>

## 2. *Negotiation is Expected*

The framing of whether the salary is negotiable appears to have a key impact on gender differences. In a field experiment conducted by the National Bureau of Economic Research, researchers varied the job posting in real-life advertisements for an administrative assistant.<sup>144</sup> These jobs were both studied in a gender neutral job scenario (fundraising) and a more male job scenario (sports).<sup>145</sup> Where the job listing left the wage ambiguous, men were more likely than women to negotiate their salary.<sup>146</sup> However, when the job listing made it clear that the wage was negotiable, women negotiated at equal rates.<sup>147</sup> As the researchers note, these “findings hold even for a job with a masculine job task, a workplace environment in which one would expect men to be at an advantage . . . our study suggests that the gender gap in wages cannot be universally and easily explained by gender dependent sorting into negotiable workplaces and willingness to initiate wage negotiations.”<sup>148</sup> Therefore, this signaling to employees about the negotiability of the wage is also key to cuing assertive behavior.<sup>149</sup>

## 3. *Training for Negotiation Works*

Assertiveness is often studied by examining whether men and women enter into negotiation at the same rate. Are they equally likely to ask for something? And, as discussed earlier, lab studies have shown significant differences. Yet, when students receive negotiation training—in law school and in business school<sup>150</sup>—the difference in likelihood to negotiate is eliminated, particularly in the all-important first salary negotiation.<sup>151</sup> In fact, in the law school study, women even received more money when they negotiated.<sup>152</sup> The more recent studies of workplace negotiation conducted in Australia also hint at different socialization and expectations having an impact.<sup>153</sup>

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143. See Travis, *supra* note 4, at 918.

144. See generally Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment* (NBER Working Paper No. 18511, November 2012).

145. *Id.* at 5.

146. *Id.* at 2.

147. *Id.* at 3.

148. *Id.* at 12.

149. Kennedy & Kray, *supra* note 1, at 5 (citing Leibbrandt & List, *supra* note 144, at 12). See also Roberts, *supra* note 122, at 77 (noting that when women want to make a good impression in negotiation, they claim more value.).

150. See Bowles et al., *supra* note 51, at 85.

151. See Schneider et al., *supra* note 50, at 381; see also Craver, *supra* note 142, at 320–21.

152. See Schneider et al., *supra* note 50, at 381.

153. See generally Artz et al., *supra* note 57.

## IV. ACTION PLAN

As studies of the workplace have shown, both individual behavior and the structure of the marketplace matter toward negotiation. As my co-authors and I have noted elsewhere, “organizational or institutionalized expectations and assumptions create a negotiated order within which negotiation occurs. These expectations and assumptions reflect power differentials and position negotiators differently.”<sup>154</sup> Therefore, change will need to occur in a variety of venues in order to be effective. On the one hand, we should continue to push for the structural and societal changes needed in order to put men and women on equal footing when it comes to negotiating on their own behalf. And, on the other hand, we would be foolish to avoid the current reality and not provide advice for how to best manage negotiation expectations today. This final section of the article attempts to do both.

## A. WHAT INDIVIDUAL NEGOTIATORS CAN DO

1. *Recognize the Stereotype*

Studies have shown that when women recognize the fallacy that they cannot negotiate on their own behalf they will do better in the negotiation.<sup>155</sup> Showing women that this is a mistaken stereotype may help them find the strength and give them the confidence to not conform to that view. In particular, when women mentally reframe negotiation as a way of advocating for all women, they see themselves as more powerful.<sup>156</sup> Just debunking this false notion can help women as they enter into a negotiation.<sup>157</sup> Additional studies on how women view themselves—and how, when women view negotiation as part of their job, they are more effective negotiators—show that this self-view of negotiation skills is crucial.<sup>158</sup> Finally, recognizing the harmful stereotype that men are “masculine” will help dismantle this.<sup>159</sup>

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154. Andrea K. Schneider, Sandra Cheldelin & Deborah Kolb, *What Travels: Teaching Gender in Cross Cultural Negotiation Classrooms*, 31 *HAMLIN J. PUB. L. POL'Y* 531, 534 (2010).

155. See Laura J. Kray et al., *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Values*, 30 *PERSONALITY & SOC. PSYCHOL. BULL.* 399, 399–400 (2004).

156. See generally *id.*; Schneider et al., *supra* note 50, at 381–82.

157. Julia Johnson, *Gender Differences in Negotiation: Implications for the Salary Negotiations*, 23 *UCLA WOMEN'S L. J.* 131, 144 (2016); see also Adam Grant & Sheryl Sandberg, *When Talking About Bias Backfires*, *N.Y. TIMES* (Dec. 6, 2014.), <https://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html> [Perma link unavailable].

158. See, e.g., Shira Mor et al., *Iron Fist in a Velvet Glove: Gender/Professional Identity Integration Promotes Women's Negotiation Performance* (Feb. 21, 2014) (on file with author or available as SSRN paper at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2451067](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451067)).

159. Williams & Richardson, *supra* note 69, at 637.

## 2. *Work Within the Stereotype*

While this might sound counterintuitive, there are elements of the female negotiation stereotype that can assist women in making their case. Women inspire paternalistic attitudes in negotiation, a hallmark of benevolent sexism.<sup>160</sup> First, there is the expectation of “communalism”—that women work for the team and for others. A woman may reduce the likelihood of backlash and be assertive by framing her requests (for increased budget, for example) as a benefit to the whole group.<sup>161</sup> Furthermore, when presenting herself as a team-player, a woman’s negotiation skills are seen as legitimate and necessary.<sup>162</sup> Similarly, framing requests for your own salary as part of a concern for others or improving relationships at home or with peers seems to reduce resistance to the request.<sup>163</sup> Another way to reduce backlash is an appeal to common goals or a shared vision—“we all want women in this law firm to be paid equally with men.”<sup>164</sup>

## 3. *Break the Stereotype*

Gender stereotypes apply when gender is the primary identity that the counterpart negotiator perceives. Therefore, other “identities” need to be added to the mix during the negotiation to reduce the attention to gender. Instead of gender identity being most salient, other roles—team leader, attorney, officer—become more relevant. Reminding your counterpart of your role in the company, title in the firm, accomplishments, or responsibilities can help. The *New York Times* advises that one should talk oneself up while anticipating doubts from your audience, and add just the right amount of personal information to appeal to the other party.<sup>165</sup> Even student publications try to demonstrate how to do this for their readers. These additional cues convey the message that stereotypes are irrelevant in this particular context.<sup>166</sup>

This can also be more obviously done by confronting and renegotiating

160. See Peter Glick & Susan T. Fiske, *Ambivalent Sexism Revisited*, 35 *PSYCHOL. WOMEN Q.* 530, 532 (2011).

161. Bowles & Babcock, *supra* note 71, at 81 (citing Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks? The Implied Communitarity Deficit*, 92 *J. APPLIED PSYCHOL.* 81, 81–92 (Jan. 2007)); see also Schneider et al., *supra* note 50, at 381–82; Kennedy & Kray, *supra* note 1, at 19.

162. See Catherine Tinsley et al., *Women at the Bargaining Table: Pitfalls and Prospects*, 25 *NEGOT. J.* 233, 238 (2009); Bowles, *supra* note 65, at 478–79.

163. See Bowles & Babcock, *supra* note 71, at 81–82; see generally Hannah Riley Bowles & Linda Babcock, *When Doesn't It Hurt Her to Ask: Framing and Justification Reduce the Social Risks of Initiating Compensation Negotiations*, Dec. 14, 2008, IACM 21st Annual Conference Paper, <https://ssrn.com/abstract=1316162> [<https://perma.cc/DT28-Y652>].

164. Tinsley et al., *supra* note 162, at 242.

165. Jessica Bennet, *How to Attack the Gender Wage Gap? Speak Up*, N.Y. TIMES (Dec. 15, 2012), <http://www.nytimes.com/2012/12/16/business/to-solve-the-gender-wage-gap-learn-to-speak-up.html> [Perma link unavailable].

166. Tinsley et al., *supra* note 162, at 242–43; Carla J. DeVelder, *Salary Negotiations 101*, 14 *AM. BAR ASSOC.* (May 1, 2013), <http://abaforlawstudents.com/2013/05/01/salary-negotiations-101> [<https://perma.cc/2V34-W4RX>].

any particular role in the negotiation to reject gender stereotypes.<sup>167</sup> For example, one could explicitly break the stereotype by subtly acknowledging the gendered expectations of her evaluators, and that this assertive behavior may appear “out of the norm.”<sup>168</sup> At the same time, a woman will need to offer an explanation for why this is so. We need to remember that the backlash effect serves as a conscious, or even unconscious, mechanism for forcing conformity to social norms. Therefore, explaining this particular instance of behavioral nonconformity does not challenge the gendered norm. This excuse should then mitigate the potential for backlash. Women can do this without explicit reference to gender stereotyping that might embarrass the other party or cause that party to lose face. For example, a woman might affirm, “I don’t mean to be too demanding, and I normally wouldn’t care about this, but in this context, I think we need to argue for a refund because of the precedent it might set for the company if we do not.”<sup>169</sup>

#### 4. *Be Pleasant and Assertive*

When negotiating, both men and women still should follow best practices in terms of balancing assertiveness with other more collaborative negotiation skills. Too much agreeableness can be inversely related to income and earnings unless balanced with assertiveness.<sup>170</sup> Women should utilize their comparative strengths in empathy and social intuition to read the situation and understand when to be assertive and when not to.<sup>171</sup> This combination of assertiveness with empathy, and social intuition is often what is needed to be more effective.<sup>172</sup> An article in the “Student Lawyer” recommends staying reasonable and personable to maintain the existing relationship; more specifically, the article suggests that instead of blatantly criticizing a low offer or the person who made the offer, one should more tactfully respond that the offer is *pretty conservative* versus *unreasonable*.<sup>173</sup> Note that this advice follows the studies that distinguish aggressive responses versus assertive responses (in which aggressive responses are viewed negatively). And, as part of being appropriately assertive and well-prepared, women should be ready to cite salary information

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167. Tinsley et al., *supra* note 162, at 242.

168. See Grant & Sandberg, *supra* note 157.

169. Tinsley et al., *supra* note 162, at 243.

170. Judge et al., *supra* note 79, at 391.

171. Kennedy & Kray, *supra* note 1, at 6 (citing Jared R. Curhan, et al., *Relational Accommodation in Negotiation: Effects of Egalitarianism and Gender on Economic Efficiency and Relational Capital*, 107 *ORG. BEHAV. & HUM. DECISION PROCESSES* 192, 192–205 (2008) and Joachim Hüffmeier, et al., *Being Tough or Being Nice: A Meta-Analysis on the Impact of Hard and Softline Strategies in Distributive Negotiations*, 40 *J. MGMT.* 866–92 (2014)).

172. BABCOCK & LASCHEVER, *supra* note 8, at 116; Victoria Pynchon, *Woman Physician, Negotiate Thyself or Lose \$350,000*, *FORBES* (Jun. 13, 2012), <http://www.forbes.com/sites/shenegotiates/2012/06/13/woman-physician-negotiate-thyself-or-lose-350000/#4103401736e5> [<https://perma.cc/CMT5-SZFK>].

173. DeVelder, *supra* note 166.

for males in similar positions.<sup>174</sup>

## B. STRUCTURAL CHANGES THAT CAN ENCOURAGE NEGOTIATION

There are obviously many fixes that could be made to the current workplace in the U.S. that could impact the gender gap. Other countries have implemented quotas on company boards to specific laws requiring gender equity with far more enforcement than the U.S.<sup>175</sup> This last section only deals with suggestions regarding negotiation in particular, recognizing that the broader societal goals of equality could be better served by even more wide-sweeping changes.

### 1. What Society and Parents Can Do

We need to socialize both men and women to celebrate the process of negotiation as a preferable way to handle disputes, and one in which we expect both boys and girls to engage. This starts with parents and others who impact the lives of young girls to set the expectations for behavior. For example, the Girl Scouts have introduced a new badge called “Win-Win.”<sup>176</sup> In order to earn this badge, a young woman must successfully complete ten negotiation exercises. The Girl Scouts have recognized that all of us need to be cognizant of the importance of proper socialization and the negative effects on the individual and society that come in the wake of limiting girls’ assertiveness. Just as we want to reward men for listening and having empathy, we should do the same for women who could be more assertive in the negotiations of their everyday lives.

### 2. What Companies Can Do

We know that when a particular workplace is highly gender unbalanced (as in a science department or a law firm), women are less likely to negotiate.<sup>177</sup> Until companies employ more women in their mix of employees (certainly an important goal), they should ensure that women are allowed to assert their demands and negotiate on the same terms as men. Rather than downgrading women for their assertiveness, this needs to be valued in job evaluations.

Secondly, market conditions, specifically unequal bargaining power, are relevant when discussing women’s negotiation abilities.<sup>178</sup> We know that women are just as likely as men to negotiate when they have full knowledge of the situation.<sup>179</sup> Many public institutions, like universities and hospitals, are already required to post salaries. Increased trans-

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174. Johnson, *supra* note 157, at 145.

175. See Jarrod Tudor, *Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee Across the Member-States*, 92 N.D. L. REV. 415, 423 (2017).

176. See NPR: *Teaching Negotiation Skills to Girls Could Close Gender Pay Gap*, GIRL SCOUTS BLOG (Feb. 15, 2011), <http://blog.girlscouts.org/2011/02/npr-teaching-negotiation-skills-to.html> [<https://perma.cc/H6YK-8F64>].

177. See Bhatia et al., *supra* note 102.

178. Elzer, *supra* note 7, at 35.

179. See *id.* at 7.



parency within companies about salaries and benefits make it more likely that women will ask for and receive equal treatment.<sup>180</sup> This transparency is also necessary to bring more scrutiny into the stereotypes that determine salaries in the first place.<sup>181</sup>

### 3. *What the Law Can Do*

Some structural barriers can also be addressed through the law. Massachusetts and other jurisdictions, for example, have changed their laws so that employers cannot ask for your previous salary.<sup>182</sup> In other words, even if early in one's career one did not negotiate over numbers, that situation should not decide what is fair pay today.

In addition, reflecting on the workplace study from the National Bureau of Economic Research,<sup>183</sup> it is clear that “simple manipulations of the contract environment can significantly shift the gender composition of the applicant pool. More precisely, by merely adding the information that the wage is ‘negotiable’ we successfully reduced the gender gap in job applications by approximately 45%. Thus, details of the contract environment have important effects on the gender gap, and with such knowledge public officials can design laws to take advantage of such effects.”<sup>184</sup> Regulations can require that job postings state that which many already assume—that any posted salary is up for negotiation.

## V. CONCLUSION

This article has discussed three myths and then outlined action that can be taken by both individual negotiators and by society. The first myth is that women do not negotiate. And while that is true in lab studies and at younger ages, more recent and widespread data in the workplace calls this myth into serious question. Second, the myth that women will face backlash and, therefore, should not negotiate continues to be perpetuated by the fact that women in leadership—particularly public leadership—face ongoing challenges. No doubt this is true. And, for individual women making a decision to negotiate, this overarching concern cannot be taken as a guideline. For one thing, it is also clear that *not* negotiating does not help in the long run anyway. More specific guidance about how to negotiate can help mitigate backlash. This leads to the third myth—that women

180. Steven Erlanger, *BBC Women Demand Action to Close Pay Gap with Men*, N.Y. TIMES (July 23, 2017), <https://nyti.ms/2tRPuxA> [Perma link unavailable].

181. Melissa Williams, Elizabeth Levy Paluck & Julie Spencer-Rodgers, *The Masculinity of Money: Automatic Stereotypes Predict Gender Differences in Estimated Salaries*, 34 PSYCHOL. WOMEN Q. 107, 118 (2010). (For example, when the BBC was forced to reveal its salaries in the summer of 2017, there was immediate political pressure to fix the “appalling” gender gap. Steven Erlanger, “Act Now” on Pay Gap, *Women Urge BBC*, N.Y. TIMES, July 23, 2017, at A7. Such transparency also makes it highly likely that the next woman to negotiate her salary will do better.)

182. See S.B. No. 2119, 189th Gen. Court (Mass. 2016); PHILA., PENN, REV. ORDINANCES Ch. 9, § 1100 (2016); N.Y. Exec. Order No. 21 (2016).

183. See Leibbrant & List, *supra* note 144.

184. *Id.* at 12.

cannot negotiate as well as men—based on the limited assumption that only assertiveness is needed for success. Out of five key negotiation skills, there is only one skill in which women, in some instances and in some studies, are rated lower than men. Yet, we do not worry that men, comparatively lacking empathy or social intuition, cannot negotiate as well as women. Overall, we know that the most effective negotiators—the most effective leaders—bring all of these skills to the table and utilize them as needed. This leads to the final section of advice. Women can work to minimize backlash, change expectations, and utilize all other negotiation skills in order to be effective. At the same time, society, companies, and the law should continue to support and encourage negotiation as one way that equality can be reached.