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Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers

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LIKEABILITY V. COMPETENCE: THE IMPOSSIBLE CHOICE FACED BY FEMALE POLITICIANS, ATTENUATED BY LAWYERS

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The 2008 election highlighted a dilemma often faced by women in the professional world—a double bind between being perceived as competent or as likeable. Both qualities are imperative for success but the incongruity of normative female roles (warm, nurturing) with characteristics perceived necessary for professional success (independence, assertiveness) means that women are either seen as likeable, but incompetent, or as competent, but unlikeable. Wherever you fell along the political spectrum, it is clear that Hillary Clinton's historic candidacy for the Presidency of the United States followed by Sarah Palin's candidacy for Vice-President provided a unique lens for considering how gender is viewed in our culture. Of course, Clinton's loss in the Democratic primary and Palin's (and McCain's) loss in the election was determined by multiple factors specific to their personalities and their campaigns. Yet, the election coverage demonstrated what workplace and social science research have shown for years: women face unique constraints when trying to be successful in traditionally masculine domains. Characteristics such as independence, assertiveness, self-reliance, and power are thought of as masculine, and therefore, properly in the domain of male behavior, whereas characteristics such as warmth, communality, caring, and helpfulness are thought of as feminine. An assertive, powerful female whose characteristics and behavior violate expectations created by the core female stereotype threatens societal conventions of how women ought to behave and results in backlash. Women seem to face a choice of being seen as likeable *or* as competent, but not as both.

Interestingly, lawyers do not seem plagued by this same double bind. After reviewing election coverage and social science research, this Article

focuses on research about lawyers demonstrating that, in style and in effectiveness, there is no difference between how female and male lawyers are perceived. In a study of lawyers rating other lawyers in their most recent negotiation, female lawyers were described in terms that were similar to their male colleagues (ethical, confident, and personable) and both were equally likely to be judged as effective in general. In fact, women lawyers were rated *more* highly in assertiveness than their male counterparts, and yet did not seem to suffer negative consequences for violating feminine proscriptions. This Article examines why lawyers appear to escape the backlash effect and argues that unique features of legal work reduce the perceived incongruity between assertiveness and proscribed feminine behavior thereby attenuating the likelihood of backlash. Finally, the Article concludes by suggesting further advice for how lawyers can deal with the backlash effect in contexts where incongruity is still salient.

I.   THE LIKEABILITY VERSUS COMPETENCE DICHOTOMY

The 2008 election provided an amazing canvas on which commentators and others could paint the candidates with all sorts of images. Even the Saturday Night Live skits about the candidates highlighted the likeability versus competence divide—Clinton always appeared smart, you just didn't like her. Palin seemed approachable and charming, just not all that intelligent. This likeability versus competence dichotomy is also seen in studies of the workplace and in several social science studies further examined below.

A. The 2008 Election

All political candidates are subject to attack from supporters of their opponent, but female candidates, especially in high profile offices such as President and Vice President, appear to face targeted gender attacks. Specifically for Hillary Clinton and Sarah Palin, these gendered attacks mirrored the two sides of the double bind; one was consistently portrayed as competent, but unlikeable and the other likeable, but incompetent, respectively.

For example, many attacks directed at Hillary Clinton were imbued with gendered messages.[1] In the window of a Kentucky Fried Chicken (KFC) restaurant was the announcement of the "Hillary Special" which consisted of "2 fat thighs with 2 small breasts and a left wing." In another poster, there is a picture of a witch flying on her broom with the words "Cackle Cackle" at the top and "Hillary Rotten Clinton" at the bottom. In a third, Obama and Clinton are pictured side-by-side. Beneath them reads "Bros before Hoes." Another poster asks the question, "What is Hillary?" Beneath the question is a square box with an inverted triangle in the top half, a small square over the tip of the triangle, with letters across the square, "C.U.N.T." Beneath the box is *Citizens United Not Timid*. A banner at the top of a distasteful picture of Clinton reads "Life's a Bitch," and below it, "Don't Elect One!"

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1. Copies of these posters and headlines can be found on YouTube.com. *See* Hillary Clinton: Mad as Hell/Bitch, http://www.youtube.com/watch?v=kcdnlNZg2iM (last visited Feb. 16, 2010). As a disclaimer, we note for the record that we find these images and content completely distasteful. Viewed together, one can see exactly how shocking some of the attacks were on both candidates.

Moreover, the more "neutral" pundits gave their fair share of gender-laden critiques. On January 4, 2008, Neil Cavuto of Fox News' *Your World*, declared with a shrill voice that, "Men won't vote for Hillary Clinton because she reminds them of their nagging wives. And when Hillary Clinton speaks, we hear 'Take out the garbage!'" Similarly, on the February 18, 2008, edition of Fox Business News Cavuto said to Frank Guerra that Hillary "needs to run away from the tough bitch image."[2] On a January 23, 2008, episode of MSNBC's *Morning Joe* Mike Barnicle provided the following: "The way she reacted to Obama with the 'look'—just the way she 'looks' at him—looking like everyone's first wife standing outside of probate court, okay?[3]" Chris Mathews topped that, however, on the January 9, 2008, edition of the same program, as he blurted, "Let's not forget and I'll be brutal. The reason she is a U.S. senator, the reason she is a candidate for President, the reason she is a front-runner is because her husband messed around. She stood up under humiliation. That is how she got to be senator of New York. We keep forgetting she didn't win on her merits. She won because everybody felt 'My God, this woman stood up under humiliation.' Right? That's what happened. That is how it happened."[4] A January 25, 2008, episode of CNN's *Cafferty File* asked, "[W]hich Hillary is going to show up? In the last few days, we have just about seen it all. At the Thursday debate in Austin, Texas, Clinton showed a softer side. A couple of days later she morphed into a scolding mother talking down to a child. She wasn't finished, resembling someone with multiple personality disorders."[5] On January 4, 2008, Cavuto added, "The news is: It cries! After spending decades stripping away all trace of emotion, femininity, and humanity, Hillary Clinton actually broke down and actually cried yesterday on the campaign trail!"[6]

Sarah Palin's candidacy also demonstrated a fixed focus on her gender. In both the mainstream media and *Saturday Night Live*, much was made of how "hot" she was and how her rallies primarily attracted men.[7] (On the other hand, one attack button suggested, "Save a Moose, Shoot a Beaver"). The scandal over her clothing budget was clearly gender-based (we don't ask how much male candidates spend on their suits although the media did fuss about John Edward's $400 haircut).[8] The nickname "Caribou Barbie" seems to say it all. Palin herself helped the gender focus, describing herself as a "hockey mom" and using the analogy of a pit bull with lipstick. And, the initial attack on her parenting is also gender-based—we do not see coverage of male candidates

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2. *Your World with Neil Cavuto: GOP Strategist on What Hilary Clinton Needs to Do to Win Ohio* (FOX News television broadcast Feb. 18, 2008) (clip available at http://mediamatters.org/ mmtv/200802190004).

3. *Morning Joe: Clinton on Obama* (MSNBC television broadcast Jan. 23, 2008) (clip available at http://mediamatters.org/research/200801230004).

4. *Morning Joe: Clinton 'I Found My Own Voice in New Hampshire'* (MSNBC television broadcast Jan. 9 2008) (clip available at http://mediamatters.org/research/200801090008).

5. *Cafferty File: Best Debate Strategy Debate for Clinton* (CNN television broadcast Jan. 26, 2008).

6. *Your World with Neil Cavuto: The Crying Game* (FOX News television broadcast Jan. 4, 2008) (clip available at http://mediamatters.org /research/200801050004).

7. Mark Leibovich, *Among Rock-Ribbed Fans of Palin, Dudes Rule*, N.Y. TIMES, Oct. 19, 2008, at A1.

8. Patrick Healy and Michael Luo, *$150,000 Wardrobe for Palin May Alter Tailor-Made Image*, N.Y. TIMES, Oct. 23, 2008, at A1.

wondering how fast they returned to work after their wife had a baby or how they could possibly manage a job and five children, including a child with special needs.

Toward the end of the campaign, the likeability versus competence balance was more clearly highlighted. Palin's performance in interviews and in the debates may have increased her likeability among voters, but at the same time, raised the negative view of her competence. CNN's *Cafferty File* stated: "If John McCain wins, this woman will be one seventy-two year-old's heartbeat away from being President of the United States. And if that does not scare the hell out of you, it should."[9] Kathleen Parker, a conservative nationally syndicated columnist, writing on *The National Review* website, accused Palin of being more than just unqualified for the position of Vice President: "[i]f BS were currency, Palin could bail out Wall Street herself."[10] At MSNBC, Keith Olbermann stated, among other things, "she does not have the chops" to be Vice President.[11] Maureen Dowd, writing in *The New York Times*, wrote an article describing a hypothetical movie she invented entitled "Miss Congeniality,"[12] which depicts Palin as a helpless, yet lovable hockey mom.[13] And *The New York Post* titled an online article "Got Milf,"[14] using the vulgar acronym to describe Palin.[15] Even after the election, the hoax report that Republican operatives said that Palin did not even know that Africa was a continent received repeated playtime, even on Fox, rather than being dismissed out of hand.[16]

In the fall of 2009, Sarah Palin appeared on the cover of *Newsweek* in running clothes and the commentary started again. The accompanying article noted that, "Obama knows the long odds against a right-wing populist winning the presidency, no matter how good she looks in a skirt (or running clothes),

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9. *Cafferty File:* (CNN television broadcast Sept. 26, 2008) (clip available at http://www.youtube.com/watch?v=L8__aXxXPVc).

10. Kathleen Parker, *Palin Problem: She's Out of Her League*, NAT'L REV. ONLINE, Sept. 26, 2008, http://article.nationalreview.com/372474/palin-problem/kathleen-parker. The author also writes, "Palin's recent interviews with Charles Gibson, Sean Hannity, and now Katie Couric have all revealed an attractive, earnest, confident candidate. Who Is Clearly Out Of Her League."

11. *Countdown with Keith Olbermann: 5: Impalin* (MSNBC television broadcast Sept. 28, 2009) (clip available at http://www.youtube.com/watch?v=irklZ-iZjhI).

12. Maureen Dowd, *Vice in Go-Go Boots?*, N.Y. TIMES, Aug. 31, 2008, at WK11 ("So imagine my delight, my absolute astonishment, when the hokey chick flick came out on the trail, a Cinderella story so preposterous it's hard to believe it's not premiering on Lifetime. Instead of going home and watching 'Miss Congeniality' with Sandra Bullock, I get to stay here and watch 'Miss Congeniality' with Sarah Palin." The author also mocks that "The P.T.A. is great preparation for dealing with the K.G.B.").

13. *Id.* (The story finishes with: "The movie ends with the former beauty queen shaking out her pinned-up hair, taking off her glasses, slipping on ruby red peep-toe platform heels that reveal a pink French-style pedicure, and facing down Vladimir Putin in an island in the Bering Strait. Putting away her breast pump, she points her rifle and informs him frostily that she has some expertise in Russia because it's close to Alaska. 'Back off, Commie dude,' she says. 'I'm a much better shot than Cheney.'")

14. For those not acquainted with the term, it means "mother I would like to f***."

15. *Divided 'View'*, N.Y. POST, Oct. 23, 2008, at 12. Moreover, searching Google provides countless blogs and YouTube videos that refer to Governor Palin as a Milf.

16. *America's Newsroom: Gov. Palin Slammed by McCain Camp Staffers After Election* (FOX News television broadcast Nov. 7, 2008) (clip available at http://www.foxnews.com/search-results/m/21384703/smear-campaign.htm).

brandishing a gun."[17]   The commentary on Fox News, by Dana Perino, former Bush press secretary and Greta Van Susteren, further highlighted the issue:

PERINO: Can you imagine if this was—if this was any other woman politician, not just conservative or a liberal, if this was any other woman politician, one, they probably wouldn't have looked that good in "Runner's World" magazine and probably wouldn't have posed for it anyway. But I think that there would have been outrage, especially from the feminist groups. But instead, there's silence.

VAN SUSTEREN: Well, you know, you can disagree with her policy, and I'm all for that, challenge her on policy. Probably should ask a little bit about the policy. But the thing that always, you know, rubs me the wrong way, and it happens with Secretary of State Hillary Clinton or Governor Palin, people—two people—two women who I might agree with on some things but not everything, is that they get treated differently.   They get—they get—they get these questions. I don't think the guys notice it, though.

PERINO: Well, that's one of the things. Like, if you don't notice it, it's even worse. But if you step back, what do we learn as women running for higher office in America, which is that you are going to be treated differently. We're not going to necessarily change that in our lifetime, so you have to adjust. And one of the things she talks about is the preparation for her campaign, and even down to the clothing and what she was going to look like. That matters. I mean, and it's just the way that it is.[18]

Politicians' policies, voting behavior, and even their personal characters are often the subject of attack.[19] Yet, these examples seem to move beyond the usual triggers to evidence a discomfort that is inextricably linked with gender. We suggest this stems from a socially constructed (and maintained) stereotype of what is feminine, which can handicap women who engage in assertive behaviors. Assertive women violate the socially constructed norms for what is appropriate and thus are freely subject to punishment or backlash. Competent women are seen as hard and unlikable; likeable and good-looking women are not competent. That is, the attacks above may be thought of as social narratives to reinforce gendered expectations about suitable and appropriate behavior for women.

B. Likeability v. Competence in the Workplace

The election coverage put a spotlight on what has long been an economic and social reality. Although great social strides have been made resulting in women's near equal representation in the U.S. workforce (49.8% as of September

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17.   Evan Thomas, *Gone Rogue*, NEWSWEEK, Nov. 23, 2009, at 28.

18*. On the Record w/ Greta van Susteren: Why Everyone is Just Wild About Sarah*, (FOX News television broadcast Nov. 17, 2009) (transcript available at http://www.foxnews.com/story/ 0,2933,575373,00.html).

19.   Men too have been subject to sexualized images and attacks. For example, in the campaign between Mario Cuomo and Ed Koch for governor of New York, printed buttons read, "Vote for Cuomo, not the Homo." *See* Maureen Callahan, *Mister Nice Guy-Will the "Makeunder" of Andrew Cuomo Propel Him into the Governor's Seat?*, N.Y. POST, Sept. 27, 2009, at 25.

2009),[20] empirical evidence robustly documents the economic disadvantage of women relative to men in the workforce. Despite organizational benefits for promoting women, such as increased return on equity and return to shareholders,[21] as well as increased diversity which can promote creativity[22] and better problem solving,[23] women are consistently underrepresented in upper management[24] and receive less compensation when controlling for career type, level, age, education, etc.[25] For example, although women made up nearly half of the nonagricultural workforce, in 2008, they held only 15.7% of corporate officerships in the Fortune 500, 15.2% of Fortune 500 board seats, and 3.0% of Fortune 500 CEO positions.[26] These patterns are repeated in law firms as well. According to the National Association for Legal Career Professionals (NALP), the 2008 statistics show that while women make up 45.3% of associates, they only make up 18.7% of partners.[27] Moreover, women between the ages of 21 and 30 earn 89% of what men earn,[28] and perhaps surprisingly, the gap in salaries between all men and women has widened slightly in the past decade.[29]

Many organizations may remain what Kanter described as "gendered" work environments, meaning they reflect and reward traits and values such as rationality, aggression, and emotional stability.[30] Moreover, these traits are more stereotypically associated with men[31] despite the fact that there is no hard evidence demonstrating any differences between men and women on these

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20. Lisa Belkin, *The New Gender Gap*, N.Y. TIMES MAG., Sept. 30, 2009, at MM11.

21. CATALYST, INC., THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY 2 (2004).

22. Charlan Jeanne Nemeth & Joel Wachtler, *Creative Problem Solving as a Result of Majority vs. Minority Influence*, 13 EUR. J. SOC. PSYCHOL. 45, 48 (1983).

23. Susan E. Jackson, *Team Composition in Organizational Settings: Issues in Managing an Increasingly Diverse Workforce*, *in* GROUP PROCESS AND PRODUCTIVITY 138, 148 (Stephen Worchel, Wendy Wood & Jeffry A. Simpson eds., 1992). *See generally* Charlan Jeanne Nemeth & Julianne L. Kwan, *Minority Influence, Divergent Thinking and Detection of Correct Solutions*, 17 J. APPLIED SOC. PSYCHOL. 788 (1987).

24. CATALYST, INC., CATALYST CENSUS OF WOMEN BOARD DIRECTORS OF THE FORTUNE 500 (2007); Barbara A. Gutek, *Changing the Status of Women in Management*, 42 APPLIED PSYCHOL.: AN INT'L REV. 301 (1993); Susan J. Wells, *A Female Executive is Hard to Find*, 1 HR MAG., June 1, 2001.

25. Joy A. Schneer & Frieda Reitman, *The Impact of Gender as Managerial Careers Unfold*, 47 J. VOCATIONAL BEHAV. 290, 308 (1995); Linda K. Stroh, Jeanne M. Brett & Anne H. Reilly, *All the Right Stuff: A Comparison of Female and Male Managers' Career Progression*, 77 J. APPLIED PSYCHOL. 251, 254 (1992).

26. CATALYST, INC. *supra* note 28.

27. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Demographics Slow to Change—Minority Women Remain Particularly Scare in Law Firm Partnership Ranks (Oct. 10 2008), *available at* http://www.nalp.org/lawfirmdiversity.

28. Sam Roberts, *For Young Earners in Big City, Gap Shifts in Women's Favor*, N.Y. TIMES, Aug. 3, 2007, at A1.

29. David A. Cotter, Joan M. Hermsen & Reeve Vanneman, *Gender Inequality at Work*, *in* THE AMERICAN PEOPLE: CENSUS 2000 107,107 (Reynolds Farley & John Haaga eds., 2005); David Leonhardt, *Scant Progress on Closing Gap in Women's Pay*, N.Y. TIMES, December 24, 2006 at A1.

30. Rosabeth Moss Kanter, MEN AND WOMEN OF THE CORPORATION (1977).

31*. See* Joan Acker, *Hierachies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139 (1990).

traits.[32] Because these traits are important for workplace success and are more stereotypically associated with men than with women, it may make it harder for women to advance in the workplace.

Gender theorists argue that an important contributor to this economic inequality is the social constraint that results from the inconsistency between the core "feminine" stereotype and the "masculine" expectations of the business world.[33] Specifically, the values and behaviors expected of effective managers are highly correlated with masculine characteristics such as independence, assertiveness, self-reliance, and power[34] and inconsistent with feminine characteristics such as communality, caring, and helpfulness.[35]

This inconsistency has important ramifications in work contexts. First, based on the descriptive function of gender stereotypes, evaluators assume women lack the masculine competencies necessary to succeed.[36] Studies show that women are perceived by their peers at work to be less diligent. These studies find that women are perceived to be less task-oriented than men, not because they cannot stay on task, but because of stereotypical expectations that a woman will be more likely to interrupt a "selfish" task to help out on an "unselfish" communally-oriented task.[37] For instance, if someone in the office needs help, or if a personal problem comes up with a co-worker, women might be seen as more likely to go off-task to help out and solve these problems than men are.[38] This behavior could very easily benefit the office as a whole, but instead of seeing the woman as a problem solver, she is viewed as getting off-task. A woman's sensitivity to interpersonal conflict can also affect a woman's perceived effectiveness as others view her sensitivity as a weakness in her position.[39]

Second, because gender stereotypes act as social norms, they also carry injunctive functions, dictating how men and women *ought to be*.[40] As such,

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32.   Madeline E. Heilman, Caryn J. Block & Richard F. Martell, *Sex Stereotypes: Do They Influence Perceptions of Managers?* 10 J. SOC. BEHAV. & PERSONALITY 237, 244 (1995).

33.   Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 574-575 (2002). *See generally* Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629 (1998).

34.   Dorothy P. Moore, *Evaluating In-Role and Out-of-Role Performers*, 27 ACAD. MGMT. J. 603, 614 (1984); Virginia E. Schein, *A Global Look at Psychological Barriers to Women's Progress in Management*, 57 J. SOC. ISSUES 675, 678 (2001); Virginia E. Schein & Ruediger Mueller, *Sex Role Stereotyping and Requisite Management Characteristics: A Cross Cultural Look*, 13 J. ORGANIZATIONAL BEHAV. 439, 444 (1992).

35.   Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent up the Organizational Ladder*, 57 J. SOC. ISSUES 658 (2001) [hereinafter Heilman, *Description*]

36.   Eagly & Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, *supra* note 37 at 574–75.

37.   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 (1996).

38.   Alice H. Eagly & Maureen Crowley, *Gender and Helping Behavior: A Meta-Analytic Review of the Social Psychological* Literature, 100 PSYCHOLOGICAL BULLETIN, 284 (1986).

39.   DEBORAH M. KOLB & LINDA PUTNAM, *Gender is More than Who We Are, in* THE NEGOTIATORS FIELDBOOK, 315, 319 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

40.   Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance, in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 151 (Daniel T. Gilbert et al. eds. 1998).

women who violate gendered expectations incur negative social consequences. In other words, evaluators tend to make negative judgments about women who behave in masculine ways to fulfill the needs of their jobs.[41] This negative social reaction people have towards women engaging in the masculine behaviors (such as independence and assertiveness) has been termed the backlash effect.[42]

For example, as outlined in the 1989 Supreme Court case, *Price Waterhouse v. Hopkins*,[43] Ann Hopkins was denied partnership at the firm Price Waterhouse, partly because 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."[44] Ms. Hopkins was clearly a victim of this backlash effect. The Supreme Court agreed, and held that when gender plays a motivating part in an employment decision, the defendant is liable for discrimination unless they can prove they would have made the same decision not taking the plaintiff's gender into account.[45] Similarly, in *Lust v. Sealy*,[46] the plaintiff was admittedly not considered for a promotion because it would involve moving her husband and children from Madison to Chicago. The Court held that, "[r]ealism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."[47]

One experiment demonstrated exactly this sort of constraint. 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).[48] Respondents watched one of these 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 fairly 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.

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41.   Alice H. Eagly, Mona G. Makhijani & Bruce G. Klonsky, *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3 (1992); Heilman, *Description supra* note 39.; Madeline E. Heilman & Tyler G. Okimoto, *Why are Women Penalized for Success at Male Tasks?: The Implied Community Deficit*, 92 J. APPLIED PSYCHOL. 81, 91 (2007); Madeline E. Heilman et. al., *Penalties for Success: Reactions to Women who Succeed at Male Gender-Typed Tasks*, 83 J. APPLIED PSYCHOL. 416, 420 (2004).

42.   Rudman, *supra* note 37, at 641.

43.   490 U.S. 228 (1989).

44*.   Id*. at 235.

45*.   Id*. at 258.

46.   383 F.3d 580 (7th Cir. 2004).

47*.   Id*. at 583.

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

Assuming both competency and likeability are necessary for career progression, we see how a gendered work environment might create unique barriers for women.

C. Results of Backlash

At least four different consequences can occur because of this likeability versus competence dichotomy. First, women may not be hired or promoted because they are either too masculine or too feminine. Second, women may choose to segregate themselves into female-dominated or gender-diverse workplaces rather than male-dominated industries which could translate into salary repercussions. Third, women may choose to take on excessively risky assignments to demonstrate their competence but more often than not end up losing that gamble. And, finally, women may choose not to negotiate or act assertively at all, resulting in financial penalties as well.

1. Not Hired or Promoted

Studies of varying methods have found that assertive and self-confident women are evaluated more negatively than men who behaved in equivalent ways.[49] Women who use stereotypically "masculine" leadership styles are rated as worse managers by their subordinates than men who use the same tactics.[50] Furthermore, the characteristics used to describe a good manager were those inherent in the male stereotypes and always different from characteristics inherent in the female stereotypes.[51] Successful women whose careers plateaued before reaching a top rank were often held back because of "poor image," which often consisted of labels such as "too whiny," "too feminine," or "too strong."[52] These studies seem to suggest only a small cookie cutter mold of how a woman should be in order to succeed in the business world, and so it comes as no surprise that most women are falling outside of that mold. This same pattern of women engaging in counterstereotypic behaviors, being perceived as competent yet socially unskilled, has been demonstrated in a number of studies exploring why women are passed up for promotions relative to equally qualified men.[53]

This effect is mirrored in social science experiments as well. For example, results from one study where participants viewed a negotiation transcript of a job applicant, found that when the female potential new hires asked for more

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49. Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48, 48 (1990); Costrich, et al., *When Stereotypes Hurt: Three Studies of Penalties for Sex-Role Reversals*, 11 J. OF EXPERIMENTAL SOC. PSYCHOL. 520 (1975); Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCHOL. 935 (1989).

50. KRISTIN M. DALY & HERMINIA IBARRA, GENDER DIFFERENCES IN MANAGERIAL BEHAVIOR: THE ONGOING DEBATE *in* HARV. BUS. REV. 33 (1995).

51. *Id.*

52. *Id.*

53. Susan T. Fiske et al., *Social Science Research on Trial: Use of Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049 (1991); Heilman, *Description, supra* note 44; Karen S. Lyness & Michael K. Judiesch, *Are Women More Likely to be Hired or Promoted into Management Positions?*, 54 J. VOCATIONAL BEHAV. 158 (1999); Gerhard Sonnert & Gerald Holton, *Career Patterns of Women and Men in the Sciences*, 84 AM. SCIENTIST 63 (1996).

compensation they were judged significantly more demanding and less "nice" than when a male potential new hire engaged in the same behavior.[54] The effect lasts beyond the decision to hire or not. In a simulated salary negotiation experiment, participants negotiating against assertive counterparts reported a lower desire to interact, both socially and in the workplace, with female counterparts than male counterparts who behaved in the exact same manner.[55] Thus, if a woman risks asking for more in salary negotiations, she is potentially risking her future effectiveness with the firm or company as well.[56]

2. Choosing Gendered Workplaces

In fact, some researchers argue that women are aware of the social penalties for counterstereotypic behavior and subsequently act in ways to hide their successes in cross-gendered contexts[57] or choose to work in environments that are more female-friendly.[58] Scott Moss has written that women might rationally choose diverse workplaces rather than work in places that are not yet diverse.[59] Moss goes on to explain that women may find diverse workplaces to be freer of gender stereotypes and segregation. However, this taste (for diversity in this case), he hypothesizes, could cost salary and benefits.[60]

3. Glass Cliff

In order to succeed, women may choose to take ill-advised high-risk workplace strategies to break out of stereotype and reach superstar status they otherwise feel is unattainable.[61] For instance, a woman wanting to succeed may be more likely to take on a long-shot project no other person in the firm is willing to take on. A woman who feels trapped under a glass ceiling may take these risks in order to prove herself. Moreover, these high-risk career moves are termed that way for a reason and are much more likely to hurt a woman's career than they are to propel it to the top.[62]

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54. 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, 89–91 (2007).

55. Emily T. Amanatullah, *Negotiating Gender Role Stereotypes: The Influence of Gender Role Stereotypes on Perceivers' Evaluations and Targets' Behaviors in Value Claiming Negotiations and Situational Moderation by Representation Role* (2007) (unpublished dissertation Columbia University) (on file with Columbia University Libraries).

56. *See* Janoff-Bulman & Wade, *supra* note 41 at 150.

57. Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. PERSONALITY & SOC. PSYCHOL. 157, 169 (2004).

58. Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1, 4 (2004).

59. *Id*.

60. *Id*. at 5.

61. *See* Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549 (2007).

62. Julie S. Ashby, Michelle K. Ryan, & S. Alexander Haslam, *Legal Work and the Glass Cliff: Evidence that Women are Preferentially Selected to Lead Problematic Cases*, 13 WM. & MARY J. WOMEN & L. 775, 778 (2007).

4. Women Don't Ask

The potential for social backlash can lead women to anticipate a social disincentive, and therefore inhibit them from behaving in independent and assertive manners necessary for career success, such as asking for resources[63] or assuming leadership roles.[64] And again, women realize this and thus are less likely to ask.[65] In an unpublished manuscript, Wade[66] found that when making salary requests in a public context, where the potential for evaluation and subsequent backlash was present, women requested lower salaries than when requests were made in a private context, where the potential for backlash was eliminated and women were freed from normative expectations of selflessness. This suggests that women's reticence to assert their self-interests stems from an anticipatory response designed to avoid backlash.

II. Women Lawyers Can Be Both Likeable *and* Competent

Fortunately, however, this likeability versus competence choice does not seem to be faced by negotiating lawyers. In at least one study (outlined below) that asked lawyers to rate one another after a negotiation interaction, Schneider found no significant gender differences in terms of negotiation approach, effectiveness rating, adjectives that describe each gender, or descriptions of what makes an effective negotiator.[67] In all areas, women and men were virtually identical.

A. The Schneider Study of Lawyers

Schneider's study was based on an earlier survey conducted by Professor Gerald Williams who in 197, surveyed roughly 1,000 attorneys in Phoenix about their approaches to negotiation.[68] His seminal study found two kinds of styles: cooperative and competitive.[69] The study did not have a large enough sample of women to make any conclusions about how women negotiate. Schneider's survey also asked attorneys to describe and evaluate the lawyer with whom they had most recently negotiated, whether or not that particular dispute was settled, then describe this opponent using 60 bipolar pairs (descriptions of opposite negotiation behaviors), and rate the general effectiveness of the opposing attorney.[70]

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63. Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. REL. 635, 651 (2003)

64. Paul G. Davies, Steven J. Spencer & Claude M. Steele, *Clearing the Air: Identity Safety Moderates the Effects of Stereotype Threat on Women's Leadership Aspirations*, 88 J. PERSONALITY & SOC. PSYCHOL. 276 (2005).

65. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003).

66. Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-advocacy*, 25 PSYCH OF WOMEN QUARTERLY 65, 71 (2001).

67. Catherine H. Tinsley, Sandra I. Cheldelin, Andrea Kupfer Schneider & Emily Amanatullah, *Women at the Bargaining Table: Pitfalls and Prospects*, 25 NEG. J. 233, 238 (2009).

68. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

69. *Id.* at 18-19.

70. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 198 (Appendix A) (2002).

Schneider found the adjectives clustered into three groups, lawyers who were: 1) true problem-solvers, 2) cautious problem-solvers, and 3) adversarial. Table I below describes each cluster by the adjectives used to characterize these lawyers. The following table shows how effective each type of lawyer is rated.

TABLE I

TOP 20 ADJECTIVES FOR THREE CLUSTERS

	True Problem-solving	Cautious Problem-solving	Adversarial
1	Ethical	Ethical	Irritating
2	Personable	Experienced	Headstrong
3	Experienced	Confident	Stubborn
4	Trustworthy	Personable	Arrogant
5	Rational	Self-controlled	Egotistical
6	Agreeable	Rational	Argumentative
7	Fair-minded	Sociable	Assertive
8	Communicative	Dignified	Demanding
9	Realistic	Trustworthy	Quarrelsome
10	Accommodating		Confident
11	Perceptive		Ambitious
12	Sociable		Manipulative
13	Adaptable		Experienced
14	Confident		Hostile
15	Dignified		Forceful
16	Self-controlled		Tough
17	Helpful		Suspicious
18	Astute about the law		Firm
19	Poised		Complaining
20	Flexible		Rude

TABLE II

NUMBER OF LAWYERS PER CLUSTER BY EFFECTIVENESS

	Ineffective	Average	Effective
True Problem-Solving	1%	24%	75%
Cautious Problem-solving	13%	62%	25%
Adversarial	58%	33%	9%

B. Women Lawyers Do Not Face the Likeability v. Competence Dichotomy

1. There Were NO Differences in Overall Effectiveness Rating

Most striking about these data is their lack of gender differences. As Table III shows, women were found to be no more or less successful than their male counterparts in each of the various negotiating techniques, be it true problem-solving or even adversarial. That is, both men and women are similar in approach and effectiveness when working on behalf of clients. Even in examining the cross-gender ratings (men rating men versus women and vice versa), no statistical differences were shown.

TABLE III

GENDER BREAKDOWN BY STYLE AND EFFECTIVENESS

	Ineffective	Average	Effective	Total
True Problem-Solving	1% .4%	10.6% 8%	20.2% 27.6%	31.8% 36%
Cautious Problem-Solving	5.8% 4.5%	24% 22.4%	11.5% 8.2%	41.3% 35.1%
Adversarial	18.3% 16.3%	7.7% 9.8%	1% 2.7%	27% 28.8%
Total	25.1% 21.2%	42.3% 40.2%	32.7% 38.5%	

Note: Women upper left – Men lower right

2. There Are Not Many Significant Stylistic Differences (and Where There Were, These were Contrary to Stereotypes)

Table IV, below, shows the adjectives that were rated at a statistically significant difference between men and women. It is important to note that, statistically, in any study of 89 using .05% accuracy, there will be approximately 4-5 statistically different results, and the six found here are not highly significant either.

TABLE IV

STATISTICALLY SIGNIFICANT DIFFERENCES FOR GENDER OVERALL

Women	Men
Assertive	Creative
Firm	Experienced

	Wise
	Avoider

As well, these differences run counter-stereotypical. For instance, the chart above finds women to be more assertive than men, less likely to be avoiders, and more firm in their decisions. Furthermore, the chart goes against stereotypes again by showing that men are actually perceived to be more creative than women, a characteristic typically perceived to be possessed by more females. Men were also viewed as more experienced and wise, but this can be explained because the women in the study were *actually* more inexperienced than were the men in the study.[71] Furthermore, it is likely that wisdom is viewed as coinciding with experience, and because the women were less experienced, it is logical that they would be rated as less wise.

This finding carried through even when breaking down the negotiators based on their effectiveness. First, Table V shows how men and women ranked adjectives for effective negotiators. It presents the top twenty adjectives for each gender and how each was ranked in terms of effectiveness. While the men and women ranked the adjectives in a somewhat different order, both sexes still used almost all of the same adjectives; only four out of twenty were different, demonstrating that women and men consider most of the same characteristics when determining effectiveness. Essentially, effective equals effective, regardless of gender. This result is striking in terms of teaching negotiation because regardless of gender, it is crucial to teach the future negotiators to possess these common characteristics in order to be seen as effective negotiators.

71. In other words, the female attorneys had been practicing law for fewer years than their male peers. From the raw data, it appears that the more experienced attorneys are overwhelmingly male; however, the increase in female attorneys in the last few decades is also visible in the data. For instance, all of the attorneys that have been practicing for 31 or more years are male. In the 21-30 years category, 130 are male and 9 are female. On the other end of the spectrum, new lawyers who have been practicing for 1-3 years consist of 17 males and 14 females. Among attorneys with 4-10 years of practice, there are more than twice as many men as there are women (43 women/92 men).

Raw Data

	1-3 years	4-10 years	11-20 years	21-30 years	31+ years	Total
Male	17	92	251	130	45	535
Female	14	43	49	9	0	115
Total	31	135	300	139	45	650

Percentage Years of Practice by Gender

	1-3 years	4-10 years	11-20 years	21-30 years	31+ years	Total
Male	3.2%	17.2%	46.9%	24.3%	8.4%	100%
Female	12.2%	37.4%	42.6%	7.8%	0%	100%

TABLE V

TOP ADJECTIVES FOR <u>EFFECTIVE</u> NEGOTIATORS

Women	Rankings for Men		Men	
Ethical	1	4.5000	Ethical	4.2886
Confident	5	3.9444	Experienced	4.2886
Personable	3	3.9444	Personable	3.9701
Trustworthy	9	3.9444	Rational	3.9602
Experienced	2	3.8889	Confident	3.9150
Rational	4	3.8000	Realistic	3.8408
Realistic	6	3.7778	Perceptive	3.8308
Accommodating	16	3.7500	Self-controlled	3.8060
Communicative	11	3.7500	Trustworthy	3.7662
Fair-minded	15	3.6667	Astute about the Law	3.7650
Dignified	12	3.6571	Communicative	3.7562
Perceptive	7	3.6389	Dignified	3.7413
Adaptable	19	3.6111	Sociable	3.6866
Self-controlled	8	3.5833	Poised	3.6617
Agreeable	17	3.5556	Fair-minded	3.6517
Astute about the Law	10	3.5278	Accommodating	3.6400
Poised	14	3.4444	Agreeable	3.6300
Analytical	22	3.4167	Masculine	3.5700
Careful	21	3.4167	Adaptable	3.5657
Sociable	13	3.3611	Wise	3.5075

In a variety of different ways, this study shows that there are very few differences in how male and female lawyers are perceived in their negotiations and, when there are differences, these go against stereotype and against the theory that there is a backlash for assertive women. It seems as though the social constraints imposed by incongruous gender roles are uniquely avoided by female lawyers.[72] In the next section this article addresses why lawyers represent a unique case, which operates as the exception to the rule.

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72. This is not to say that women will not still face gendered attacks. In a study of civility in the Eighth Circuit, researchers found an interesting pattern. "[A]lmost two-thirds of attorneys have experienced general incivility, gendered incivility, and/or unwanted sexual attention while in litigation in the Eighth Circuit federal courts—with women encountering such mistreatment more frequently than men. Nearly all of these experiences involve general incivility and—for most *male* targets—general incivility alone. According to our narrative results, generally uncivil behavior takes many forms—from mildly annoying to harmfully abusive to blatantly unethical. For *women* targets, by contrast, these generalized forms of mistreatment typically go hand-in-hand with incivility explicitly tied to their gender. Overall, women are overwhelmingly more likely than men to

III. WHY MIGHT LAWYERS ESCAPE THE BACKLASH EFFECT?

There are several reasons why lawyers do not appear to face the same sanctions for being assertive on behalf of their clients and, in fact, get rated even higher in assertiveness than their male peers. Each of these factors—status, expectation-confirmation, and advocacy—functionally serves to align assertive behavior with gendered expectations thereby alleviating the perception of stereotype-violation that results in backlash.

A. High Status Women

First, social science studies have shown that for women with externally conferred high status, the backlash seems to be lessened. In one experiment, researchers hypothesized and found that when a woman was described as being of high status—a senior human resource manager with a track record of success—backlash against her was diminished.[73] A possible explanation for this effect of status on the potential for backlash is that women who occupy a position of high status (especially one that is externally conferred such as organizational role) are no longer perceived as a challenge to the status quo if their behaviors violate traditional gendered expectations. In other words, her assertive behavior is attributed to her position rather than her gender, and because successful executives are expected to assert themselves, this behavior is no longer perceived as a violation of expectations. Senior human resource managers who have established track records of success may be less bound to rules about "being nice." When lawyers have been hired by their clients and sent by their law firms, companies, or the government to negotiate, they already have a high status conferred by that situation.

B. No Backlash When Meeting Expectations

Second, a female lawyer who is assertive on behalf of her clients fulfills the role that the public and her peers have accepted—and come to expect—over time. Harré and Moghaddam describe this phenomenon as "positioning" theory.[74] The theory explains that when we interact with others we create a storyline. As the story unfolds, parties get placed in a fairly predictable position juxtaposed against each other. Identities get negotiated through narratives that emerge from interpersonal interactions.[75]

To manage complexity, people categorize their social world into groups (i.e. social categorization theory), and we derive our identity by our membership in (or exclusion from) these social groups (social identity theory). To simplify, we tend to aggregate people into a dichotomous structure where there is an

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encounter gender-related incivility." Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235, 256 (2002).

73. Emily T. Amanatullah and Catherine H. Tinsley, Ask and Ye Shall Receive? How Gender and Status Moderate Negotiation Success 15 (2010) (unpublished manuscript, on file at http://guwli.georgetown.edu/research/)

74. *See* POSITIONING THEORY: MORAL CONTEXTS OF INTENTIONAL ACTION (Rom Harré & Luk van Langenhove eds, 1999); Rom Harré & Fathali Moghaddam, THE SELF AND OTHERS: POSITIONING INDIVIDUALS AND GROUPS IN PERSONAL, POLITICAL, AND CULTURAL CONTEXTS, 123-136 (2003).

75. *Id.*

other who is not like us. There are in-groups (who define my identity) and out-groups (who are the antithesis of it). That is, we set up "categories of difference."[76] The frames we use to understand the *other* are organized into binary spheres. Though these are not absolute categories, they are conceived as dichotomous.[77]

Gender may still be a powerful marker because it is a naturally dichotomous category. There are men and not men (women). Therefore, it may be important to protect the gendered categories of difference as a way of protecting the "male" and "female" identities. Hence we see the strong backlash against powerful, assertive females, particularly those that are "breaking the barriers" (i.e. the carefully crafted social constructions).

If identity is derived from narratives that position a person in certain social groups, then the identity of public figures is negotiated in public through the storylines promulgated through the media. These narratives position the public figure and these positions have social sanctions constructed within them. For example, if a woman seeks the U.S. Presidency—an office previously held by men only—she is likely to be positioned, at the very beginning, as disadvantaged ("you know, I think someone is going to have to go out and take her behind the barn").[78] As conflict emerges, so too does the creation of an *unacceptable other*. The enemy gets named (the *woman*) initially by legitimate spokespeople (the political pundits). Hence we see the strong backlash against a female politician; her attempt at breaking the social barriers is subject to punishment. The unflattering pictures of Clinton on posters permit hostility ("that look;" "we keep forgetting she didn't win on her merits"), name calling ("hoe;" "bitch;" "multiple personality;" "c.u.n.t.") and even violence (images with her hanging from a noose; stabbed).

The public image of female lawyers, on the other hand, is quite extensive compared to that of female presidential candidates. An aggressive litigator, male or female, would fully fit in with what we have seen in the movies and on TV. Similarly, female judges on television abound—Judge Judy remains a perennial favorite—and this reflects the reality that in state and federal courts, women hold close to thirty percent of the judgeships.[79] A study of media coverage for judicial races in Wisconsin, in fact, shows that gender did not play a role at all in an otherwise nasty campaign for the state Supreme Court.[80] So

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76. Susan Moller Okin, *Gender, the Public, and the Private*, *in* FEMINISM AND POLITICS 116, 117 (Anne Phillips, ed., 1998).

77. Emily B. Mawhinney, Witness to Gendercide: A Critical Feminist Analysis of Rape as a Tool of War in Bosnia and Rwanda 13, (March 4, 2005) (unpublished manuscript, *available at* http://www.allacademic.com/meta/p72204_index.html) (offering other modernist binaries: center vs. periphery, push vs. pull, homogeneity vs. heterogeneity, consumption vs. production, and workers vs. cosmopolitans).

78. Republican strategist Pete Snyder said on Fox News' *Hannity & Colmes* February 26, 2008.

79. The National Association of Women Judges calculates that women make up 26% of state court judges overall with even more — 29% and 30% — at the higher levels of the courts. Nat'l Ass'n of Women Judges, 2009 Representation of United States State Court Women Judges, http://www.nawj.org/us_state_court_statistics_2009.asp (last visited Feb. 13, 2010). At the federal court level, while there are only currently two female Supreme Court justices, women hold 30% of the seats at the Court of Appeals level and 27% of the district court seats. www.jtbf.org

80. See Joseph D. Kearney & Howard B. Eisenberg, The Print Media and Judicial Elections:

when women are assertive in their role as lawyers they are not threatening a publicly created persona or construction.

C. On Behalf of Others

Finally, it may be that women are allowed to be assertive when their assertiveness is for the benefit of others (clients, team members, family members, etc.). Advocating for others would be consistent with the overall expectation that women are communal or nurturing. When acting as lawyers, these women were not sanctioned even though they were rated higher in assertiveness and firmness. In other words, assertive behavior faces little backlash when it is seen as protecting colleagues or advocating on behalf of teammates. Similarly, assertive female mangers negotiating on behalf of a group are no less likely to get what they ask for nor no more likely to incur social sanctions than similarly assertive men.[81] Interestingly, acting on behalf of others not only aligns assertive negotiation behavior with communal aspects of the female gender stereotype, but may actually change expectations of gender appropriate behaviors. For example, an other-advocating female negotiator who behaves non-assertively is actually perceived as violating gendered expectations and in this context will incur backlash similar to that experienced by self-advocating women who behave assertively.[82]

IV. HOW LAWYERS CAN CONTINUE TO AVOID BACKLASH

The deeply ingrained nature of gender categories, for our society as a whole and for individual members of that society, suggests that trying to argue people out of (often subconscious) gender stereotype is not likely to yield positive results. As with other de-biasing attempts, success at undoing gender biases simply by telling people they exist is likely to be elusive. So what is our best advice to lawyers? In short, use your status and training; be part of a team; don't deny or hide that you are a woman, but be prepared to fight against stereotyping; and continue to create networks and mentoring at work to change the entire system.

A. Lawyers Should Use Their Status and Role

First, lawyers who have already self-selected into a legal career may be better able to negotiate on their own behalf. Women entering law school may have already been screened so that they are no more caring or cooperative than the males in law school, and the women likely possess many of the same attributes as men because both sexes were driven enough to enter law school to begin with.[83] Additionally, women may also take on the view that "when they

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Some Case Studies from Wisconsin, 85 Marq. L. Rev. 593 (2002).

    81. Emily T. Amanatullah & Catherine Tinsley, Accepting Assertive Advocates: The Moderation of the Backlash Effect Against Assertive Women Due to Advocacy, (2009) (unpublished manuscript, on file with http://guwli.georgetown.edu/research/)

    82. Id. at 13.

    83. Lloyd Burton et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles,* 1991 J. DISP. RESOL. 199, 220 (1991).

are in a male-dominated profession, they will do as the males do."[84]   Charles Craver's research into his own negotiation class supports the idea that the self-selection into law school may have eliminated any differences. First, he found that women were no more risk-averse than men, and furthermore, did just as well in negotiations.[85]   He determined that the advanced education of female law students, as well as females' greater ability to read nonverbal messages, counterbalanced any disadvantage from the female stereotypes.[86]

Second, the legal training in advocacy during law school may also better equip female lawyers to negotiate on their own behalf.   Even though competition is a way of life for lawyers, it is not the ruthless "gladiator" competition as the public sees it.[87]   While male lawyers may still be more competitive than female lawyers, studies have shown that lawyers in general use a problem-solving approach to negotiation more so than any other approach.[88]   Stereotypically, people expect lawyers to be ruthless negotiators who use the "masculine" competitive approach to "win" the negotiation. However, in reality, lawyers live in a tight-knit legal community and have to do business with each other repeatedly over the course of their careers.   Thus, lawyers of both genders understand the importance of cooperating in order to improve their reputation among their peers as someone "with whom negotiation is likely to be fruitful."[89]   Thus, it can be argued that law school or business school training reduces the gender difference.   For instance, Linda Babcock writes that women, after taking her negotiation class, ask for more.[90] They also feel better about themselves as negotiators and have increased confidence in what they can do.

B. Lawyers Are Part of a Team

If the core feminine stereotype deems women to be nurturing and protecting of others, then efforts to align women's assertive bargaining moves with this nurturing behavior will be fruitful for garnering economic gains while avoiding social costs. The research on advocacy suggests that one way women might align the core feminine stereotype with assertive bargaining would be to reframe negotiations for raises or promotions as other-oriented (e.g., for the communal welfare of her client, work team, or law firm) rather than self-interested.   Using specific references in the negotiation to the team, client, or firm will help to reinforce the communal frame of negotiation.   This serves both the women and those on whose behalf they are negotiating. Indeed, the lawyers in our studies advocating for their client were successful; clearly this win would help their own career as well.   Moreover, Amanatullah and Tinsley found that

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84. *Id.*

85. Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance,* 5 MICH. J. GENDER & L. 299, 320-21, 346-47 (1999).

86. *Id.*

87. Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiations Styles,* 7 CARDOZO J. CONFLICT RESOL. 1, 16 (2006).

88. *Id.* at 12. *See* Schneider, *supra* note 74, at 189-90.

89. Nelken, *supra* note 92 at 12.

90. BABCOCK & LASCHEVER, *supra* note 69 at 144 .

women managers negotiating a raise for their *work team* were rewarded to the same degree as their male counterparts.[91]

Women might consider providing explanations or social accounts for their assertive behavior so that they are not judged as violating gendered expectations.   For example, they could use their position/role in the organization to justify that behavior as role-based. Statements to the effect of "I wouldn't be a very good lawyer/manager/owner if I didn't ask for more resources" help to remind the other party of the position rather than the gender of the negotiator.

Women could also acknowledge the gendered expectations of her evaluator and that her assertive behavior may appear "out of the norm," but offer social accounts for why in this instance her behavior is valid (and even beneficial for the organization). Because the backlash effect is a mechanism for forcing conformity to social norms, claiming that this instance of behavioral non-conformity is not a challenge to that gendered norm will mitigate the potential for backlash. For example, women might explain, "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."

C. Fight the Stereotype

Research by Laura Kray and others has also found, consistent with past research, women succumb to stereotype threat, and negotiate more poorly when cues to stereotypes are subtly activated.[92] However, when stereotype cues are blatantly activated (in this case by mentioning former Harvard President Larry Summers' inflammatory comment that women could not do science), female negotiators react against the norm and negotiate more effectively. It is possible this reaction to overt stereotyping may be a result of female negotiators treating the situation as a negotiation on behalf of their social group as a whole (defending women in general) rather than merely for herself. This is consistent with the previous findings reviewed on other-advocacy and suggests that empowering female negotiators with the mentality that every interaction is a reflection on her social group may open doors to effectively asserting interests at the bargaining table. When no other external constituencies are present to defer self-interested pursuits, women should mentally reframe the negotiation as one on behalf of the larger social group, e.g., women as a whole, and argue on behalf of gender equity concerns. Reminding oneself of the typical stereotypes—that women don't ask for more, that women are perceived as more cooperative— should trigger the behavior necessary to overcome this.

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91.   Amanatullah & Tinsley, *supra* note 86 at 17.

92.   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, 400-401, 404 (2004).

D. And Still Remain Feminine

Another important lesson for working within the core feminine stereotype is the realization that affirming expectations of femininity is crucial for avoiding backlash. Some researchers argue that the backlash effect is not a reaction to women behaving too masculinely, but rather is a sanction against women who are not behaving femininely.[93] For example, effective female lawyers were rated highly in both being tough *and* sensitive, forceful *and* empathetic.[94]   When comparing the top adjectives for women and men rated as effective lawyer negotiators, the adjectives tough, sensitive, forceful, warm, and empathetic were used to describe the women but not the men.[95]   Masculinity, *per se*, was not needed for success.   As such, learning to balance and monitor one's self-presentation as both competent (masculine) and likeable (feminine) is vital for negotiation and career success.   In the past, women with career aspirations thought the key to success was becoming one of the guys (e.g., by pulling their hair back, wearing pantsuits instead of skirts, and rejecting femininity for masculinity). Yet, as Ann Hopkins might attest, this strategy seems destined to lead to criticism that the woman is "unfeminine." We now know that balance is the key to navigating the corporate and legal labyrinth, so maintaining a feminine presence while engaging in the masculine behaviors necessary to succeed will facilitate the ascent up the hierarchy. For example, another study found that when both men and women flirted in the negotiation, women were perceived as more likeable.[96] As the researchers noted, because the flirting may fit more closely with the perceived stereotype of women, the women may have benefited more from this behavior. Furthermore, the flirting had no impact on the measure of perceived competence of the negotiator.

E. Work to Change Your Organization

To help destabilize the dichotomy or required unidimensionality that seems to exist for each gender, women might add to their own complexity and multidimensionality by presenting simple and acceptable social accounts. For example, a woman could highlight her role as an employee of the firm, manager of the team, community member, devoted wife, loving mother, football fan, etc., creating a multi-faceted and complex identity of the individual whereby she can no longer be evaluated simply as a woman against traditional gender norms. The campaign of "hope" that President Obama created, for example, overrode what could have been perceived as a one-dimensional campaign based on race. Clinton might have been able to use her former career as a lawyer to present other "stories," had that history not been sullied with accusations of overbilling. Initially, Palin benefitted from multiple narratives when she was introduced to the public, in part because she was introduced to the public so late in the campaign season that no one story had dominated. She was a mom *and* hunter *and* governor *and* beauty queen *and* basketball star. The media coverage at the

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93.   Heilman & Okimoto, supra note 45 at 82.

94.   See infra Part II.B.

95.   Id.

96.   Laura J. Kray & Connson C. Locke, To Flirt or Not to Flirt? Sexual Power at the Bargaining Table, 24 Negotiation. J 483, 490 (2008).

beginning of her campaign managed to have coverage of all of these competing narratives rather than focusing on a single narrative.

Women should also cultivate powerful allies at work who will support their complex identities. Through intentional and vigorous networking, women should utilize the social capital of others to help them change the dichotomous, gendered context—as Deborah Kolb puts it, we can work to undo gender.[97] The more people who enforce this individual complexity over gendered dichotomy, the more normative it will be to evaluate individuals based on their individuality rather than gendered heuristics. Palin's candidacy did this nicely with McCain's praising her repeatedly.[98] This also explains why, at law firms, mentoring for junior female associates is critical to retention and promotion. The networking is necessary to support these complex identities of women and promote them within the law firm.

V. CONCLUSION

Despite the fact that the 2008 election showed just how harsh the likeability versus competence dichotomy can be for female candidates and that this dichotomy is often repeated at the workplace, women lawyers seem uniquely able to avoid this backlash thanks to contextual factors which align assertive behavior with gendered expectations. Female lawyers are effective negotiators, perceived as both assertive and empathetic. This result is because of at least three factors: the high status of lawyers, their role expectations, and the fact that these negotiations are on behalf of others. Women lawyers and other professionals can use this information to continue their success on behalf of clients and themselves in a variety of ways. Lawyers need to make the most of their lawyer status and their training in advocacy. They can remind themselves that they are fighting for their clients, as well as for their gender, when they negotiate. They should maintain their femininity while cuing themselves to fight the stereotypes and negotiate hard. Finally, lawyers can look to their own organizations to continue to promote, mentor, and network women so that we can all move past the very limited narratives often unwillingly placed on women in the workplace.

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97. Deborah 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, 524 (2009).

98. It also helped that the people most likely to criticize Palin's balance between her job and her family were those who supported her political positions. So, as many have noted, the conservative media glossed over several things that might have sunk any Democratic candidate, including Palin's daughter's pregnancy.