

NEGOTIATING THE SITUATION: THE REASONABLE PERSON IN CONTEXT

by
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This Essay argues that our understanding of the reasonable person in economic transactions should take into account an individual's race, gender, or other group-based identity characteristics—not necessarily because persons differ on account of those characteristics, but because of how those characteristics influence the situations a person must negotiate. That is, individuals' social identities constitute features not just of themselves, but also of the situations they inhabit. In economic transactions that involve social interaction, such as face-to-face negotiations, the actor's race, gender, or other social identity can affect both an individual actor and those who interact with him or her, because those characteristics often create expectations, based largely on group-based stereotypes, that influence the parties on both sides of the transaction. Individuals' social identities thereby can influence their constraints and incentives, and accordingly their choices, behavior, and outcomes.

This Essay offers a couple of well-known examples of the influence of social stereotypes on individuals' choices, behavior, and outcomes in economic transactions. It then provides a more extended examination of the effect of social identity on economic transactions by drawing upon a recent, growing, and fascinating area of social psychological research into the effect of gender on negotiations. The findings of this research are both disturbing and promising: disturbing because they show that stereotypes can influence the behavior of both women and men in negotiations, to the detriment of women, even if the individuals do not believe the stereotypes to be true, and that stereotypes can interact with other features of the situation to aggravate their tendency to promote unequal outcomes. The findings are promising as well, however, because they also show that gender stereotypes can be moderated or even counteracted by yet other features of the situation. Appreciating the situation-altering yet situation-sensitive influence of social identities such as gender provides us with a richer understanding of the circumstances

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in which people interact and shows that, sometimes, common economic transactions take place in different places for different people.

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I. INTRODUCTION

Although perhaps more readily recognized as an influence on tort¹ and criminal² law, the Reasonable Person also plays an important role in the law that governs economic transactions. In the common law of contracts, which can come into play in a wide range of economic transactions, for example, the concept of reasonableness—frequently incorporated through use of the “objective standard”³—is pervasive, and

¹ See, e.g., Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389, 393 (1997) (referring to the reasonable person as “the staple of tort law”); Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351 (2010); MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 3 (2003) (stating that “the law of negligence is the central and most important instance of the reasonable person standard”).

² See, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 3–4, 25–26, 203–09 (2003) (discussing reasonable man or reasonable person standard in criminal law doctrines of provocation and self-defense).

³ See, e.g., 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.6 (3d ed. 2004) (distinguishing the subjective and objective theories of assent). The classic Corbin treatise on contracts, for example, begins with the principle that “The Main Purpose of Contract Law is the Realization of Reasonable Expectations Induced by Promises.” ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 1 (1952). Corbin goes on to explain that the law of contracts is designed not for “the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one.” *Id.* That is, “[t]he expectation must be one that most people would have; and the promise must be one that most people would perform.” *Id.*

Some variety of reasonable person construct is incorporated into the law governing a wide range of specific types of economic transactions as well. See, e.g., U.C.C. § 1-201 cmt. 20 (2002) (incorporating into the obligation of good faith that applies to every contract made by a merchant and governed by the U.C.C. a standard of “observance of reasonable commercial standards of fair dealing in the trade”); Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor*

“[t]he reasonable person is the personification of the objective theory of contracts.”⁴

As every first-year law student learns, a major task for the reasonable person in contract law is to help determine the legal effect to accord particular parties’ interactions, by helping to ascertain the parties’ reasonable expectations with regard to those interactions.⁵ In serving this purpose, the reasonable person “provide[s] a viewpoint from which to assess the legal and normative meaning of particular actions”⁶—that is, he or she performs what Dean Mayo Moran has identified as the reasonable person’s “perspectival” function.⁷ In performing this function, and in contrast to his or her counterpart in tort law, the reasonable person of contract is not so much a “universalized personage” but rather “a more specialized creature, possessing all of the idiosyncratic features of the contracting parties viewed within the context of their interaction.”⁸ Accordingly, construction of the contractual reasonable person might incorporate information about characteristics of the parties, their relationship and previous dealings, customs and trade usages, and community norms, constraints, and pressures.⁹ “In essence, the reasonable person is constructed from the *background* of the transaction or relationship.”¹⁰

It is with this contextualized understanding of the reasonable person and the perspective-imparting role in mind that I approach and particularize the question posed by this symposium: *Who is the Reasonable Person—whose characteristics and values define reasonableness—in legal views of economic transactions?* And, more particularly still, should the reasonable person concept in this setting accommodate differences in individuals’ race, gender, or other group-based identity characteristics?¹¹

To take into account a person’s race, gender, or other personal characteristics might seem unsuited to areas of law that concern

a Woman?, 15 WM. & MARY J. WOMEN & L. 291 (2009) (addressing the notion of the reasonable investor in U.S. securities regulation).

⁴ Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 343 (1997).

⁵ See, e.g., BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 59–78 (2008) (chapter in contracts casebook devoted to “contractual assent and the objective test”).

⁶ Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1265. (2010).

⁷ *Id.* Dean Moran distinguishes the perspectival function from the reasonable person’s other major function, culpability determining. See *id.* at 1259–65.

⁸ DiMatteo, *supra* note 4, at 317.

⁹ See generally *id.* at 318–36. See also BLUM & BUSHAW, *supra* note 5, at 64–65.

¹⁰ DiMatteo, *supra* note 4, at 318.

¹¹ The organizers of this Symposium invited presenters to consider whether diverse areas of law should take different approaches to the question of “whether the ‘reasonable person’ concept should accommodate differences in basic immutable characteristics such as race, gender, age, sexual orientation, and physical and mental ability.”

economic transactions, which would seem largely to comprise impersonal or utilitarian exchanges. In my view, however, when legal decision makers consider the reasonable person in economic transactions, they should take into account an individual's race, gender, or other such characteristics to the extent that those characteristics create what social psychologist Claude M. Steele has called "identity contingencies."¹² That is, they should take into account the ways that social identities and related stereotypes influence the circumstances a person must "deal with in order to get what [he or she] want[s] or need[s] in a situation."¹³

To be clear, my argument is *not* that individuals who share a social identity such as race or gender are alike when it comes to their economic interactions, but rather that people often *treat them* as if they are (or should be) and that this tendency promotes group-based differences in individuals' behavior because it affects their choices. That is, individuals' social identities constitute features not just of themselves, but also of the situations they inhabit. A full understanding of a person's situation or context should include an appreciation of how his or her gender, race, or other social identity potentially shapes or influences it. Particularly in situations that involve social interaction, such as face-to-face negotiations, the actors' race, gender, or other social identity can affect both an individual actor and those who interact with him or her, because those characteristics often create expectations, based largely on group-based stereotypes, that influence the parties on both sides of the transaction. Individuals' social identities thereby have impact on their constraints and incentives, and accordingly their choices, behavior, and outcomes.

This essay will offer a couple of well-known examples of the influence of social stereotypes on economic transactions to illustrate how social identity-based expectations can affect individuals' choices, behavior, and outcomes. It then will provide a more extended examination of the effect of social identity on economic transactions by drawing upon a recent, growing, and fascinating area of social psychological research into the effect of gender on negotiations. That examination will illuminate the situation-altering and situation-sensitive influence of social identity and show why appreciating that potential is important to gaining a complete perspective on the reasonable person in context.

II. "DIFFERENT PLACES FOR DIFFERENT PEOPLE"¹⁴

Professor Ian Ayres and his colleagues uncovered evidence of how group-based stereotypes can alter the circumstances surrounding a bargain and thereby constrain individuals' choices in their well-known

¹² CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 3 (2010).

¹³ *Id.*

¹⁴ *See id.* at 60.

studies of retail car sales, where they found “systematic disparate treatment” in the average sales prices dealerships offered customers depending on the customers’ races and genders.¹⁵ In 1990, the researchers audit tested over 200 randomly selected new car dealerships in the Chicago area, sending pairs of testers (always including a white male) to negotiate for the purchase of a new car and then comparing the results they obtained. To maintain uniformity aside from the testers’ races and genders, researchers trained them to use the same bargaining strategy—focusing only on price and following identical scripts—and controlled for a host of criteria including age, education, dress, transportation, economic class, occupation, address, and attractiveness.¹⁶ The disparity in outcomes was dramatic: The average price offered to white women was more than \$200 higher, to black women more than \$400 higher, and to black men more than \$900 higher than the average price offered to white men.¹⁷ Salespeople behaved differently towards members of the different groups, as well, asking certain questions of, or using particular tactics with, members of some groups more frequently than others.¹⁸

Ayres’s analysis of the data supported a number of explanations for these disparities that did not depend on the salespeople’s harboring race- or gender-based animus toward the customers. While cautioning that “[n]o single causal theory may be adequate to explain discrimination against both blacks and women,”¹⁹ and that “the mutually enforcing nature of multiple causes” may be at work,²⁰ Ayres concluded that “sellers’ bargaining behavior is broadly consistent with revenue-based statistical inference as a partial cause of the sellers’ discrimination”²¹ To oversimplify a bit, this explanation rests upon sellers’ differential beliefs about different customers’ willingness to pay, which in turn rested on differential beliefs about the circumstances of customers from different groups. The evidence suggested that sellers believed customers from the other groups were willing to pay more than white men, based on their expectations that white women, black women, and black men were more averse to bargaining, had higher search costs (for example, were less likely to own a car and therefore less able to travel to different dealerships), and were less informed consumers (that is, knew less about dealers’ costs and what points were negotiable) than white men.²²

¹⁵ See IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 21 (2001); see also Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991).

¹⁶ AYRES, *supra* note 15, at 22–28 (describing methodology).

¹⁷ *Id.* at 21, 28–37 (reporting results with respect to price discrimination).

¹⁸ *Id.* at 37–41 (reporting results with respect to non-price discrimination in this and an earlier pilot study).

¹⁹ *Id.* at 64.

²⁰ *Id.* at 85.

²¹ *Id.* at 84.

²² See *id.* at 73–80.

In that market, competition did not work to reduce or eliminate, but instead reinforced, these effects. Even if individuals within a group differed in terms of, for example, their own search costs or knowledge, it made sense for sellers to generalize across a group because, in that market, a small number of high markup sales contributed disproportionately to overall profits, making “bargaining for cars . . . a ‘search for suckers’—a search for consumers who are willing to pay a high markup for whatever reasons.”²³ Regardless of individual differences, then, his or her social identity was part of the situation each buyer walked into at those dealerships. It determined the approach the sales staff would take with each buyer, what price he or she would be offered, and consequently the constraints and choices the buyer faced. In other words, while it might have appeared to be the same for everyone, a car dealership was a “different place[] for different people.”²⁴

But in real life, and unlike the testers in the Ayres study, individuals do not follow identical negotiation scripts. Of course, individual differences of personality, preferences, knowledge, and resources account for some of the ways in which individuals’ approaches to and behavior in negotiations vary. At least some of the difference often is attributable, as well, to individuals’ different social identities. That is, and as Ayres’ study demonstrated, members of different social groups often have different experiences of negotiation. As a consequence of their own experiences or awareness of the experiences of others, members of different social groups also may have different expectations of negotiations and, accordingly, approach (or avoid) and navigate them differently. For example, and no doubt at least in part because of experiences like those documented by Ayres, “[p]opular wisdom suggests that women bring a man with them to the dealership so that they are ‘taken seriously’ and given a fair shake.”²⁵ Some of my Asian-American relatives and friends have employed this practice as well, by negotiating through white friends or acquaintances.

And it’s not just women and people of color who are influenced by their social group status in choosing how to behave in economic interactions; everyone potentially is. Professor Patricia Williams made this observation in her well-known account of the differing tactics she and her white male colleague took to the same kind of transaction—renting an apartment—when they started their teaching jobs.²⁶ Williams took a formal, arms-length approach to a lease with friends for an apartment in

²³ *Id.* at 82.

²⁴ STEELE, *supra* note 12, at 60 (noting that race and gender stereotypes are sometimes salient features of normal situations).

²⁵ Laura J. Kray, Adam D. Galinsky & Leigh Thompson, *Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration*, 87 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 386, 387 (2002).

²⁶ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406–08 (1987).

a building that they owned, all in an effort to show her “good faith and trustworthiness” and out of her perception that she needed to counteract the likelihood that her “black femaleness” would be viewed as “unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute.”²⁷ Her colleague, on the other hand, entered into a sublease and handed over a substantial cash deposit to “strangers with whom he had no ties other than a few moments of pleasant conversation” on no more than a “handshake” and “good vibes.”²⁸ He transacted business so informally because he too wanted to establish a sense of trust, but his approach was distinctly different from hers because he felt the need to overcome the barrier that might have been created by the image of him as a “white or male or lawyer authority figure.”²⁹ The two professors took opposite approaches to the same kind of transaction because each was aware of his or her social identity and its potential effect on the *other* party’s perceptions and behavior.³⁰

As these examples illustrate, characteristics such as a person’s gender or race are features of not just that person but also of the situations in which he or she operates. Accordingly, they influence not just his or her perceptions and behavior, but also those of others who interact with him or her, such as the salespeople in the Ayres study. What economic behavior and decisions seem reasonable or rational to an individual, accordingly, can vary depending on those characteristics and how they shape the person’s choices. Furthermore, individuals may contribute to this dynamic by responding to those circumstances in a way that conforms to, rather than confounds, group-based stereotypes. When women or people of color negotiate through white male agents, for example, they may confirm a salesperson’s stereotype of their group as ineffective negotiators. While acquiescing to stereotypes might not be in one’s longer-term or broader interest, sometimes a person might choose to do so “in order to get what [he or she] want[s] or need[s] in a situation.”³¹

These points would suggest that the reasonable person should be understood differently depending on his or her race, gender, or other socially relevant characteristics, the ways in which those characteristics intersect (as in the case of the black women testers in the Ayres study),³²

²⁷ *Id.* at 406–07.

²⁸ *Id.* at 406.

²⁹ *Id.* at 407.

³⁰ *Id.* at 406–08.

³¹ STEELE, *supra* note 12, at 3. *See also id.* at 68–69 (describing identity contingencies); LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 71–73 (2006) (discussing why an individual might behave in a way that confirms another’s stereotypes about him or her even if the stereotypes are not accurate).

³² *See* Deborah M. Kolb, *Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years*, 25 NEGOTIATION J. 515, 520 (2009) (pointing out that, in addition to gender, “[r]ace, ethnicity, and other simultaneous

and the varying stereotypes and expectations they carry. To end the analysis with that conclusion, however, would be to give an incomplete picture of how these characteristics influence situations, choices, and economic behavior: A fuller account would include the understanding that—because they constitute features of the situation, as well as of the person—the influence of these characteristics is not inevitable. Other factors in the situation can interact with those characteristics to influence the strength and even the direction of their effect.

III. NEGOTIATING THE SITUATION: THE REASONABLE PERSON IN CONTEXT

One aspect of social identity that appears to play a large role in economic interactions and outcomes is gender. This effect seems to be especially important in economic transactions that implicate negotiations, and the consequences of gender effects are potentially far greater than the startling difference in price a woman might pay for a car compared to a man. Gender differences in negotiation may account in part, for example, for persistent gender gaps in an economic arena that for many people may be the most important of their lives, the workplace. The well-known disparity in wages between men and women, the slower pace at which women advance in their careers, and the “glass ceiling” that divides women from the highest positions in many organizations all may rest upon gender differences in negotiation.³³ Moreover, initial disparities in salary and position tend to be compounded over the course of individuals’ careers,³⁴ and the potential for gender inequities may be growing in importance as opportunities for employees to negotiate individualized work arrangements increase.³⁵

The connection between gender and performance in negotiations is highly complex; research on the topic spans multiple disciplines and examines numerous questions, and it has uncovered no single reason or simple account of how or why women and men tend to differ in

dimensions of identity are also likely to affect how different groups of negotiators come to the table”).

³³ See Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007), available at <http://marketing.wharton.upenn.edu/documents/research/Who%20goes%20to%20the%20bargaining%20table.pdf>. See also Fiona Greig, *Propensity to Negotiate and Career Advancement: Evidence from an Investment Bank that Women Are on a “Slow Elevator”*, 24 NEGOTIATION J. 495, 503 (2008) (reporting on study indicating that gender differences in the propensity to negotiate partially explains the underrepresentation of women in senior positions).

³⁴ See, e.g., Small et al., *supra* note 33, at 601 (“When projected across the course of women’s careers, [a] starting salary gap would be even more striking because raises, bonuses, and other compensation are typically based on initial salary.”).

³⁵ *Id.* at 600.

negotiations.³⁶ This Essay does not attempt a comprehensive review of the questions studied, conclusions reached, or theories developed in “this daunting body of research.”³⁷ It instead offers a glimpse into a compelling and important set of findings that reveal the situation-dependent effect of gender on individuals’ expectations, choices, behaviors, and outcomes in negotiations in order to provide a perspective on the reasonable person in that context.

A growing area of social psychological study has focused on the effects of gender on parties’ expectations, behavior, and outcomes in negotiations. That research has contributed to an evolution from a focus on gender as an individual characteristic—that is, a focus on the deficiencies of women as negotiators—to understanding gender as “a more complex and shifting dimension of individual identity shaped by the contexts in which negotiation occurs.”³⁸ The findings of this research are both disturbing and promising. They are disturbing because they show that stereotypes, both descriptive and prescriptive, can influence the behavior of both women and men in negotiations, even if the individuals do not believe the stereotypes to be true. Further, gender stereotypes can interact with other features of the situation that aggravate their tendency to promote unequal outcomes for women.

The research findings are promising as well, however, because they further show that, as just one of potentially many situational factors, gender stereotypes also can be mediated or counteracted by yet other features of the situation. The strength and even the direction of their influence can be highly sensitive to the context. As two of the leading researchers in the area have explained:

Male and female negotiators sometimes fulfill the sex stereotypic expectations that men will be more competitive bargainers and claim a greater portion of the pie than women, but people’s gender is *not* a consistent predictor of their negotiating behavior or performance. . . . [W]hat recent research has shown is that gender effects on negotiation are contingent on situational factors that make gender more or less relevant, salient, and influential.³⁹

³⁶ See generally Laura J. Kray & Leigh Thompson, *Gender Stereotypes and Negotiation Performance: An Examination of Theory and Research*, in 26 RES. IN ORGANIZATIONAL BEHAV. 103, 106–07 (2005). Contributing to the complexity of research findings is “that the question has been examined through different theoretical lenses in different contexts, using different types of negotiation tasks, and with different measures of process and performance. Thus, the conclusions of a given empirical examination may contradict another finding because the context of the question has substantially changed.” *Id.* at 107.

³⁷ *Id.* at 106.

³⁸ Kolb, *supra* note 32, at 517 (emphasis omitted).

³⁹ Iris Bohnet & Hannah Riley Bowles, *Gender in Negotiation: Introduction*, 24 NEGOTIATION J. 389, 390 (2008).

A. Getting to the Bargaining Table

Many women do not have the opportunity to succeed in negotiations because they never even get to the bargaining table. That is, “women don’t ask.”⁴⁰ In experimental settings and real life, they are significantly less likely than men to initiate negotiations.⁴¹ This disinclination might be attributable to a number of factors, such as a tendency for women to feel less entitled than men⁴² or to recognize opportunities to negotiate less readily than men.⁴³ Certainly, women can work to improve their own negotiation skills and level of assertiveness. But “fix[ing] the women” alone cannot eliminate gender differences in negotiation; as experts on gender and negotiation teach us, we also must “take into consideration the gendered social context out of which gender differences in behavior emerge.”⁴⁴ Women’s and men’s differing propensities to initiate negotiations do not necessarily or just originate in individual differences; they also reflect the influence of external gender norms and expectations. Women and men face different social pressures—different costs and incentives—that influence their choices, creating a classic feedback loop: Different expectations are held by women and men at least in part because society has different expectations of women and men.

Women face a dilemma—“the classic double bind”⁴⁵—when it comes to initiating negotiations. The standard advice for someone who seeks

⁴⁰ See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

⁴¹ See, e.g., Linda Babcock et al., *Gender Differences in the Propensity to Initiate Negotiations*, in *SOCIAL PSYCHOLOGY AND ECONOMICS* 239, 245, 253 (David De Cremer et al. eds., 2006) (reporting results of empirical study showing “important gender differences in the propensity to initiate negotiation” among a diverse sample of respondents with demographics that closely matched the 2000 U.S. Census); Small et al., *supra* note 33, at 603–06 (reporting results of studies finding that women were significantly less likely than men to initiate negotiations over compensation for participating in an exercise, even when the situation provided cues that compensation was negotiable).

⁴² See, e.g., Babcock et al., *supra* note 41, at 251, 254; Serge Desmarais & James Curtis, *Gender and Perceived Pay Entitlement: Testing for Effects of Experience with Income*, 72 J. PERSONALITY & SOC. PSYCHOL. 141 (1997). Similarly, evidence suggests that members of different racial and ethnic groups might have different expectations about salary, and those differences could affect their approaches to salary negotiations. See, e.g., Derek R. Avery, *Racial Differences in Perceptions of Starting Salaries: How Failing to Discriminate Can Perpetuate Discrimination*, 17 J. BUS. & PSYCHOL. 439, 440 (2003).

⁴³ See Babcock et al., *supra* note 41, at 251–54.

⁴⁴ 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 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 85 (2007), available at <http://www.cfa.harvard.edu/cfawis/bowles.pdf>; see also Ronnie Janoff-Bulman & Mary Beth Wade, *The Dilemma of Self-Advocacy for Women: Another Case of Blaming the Victim?*, 15 J. SOC. & CLINICAL PSYCHOL. 143, 144 (1996).

⁴⁵ Catherine H. Tinsley et al., *Women at the Bargaining Table: Pitfalls and Prospects*, 25 NEGOTIATION J. 233, 235 (2009).

better pay or another resource from someone else is, quite simply, “ask!”—but women may not view that course of action as beneficial. Particularly when they would be seeking resources for themselves, such as compensation, women often expect to encounter aversion or resistance from the other party, and fear of, or nervousness about, eliciting such a reaction can inhibit them from asking.⁴⁶ In other words, women expect to pay a social cost when they attempt to negotiate, and this expectation serves as a disincentive to make the request.⁴⁷

Women’s fears appear to be well-founded, for studies have shown that they do pay a price for violating social stereotypes of how women ought to behave. Those stereotypes include the general prescription that women should be communally-focused, as opposed to self-focused, putting the needs of others before their own. That is, women ought to be modest, “nice,” and selfless, and they should not demand resources or status.⁴⁸ Evidence that women are less well-liked and suffer a penalty for acting against those standards—what has been called the “backlash effect”⁴⁹—has been found in a range of settings from the workplace to home life.⁵⁰ This cost is a factor in negotiations as well. In one much-cited study of simulated compensation negotiations, researchers found that individuals were significantly less inclined to want to hire or work with a woman who attempted to negotiate for higher compensation but felt significantly less negatively—or no differently at all—about a man who did so.⁵¹ The social penalty women suffered did indeed arise from their having violated gender-based prescriptions, as evaluators perceived

⁴⁶ See Bowles, Babcock & Lai, *supra* note 44, at 98–99. This fear is not necessarily the result of a conscious, cost-benefit calculation based on a well-defined understanding that such behavior is perceived as a violation of prescriptive stereotypes. Rather, it seems to be based more on an emotional intuition that initiating negotiation will not be received well by the other party—particularly if the other party is male.

⁴⁷ The study further found that gender differences in willingness or reluctance to negotiate did not correlate with personality differences. Participants were asked to rate themselves on a range of traits associated with feminine or masculine personalities, and no gender differences were found in participants’ identification with masculine personality traits. *Id.* at 97.

⁴⁸ See, e.g., Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 *PSYCHOL. WOMEN Q.* 65, 72 (2001).

⁴⁹ See Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 *J. SOC. ISSUES* 743, 746 (2001).

⁵⁰ In a chapter titled “Scaring the Boys,” Linda Babcock and Sara Laschever recount empirical studies and anecdotal evidence of the ways in which women pay a price for acting against gender norms, and particularly for not being sufficiently “likeable.” BABCOCK & LASCHEVER, *supra* note 40, at 85–111.

⁵¹ Bowles, Babcock & Lai, *supra* note 44, at 88–89, 90, 93–94. Women paid a price with both male and female evaluators in all three experiments testing reactions to candidates who initiated negotiations. In one of the three experiments (but not in the other two), men also evoked a negative reaction for initiating negotiations, but only from female evaluators. See *id.* at 93–94.

women who attempted to negotiate as “not nice” and “overly demanding.”⁵² Additional studies of negotiations support these findings.⁵³

The need to take into account the potential social cost of asking for more compensation constrains women’s choices. They feel, and often are, compelled to choose between taking the chance to increase their resources at the expense of their relationships—which can translate into economic costs when work or business relationships are at stake—or forgoing the opportunity to increase their material gains in order to preserve their relationships. As one writer has put it, “[t]he very behavior that could increase a woman’s initial salary may undermine her ability to function in the job she then undertakes.”⁵⁴ Men, on the other hand, generally do not anticipate or receive a negative reaction to their attempts to bargain and therefore do not face this disincentive to negotiate.

Some situations, however, can offer a way for women to overcome this obstacle to seeking what they want—albeit sometimes not by overcoming gender stereotypes, but instead by framing the request as one that is acceptable in light of them. First, women’s own reluctance to go to the bargaining table can be lessened significantly if the interaction that will occur there is put in different terms—for example, if the opportunity is presented as “asking” as opposed to “negotiating” for more. It turns out that even the term “negotiation” is not gender neutral.⁵⁵ Whereas men are indifferent between “negotiating” and “asking,” women find the prospect of initiating negotiations to be significantly more intimidating than asking.⁵⁶ When they explored the psychological mechanism that accounts for men’s and women’s different inclinations to negotiate versus ask, researchers found that it is based in differences in power between the two genders. Initiating negotiations is associated with having “power and thus the authority to try to change the status quo, whereas . . . asking is associated with being in a submissive position vis-à-vis a decision maker.”⁵⁷ Women seem to find it less intimidating to ask than to negotiate because they tend to have less

⁵² *Id.* at 91–95.

⁵³ See Tinsley et al., *supra* note 45, at 237 (citing the authors’ studies of simulated negotiations in which participants “reported a lower desire to interact, both socially and in the workplace” with assertive female counterparts than with assertive male counterparts who “behaved in the exact same manner,” and in which a “manager [who] negotiated for a refund on unused hotel space . . . was judged more offensive and was less likely to receive a refund when the role was played by a female than by a male”). See also Hannah Riley Bowles & Linda Babcock, *When Doesn’t It Hurt Her to Ask? Framing and Justification Reduce the Social Risks of Initiating Compensation Negotiations* 9 (IACM 21st Annual Conference Paper, 2008), available at <http://ssrn.com/abstract=1316162>.

⁵⁴ Wade, *supra* note 48, at 65.

⁵⁵ Small et al., *supra* note 33, at 610.

⁵⁶ *Id.* at 606–07.

⁵⁷ *Id.* at 610.

power than men in society.⁵⁸ These feelings have behavioral consequences: Women are significantly more likely to request increased compensation if doing so is described as “asking” as opposed to “negotiating” for more, even if they are told that seeking more is acceptable and common.⁵⁹ In fact, framing the request as asking “was sufficient to eliminate the gender gap in the initiation of negotiation” in an experimental setting.⁶⁰

While that finding offers a mixed solution in that it identifies a way to overcome women’s reluctance to initiate negotiations that merely conforms to prescriptive gender stereotypes rather than challenges them, the same set of studies offers cause for optimism that gender differences in the propensity to negotiate can be overcome in a way other than acquiescing to those expectations: When researchers “primed” women to feel powerful by asking them to recall a situation in which they had “power [meaning control and influence] over another individual or individuals,” the women were much less intimidated by the prospect of initiating negotiations.⁶¹ In fact, when “primed to experience power,” women’s “aversion to negotiating [was] diminished such that they react[ed] much more like men typically do.”⁶² These findings reinforce the point that gender effects are “highly malleable”⁶³ and situation-dependent and point to an alternative way of reframing opportunities to negotiate that focuses on empowerment as opposed to submission.⁶⁴

But even if a woman gets past her own reluctance to initiate a negotiation, she still may face the prospect of backlash from others for having violated gender prescriptions. Again, how the request is framed can make a difference, in this case by reducing the social risk. That is, a woman can avoid the backlash effect if she presents her request in terms that are consistent with prescriptions for women’s behavior or that “legitimate” her request. Specifically, researchers have found that women seeking higher compensation can avoid being perceived negatively if they either 1) make their request in a cooperative or communal way, or 2)

⁵⁸ *Id.* The researchers confirmed this explanation through the experiment described in the text accompanying *infra* notes 61–64.

⁵⁹ *Id.* at 607–08. Providing a cue that negotiation was acceptable did increase rates of initiating negotiation for both male and female subjects, but even so, men were significantly more likely than women to negotiate.

⁶⁰ *Id.* at 608. Actually, women were slightly, though not significantly, more likely to ask than were men when making a request for more compensation was so framed. *Id.* at 607.

⁶¹ *Id.* at 608–09.

⁶² *Id.* at 609.

⁶³ *Id.* at 610.

⁶⁴ *See id.* at 610–11.

present their reason for asking as being justified by a credible, externally validated account.⁶⁵

In the first scenario, the woman emphasizes the importance of relationships in making her request—stating, for example, “I hope it’s OK to ask you about this. I’d feel terrible if I offended you in doing [s]o. My relationships with people here are very important to me.”—and seeking the negotiating partner’s advice along with making her request for a salary at the top of the range.⁶⁶ When women negotiated in this way others perceived them as being more “relational” and were as willing to work with them as with women who did not seek higher compensation at all.⁶⁷ In the second scenario, the woman supports her request for higher compensation with an external source of justification, such as an offer from another employer. The outside offer makes the woman’s request seem more legitimate and, once again, researchers found that others were as willing to work with a woman who so justified her request as with one who had not even made a request—at least when it did not appear that the woman had sought out that offer in an attempt to gain leverage with the current employer.⁶⁸ On the other hand, the two strategies were not effective when presented in combination—that is, it did not help to reduce backlash if a woman both took a communal approach and cited the existence of an outside offer—probably because the two approaches are not perceived as being compatible.⁶⁹

B. The Power of Suggestion: Stereotype Threat, Boost, Reactance, and Regeneration

At the bargaining table, as well, gender stereotypes can exert influence on the parties’ behavior, leading both women and men to behave in stereotype-consistent ways that produce worse outcomes for women. Influential stereotypes can be both prescriptive—how men and women “ought to be”—and descriptive—how men and women “are.” Again, generally held stereotypes in the context of negotiations favor men, for “[m]any of the traits that characterize effective negotiators are perceived to be masculine in nature, and many of the traits of ineffective negotiators are perceived to be feminine.”⁷⁰ Effective negotiators are

⁶⁵ See Bowles & Babcock, *supra* note 53, at 1. In contrast, justifying the request using internal validation, such as the woman’s assessment that “I’m worth it,” did not reduce the backlash effect of asking. *Id.* at 8, 18.

⁶⁶ *Id.* at 20 (quoting script followed in “communal frame” condition).

⁶⁷ *Id.* at 16–17.

⁶⁸ *Id.* at 18–19.

⁶⁹ *Id.* at 17.

⁷⁰ Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 943, 944 (2001). See also Kray & Thompson, *supra* note 36, at 147–48 (summarizing research findings that “clearly support the view that expectancies pertaining to negotiator behavior are stereotypically masculine”).

characterized as “assertive, rational, decisive, constructive, and intelligent,” while ineffective negotiators are viewed as “weak, emotional, irrational, and too conciliatory.”⁷¹

These views are shared even by individuals who might be expected to repudiate them, such as “students enrolled in a highly competitive MBA program at a top business school”⁷² Further, studies of simulated, face-to-face sales negotiations among members of this population found that gender stereotypes had a subtle but significant effect on the expectations and assertiveness—and consequently on the negotiated outcomes—of women and men, negatively affecting women’s performances and enhancing men’s when they negotiated with those of the opposite gender. Researchers tested the effect of implicitly invoking gender stereotypes, in one study by telling subjects that their performance in the exercise would indicate their effectiveness as negotiators and in another by tying negotiator effectiveness with traits that are stereotypically male and ineffectiveness with traits that are stereotypically female. In neither case did researchers *explicitly* link gender with effectiveness as a negotiator. Men began the negotiation expecting to do significantly better for themselves (that is, expecting to get a greater share of resources) than did women when gender stereotypes were thus invoked and they negotiated with a partner of the other gender.⁷³ In those situations, men also behaved more assertively than women, making more extreme opening offers (meaning their offers were higher when they acted as seller and lower when they acted as buyer), and achieved outcomes superior to those obtained by women.⁷⁴ On the other hand, when subjects were told that the exercise was simply a learning tool—that is, not diagnostic of negotiating ability—or negotiated in same-gender dyads, no significant gender differences in expectations, assertiveness, and outcomes appeared.⁷⁵

These findings are consistent with a well-documented phenomenon known as “stereotype threat”—and its converse, “stereotype lift” or “stereotype boost.” Stereotype threat is a kind of self-fulfilling prophecy⁷⁶

⁷¹ Kray, Thompson & Galinsky, *supra* note 70, at 943.

⁷² *Id.* at 945 (describing subjects in studies, noting further that the negotiations course from which the subjects were drawn “was the most popular elective in the school”). When subjects from this group were asked to take and justify a position on the question “who has the distributive advantage in negotiations—men or women”?, “[r]espondents believed that men will come out ahead in terms of bargaining advantage (48%) to a greater extent than women (32%) or neither (20%). . . . [A] substantial number of the reasons provided correspond to universal gender stereotypes.” *Id.* at 944.

⁷³ *Id.* at 945.

⁷⁴ *Id.* at 945, 947–48.

⁷⁵ *Id.*

⁷⁶ A self-fulfilling prophecy is “a process by which people, acting on the basis of an assumption or prediction, and regardless of its truth or falsity, actually cause that assumption to be verified or the prediction to occur, thereby confirming the ‘accuracy’ of the belief.” WANG, *supra* note 31, at 51. For a fuller discussion of group-

that causes members of groups that are stereotyped as being less capable in a relevant dimension to perform more poorly in situations when they are subtly reminded of that stereotype than when they are not, even when the stereotype is not true of the individual, and especially if the individual cares enough about the supposed ability in question to want the stereotype to be untrue. In other words, and ironically, fear of confirming a negative stereotype can cause higher achieving members of the stereotyped group—those whose actual abilities *least* match the stereotype—to perform less well on relevant tasks when they are reminded of the stereotype, thereby acting to confirm the stereotype.⁷⁷

Social psychologists first discovered and described stereotype threat in a series of well-known studies of performance on standardized tests of academic ability. In those studies, they found that African American, Latino, and female students performed significantly worse than Caucasian male students on standardized tests in areas in which their groups are stereotyped as having lesser ability, such as math or verbal skills—but only when they were tested after being subtly reminded of the negative stereotype by, for example, being asked to note their race on a form before taking the test.⁷⁸ When the stereotype was not invoked, members of these groups performed as well as white male subjects.⁷⁹ Further studies have shown that stereotype threat can cut across categories, as well; its effects are not limited to women and people of color or to tests of academic ability. Studies have found, for example, that persons of lower socioeconomic status, older adults, and even white males can be vulnerable to stereotype threat in tests of academic ability, memory, and athletic ability.⁸⁰

Stereotype threat can affect anyone under the right conditions, because it is a feature of the situation, not the person. Making a negative

based stereotypes and self-fulfilling prophecies, see *id.* at 49–81 (discussing “self-fulfilling stereotypes”).

⁷⁷ See STEELE, *supra* note 12, at 54–59, 90–92.

⁷⁸ See generally Joshua Aronson et al., *The Effect of Stereotype Threat on the Standardized Test Performance of College Students*, in READINGS ABOUT THE SOCIAL ANIMAL 403 (Elliot Aronson ed., 8th ed. 1999); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

⁷⁹ See STEELE, *supra* note 12, at 51–52; Aronson et al., *supra* note 78, at 406; Steele, *supra* note 78, at 620.

⁸⁰ Studies have found, for example, that subjects of lower socioeconomic status did worse on a verbal test when reminded of the stereotype that links low socioeconomic status to low intellectual ability and better when they were not; that adults between the ages of 62 and 84 did worse on tests of recall when they were reminded of the stereotype that links age with memory decline and better when they were not; that black athletes did worse on a test of athletic ability when they were told it was a test of “sports intelligence” and reminded of the stereotype that black athletes are intellectually inferior and better when they were not; and that white athletes did worse on the same test of athletic ability when they were told it was a test of “natural athletic ability” and reminded of the stereotype that white athletes are physically inferior and better when they were not. See WANG, *supra* note 31, at 54–55.

stereotype salient to an individual from the stereotyped group who cares about the ability supposedly being tested actually *alters the testing situation*, framing it as a “high-stakes endeavor”: “[T]he mere existence of a devaluing stereotype means that anything one does, or any of one’s features that conform to it, makes the stereotype more plausible as a self-characterization, in the eyes of others, and perhaps even in one’s own eyes.”⁸¹ This predicament places a psychological burden on the individual, creating anxiety and distraction that interfere with his or her performance. Accordingly, anyone from a group to which a negative stereotype can be applied may be vulnerable to stereotype threat—including white athletes on tests of athletic ability who are reminded of the stereotype that whites are physically inferior to black athletes and white male students on math tests who are reminded of the stereotype that Asian students outperform other groups in math.⁸²

But while members of any group might experience stereotype threat under certain conditions, some groups are exposed to those conditions on a more regular basis. Some settings, “though seemingly the same for everybody, are, in fact, different places for different people.”⁸³ For women and people of color, gender and other group-based stereotypes sometimes are salient features of normal, real-life situations. Situations in which a person’s race or gender is noticeable—such as where a “token” woman executive meets with a group otherwise comprising men—can create self-consciousness and worry that can hamper the person’s performance.⁸⁴ Accordingly, to alter the real-life situation would require *removing* that “‘collar’ of stigma” by lowering stereotype-related pressures.⁸⁵

A converse, complementary effect, stereotype lift or boost, has also been documented.⁸⁶ This effect occurs when members of groups that are not subject to negative stereotypes are reminded of the negative stereotypes that apply to *other* groups. Being able to compare one’s group to the other, denigrated group (that is, to engage in “downward social comparison” with that other group) elevates one’s confidence and motivation and enhances performance.⁸⁷ This effect seems to explain why the male MBA students performed better in negotiations with women when the traits of effective negotiators were identified as characteristics that are stereotypically male: While this suggestion “represents a threat

⁸¹ Aronson et al., *supra* note 78, at 402, 404; *see also* STEELE, *supra* note 12, at 52–54.

⁸² *See* Aronson et al., *supra* note 78, at 413; STEELE, *supra* note 12, at 8–10, 90–92; Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999).

⁸³ STEELE, *supra* note 12, at 60.

⁸⁴ *See* BABCOCK & LASCHEVER, *supra* note 40, at 80–81.

⁸⁵ STEELE, *supra* note 12, at 38.

⁸⁶ Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 456 (2003).

⁸⁷ *See id.* at 456.

for women[, it also represents] an opportunity for men, and ultimately leads to a performance advantage for men negotiating with women.”⁸⁸

On the other hand, gender effects need not always disadvantage women, and these phenomena can present an opportunity for women under the right circumstances. That is, the influence of gender stereotypes does not inevitably work to women’s disadvantage in negotiations; it depends on the situation. The way in which gender stereotypes are activated or the aspects of those stereotypes that are emphasized can affect the direction of their influence, to make women more and men less effective negotiators.

We have just seen that subtly or implicitly invoking gender stereotypes can hamper women’s performance in negotiations and enhance men’s by introducing stereotype threat and boost that promote stereotype-confirming behavior. Surprisingly, making those same stereotypes *explicit*—that is, stating that the personality characteristics associated with effective or ineffective negotiators “tend to vary across gender”⁸⁹—sometimes can have the opposite effect, causing women to achieve better outcomes and men to fare worse. This research supports the idea that members of any group can be affected adversely by negative stereotypes and shows that positive stereotypes can be a burden too, depending on how they are perceived.

That women would do better when negative stereotypes about them are explicitly mentioned is counterintuitive, because reminding someone of her supposed deficiencies would seem to put her at a psychological disadvantage. In some situations when gender stereotypes are explicitly noted, however, women react *against* those stereotypes. That is, rather than assimilate and act in accordance with negative stereotypes, women seem to distance themselves from the disabling traits that they are supposed to have⁹⁰ and then act counter to expectations, entering negotiations more assertively, behaving more competitively, and outperforming men.⁹¹ Researchers have called this effect “stereotype reactance.”⁹²

⁸⁸ Kray, Thompson & Galinsky, *supra* note 70, at 954 (describing the researchers’ hypothesis, which their studies largely confirmed).

⁸⁹ *Id.* at 952.

⁹⁰ In pre-negotiation self-assessments, women who had been explicitly reminded of gender stereotypes were less likely than men to identify emotion as their weakness in negotiation and more likely to identify assertiveness as their key strength. *Id.*

⁹¹ *Id.* at 950, 953.

⁹² *Id.* at 948–49. Highlighting the contingent nature of gender effects, however, a subsequent study found that “the ability of women to react against a negative stereotype appears to be limited to the case in which they are not disabled by a salient power disadvantage in the negotiation.” Kray & Thompson, *supra* note 36, at 161 (citing Laura J. Kray et al., *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Value*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 399, 400 (2004) (finding that gender reactance was not sufficient to overcome a gender gap in negotiation when women subjects were placed at a power

Likewise, if an implicit reminder of their supposed gender advantage gives men a performance boost, explicitly pointing it out would seem to give them even more confidence in negotiations. Again, however, the actual effect appears to be the opposite. When men were explicitly reminded of stereotypes favoring them, they reported feeling less powerful rather than more, and women outperformed them. In this case, the explanation seems to be that the explicit reminder is a kind of burden, in that it causes men to fear that they will fail to live up to the positive stereotype, experience self-doubt, handicap themselves (that is, claim “weaknesses that limit their chances for success”),⁹³ and perform less well. The researchers call this response “choking under pressure.”⁹⁴

Even the implicitly activated phenomena of stereotype threat and boost can run counter to their usual direction in negotiations, favoring women over men, if the usual assumptions linking masculine traits with effective negotiators are turned on their heads. To be more precise, the effect of stereotypes can cut in both directions: They “can empower and disempower individuals in the negotiation context, depending on which stereotypical traits are linked to positive performance.”⁹⁵ Women can experience stereotype boost rather than threat—and men can have the converse experience—if the situation “regenerates” gender stereotypes, by accentuating different aspects of those stereotypes and their link to success in negotiations. Stereotype regeneration is not possible in every setting or for every group,⁹⁶ but it is in the case of negotiations and gender. In the context of negotiations, gender stereotypes are malleable.⁹⁷ That is, despite the common perception that effective negotiators display traits that are stereotypically masculine, “many of the traits regarded by experts to be critical to negotiation success are in fact [stereotypically] feminine in nature.”⁹⁸ Among these are “being insightful and emotionally expressive” and having effective communication and listening skills.⁹⁹

disadvantage by being given options in the negotiation that were less favorable than those available to the other party)).

⁹³ Kray, Thompson & Galinsky, *supra* note 70, at 950–51.

⁹⁴ *Id.* at 949. Subjects’ pre-negotiation assessments of their key strengths and weaknesses and post-negotiation assessments of their power and performance supported the interpretation that men felt less powerful and successful when they were explicitly reminded of the presumed male advantage and were not “allow[ing] women to dominate out of a chivalrous motive or attempt[ing] to minimize their advantage so that their negotiating partner had an equal or fair opportunity at the pie.” *Id.* at 954 (citation omitted).

⁹⁵ Kray, Galinsky & Thompson, *supra* note 25, at 398.

⁹⁶ *Id.* at 390.

⁹⁷ *Id.* at 406.

⁹⁸ *Id.* at 390.

⁹⁹ *Id.* See also *id.* at 391–92 (reporting on results of a pretest confirming that subjects considered these traits to be stereotypically feminine).

In one experimental study, women did better and men did worse when they negotiated in mixed-sex pairs after being told that the exercise was highly diagnostic of negotiating abilities and that highly skilled negotiators had the traits noted above as being stereotypically feminine. Women set higher goals and performed better in this situation and their partners evaluated them more positively.¹⁰⁰ In the “gender-neutral” scenario, on the other hand—when effective negotiators were described as having traits that are stereotypically neither masculine nor feminine—men did better.¹⁰¹

It is interesting to note that the latter, supposedly gender-neutral, situation favored men. The researchers speculated that this condition was not actually gender-neutral because the exercise was still described as being highly diagnostic of ability. That is, just as we have seen in experiments involving standardized tests, “describing a task as diagnostic of ability is enough to produce stereotype threat effects in disadvantaged groups.”¹⁰² In other words (and as noted above),¹⁰³ sometimes stereotypes do not have to be activated to be present; sometimes they are a normal part of the situation.

C. *Facilitating, Constraining, Triggering, and Transcending Gender Effects*

Even as gender stereotypes often are features of a negotiation setting that can influence the parties’ expectations, choices, behavior, and outcomes, they also can interact with and be exacerbated by other features of the situation, such as the structure of the situation and the representational roles the parties are to play. Again, this context sensitivity can be cause for both discouragement and hope. Recognizing that stereotypes are just one feature of a situation that interacts with other features of the situation provides reason for optimism that gender effects are neither unidirectional nor inevitable: Just as gender effects can be aggravated by some situations, so too can they be countered or reduced by others. Gender does not always disadvantage women, and women and men do not always behave the same way in every negotiation because of their gender.

One important situational variable that affects the extent to which stereotypes exert influence is the situation’s strength or weakness or, in other words, its clarity or ambiguity. A strong situation is one in which

¹⁰⁰ *Id.* at 395–99. Implicitly linking ineffective negotiators to traits that are stereotypical of their respective genders impaired the performances of both women and men in competitive negotiations. Conversely, each gender group performed better when ineffective negotiators were linked to traits that are stereotypical of the other group. *Id.* at 400–04.

¹⁰¹ *Id.* at 395–99. The gender-neutral traits were those that fell in the mid-range of the masculine-feminine scale based upon the pretest described in note 99, *supra*. *Id.* at 392, 394.

¹⁰² *Id.* at 399 (citation omitted).

¹⁰³ See *supra* text accompanying notes 84–85.

people share a single, clear understanding of how they ought to act and are able to behave in accordance with that understanding. In a weak or ambiguous situation, however, appropriate standards are not clear; people therefore “have to come up with their own interpretations as to what is the appropriate response”¹⁰⁴ Negotiation situations are ambiguous when, for example, parties are uncertain about their economic structure or parameters. They may be unsure about what pool of resources is available for distribution, what the limits are of the bargaining range, or what the appropriate standards are for agreement (such as market value or other benchmark).¹⁰⁵

Situational ambiguity increases the potential influence of individual differences such as gender.¹⁰⁶ Ambiguous situations have been found to promote gender differences in negotiations both on an industry-wide level and in one-on-one interactions. First, a study of MBA students’ starting salaries from the year 2000 supported the relationship between structural ambiguity and the effects of gender. Overall, female MBA graduates’ average starting salaries were 5% lower than men’s. When researchers categorized industries by their degree of uncertainty regarding the potential salary range and appropriate standards for agreement, however, they found that structural ambiguity moderated the effects of gender: Low structural ambiguity industries (such as venture capital/private equity) showed no significant sex effect on salaries, while high structural ambiguity industries (such as retail or health/human services) had a gender gap of \$10,000 in favor of men.¹⁰⁷

The same researchers studied the effect of structural ambiguity on individual negotiations, focusing on a simulated, competitive negotiation over sales price between mixed-sex pairs of buyer and seller. They manipulated the structural ambiguity faced by buyers by giving or withholding clear price comparison information (specifically, the price his or her superior hoped would be reached in the agreement), while holding constant the information they provided sellers. Results confirmed that structural ambiguity enhances gender differences in expectations and outcomes: When uncertainty was high, female buyers had less optimistic expectations and performed worse—that is, they paid more—than male buyers. When buyers received price information and the situation was more certain, on the other hand, no significant

¹⁰⁴ Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 952 (2005).

¹⁰⁵ *Id.* at 952–53.

¹⁰⁶ *Id.* at 952.

¹⁰⁷ *Id.* at 956 (noting that the study controlled for a “wide array of salary predictors”). The researchers pointed out that such a difference in starting salaries could result in a salary gap of \$600,000 and a wealth gap of \$1.5 million over the course of a career. *See id.* at 963 (stating the assumptions under which these gaps were calculated).

differences appeared in the expectations or outcomes of male and female buyers.¹⁰⁸

Situational ambiguity does not necessarily cause gender effects; rather, it facilitates their emergence.¹⁰⁹ Ambiguous situations do not provide clear expectations or guidelines, so cues such as stereotypes can offer powerful, if often unconscious, guidance on how to respond. Further, because ambiguous situations lack clear standards—that is, provide no clear sense of what conduct is right or wrong or what amount is within or outside the acceptable range—they also tend to obscure disparities in outcomes, so the actors may not recognize that members of one group are faring worse than those of another.¹¹⁰ Strong or clear situations, on the other hand, offer less room and cover for gender differences in behavior and outcomes because expectations and standards are better defined.

Aside from facilitating gender effects, situations also might contain specific features that “trigger” gender differences in negotiation behavior by cueing gender-related “scripts” that prompt the parties to act in accordance with prescriptive gender roles; the content of those scripts can impede or promote women’s effectiveness as negotiators. An example of such a feature is the representational role of a negotiating party—that is, whether the party negotiates on behalf of himself or herself or represents another.¹¹¹ As noted above, prescriptive stereotypes define appropriate feminine behavior as communal and other-oriented as opposed to self-focused and “demanding.”¹¹² Perhaps because it is more acceptable for women to advocate for someone else than for themselves, researchers have found that women are more motivated, effective, and successful negotiators when they represent the interests of another person than when they negotiate for themselves,¹¹³ and they tend to find more acceptance in that role.¹¹⁴ In fact, women who represented others in simulated negotiations not only performed better than women who represented themselves, they also outperformed men who fulfilled either role.¹¹⁵ (One researcher has suggested that this finding might offer an alternative explanation for women’s gender reactance, discussed above.¹¹⁶ That is, when gender is explicitly made salient, women may view themselves as representatives not just of themselves but of their social group as a whole, and therefore “react against the norm and negotiate

¹⁰⁸ *Id.* at 957.

¹⁰⁹ *Id.* at 962.

¹¹⁰ See WANG, *supra* note 31, at 36–42.

¹¹¹ See Bowles, Babcock & McGinn, *supra* note 104, at 952–53.

¹¹² See *supra* text accompanying note 48.

¹¹³ Bowles, Babcock & McGinn, *supra* note 104, at 953, 958–60.

¹¹⁴ See Tinsley et al., *supra* note 45, at 238.

¹¹⁵ Bowles, Babcock & McGinn, *supra* note 104, at 958–59.

¹¹⁶ See *supra*, text accompanying notes 90–92.

more effectively.”¹¹⁷) The performance of male negotiators, on the other hand, was unaffected by their representational role.¹¹⁸

Further highlighting the situation-sensitivity of gender differences in negotiations, researchers have found that situational factors that facilitate or trigger gender differences—such as situational ambiguity and representational role, respectively—do not just work independently to influence the strength and direction of the influence of gender stereotypes. They also can work in tandem; that is, in highly ambiguous situations, the representational role played by women has been found to have significant effects on negotiation performance, with women who negotiate for themselves faring significantly worse than women who represent another. In low ambiguity situations, on the other hand, no significant differences emerged based on women’s representational roles.¹¹⁹

Beyond carrying the potential to introduce, redirect, strengthen, or constrain the influence of gender stereotypes, some situations might even offer an opportunity to transcend them—in the process altering the very focus and dynamics of the negotiation. In one experiment with promising results, researchers found that any bargaining advantage for one gender over another could be “negated” if they told subjects that an identity they shared was linked to effective negotiating skills and explicitly noted the irrelevance of gender.¹²⁰ Specifically, researchers told them that the key difference between those who do and those who do not display the skills of effective negotiators was “almost entirely determined by college education and professional aspirations” and that “[t]his is true for men and women alike.”¹²¹ Invoking this “shared superordinate identity”¹²² apparently equalized the perceived power between the two parties. As a consequence, negotiators perceived less of a difference between themselves and “were better able to work cooperatively”: Rather than focusing on *distributing* resources between themselves, they *created* resources—expanded the pie—by making concessions and tradeoffs and sharing information.¹²³

D. Beyond the “Closed System” of the Laboratory¹²⁴

Taken as a whole, the research discussed above reveals, on one hand, that gender stereotypes can be a powerful influence on negotiations and,

¹¹⁷ See Tinsley et al., *supra* note 45, at 240.

¹¹⁸ Bowles, Babcock & McGinn, *supra* note 104, at 959.

¹¹⁹ *Id.* at 961–62. For men, however, representational role had no significant effect on performance regardless of degree of situational ambiguity. *Id.*

¹²⁰ Kray, Thompson & Galinsky, *supra* note 70, at 952–54.

¹²¹ *Id.* at 952, 954.

¹²² *Id.* at 951.

¹²³ *Id.* at 954.

¹²⁴ See Deborah Kolb & Kathleen McGinn, *Beyond Gender and Negotiation to Gendered Negotiations*, 2 NEGOTIATION & CONFLICT MGMT. RES. 1, 3 (2009).

on the other, that their influence is situation sensitive and not inevitable. Of course, one should be careful not to assume that actual negotiations play out like the simulated negotiations of laboratory settings, which involve contrived interactions between strangers, have very low stakes, and tend to focus on a relatively homogeneous and narrow population, typically college or MBA students. There is good reason to believe, however, that gender effects in many real-life settings, the workplace in particular, are even more significant (though perhaps even less apparent), for real-life negotiations often are characterized by multiple factors that tend to promote gender effects—favoring men over women while at the same time masking their influence.¹²⁵

For one thing, experimental settings generally are strong or unambiguous in comparison to real-life situations,¹²⁶ which often are weak or unclear, a factor that increases the influence of social stereotypes.¹²⁷ As Ayres pointed out in the case of retail car sales, for example, salespeople often have a lot of discretion in negotiating individual agreements, and customers who are women or people of color are unlikely to know what deals their white male counterparts are offered.¹²⁸ Furthermore, laboratory negotiations bring strangers together for structured, isolated, one-time, single topic transactions, so the parties interact without a larger organizational culture to navigate, no history of prior negotiations and no future negotiations to anticipate, and but a single, experimenter-imposed issue over which to haggle. The “closed system” of the laboratory therefore lacks “precisely those gender effects likely to be most operative in organizations,” including multiple factors that affect the relative power of women and men in organizations—commonly to the detriment of women—such as “the relative presence of women and men in power positions; the extent to which negotiations have included or benefitted men and women differently in the past; and awareness of multiple interrelated negotiations rather than one-shot deals.”¹²⁹ In some organizations, moreover, even what issues require negotiation¹³⁰ or are considered to be negotiable¹³¹ may be a gendered question. Factors such as these all can affect whether and the degree to

¹²⁵ See *id.* at 1.

¹²⁶ As Bowles, Babcock and McGinn have noted, “Experimental settings tend, by design, to be strong situations and tend, therefore, to minimize potential effects of gender and other individual differences on behavior.” Bowles, Babcock & McGinn, *supra* note 104, at 962 (citation omitted).

¹²⁷ See *supra*, text accompanying notes 105–10.

¹²⁸ See AYRES, *supra* note 15, at 4–11, 19.

¹²⁹ Kolb & McGinn, *supra* note 124, at 3.

¹³⁰ See *id.* at 1 (noting that in some situations women have to negotiate over issues that men “take as givens,” such as opportunities for promotion and training and other resources).

¹³¹ See Kolb, *supra* note 32, at 525–26 (citing as an example that work assignments may be made in a way that disadvantages women or people of color but is taken for granted).

which the contexts of real-life negotiations are “different places” for women than for men.¹³²

IV. CONCLUSION

Understanding how gender shapes negotiation situations, and how other features of the situation in turn can aggravate or alleviate that influence, has great practical value. Most immediately, individuals can draw on that understanding to develop strategies for navigating more successfully within the existing order, potentially improving their own negotiated outcomes.¹³³ Ideally, key actors within organizations can incorporate these insights into a larger strategy to shape and equalize the broader contexts in which individual negotiations take place.¹³⁴

Legal decisions also can benefit from an appreciation of how characteristics like gender can affect individuals’ choices of whether and how to negotiate. In individual cases, that appreciation can contribute to a fuller understanding of the circumstances surrounding a particular transaction and aid courts in interpreting parties’ interactions in light of their social context.¹³⁵ By providing a more complete account of the “background of the transaction or relationship,”¹³⁶ for example, it could help to illuminate differences in social constraints that might lead to differences between how women and men sometimes express their intentions within a transaction or relationship.¹³⁷

¹³² For a fuller discussion of how gender in organizations intersects with negotiation, see Kolb & McGinn, *supra* note 124.

¹³³ Some of the leading scholars in this area have offered resources and advice incorporating the research discussed in this essay. See, e.g., Tara Siegel Barnard, *A Toolkit for Women Seeking a Raise*, N.Y. TIMES, May 15, 2010, at B1 (interview with Hannah Riley Bowles); Tinsley et al., *supra* note 45, at 239–45 (offering suggestions on “how women might attenuate backlash at the bargaining table” and ideas on how to teach about issues of gender and backlash to address this dynamic on both sides of the table); WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE (featuring Linda Babcock and Sara Laschever), <http://www.womendontask.com/more.html>; NEGOTIATING WOMEN (featuring Deborah Kolb), <http://www.negotiatingwomen.com/>.

¹³⁴ See generally Hannah Riley Bowles & Kathleen L. McGinn, *Untapped Potential in the Study of Negotiation and Gender Inequality in Organizations* (2007), available at <http://ssrn.com/abstract=963134>; Kolb & McGinn, *supra* note 124.

¹³⁵ As Dean Moran has explained, “it may be promising to think about the reasonable person as a kind of corrective to an unproblematic judicial point of view.” Moran, *supra* note 6, at 1266–71.

¹³⁶ DiMatteo, *supra* note 4, at 318.

¹³⁷ Such an understanding could, for example, help a court or jury to appreciate that a woman might take a deferential approach in communicating with another party not because she does not seek to assert a position but in order to increase the probability that the other party will accept her position. I thank my co-panelist, Professor Laura Heymann, for suggesting this general point and for referring me to the copyright case involving a claim of co-authorship of the Broadway musical *Rent*, in which such a gendered social dynamic might have been at work. See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). In that case, the district court rejected Thomson’s claim of co-authorship despite her having made a “non-de minimus

In addition, lawmakers can draw on this knowledge to craft rules and policies that recognize the potential for gender to affect the situations individuals must negotiate or that even improve situations to reduce that potential. The proposed Paycheck Fairness Act and Fair Pay Act take both of these approaches in trying to reduce gender disparities in pay.¹³⁸ First, the Paycheck Fairness Act would close a loophole in current law that allows differences in negotiation to justify differences in pay. Under the existing Equal Pay Act of 1963, employers are prohibited from paying different wages to men and women who perform equal work in the same workplace.¹³⁹ Differential payment is permitted, however, if it is “based on any other factor other than sex.”¹⁴⁰ Courts generally have permitted this defense for employers who cite differences in how men and women negotiate their salaries to justify disparate pay.¹⁴¹ As the research discussed above reveals, however, differences in negotiation between men and women often are, in fact, based on sex. The Paycheck Fairness Act would remove the “any factor other than sex” defense and replace it with a defense requiring the employer to show “a bona fide factor other than sex, such as education, training, or experience.”¹⁴² As my colleague Deborah Brake has explained, this amendment would “help close what has become a gaping loophole in the Equal Pay Act’s promise of a nondiscriminatory wage” and require employers to demonstrate a factor that is “not based upon or derived from a sex-based differential in

copyrightable contribution” to the play, because it found that parties did not mutually intend to be identified as co-authors. *See id.* at 200–05. More specifically, the court found that Larson did not intend that Thomson be a co-author. *See id.* at 201–05. In affirming this decision, the Second Circuit reviewed evidence of Larson’s intent, such as his decision making authority within their relationship. *Id.* at 200–07. Among the evidence the court cited as confirming “the advisory nature” of Thomson’s role was “the deferential language she employed in communicating with Larson and [others].” *Id.* at 203 n.21 (quoting plaintiff’s notes to Larson, in which she wrote, “Please know that everything is intended as a question but might sound differently in the shorthand of the writing.” and “Usual disclaimer; the following is meant to generate discussion. Even when I offer ‘solutions’ what I mean is only to communicate a response by example.”); *see also* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 240 (2001) (discussing the Thomson opinion). Professor LaFrance points out that “the court may have given too much weight to this evidence. Thomson’s fear of offending Larson by her suggestions may say more about her personality (or Larson’s) than about her co-authorship status.” *Id.* at 240 n.191. The studies discussed in this article suggest, moreover, that Thomson’s deferential approach also might say more about the social constraints that Thomson felt or faced than about either her personality or his. *See id.* at 240 n.193.

¹³⁸ *See* Paycheck Fairness Act, S. 182, 111th Cong. (2009); Fair Pay Act of 2009, S. 904, 111th Cong. (2009).

¹³⁹ Equal Pay Act, 29 U.S.C. § 206(d) (2006).

¹⁴⁰ *Id.*

¹⁴¹ For a thorough discussion of this issue, see Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiations is Not a “Factor Other Than Sex” Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1 (2009).

¹⁴² S. 182, § 3.

compensation, and that . . . is job-related and consistent with business necessity.”¹⁴³

The Paycheck Fairness Act and the Fair Pay Act also include provisions to improve collection of and access to information on pay.¹⁴⁴ Having access to such information is important both for enforcement of the equal pay laws¹⁴⁵ and to help reduce uncertainty for workers in negotiating compensation, as a way of increasing their knowledge of the appropriate standards and, accordingly, constraining the effects of gender in negotiations.¹⁴⁶ Finally, the Paycheck Fairness Act also authorizes the Secretary of Labor to establish and carry out a grant program for negotiation skills training to “help girls and women strengthen their negotiation skills to allow the girls and women to obtain higher salaries and rates of compensation that are equal to those paid to similarly-situated male employees.”¹⁴⁷

More broadly, appreciating the situation-altering yet situation-sensitive influence of social identities such as gender provides us with a richer understanding of the circumstances in which people interact. It shows that, sometimes, common transactions can take place in different places for different people. Accordingly, we should expand our focus beyond the *person* in understanding the perspective of the “reasonable person”: The reasonable person construct should accommodate gender (and perhaps other group-based identity characteristics) not necessarily because *persons* differ on account of those characteristics, but because of how those characteristics influence the *situations* a person must negotiate.

¹⁴³ *The Failure of Existing Employment Laws to Close the Gender Wage Gap: Before the Senate Committee on Health, Education, Labor, and Pensions*, 111th Cong. 9 (2010) (testimony of Deborah L. Brake, Professor of Law, University of Pittsburgh), available at <http://help.senate.gov/imo/media/doc/brake.pdf>.

¹⁴⁴ S. 182, § 8; Fair Pay Act of 2009, S. 904, 111th Cong. § 6 (2009).

¹⁴⁵ See *The Failure of Existing Employment Laws to Close the Gender Wage Gap*, *supra* note 143, at 13–14.

¹⁴⁶ See *supra*, text accompanying notes 106–10 for discussion of the effects of situational ambiguity and clarity.

¹⁴⁷ S. 182, § 5(5).