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IF WOMEN DON'T ASK: IMPLICATIONS FOR BARGAINING ENCOUNTERS, THE EQUAL PAY ACT, AND TITLE VII

*Charles B. Craver**

WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE. By *Linda Babcock* and *Sara Laschever*. Princeton, NJ: Princeton University Press. 2003. Pp. xii, 223. $24.95.

Last spring, Jennifer and Richard graduated from the same law school with similar backgrounds. Both were offered associate positions with the same law firm with a $75,000 starting salary. Jennifer enthusiastically accepted the firm's offer, but Richard was hesitant. He informed the hiring partner that comparable firms in this area were paying new associates $80,000 per year. The partner offered Richard a starting salary of $80,000, which he accepted.

Felicia and Harold manage similar departments for an e-commerce business. They have similar backgrounds, and have been with this firm for the same number of years. When Harold meets with the CEO to review his recent performance, the CEO gives him a "superior" rating, and offers him a $10,000 salary increase. Harold notes that his departmental sales went up 10% over the past twelve months and indicates that he thinks he should receive a more substantial increase. The CEO praises Harold for his initiative and confidence, and agrees to a $20,000 increase. Two days later, Felicia meets with the CEO to review her performance. The CEO gives her a "superior" rating, and offers her a $10,000 salary increase. Felicia notes that her departmental sales have increased 20% over the past year and requests a more generous increase. The CEO indicates that he has always found her a bit pushy and self-centered. He encourages her to develop her "feminine side" and be "more lady-like." He then says that if she wants an increase of more than $10,000, she should look for work elsewhere.

INTRODUCTION

For many years, the annual earnings of women working full-time have lagged behind the earnings of men working full-time.[1] Until the

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1. *See* RANDALL K. FILER ET AL., THE ECONOMICS OF WORK AND PAY 560-73 (1996).

last two decades, women earned about 60% of what their male cohorts earned. Although this gender gap has narrowed in recent years to approximately 80%[2] as many women have entered traditionally male occupations, the wage gap remains significant. Some of this differential is caused by the continued concentration of women in traditionally female occupations, and the fact that women are more likely than men to take time out from paid work to take care of parental obligations.[3] But much of this difference is due to the reluctance of women to believe that they deserve more, and the hesitancy of females to use their bargaining skills to obtain greater salary increases. It may also reflect the concern of women that they will be evaluated negatively if they contradict stereotyped supervisory expectations and behave too much like their male colleagues.

In their new book, *Women Don't Ask: Negotiation and the Gender Divide* ("*Women Don't Ask*"), Linda Babcock[4] and Sara Laschever[5] thoughtfully explore relevant gender-based stereotypes and the reluctance of women to negotiate more advantageous employment terms for themselves. The detailed empirical research discussed by Babcock and Laschever explains why females feel less comfortable in bargaining contexts than their male cohorts. The authors also discuss ways in which women can overcome these gender-based inhibitions.

To the extent women undervalue their services and are hesitant to negotiate more generous employment conditions, they may place themselves at a disadvantage vis-à-vis male colleagues who perform substantially equal work. When employers permit these gender-based compensation differentials to exist, they expose themselves to liability under the Equal Pay Act.[6] Unless employers can establish that the differentials are based upon one of the four statutory exceptions,[7] they may be held liable for back pay, an equal amount of liquidated damages, and attorney fees.[8]

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2. *See Wage Gap Between Men, Women Persists, But GAO Says Reasons for Difference Unclear*, DAILY LAB. REP. (Bureau of National Affairs) Nov. 21, 2003, at A-6.

3. *See* RANDALL K. FILER & DANIEL S. HAMERMESH, THE ECONOMICS OF WORK AND PAY 560-73 (1996).

4. James M. Walton Professor of Economics, H. John Heinz III School of Public Policy and Management, Carnegie Mellon University.

5. Freelance writer.

6. 29 U.S.C. § 206(d) (2000). The Equal Pay Act prohibits compensation differentials based upon gender for persons performing jobs that require equal effort, skill, and responsibility under similar working conditions. *Id.*

7. The Equal Pay Act excepts pay differences that are based upon: (1) a seniority system; (2) a merit system; (3) a system measuring earnings by the quantity or quality of production; or (4) any factor other than sex. *Id.*

8. *See id.* § 216(b). In order to comply with the Equal Pay Act, the employer must raise the compensation of the lower paid worker to that of the higher paid worker. *See id.* § 206(d).

Gender-based stereotypes may also expose employers to potential liability under Title VII of the Civil Rights Act of 1964.[9] If firms are aware of the reluctance of women to negotiate higher salaries for themselves and deliberately choose to pay male employees more for work of comparable worth, they may contravene Title VII's sex discrimination prohibition. In addition, subconscious sex-related behavioral role expectations that cause similarly situated men and women to be judged differently may create other Title VII problems.

In Part I, this Review will explore the empirical studies discussed in *Woman Don't Ask* and evaluate the impact of those research findings on male and female bargaining encounters. Part II will then examine Equal Pay Act issues that may arise because of the hesitancy of women to seek compensation levels commensurate with those of their male cohorts. Finally, Part III will discuss ways in which different gender-based stereotypes may raise substantial Title VII issues with respect to women whose behavior contradicts societal expectations.

I. GENDER AND BARGAINING INTERACTIONS

When Linda Babcock was director of her Ph.D. program at Carnegie Mellon University, she discovered that the starting salaries of male graduates were 7.6% higher than those for female graduates (p. 1). She endeavored to determine the reason for this differential and found that while 57% of men asked for more money when they received job offers, only 7% of women did so (p. 1). The graduates who negotiated their starting salaries increased their initial offers by 7.4% (p. 2). She noted that most employers actually expect new hires to bargain over their initial employment terms and could not understand why more women were not willing to do so (p. 8). While young boys are taught to ask for what they want, young girls are taught to focus more on the needs of others (p. 11). Men are expected to be bold and even aggressive when advancing their own interests, while women are supposed to behave modestly and unselfishly (p. 11). She also noted that even when females do negotiate their initial terms of employment, they tend to obtain less beneficial salaries than males, because women generally ask for less and have lower personal expectations (pp. 11-12).

Babcock wanted to learn more about the reluctance of women to negotiate and the hesitancy of females who do ask for more to seek as much as their male colleagues. She initially used a "turnip-to-oyster" scale which measured the propensity of people to think they can change their own circumstances. She and her colleagues found that females are 45% more likely than males to achieve low scores on this

9. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2000).

scale, indicating that they do not believe they can modify their personal situations (pp. 19-20). She then employed a "locus-of-control" scale designed to determine whether test takers think they exercise meaningful control over their own circumstances, and discovered that males are far more likely to believe they can control their own destinies than women.[10]

Studies pertaining to the acculturation process for boys and girls help to explain many of the gender-based differences Babcock found. Boys are brought up to believe they can control their own lives, while girls are taught they exercise less control over their personal situations (p. 29). When parents assign chores to young sons and daughters, they tend to assign more independent tasks to boys than to girls (p. 29). Parents generally feel that girls are more vulnerable than boys, and they are more protective of their daughters than their sons (p. 30). Girls tend to play more structured games that teach them compliant behavior, while boys tend to play less-structured games that encourage more-independent behavior (pp. 34-35).

In Chapter 2, Babcock and Laschever explore empirical studies indicating that females tend to expect lower salaries than their male cohorts (pp. 41-61). As children, girls are usually asked to perform housekeeping chores (cleaning, cooking, and dishwashing) for which they receive no monetary rewards, while boys tend to perform external tasks (lawn mowing and car washing) for which they receive cash payments (p. 47). As a result, when males and females enter the regular labor force, males expect greater compensation than do females who tend to compare their salaries only with those earned by other women rather than to the higher salaries received by men (pp. 54-55).

Societal expectations for males and females differ greatly. "Men are thought to be assertive, dominant, decisive, ambitious, and self-oriented, whereas women are thought to be warm, expressive, nurturing, emotional, and friendly" (p. 62). Due to their other-oriented upbringings, females find it more difficult to ask for things for themselves than their self-oriented male cohorts (p. 63). Babcock and Laschever cite "pay-allocation" studies indicating that females expect less pay for the same work, and expect to work for longer periods for the same compensation, than do males (p. 64).

Men and women continue to be employed in traditionally male and female occupations. The vast majority of child-care workers, elementary-school teachers, nurses, secretaries, and social workers are women, while the vast majority of corporate officers, engineers, construction workers, and financial managers are men (p. 65). Much of

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10. P. 23. Women are more likely to believe that life is fair and that they will get what they deserve, while men tend to think that they must act to obtain their just rewards. P. 33.

this gender-based occupational segregation is attributable to the acculturation process. Most of the characters on Saturday morning children's television programs are male, and the majority of action figures in computer games are male (p. 70). Boys play with action toys, and girls play with dolls and kitchen equipment designed to inculcate care-giving skills (p. 70). Despite societal changes over the past several decades, recent studies of undergraduate students have found that men and women continue to have strong gender-based role expectations (p. 75).

Boys are raised to have a sense of entitlement — they deserve what they earn — while girls are implicitly taught that they do not deserve very much (pp. 51-54). As a result, girls develop the "imposter syndrome" which causes them to question their ability to perform well in male-dominated fields (pp. 77-78). Babcock and Laschever draw upon the work of Claude Steele to explore the impact of "stereotype threat" which demonstrates that women tend to perform below their true levels of competency when asked to perform tasks they think are male-oriented.[11] The authors suggest that since many people think of bargaining as a male task, stereotype threat may cause female negotiators to perform less well than they would if they considered bargaining interactions to be gender-neutral endeavors (p. 81).

Babcock and Laschever explore empirical studies suggesting that women feel less comfortable with overt competition than men, based upon the fact that boys are brought up to be competitive while girls are not (pp. 102-03). Girls are raised to believe that if they are openly competitive, they will find it difficult to attract boys (p. 103). This may help to explain why males feel more comfortable using a "dominant style" when trying to persuade others, while women feel more comfortable employing a "submissive style" (p. 105). These studies indicate the degree to which societal gender-based expectations influence the different ways we think men and women should behave in similar situations (pp. 106-07). These expectations may affect negotiating styles, with males expected to behave more competitively and women expected to behave more cooperatively.

In Chapters 5, 6, and 7, Babcock and Laschever focus specifically on two phenomena that may significantly influence negotiation encounters: (1) the reluctance of women to ask for benefits for themselves and (2) the lower aspirations held by many females. The authors note that, 2.5 times as many women than men feel substantial apprehension when they are required to negotiate and make the demands associated with the bargaining process (p. 114). Women question their competence as negotiators, and they fear that such

11. Pp. 79-81. *See generally* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997).

competitive encounters may threaten existing relationships (pp. 116-17). Males think of bargaining situations as ways to advance their interests, but females view such settings negatively (pp. 118-19). These different perspectives reflect the fact that boys have been raised to welcome competitive situations, while girls have been brought up to value cooperation and the avoidance of conflict (p. 120).

When men and women negotiate, males often obtain more beneficial results than females (pp. 130-31). Babcock and Laschever attribute these differences to the direct correlation between negotiator aspiration levels and bargaining outcomes, and the fact that males tend to establish higher goals than females (pp. 137-39). Male negotiators are more comfortable accepting the risk of nonsettlement, while more risk-averse females fear such stalemates (pp. 138-39). Men also tend to exude a greater confidence when they negotiate than do women (pp. 140-41).

In Chapter 7, Babcock and Laschever cite empirical studies indicating that people expect men to achieve better results when they negotiate than women. They note Ian Ayres' car-dealer study finding that car salespeople offer better deals to males than to females.[12] When subjects play the "ultimatum game," in which participants have to propose to other subjects ways to divide set sums of money, offerors expect females to accept less generous divisions than males (pp. 149-50).

Babcock and Laschever do an excellent job of explaining why women may feel less comfortable in bargaining environments than men and why they may not achieve results as beneficial as those men receive. They do not, however, discuss as thoroughly factors that might cause women to be more effective than men with respect to competitive bargaining interactions. For the past thirty years, I have taught legal-negotiation courses in which students explore the negotiation stages, verbal and nonverbal communication, negotiator styles, bargaining techniques, and other relevant factors.[13] The students are required to engage in a series of negotiation exercises, the results of which determine two-thirds of their course grade.[14] Women feel less comfortable with the overt competition indigenous to my course structure than men, based upon personal comments I have

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12. Pp. 148-49. *See generally* Ian Ayers & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995).

13. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (4th ed. 2001) [hereinafter CRAVER, EFFECTIVE LEGAL NEGOTIATION]; *see also* CHARLES CRAVER, THE INTELLIGENT NEGOTIATOR (2002).

14. The other one-third is based upon a ten- to fifteen-page paper students must prepare examining different aspects of bargaining interactions.

received from students and the fact that 38.8% of women take my course on a credit/no-credit basis while only 26.7% of men do so.[15]

Over the years, I have endeavored to determine which factors influence bargaining outcomes. I have found no statistically significant correlation between student GPAs when they graduate and negotiation exercise results.[16] GPAs reflect abstract reasoning skills, while negotiation performance reflects interpersonal skills — what Daniel Goleman likes to call "emotional intelligence."[17] If we do raise girls to be more attune to inter-personal relationships than boys, this factor should help females achieve more beneficial negotiation outcomes. Studies also show that women are typically better readers of nonverbal signals than men,[18] which should be a critical factor with respect to bargaining encounters in which more than half of the communication is nonverbal.[19]

When men negotiate, they tend to use direct language to support their positions, but women are more likely to employ indirect language.[20] Although this communicational difference might induce others to perceive male negotiators as more forceful than female negotiators, this impact may be counterbalanced by a related factor. The directness of men may alert opponents to their overtly competitive objectives, while the indirect style of females may induce some opponents to lower their guard expecting less competitive interactions.

Despite empirical studies finding gender-based differences between male and female high-school and undergraduate students, studies have also found that greater educational attainment reduces male-female differences.[21] Specific training in negotiation courses,

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15. *See* Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 331-33 (1999); *see also id.* at 312-13 (citing relevant studies).

16. *See* Charles B. Craver, *The Impact of Student GPAs and a Pass/Fail Option on Clinical Negotiation Course Performance*, 15 OHIO ST. J. ON DISP. RESOL. 373 (2000); *see also* Charles B. Craver, *The Impact of a Pass/Fail Option on Negotiation Course Performance*, 48 J. LEGAL EDUC. 176, 183 (1998) (finding that students taking the course for a letter grade achieve significantly better negotiation exercise results than students taking the course on a credit/no-credit basis).

17. *See generally* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995); DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE (1998).

18. *See* JUDITH A. HALL, NONVERBAL SEX DIFFERENCES: COMMUNICATION, ACCURACY AND EXPRESSIVE STYLE 15-17, 27 (1984); NANCY M. HENLEY, BODY POLITICS: POWER, SEX, AND NONVERBAL COMMUNICATION 13-15 (1977).

19. *See* PETER B. STARK & JANE FLAHERTY, THE ONLY NEGOTIATING GUIDE YOU'LL EVER NEED 45 (2003).

20. *See* DEBORAH TANNEN, TALKING FROM 9 TO 5, at 78-106 (1994).

21. *See* Larry R. Smeltzer & Kittie W. Watson, *Gender Differences in Verbal Communication During Negotiations*, 3 COMM. RES. REP. 74, 77-78 (1986); *see also*

including work on bargaining exercises, should further diminish male-female differences as participants learn the most effective ways to advance their goals.

During the first few weeks of each negotiation course, I give students a practice exercise in which I ask them to record their bargaining objectives before they begin to interact with their opponents. When I graph the negotiation results against pre-bargaining aspiration levels, students see a direct correlation between negotiator aspiration levels and negotiation outcomes. This is designed to convince students of the importance of elevated expectations. I also try to make students feel comfortable with the notion they should not be embarrassed when they use ethical tactics to obtain beneficial results for their own side.

Individuals who teach negotiation courses should always explore perceived gender differences and their possible impact on bargaining interactions. Both male and female students should appreciate the potential impact of gender-based stereotypes, and learn how to diminish the influence of such factors. As students work on subsequent negotiation exercises, they can learn the importance of firm aspirations and the use of persuasive language.

Do male and female students achieve different results on my Legal Negotiation course exercises? I have found no statistically significant differences.[22] This indicates that well-educated and specially trained students should be able to overcome any differences one might expect to find due to gender-based role expectations.

Babcock and Laschever focus primarily upon two critical factors causing women to accept lower salaries than their male cohorts. First, the hesitancy of females to request greater compensation levels when they are offered employment opportunities. Second, the tendency of women to undervalue the true worth of their services. College professors and parents need to teach both males and females that employers generally expect persons to negotiate their initial terms of employment when they are offered new jobs.[23] Once employment offers have been tendered, the recipients of those offers should politely ask if the offering firms would consider more generous compensation. Most will indicate that they would be amenable to such a discussion and ultimately offer higher starting salaries or more expansive fringe benefits.

DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND 235-38 (1990) (indicating that when women interact with men, they tend to adopt male norms).

22. *See* Craver & Barnes, *supra* note 15, at 343-44 tbl.6.

23. *See* ROBIN L. PINKLEY & GREGORY B. NORTHCRAFT, GET PAID WHAT YOU'RE WORTH 3-5 (2000).

Professors and parents must also teach females that they are worth as much as their male cohorts in the employment world. Women should not judge their worth by what females — especially those in traditionally female occupations — are paid. They should be encouraged to ascertain the salary levels for men and expect commensurate compensation. This would persuade female applicants to raise their aspiration levels and induce them to negotiate more beneficial employment terms.

After spending seven chapters explaining why women tend to obtain less beneficial negotiating results than men, Babcock and Laschever use Chapter 8 to soften the impact of their findings. They cite the trend away from win-lose, competitive, positional bargaining toward win-win, interest-based bargaining.[24] They suggest that contemporary negotiation experts are more interested in the achievement of greater joint gains than the attainment of personal gains, and assert that the female emphasis on relationships and cooperative bargaining should enhance this new negotiation approach.

It is undoubtedly true that self-oriented, win-lose negotiators who only care about the maximization of their own returns often do not do as well as they might have done through interest-based bargaining. They place undue emphasis on positions, pay minimal attention to opponent needs, and frequently assume a fixed-pie to be divided. If they used the Preparation Stage to ascertain the underlying needs and interests of their own side[25] and the Information Stage to determine the underlying needs and interests of the opposing side,[26] they could achieve more beneficial results. They could look for ways to expand the pie to be divided through such things as in-kind payments or structured settlements, and they could determine how to maximize opponent gains at minimal costs to their own side.

Can all bargaining issues be resolved in a win-win fashion? Generally not in the business and legal worlds. In almost all such bargaining interactions, there will be distributive items that are highly valued by both sides.[27] These are the terms the parties will fight about. Starting salaries are a perfect example. Either the new employee will obtain more beneficial terms or the employer will save money that can be used elsewhere. If women — and men — are taught to be more accommodating when they negotiate, they will concede too much to competitive opponents.

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24. Pp. 164-79. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES (1981); ROBERT H. MNOOKIN ET AL., BEYOND WINNING (2000).

25. *See* CRAVER, EFFECTIVE LEGAL NEGOTIATION, *supra* note 13, at 61-91.

26. *See id.* at 107-41.

27. *See generally* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996).

In their book, *The Power of Nice*,[28] Ron Shapiro and Mark Jankowski talk about their real-world views of *Getting to Yes* bargaining. "If someone is going to come out ahead, our aim is to make sure that someone is you. That's WIN-win. Both parties win, but you win bigger."[29] I develop their theme in my own book when I discuss the "competitive/problem-solving" style, which encourages negotiators to first seek to advance their own side's interests and then work to maximize the joint returns achieved by both sides.[30] Both Gerald Williams, in the early 1980s, and Andrea Kupfer Schneider, in the late 1990s, conducted similar empirical studies pertaining to the negotiating styles of lawyers. Although they found more cooperative/problem-solvers to be "effective" negotiators than competitive/adversarials and far more competitive/adversarials to be "ineffective" bargainers than cooperative/problem-solvers,[31] they found a common characteristic among most effective negotiators from both groups. The bargainers want to maximize their own side's results.[32] This suggests that even people characterized as cooperative/problem-solvers should more realistically be considered competitive/problem-solvers.

The most proficient negotiators are thoroughly prepared, have established firm, beneficial aspiration levels, and wish to obtain advantageous results for their own side. To the extent Babcock and Laschever — and others — encourage women to be more accommodating and less goal-oriented, they further traditional gender-based stereotypes and place the persons who follow this approach at a distinct disadvantage. If they are open with their confidential information when more manipulative opponents are not being so forthright and if they become so concerned about the need to satisfy opponent needs that they forget to strive for optimal results for themselves, they are likely to achieve less beneficial outcomes for themselves. I would have been more enthusiastic about a substitute chapter that would seek to teach females how to be more comfortable with the competition inherent in most commercial bargaining encounters and to believe that it is perfectly acceptable to obtain generous results for oneself.[33] By redefining negotiation success to

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28. RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE (2001).

29. *Id.* at 45.

30. *See* CRAVER, EFFECTIVE LEGAL NEGOTIATION, *supra* note 13, at 19-22.

31. *See* GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 19 (1983); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 167 (2002).

32. *See* WILLIAMS, *supra* note 31, at 27; Schneider, *supra* note 31, at 188.

33. *See generally* LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING (2002). *See also* DEBORAH M. KOLB & JUDITH WILLIAMS, THE

emphasize pure win-win results, they encourage continued female behavior that will cause women to defer to the more competitive demands of male opponents. This will be especially true when they have to interact with manipulative opponents who use the competitive/problem-solving style to advance their own interests ahead of those of the other side.

II. EQUAL PAY ACT IMPLICATIONS

In the early 1960s, the average income of full-time females was about 60% of the income received by full-time males.[34] In 1963, Congress decided to address this disparity by enacting the Equal Pay Act ("EPA") amendment to the Fair Labor Standards Act ("FLSA").[35] The EPA makes it unlawful for an employer to discriminate:

> between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[36]

Once a claimant demonstrates the existence of a gender-based compensation differential with respect to work that is substantially equal,[37] the employer may avoid liability only by showing that the differential is based upon: (1) a seniority system; (2) a merit system; (3) a system measuring earnings by the quantity or quality of production; or (4) any other factor other than sex.[38]

The EPA is enforced through the regular FLSA enforcement procedures. Individuals may bring civil actions under section 16(b)[39] seeking back pay for the difference between the claimant's lower salary and the male employee's higher salary, and the statute expressly requires the lower rate of compensation be raised to that of the higher paid worker.[40] The claimant can also obtain an equal amount as

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SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS (2000).

34. *See supra* notes 1-2 and accompanying text.

35. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963). The EPA is set forth in section 6(d) of the FLSA, 29 U.S.C. § 206(d) (2000).

36. 29 U.S.C. § 206(d)(1) (2000).

37. *See, e.g.*, Thompson v. Sawyer, 678 F.2d 257, 272-73 (D.C. Cir. 1982); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

38. 29 U.S.C. § 206(d)(1) (2000).

39. 29 U.S.C. § 216(b) (2000).

40. *See id.* § 206(d).

liquidated damages and an award of attorney fees.[41] If the employer can establish that the EPA violation was due to action taken in good faith and with reasonable grounds for believing that it did not contravene the EPA, the court may reduce or eliminate the liquidated damage portion of any award.[42]

Employer motivation is irrelevant with respect to EPA liability.[43] To establish an EPA violation, a female claimant need not prove that all or most males are being paid more than she is; she only has to find a single male performing equal work who is receiving greater compensation.[44] Even if the claimant occupies a unique position that differs from the jobs of her coworkers, this does not ipso facto preclude a possible EPA claim. If she can show that her male predecessor or male replacement performed the same job but received higher pay, she may challenge her reduced compensation.[45]

It is important to acknowledge the narrow scope of EPA coverage. It only applies to gender-based compensation differentials pertaining to individuals performing substantially equal work. If males performing certain job tasks are paid more than females performing different job tasks, there would be no EPA liability.[46] As a result, to the extent women enter lower-paying female occupations and men enter higher-paying male occupations, the women would be unable to challenge the resulting compensation differentials under the EPA due to the lack of substantially equal jobs.

Babcock and Laschever discuss situations directly affected by the EPA when they talk about the fact that far more men than women try to negotiate higher initial salaries when they receive offers of employment (p. 1). This partially explains why Babcock, in her study of Carnegie Mellon University graduates, found the starting pay levels for the males to be 7.6% higher than those for females. If an employer

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41. The Equal Employment Opportunity Commission ("E.E.O.C.") may also sue the offending employer on the claimant's behalf and obtain back pay and liquidated damages on behalf of that person. *See id.* § 216(c).

42. *See id.* § 260.

43. *See, e.g.*, Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir. 1993); Hodgson v. Am. Bank of Commerce, 447 F.2d 416, 423 (5th Cir. 1971).

44. Although the EPA expressly prohibits gender-based "wage" differentials, the E.E.O.C. has taken the position that the term "wages" includes all forms of compensation, including fringe benefits. *See* 29 C.F.R. § 1620.10 (2003); *see also, e.g.*, Laffey v. Northwest Airlines, Inc., 642 F.2d 578, 586-88 (D.C. Cir. 1980). If most similarly situated males are being paid the same amount as the claimant who is basing her case upon one or two higher-paid males, the employer may be able to show that the greater compensation levels for those workers falls within one of the statutory exceptions.

45. *See, e.g.*, Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461-62 (7th Cir. 1994); Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 729 (10th Cir. 1984).

46. Any challenge to pay differentials pertaining to different jobs would have to be brought under Title VII. *See infra* Part IV.A.

were to succumb to male bargaining entreaties with respect to jobs that are substantially equal to those of women who do not ask about the possibility of more advantageous employment terms, the women would have claims under the EPA. This is the exact situation the enactment was designed to proscribe — the willingness of females to work for less based upon the "outmoded belief that a man . . . should be paid more than a woman, even though his duties are the same."[47]

No defense would be available to the employer, because the pay differential would not be based upon seniority differences, a merit system, a system measuring the quantity or quality of production, or any other non-gender-related factor. If the employer thinks the higher salary given to males is appropriate for the position, it should provide the same compensation to women — even if they failed to take the initiative and request more beneficial terms. The only exception would be where the male has received another offer from a different firm and asks this employer to match that offer. When a company agrees to pay one employee more to match an actual offer received by that person from another firm, courts generally treat the resulting wage differential between this individual and his or her colleagues as a reflection of that person's market worth and regard it as a "factor other than sex"[48] — so long as there is no indication that the firm only matches external offers received by men but not by women.[49]

A similar issue arises when a company hires people already employed by other firms and considers the salaries they are receiving with their present employers when deciding the compensation to give to them. Courts have held that this practice assumes that the different salaries being earned by these individuals with their current firms reflect their actual market values and thus constitute a factor other than sex.[50] The fact that this factor may favor males who are more likely to have negotiated more generous compensation packages with their present employers than their female cohorts does not prevent these courts from applying the "other-than-sex" exception. Even if courts were to ignore this "women-don't-ask" factor, they should appreciate the fact that this approach also extends the impact of gender-based differentials generated by the traditional under-valuing of women's work, but they do not believe that firms hiring new employees should be held responsible for the continued wage differences associated with this salary-setting practice.

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47. 5 Rep. No 176, 88th Cong., 1st Sess. 1 (1963), *quoted in* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

48. *See* Horner v. Mary Inst., 613 F.2d 706, 714-15 (8th Cir. 1980).

49. *See* Winkes v. Brown Univ., No. 80-0234B, 1983 U.S. Dist. LEXIS 15200 (D.R.I. July 26, 1983), *rev'd on other grounds*, 747 F.2d 792 (1st Cir. 1984).

50. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 594-96 (3d Cir. 1973).

When employers provide male employees with larger current salaries either to match offers they have received from other firms or because of the higher present salaries they are being paid by different companies, how long may these differentials continue? If male and female employees are performing substantially equal work and have received comparable evaluations during their employment with the same employer, how long would a continued compensation differential based upon prior market considerations constitute a factor other than sex? I have never found a case resolving this question, but would think that after the passage of a reasonable period of time, the current employer of these individuals should have to make its own independent determination of their true worth. If they are found to be equal in this regard, their employer should have to raise the salary of the lower wage person to that of the higher wage individual. If the differential were maintained indefinitely, the lower-paid female would have the right to believe that her lower salary is no longer based upon gender-neutral market factors.

The Babcock and Laschever findings raise a related problem. What happens if male and female employees have been with the same firm for a number of years performing substantially equal work, and a number of males negotiate greater pay increases than their more docile female colleagues? Would the resulting compensation differentials be lawful under the EPA? If the sole determining factor were the greater tendency of men to request more generous pay increases, the employer should not be permitted to maintain the compensation differences. These differentials would reflect two gender-based factors. First, the hesitancy of females to request greater incomes, and, second, the demonstrated willingness of women to undervalue their services. These considerations are the precise reasons Congress enacted the EPA. Unless an employer can establish more than a willingness of women to accept the devaluation of their worth, the firm should be obliged to raise the female compensation levels to those of their male cohorts. The only way the men should be able to obtain greater compensation in such situations should be where they have actually received more generous job offers from other companies and their employer agrees to match those offers to retain their services.

The Babcock and Laschever findings should cause judges to examine salary differentials based upon external offers carefully. If men are more likely than women to explore other employment opportunities and to use those circumstances to negotiate greater compensation increases from their current employer, it would be difficult to maintain that their exalted pay levels are due to market-based factors unrelated to gender-based considerations. Nonetheless, I think that many judges would find these practices lawful — at least where the company does not continue the resulting differentials

indefinitely for males and females who are performing equal work and who have comparable performance evaluations.

III. TITLE VII IMPLICATIONS

The Babcock and Laschever findings also raise two critical issues under Title VII, which prohibits employment discrimination based upon race, color, religion, sex, or national origin. Even when males and females are not performing jobs that are substantially equal in terms of skill, effort, and responsibility, the tendency of employers to overvalue male work and to undervalue female work may create liability under Title VII. In addition, the possibility that employers may apply different criteria reflecting gender-based stereotypes when they evaluate the behavior of men and women may raise other Title VII concerns. What makes these cases especially problematic concerns the fact that while some supervisors may consciously apply different evaluative standards to males and females, other managers would be likely to apply different standards subconsciously without even realizing that differential treatment is occurring.

A. *Gender-Based Compensation Differentials*

Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[51] It is absolutely settled law that if an employer were to hire men and women to perform similar work and deliberately paid the females less than their male cohorts *because of* their gender, the firm would contravene Title VII's employment-discrimination prohibition.[52] Suppose an employer did not engage in such overt sex discrimination, but merely paid traditionally male jobs more than traditionally female jobs. Would such disparate treatment violate Title VII?

Individuals may establish Title VII violations using either the discriminatory-treatment or the disparate-impact approach. Under the former, a claimant must show that he or she has been treated differently because of his or her sex — i.e., the employer was motivated by impermissible gender-based considerations.[53] The proof

51. 42 U.S.C. § 2000e-2(a)(1) (2000).

52. *Cf.* Bazemore v. Friday, 478 U.S. 385, 394-97 (1986) (finding deliberate race-based compensation differentials to be unlawful).

53. On rare occasions, gender may constitute a bona fide occupational qualification ("BFOQ") for the positions in question. *See* 42 U.S.C. § 2000e-2(e) (2000). BFOQs are generally limited to positions that involve gender-based privacy considerations, such as fitting-room or bathroom attendants.

construct for these discriminatory treatment cases is divided into three stages.[54] The claimant must initially demonstrate that she applied for a position, met the stated qualifications, and was rejected. The burden of articulation — but not persuasion — then shifts to the employer to provide a nondiscriminatory explanation for the challenged action.[55] Once this minimal burden is satisfied, the claimant has the burden to show that the stated employer justification is really a pretext for unlawful gender discrimination.[56]

Suppose an employer does not pay men more than women to perform similar tasks on gender grounds alone, but instead identifies the jobs men and women have traditionally held, evaluates the economic values the jobs generate, and then decides to pay the men the full value of their positions, but the women only 70 or 75% of the evaluated worth of their jobs. In *County of Washington v. Gunther*,[57] this is exactly what the county had done with respect to its male and female correctional workers. The lower courts found no EPA violation because of the meaningful differences in the job responsibilities involved.[58] The plaintiffs were thus forced to rely upon their Title VII claim.

The county relied upon Section 703(h), which provides that "it shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the [Equal Pay Act]."[59] Since there was no EPA violation, the county asserted that there could be no Title VII violation. The *Gunther* Court rejected this contention, and held that this Title VII cross-reference did not immunize gender-based pay differentials that did not contravene the EPA solely because of the different job functions involved. This provision merely indicated that pay differences based upon seniority or merit systems, systems measuring the quantity or quality of production, or any other factor other than sex, that are excepted from EPA coverage, are similarly exempted under Title VII.[60]

The *Gunther* Court carefully noted that the challenged county compensation scheme did not involve the "controversial concept of

54. *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (setting out the test for establishing a prima facie case of Title VII racial discrimination).

55. *See* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

56. *Cf.* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-49 (2000) (clarifying the pretext-stage burden in an age-discrimination case).

57. 452 U.S. 161 (1981).

58. *See Gunther*, 452 U.S. at 165.

59. 42 U.S.C. § 2000e-2(h) (2000).

60. *See Gunther*, 452 U.S. at 167-80.

'comparable worth' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization."[61] It instead concerned a claim that the county had deliberately chosen to underpay the female guards following a job-valuation study performed by an outside firm at the county's own request. The Court held that employers that evaluate the relative economic values of different jobs and intentionally choose to underpay certain positions *because of* the gender of the employees performing those jobs may be held liable under Title VII.

Suppose the job valuations are not performed by the employer, but are instead conducted by firm employees or an external civil-rights organization on the workers' behalf. If the results of this study indicate that the female-guard positions are worth as much as the male-guard positions but are being compensated at lower levels, would the female guards have a claim under Title VII? In *AFSCME v. State*,[62] the Ninth Circuit carefully reviewed the *Gunther* holding and concluded that Title VII does not prohibit such market-based differentials, even though they may reflect societal undervaluing of female work. Unless claimants can demonstrate that their employer had the relative-worth evaluations conducted and deliberately elected to underpay the employees performing traditionally female work, no claim under Title VII could be maintained.

Suppose female employees decide to challenge their employer's reliance upon prior salaries when establishing compensation levels for its new hires or its considerations of outside offers from other firms when deciding how much to increase the salaries of current employees. They cite the Babcock and Laschever findings that show that such practices tend to result in the underpaying of female workers. Unless they could show that the employer used these factors for the purpose of disadvantaging women employees because of their gender, the claimants could not prevail under the discriminatory-treatment model. They would have to rely on the disparate-impact approach.

In *Griggs v. Duke Power Co.*,[63] a unanimous Supreme Court held that Title VII not only prohibits intentional discrimination based on an impermissible factor, but also proscribes reliance upon facially neutral factors that have a disparate effect on protected groups. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment

61. *Id.* at 166.

62. 770 F.2d 1401, 1404-06 (9th Cir. 1985).

63. 401 U.S. 424 (1971).

practices."[64] As a result, the application of facially neutral standards that have a disproportionate impact upon women (and other protected groups) cannot be maintained, unless reliance upon those factors is job related and consistent with business necessity.[65] The Supreme Court subsequently sought to modify the *Griggs* disparate-impact proof construct in *Wards Cove Packing Co. v. Atonio*[66] by holding that employers could defend challenged practices by merely articulating nondiscriminatory business justifications for those techniques.[67] Congress statutorily reversed this portion of the *Wards Cove Packing* decision in the 1991 Civil Rights Act,[68] when it added section 703(k) to Title VII to codify the prior *Griggs* approach.

Under section 703(k), if a female claimant demonstrates that the application of a facially neutral employment practice has a disparate impact based upon sex, the employer can only continue to rely upon that factor if it can prove that the practice is "job related for the position in question and consistent with business necessity."[69] If employer reliance upon previous salaries when it decides how much to pay new hires were to disadvantage females in a statistically significant way, the employer should be obliged under Title VII to show that its use of this factor is job related and consistent with business necessity. An employer would undoubtedly argue that this approach merely reflects market-based worth determinations over which it exercises no control. More conservative, law-and-economics-oriented judges would probably accept this rationale. They would suggest that employers must rationally endeavor to determine the "worth" of new employees and conclude that compensation levels with their immediate past employers provide prima facie evidence of their market values. If female claimants were similarly able to establish disparate impacts based upon their employer's practice of matching external offers received by its current employees, judges would most likely use analogous reasoning to sustain this practice.

If the job-related nature of these compensation-setting practices were sustained, the claimants could only prevail if they could demonstrate the availability of equally predictive and less discriminatory techniques. Disadvantaged women could argue that

64. *Griggs*, 401 U.S. at 430; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-35 (1975).

65. *See Griggs*, 401 U.S. at 431.

66. 490 U.S. 642 (1989).

67. *See Wards Cove Packing*, 490 U.S. at 658-61.

68. Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, 105 Stat. 1074-76 (1991).

69. 42 U.S.C. § 2000e-2(k) (2000). If the employer establishes the requisite job relationship, the claimant can still prevail by showing that an equally predictive and less discriminatory alternative exists which the employer has failed to adopt. *See id.* § 2000e-2(k)(1)(A)(ii).

firms should be required to make their own individualized assessments of employee worth without considering gender-biased market factors, but courts would be reluctant to impose such a burden on employers. Judges would most likely find that a person's immediate past salary — or current offer from another firm — constitutes the most reliable indicator of that individual's present worth in the overall labor market.[70]

So long as courts allow employers to consider market-based factors when making compensation decisions, women will continue to be disadvantaged. First, by the acknowledged fact that the employment market has historically overvalued male work and undervalued female work. Second, by the fact that *Women Don't Ask.* If more men bargain over their new salaries and are more likely to seek offers from other firms, if only to improve their salaries with their present employers, women will continue to be paid less than their male cohorts for work of comparable worth.

B. *Impact of Gender-Based Stereotyping*

In *Women Don't Ask*, Babcock and Laschever focus on factors that cause females to accept lower compensation for their services than their male cohorts. While the reluctance of women to negotiate greater salaries constitutes a critical issue, the authors also discuss subtle gender-based stereotypes that raise different issues under Title VII. When male (and even female) managers evaluate subordinates, they frequently use male behavioral expectations to assess worker performance. Women (and men) who contradict these masculine role models are likely to receive lower ratings — even when their actual job performance is equal to or better than that of their more highly rated male colleagues.

Many individuals expect men and women to behave in stereotypically different ways when they interact with others.[71] Men are supposed to be rational and logical, while women are supposed to be emotional and intuitive.[72] Males are expected to emphasize

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70. *See supra* notes 44-46 and accompanying text.

71. *See* KAY DEAUX, THE BEHAVIOR OF MEN AND WOMEN (1976); CATHARINE A. MACKINNON, SEX EQUALITY 158-75 (2001); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 494-95 (1990); Susan Struth, Note, *Permissible Sexual Stereotyping Versus Impermissible Sexual Stereotyping: A Theory of Causation*, 34 N.Y.L. SCH. L. REV. 679 (1989). *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Nadine Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

72. *See* DEAUX, *supra* note 71, at 13; Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning From the Legal Mind*, 18 IND. L. REV. 629, 633 (1985).

objective fact, while females focus more on relationships.[73] Men are supposed to define issues in abstract terms and to resolve them through the application of wholly rational principles.[74] Males are expected to behave in dominant and authoritative ways, while females are supposed to behave more passively and submissively.[75]

When men want something, they are likely to express their desires directly, while women tend to indicate their wishes indirectly.[76] If a male supervisor wants a subordinate to do something, he is likely to tell that person exactly what he wants done. A female manager would be more likely to ask the subordinate if he or she would be willing to perform the requisite task. A subordinate understands that the direct male approach requires immediate action, while the same subordinate may not appreciate the imperative nature of the indirect female approach and may fail to carry out the requested work.

Male and female self-concepts are influenced by the stereotypical ways in which others evaluate their performance. Men who perform traditionally masculine tasks no more proficiently than women tend to receive higher ratings.[77] When men are successful, their performance tends to be attributed to intrinsic factors such as intelligence and hard work, but when women are successful, their performance is likely to be attributed to extrinsic factors such as easier circumstances or the assistance of others.[78] This means that male success is overvalued, while female success is undervalued.

When men and women encounter competitive situations, they tend to behave differently. Males, who have been raised since childhood to welcome overt competition and the opportunity to demonstrate their competence, look forward to these encounters. "[W]omen are more likely to avoid competitive situations, less likely to acknowledge competitive wishes, and not likely to do as well in competition."[79] Males tend to exude greater confidence than females in performance-oriented circumstances. Even when they are only minimally prepared,

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73. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443, 446 (1991).

74. *See* Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1227 (1988).

75. *See* ELEANOR EMMONS MACCOBY & CAROL NAGY JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 228, 234 (1974).

76. *See* Lynn Smith-Lovin & Dawn T. Robinson, *Gender and Conversational Dynamics*, *in* GENDER, INTERACTION, AND INEQUALITY 122, 124-26 (Cecilia L. Ridgeway ed., 1992).

77. *See* Martha Foschi, *Gender and Double Standards for Competence*, *in* GENDER, INTERACTION, AND INEQUALITY 181, 185 (Cecilia L. Ridgeway ed., 1992).

78. *See* DEAUX, *supra* note 71, at 30-32, 41; Foschi, *supra* note 77, at 191.

79. IRENE P. STIVER, WORK INHIBITIONS IN WOMEN 5 (Stone Ctr. for Developmental Servs. & Studies, Work in Progress Series No. 3, 1983); *see* pp. 102-03.

men think they can get through successfully.[80] On the other hand, no matter how thoroughly prepared women are, they often feel unprepared.[81]

Price Waterhouse v. Hopkins[82] provides a perfect example of the impact of gender-based stereotyping on employment decisions. Ann Hopkins was a senior manager in the Washington, D.C. office of Price Waterhouse, and was the leading generator of firm business in that location. In 1982, she was the sole female among the eighty-eight persons proposed for partnership. Some of the partners thought she was overly aggressive and occasionally abrasive when she interacted with staff members.[83] Evidence indicated that some of the negative reactions to Hopkins were gender-based. One partner described her as "macho," while another suggested that she "overcompensated for being a woman."[84] One partner had advised Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," while another encouraged her to take "a course at charm school."[85]

Dr. Susan Fiske, a social psychologist, testified that the partnership process had probably been influenced by sex stereotyping.[86] The trial judge held that Price Waterhouse had illegally discriminated against Hopkins by *consciously* relying upon evaluations that reflected sex stereotyping.[87] The Supreme Court sustained this conclusion. "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[88] The Court further recognized that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[89] The Court also noted the double bind for women created by employers that expect females to act like men when

80. *See* DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 7 (1998).

81. *See* GAIL EVANS, PLAY LIKE A MAN, WIN LIKE A WOMAN 84-85, 90-91 (2000); PEGGY MCINTOSH, FEELING LIKE A FRAUD (Stone Ctr. for Developmental Servs. & Studies, Work in Progress Series, No. 18 1985).

82. 490 U.S. 228 (1989).

83. *See Hopkins*, 490 U.S. at 234-35.

84. *Id.* at 235.

85. *Id.*

86. *Id.*

87. *See id.* at 237.

88. *Id.* at 250.

89. *Id.* at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (alteration in original); *see also* Radford, *supra* note 71, at 500-03.

soliciting business, but to act like "ladies" when interacting with colleagues.[90]

In *Women Don't Ask*, Babcock and Laschever discuss the pressure on women not to intimidate their male colleagues (pp. 85-111). Male supervisors can directly tell subordinates what they want done, but female managers are expected to be less direct. Women have to be likeable if they wish to influence others (p. 87). These gender-based expectations explain why "women who use autocratic styles are judged less favorably than women who use democratic styles" (p. 89). Although the *Hopkins* Court did not explicitly discuss this issue, the reluctance of Price Waterhouse staff members to accept the managerial style of Hopkins probably reflected gender-based role expectations. The staff members accepted autocratic directives from male supervisors that they would not tolerate from female managers. They expected Hopkins to be more democratic and less direct. She should have asked them if they would do what she wanted instead of telling them what to do.

Although the *Hopkins* Court appropriately recognized that employer reliance upon gender-based stereotypes may create liability under Title VII, it implicitly acknowledged the difficulty judges may have deciding which proof construct to apply to such cases. Since the trial court had expressly found that Price Waterhouse had consciously relied upon sex stereotypes when evaluating Hopkins' performance, it was clear that she had established a discriminatory treatment claim. She had been treated differently because of her gender. At another point in its opinion, however, the Court suggested the applicability of the disparate-impact proof construct with respect to other sex stereotype claims:

> Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not . . . condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a [disparate] impact on members of protected groups when those tests or qualifications are not required for performance of the job.[91]

The *Hopkins* Court cited *Watson v. Fort Worth Bank & Trust*,[92] in which it had held that persons challenging subjective employment factors that affect men and women differently should use the disparate-impact approach.

When employers consciously allow gender-based stereotypes to influence employment decisions, courts should clearly apply the

90. *See Hopkins*, 490 U.S. at 251.

91. *Id.* at 242.

92. 487 U.S. 977 (1988).

discriminatory-treatment proof construct. This approach should be utilized with respect to cases in which the evidence indicates that firm officials knowingly applied different standards to men and women. For example, female employees told they are behaving too masculinely (or males told they are behaving too femininely). Women may be informed that they should not act too aggressively or use foul language, because such conduct is not "lady-like." Employers may refuse to employ women with young children[93] or to assign late-night work to such females because they feel this would interfere with their parenting obligations or refuse to employ women in work environments that would expose them to substances that might affect their fetuses if they became pregnant.[94] When employers tie expected behavioral norms to explicit sex stereotypes, it should be obvious that discriminatory treatment has occurred. So long as these considerations are found to have been "motivating factors,"[95] Title VII liability should result.[96]

What proof construct should be applied to employment decisions that may have been influenced by subconscious gender-based stereotyping? If the claimants had to prove deliberate sex discrimination, they would fail since the deciding persons were not actually motivated by overt consideration of gender. If the disparate-impact approach were employed, however, statistical difficulties might arise. To establish prima facie cases, claimants would have to show that subconscious reliance on stereotyped expectations disproportionately affected one gender. When only a few individuals have been disadvantaged by such practices, it would be difficult, if not impossible, for claimants to establish the requisite disparate impact.[97]

These cases would involve circumstances in which supervisors provided some women with less generous evaluations because they failed to conform to gender-based expectations. They may have been more aggressive than these evaluators thought they should have been in situations in which equally aggressive males received positive ratings for their initiative and drive. The managers responsible for these different evaluations never thought in terms of gender and would be offended if such a suggestion were made. They were completely unaware of the subconscious gender-based stereotypes

93. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971).

94. *See* Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 197-207 (1991).

95. *See* 42 U.S.C. § 2000e-2(m) (2000).

96. If the employer could prove that it would have taken the identical action had it not considered such gender-based factors, it would not avoid Title VII liability, but could eliminate back pay and other monetary relief. *See id.* § 2000e-5(g)(2)(B). The claimant would still be entitled to injunctive relief and an award of attorney fees.

97. If no disproportionate impact were established, the employer would not be required to demonstrate any job relatedness. *See id.* § 2000e-2(k)(1)(B)(ii).

influencing their judgments.[98] Unless the number of females receiving lower evaluations because of these factors was significant, they would be unlikely to prevail under a disparate-impact theory.

How should courts deal with subconscious sex stereotyping claims? They could endeavor to fit these cases within the traditional discriminatory-treatment model.[99] They could examine the evaluative criteria used to rate candidates for different positions and allow social psychologists to testify which factors are particularly susceptible to gender-biased stereotyping. They could then permit jurors to infer the requisite discriminatory intent from the employer's reliance upon these factors.[100] The difficulty with this approach would be the absence of any real evidence of deliberate sex-based motivation. Now that prevailing claimants in discriminatory-treatment cases may not only obtain back pay, but also compensatory and possibly punitive damages,[101] it would be inappropriate to use a proof construct designed for intentional discrimination cases that effectively eliminated the deliberateness element.

Courts could try to apply the disparate-impact model to these cases, but a prima facie case could only be established only where the same evaluative criteria have been applied to many employees and where numerous female claimants could demonstrate the existence of a disproportionate impact. Judges could circumvent this statistical impediment by allowing social psychologists, economists, and other experts to testify about the factors likely to have a negative effect due to the operation of subconscious gender-based stereotyping. The problem with this approach would concern the lack of statistical evidence showing that the use of these criteria has disproportionately affected women employed by the defendant firm.

If neither the discriminatory-treatment nor the disparate-impact proof construct can reasonably be employed to challenge employer reliance on evaluative criteria that adversely affect women due to subconscious gender-based expectations, should the use of those factors remain unregulated under Title VII? In *Griggs*, the Supreme Court acknowledged that the objective of Congress when it enacted

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98. Employees may suffer similar fates because of subconscious race-based stereotyping. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 78 N.Y.U. L. REV. ___ (forthcoming 2004); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

99. *See* Radford, *supra* note 71, at 507-13; *see also* Amy L. Wax, *Discrimination by Accident*, 74 IND. L.J. 1129, 1169-76 (1999).

100. *See* Taub, *supra* note 71, at 394-97.

101. *See* 42 U.S.C. § 1981a (2000). Compensatory and punitive damages are expressly limited to discriminatory-treatment cases. *See id.* § 1981a(2).

Title VII was to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in operation.... [G]ood intent or absence of discriminatory intent does not redeem employment procedures ... that operate as 'built-in headwinds' " for protected groups.[102] If this lofty goal is to be achieved, courts must develop an intermediate proof construct that will diminish employer reliance upon factors that subconsciously reflect gender-based stereotyping.

In her thoughtful article, Linda Hamilton Krieger suggested an approach that could be used to challenge employment decisions influenced by subconscious gender-based stereotypes. Instead of asking whether the decision maker consciously discriminated against someone because of her gender, courts should examine the seemingly gender-neutral standards relied upon and ask whether criteria reflecting subconscious gender-based expectations constituted "motivating factors" with respect to the decision in question.[103] She suggests that "it is reasonable to presume in such situations that the employer's decisionmaking was contaminated by cognitive sources of intergroup bias."[104]

Under the gender-biased "motivating-factor" approach, claimants would not have to prove conscious discrimination because of gender, nor would they have to establish statistically significant disproportionate impacts based on sex. They would instead have to demonstrate that the decisionmaking process was tainted by reliance upon factors influenced by subconscious gender-based stereotyping. Since intentional sex discrimination would not be shown, Krieger suggests that compensatory and punitive damages available for deliberate discrimination should not be awarded to claimants under the "motivating-factor" approach.[105]

Adoption of a motivating-factor proof construct would require claimants to establish that decisionmakers relied upon evaluative criteria reflecting subtle, gender-biased stereotypes. This would not be an easy standard to satisfy, especially with respect to holistic hiring and promotion procedures that do not evaluate candidates on a factor-by-factor basis. Where evaluators consider various criteria and develop overall comparative assessments, rejected persons would have to use regression analyses or similar techniques to show that the challenged decisions were biased by subconscious gender-based expectations. While this approach would not eliminate all forms of

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102. 401 U.S. at 431-32. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.

103. *See* Krieger, *supra* note 71, at 1241-44; *see also* Taub, *supra* note 71, at 397-407.

104. *See* Krieger, *supra* note 71, at 1242.

105. *See id.* at 1243.

gender stereotyping, it would encourage employers to carefully review their evaluation criteria and be aware of the factors that may reflect subtle gender biases.[106]

CONCLUSION

In *Women Don't Ask*, Babcock and Laschever have provided a well-researched and thoughtful analysis of the hesitancy of females to ask for more beneficial starting salaries and to believe they deserve to be paid as well as their male cohorts. This book should be of significant interest to students of the negotiation process, as well as to persons concerned about the lower compensation received by women and the capacity of the Equal Pay Act and Title VII to eliminate such differentials. Their research findings with respect to subtle gender-biased stereotyping also raise challenging issues that do not fit within existing Title VII proof constructs.

106. *See* Wax, *supra* note 99, at 1180-92.