

# The Aid Gap

Chris Guthrie and Emily Lamm

## Introduction

Women lag men in wages and wealth. Women *earn* 81 percent as much as similarly situated men,<sup>1</sup> and they *own* only 32 percent of the wealth that men own.<sup>2</sup> Lawyers are no different. According to the U.S. Census Bureau, female lawyers make 77 percent as much as their male peers,<sup>3</sup> and according to the National Association of Women Lawyers, female equity partners make almost \$100,000 less each year than their male peers.<sup>4</sup> Because wage gaps lead to wealth gaps, female lawyers accrue less wealth than their male counterparts.

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1. Sonam Sheth et al., *6 Charts Show How Much More Men Make than Women*, BUS. INSIDER (Aug. 27, 2018, 10:50 AM), [https://www.insider.com/gender-wage-pay-gap-charts-2017-3?utm\\_source=copy-link&utm\\_medium=referral&utm\\_content=topbar](https://www.insider.com/gender-wage-pay-gap-charts-2017-3?utm_source=copy-link&utm_medium=referral&utm_content=topbar) (generating graphs of the data from the U.S. Census Bureau). This wage gap is projected to continue through 2059. See also Julie Anderson et al., *Projected Year the Wage Gap Will Close by State*, INST. WOMEN'S POL'Y RES. (Mar. 22, 2017), <https://iwpr.org/publications/projected-year-wage-gap-will-close-state/>.
2. Heather McCulloch, *Closing the Women's Wealth Gap: What It Is, Why It Matters, and What Can Be Done About It 2* (2017), <https://womenswealthgap.org/wp-content/uploads/2017/06/Closing-the-Womens-Wealth-Gap-Report-Jan2017.pdf>.
3. Debra Cassens Weiss, *Full-Time Female Lawyers Earn 77 Percent of Male Lawyer Pay*, ABA J. (Mar. 17, 2016, 8:10 AM), [https://www.abajournal.com/news/article/pay\\_gap\\_is\\_greatest\\_in\\_legal\\_occupations](https://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations). See also Mark A. Cohen, *Why Does the Gender Wage Gap Persist in Law?*, <https://www.legalmosaic.com/why-does-the-gender-wage-gap-persist-in-law/> (Apr. 3, 2018) (reporting several studies showing that female lawyers earn less than similarly situated male lawyers); Erin C. Cowling, *Ending the Gender Pay Gap in Law*, ABA L. PRAC. TODAY (Feb. 14, 2018), <https://www.lawpracticetoday.org/article/ending-gender-pay-gap-law/> (reporting a study by Major, Lindsey & Africa showing that female partners in London law firms earn 24% less in compensation than their male counterparts); Lizzy McLellan, *Amid Gender Pay Gap Disclosures, Law Firms Keep U.S. Data Under Wraps*, AM. LAW. (Mar. 30, 2018) (documenting pay gaps at law firms in the United Kingdom).
4. Destiny Peery, *Report of the 2018 NAWL Survey on Retention and Promotion of Women in Law Firms*, 103 WOMEN LAW. J. 22, 34 (2018). See also Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, AM. LAW. (Dec. 6, 2018, 9:20 AM), <https://www.law.com/americanlawyer/2018/12/06/new-data-finds-even-bigger-gender-gap-in-law-firm-partner-pay/> (finding a 53% gap in partner compensation based on gender).

Gender gaps in wages and wealth are well known<sup>5</sup> and have attracted widespread attention. In the past year alone, *The American Lawyer*, *The Economist*, *Money*, *Forbes*, *Time*, *U.S. News*, and other media outlets have highlighted them.<sup>6</sup> Likewise, policymakers have tried to address them legislatively.<sup>7</sup> California, for example, requires employers to pay equal wages to employees doing substantially similar work<sup>8</sup> and recently enacted a law calling for publicly traded companies to include at least one woman on their boards of directors.<sup>9</sup> Advocacy organizations have also taken up the cause. For example, the National Committee on Pay Equity (NCPE)<sup>10</sup> recognizes “Equal Pay Day” every April to highlight how many months a woman must work each year to earn what a similarly situated man earned in the prior year.<sup>11</sup>

Although gender gaps in wages and wealth have attracted much attention, another gender gap has escaped notice. This gap, which we call the “aid gap,” arises from the practice of merit scholarship negotiation in law schools and directly affects law students and lawyers. Many law schools award extra merit scholarship money to those admitted students who seek to negotiate for additional aid. The onus to initiate negotiation rests on the students, and researchers have consistently found that men are significantly more likely than women to initiate negotiation.

5. See, e.g., JPMORGAN CHASE, *The Gender Wealth Gap is Even More Concerning than the Wage Gap. Here's Why*, THE LILY (Sept. 7, 2017), <https://www.thelily.com/brandstudio/the-gender-wealth-gap-is-even-more-concerning-than-the-wage-gap-heres-why/>; Diana Farrell & Fiona Greig, *The Gender Gap in Financial Outcomes: The Impact of Medical Payments*, JPMORGAN CHASE & CO. INST. (2017).
6. See, e.g., Packel, *supra* note 4; *Forcing Employers to Reveal Their Gender Pay Gaps is Making Them Think*, THE ECONOMIST (Apr. 5, 2018), <https://www.economist.com/britain/2018/04/07/forcing-employers-to-reveal-their-gender-pay-gaps-is-making-them-think>; Kaitlin Mulhere, *Here is the Gender Pay Gap in Every U.S. State - and What Could Be Behind It*, MONEY (Apr. 10, 2018), <http://money.com/money/5233753/gender-pay-gap-every-state/>; Lisa Rabasca Roepe, *3-Year Study Finds Gender Wage Gap Widening: Here's How To Close It*, FORBES (Apr. 10, 2018, 8:03 AM), <https://www.forbes.com/sites/lisaroepe/2018/04/10/three-year-study-finds-gender-wage-gap-widening-heres-how-to-close-it/#2431e368236d>; Krystal Chia, *It Could Take 202 Years for Women to Earn as Much as Men*, TIME (Dec. 18, 2018, 8:37 AM), <http://time.com/5482285/women-men-gender-pay-gap-202-years/>; Casey Leins, *Gender Pay Gap Virtually Unchanged in U.S.*, U.S. NEWS (Oct. 24, 2018, 3:47 PM), <https://www.usnews.com/news/national-news/articles/2018-10-24/gender-pay-gap-virtually-unchanged-in-us#:~:text=By%20Casey%20Leins%2C%20Staff%20Writer%20Oct.,2018%2C%20at%203%3A47%20p.m.&text=The%20gender%20pay%20gap%20has,American%20Association%20of%20University%20Women>.
7. See McCulloch, *supra* note 2, at 4-6.
8. CAL. LAB. CODE § 1197.5 (West 2019).
9. Julia Carpenter & Jackie Wattles, *California Has a New Law: No More All-Male Boards*, CNN BUS. (Oct. 3, 2018, 8:14 AM), <https://www.cnn.com/2018/09/30/business/california-requires-women-board-of-directors/index.html>.
10. NAT'L COMM. ON PAY EQUITY, <https://www.pay-equity.org/day.html> (last visited July 29, 2020).
11. *Id.*

Because men are more likely to negotiate,<sup>12</sup> male law students are likely receiving more than their fair share of scholarship aid at many law schools. This, in turn, means that women may be subsidizing the legal education of their male classmates.

This is particularly troubling because female law students often enter law school at a financial disadvantage to their male peers.<sup>13</sup> According to the American Association of University Women (AAUW), women hold nearly two-thirds of outstanding student loan debt even though they comprise only 56 percent of college graduates.<sup>14</sup> If the women applying to law school receive smaller scholarships than their male peers and have to borrow more money to pay for their legal education, their already greater debt burden will only deepen while they pursue a JD.

In this Essay, we criticize merit scholarship negotiation on disparate impact grounds. We begin in Part I by describing the practice of merit scholarship negotiation. In Part II, we explain why this process can lead to a gender-based aid gap. In so doing, we rely on a rich literature on gender in negotiation, focusing particularly on the literature documenting gender-based differences in the initiation of negotiation. Then, in Part III, we recommend that the American Bar Association (ABA) act to address the aid gap. We begin by arguing that the ABA should ban merit scholarship negotiation altogether—an action that falls within the ABA’s accrediting authority and that would eliminate the gap. In the event the ABA is unwilling or unable to ban merit scholarship negotiation, we recommend that the ABA follow the approach it has taken with so-called “conditional scholarships” and mandate disclosure. While mandatory disclosure might not fully eliminate the aid gap, it would inform admitted students of each school’s merit scholarship negotiation practices and outcomes, and this awareness should at least reduce the aid gap. Finally, we conclude our Essay by observing that the aid gap is likely part of a much larger problem affecting other less advantaged populations and impacting students enrolling in other degree programs. By taking a strong stance against merit scholarship negotiation in legal education, the ABA, the Law School Admissions Council (LSAC), and the law schools themselves can become role models for all of higher education.

12. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).
13. Annie Nova, *Women Have \$890 Billion in Student Loan Debt, the Country’s Biggest Share*, CNBC (June 6, 2018, 1:22 PM), <https://www.cnn.com/2018/06/06/why-women-hold-the-majority-of-student-loans.html> (showing that women are more likely to accrue more debt than men pursuing their undergraduate degree).
14. See AM. ASS’N U. WOMEN, *DEEPER IN DEBT: WOMEN AND STUDENT LOANS* 35 (2018), <https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf>. The AAUW’s analysis also found that upon completion of a bachelor’s degree, black women took on “more student debt on average than the members of any other group.” *Id.* at 2. Additionally, it took Hispanic and black women longer to repay their student loans than white or Asian borrowers. *Id.* This suggests that a gender disparity within negotiation practices, would further disadvantage minority students.

### I. Merit Scholarship Negotiation

In the wake of the Great Recession and the resulting collapse in the JD applicant pool, law schools have dramatically increased the amount of money they devote to scholarships.<sup>15</sup> While this increase in aid has benefitted many law students, law schools have come under attack for the way they allocate that aid. Rather than awarding aid based on student and family need, law schools are now more likely to award aid based on a student's academic record—primarily undergraduate performance and LSAT score.<sup>16</sup>

Commentators have expressed concern about this shift in aid practices, arguing that the least advantaged students are now subsidizing the most advantaged students.<sup>17</sup> In the 2016 Law School Survey of Student Engagement, for example, Aaron Taylor argues that “law school scholarships flow most generously to students with the least financial need and least generously to those with the most need,” thereby exacerbating “preexisting privilege and disadvantage, setting the stage for long-term disparities in experiences and outcomes.”<sup>18</sup> On this telling, the law school admissions office, which once played the role of a benefactor seeking to award aid to those least able to pay, has morphed into a talent scout, seeking to distribute aid based on seemingly objective measures of merit (however imperfect those measures might be).

While some commentators have bemoaned the replacement of need-based aid with merit-based aid, they have ignored another aid practice that is likely to lead to a different kind of disparate impact: merit scholarship negotiation. At many law schools, scholarship awards are based not only on an applicant's seemingly objective credentials but also on negotiations between law schools and admitted students.<sup>19</sup> These schools offer initial aid awards below what the merits justify in order to remain within their scholarship budgets and to leave room to negotiate with those students who have the temerity to negotiate with them. Scholarship offers, in short, are viewed as opening offers in a negotiation rather than merit-based awards. Here, then, the law school admissions office morphs from talent scout to used car salesperson, selling law school at a steeper discount to the admitted students who have the gumption to haggle.

15. Chelsea Phipps, *More Law Schools Haggle on Scholarships*, WALL STREET J. (July 29, 2012, 9:23 AM), <https://www.wsj.com/articles/SB10000872396390444130304577557182667927226>.

16. L. SCH. SURV. STUDENT ENGAGEMENT, LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY 7–10 (2016), <http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-2016-Annual-Report-1.pdf>.

17. *See id.* at 6 (Aaron Taylor, LSSSE's former director, observing that the shift from need-based to merit-based aid has resulted in a law school landscape in which “the most disadvantaged students subsidize the attendance of their privileged peers”); Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41, 48 (2018) (arguing that the LSAT has resulted in a “reverse Robin Hood” cost-shifting strategy through which disadvantaged students subsidize the tuition of their peers from privileged backgrounds”).

18. L. SCH. SURV. STUDENT ENGAGEMENT, *supra* note 16, at 6.

19. *See* Phipps, *supra* note 15.

Consider the following hypothetical to illustrate how this process unfolds:

Imagine two students: Jason, a male, and Jennifer, a female. Suppose that Jason and Jennifer attended similarly ranked colleges, majored in Civil Engineering, and achieved identical GPAs and LSAT scores. Rather than pursue careers as engineers, suppose that Jason and Jennifer decide to apply to law school.

Jason and Jennifer would both like to attend School X, a private school that charges \$50,000 in tuition and reports a total cost of attendance of \$70,000. Both Jason and Jennifer have GPAs that exceed School X's median GPA target, but they possess LSAT scores that fall well below School X's median LSAT.

School X admits both Jason and Jennifer and offers each of them a \$10,000 merit scholarship. In extending its aid offers, School X does not indicate that the \$10,000 scholarships are "opening offers" or that the scholarships are "negotiable" but simply presents the \$10,000 scholarships to the admitted students. School X waits anxiously for Jason and Jennifer to accept their offers of admission and to pay deposits to hold their spots in the incoming 1L class.

Like the modal law applicant, Jason and Jennifer applied to other law schools.<sup>20</sup> Among these, Jason and Jennifer applied to School Y, a school that bears some resemblance to School X. Like School X, School Y is a private school, enjoys a comparable ranking, charges \$50,000 in tuition, and reports an overall cost of attendance of \$70,000. School Y awards each student a \$25,000 scholarship.

Even after receiving School Y's aid offer, Jason and Jennifer both prefer School X. Behaving in a gender stereotypical way, Jason contacts School X, informs School X of his scholarship offer from School Y, and asks School X to increase his aid offer. School X matches School Y's \$25,000 scholarship offer, and Jason happily pays his deposit and enrolls at School X. Jennifer, also behaving in a gender stereotypical way, does not perceive this as a situation that calls for negotiation, so she accepts School X's opening scholarship offer of \$10,000, and she, too, pays her deposit and attends School X.

Because Jason negotiated and Jennifer did not, Jennifer pays \$15,000 more per year for her JD than Jason pays for his. Assuming she borrows to finance the additional \$45,000, consolidates the debt at a 7 percent interest rate, and amortizes the debt over a 25-year period, she will pay nearly \$100,000 more than Jason pays for the JD.

This is the gender-based aid gap of concern in this Essay.

20. Mike Spivey, *How Many Law Schools Should You Apply To?* (June 28, 2018), <https://blog.spiveyconsulting.com/how-many-law-schools-should-i-apply-to/> ("According to LSAC, the average applicant applies to about six law schools.")

## II. The Asking Gap

Negotiation scholars have developed a robust research literature on gender and negotiation.<sup>21</sup> There is an active debate about the impact of gender on various aspects of the negotiation process,<sup>22</sup> but there is little disagreement over the existence of a gender-based “asking gap” between men and women.<sup>23</sup>

Women are less likely to initiate negotiation than men. As the leading researcher in the field puts it, “women don’t ask.”<sup>24</sup>

In the foundational exploration of this phenomenon, Linda Babcock examined the starting salaries of MBA students graduating from Carnegie Mellon University (CMU) and discovered that men were eight times more likely than women to negotiate their salaries.<sup>25</sup> Even though CMU “strongly advised” all students to negotiate their offers,<sup>26</sup> only seven percent of women—as compared to 57 percent of men—initiated negotiation. Those who did increased their starting salaries more than seven percent—just around the average salary difference between men and women at the time.<sup>27</sup>

In a similar real-world study, Babcock and her colleagues, Michele Gelfand, Deborah Small, and Heidi Stayn, surveyed several hundred adults and asked them to recall the most recent negotiation they had initiated or attempted. Men reported that they had initiated a negotiation two weeks earlier versus

21. See SHERLY SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013); BABCOCK & LASCHEVER, *supra* note 12.
22. See Mary Al Dabbagh et al., *Status Reinforcement in Emerging Economies: The Psychological Experience of Local Candidates Striving for Global Employment*, 27 *ORG. SCI.* 1453, 1454 (2016) (identifying the cues and circumstances that intensify gender differences in negotiation outcomes); Emily T. Amanatullah & Catherine H. Tinsley, *Punishing Female Negotiators for Asserting Too Much... or Not Enough: Exploring Why Advocacy Moderates Backlash Against Assertive Female Negotiators*, 120 *ORG. BEHAV. & HUM. DECISION PROCESSES* 110, 111-12 (2013) (studying how negotiations are differentially judged by others on the basis of gender); Julia Bear, “*Passing the Buck*”: *Incongruence Between Gender Role and Topic Leads to Avoidance of Negotiation*, 4 *NEG. & CONFLICT MGMT. RES.* 47, 55-56 (2011) (finding that women are significantly more likely to pass off negotiation than men on topics of compensation); Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating are Mediated by Women’s Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 *J. PERSONALITY & SOC. PSYCH.* 256, 257-58 (2010) (identifying gender-based disparities in negotiation that work to the disadvantage of women).
23. Andrea Schneider questions the inferences that can reasonably be drawn from this vast literature, largely because the research is focused primarily on negotiations over money, undergraduate or young graduate students, and “one-off” transactions. But in the case of merit scholarship negotiation, her questions do *not* apply, as it is students who are deciding whether or not to initiate one-time financial negotiations. Andrea Schneider, *Negotiating While Female*, 70 *S.M.U. L. REV.* 695, 698-700 (2017) (arguing that conceptual and methodological problems in negotiation studies have created the myth that women simply do not negotiate)..
24. See BABCOCK & LASCHEVER, *supra* note 12.
25. *Id.* at 1-2.
26. *Id.*
27. *Id.*

a month earlier for women. When asked to identify the second-most recent negotiation they recalled initiating, men reported that they had initiated a negotiation 7 weeks earlier versus 24 weeks earlier for women.<sup>28</sup>

These field data are both suggestive and troubling—indicating that “men are asking for things they want and initiating negotiations much more often than women”<sup>29</sup>—but the observed differences might reflect something other than, or in addition to, gender. To isolate the impact of gender on propensity to negotiate, Babcock and other researchers in the field have also conducted numerous controlled experiments.<sup>30</sup> These experiments, like the field data, reveal significant differences between men and women.

In one illustrative study, researchers asked students at CMU to play *Boggle*, a game in which players try to form as many words as possible out of letter sequences depicted on dice.<sup>31</sup> Each student played four rounds of *Boggle* after which an experimenter offered three dollars and inquired if this amount was okay.<sup>32</sup> The men and women evaluated their performance in the game similarly and expressed similar levels of satisfaction or dissatisfaction with the compensation, but the men were *nine times* more likely than their female counterparts to ask for more money. As a result, the difference between the men and women “seemed to be that for men, unhappiness with what they were offered was more likely to make them try to fix their unhappiness—by asking for more.”<sup>33</sup>

To attempt to assess the overall effect of gender on the propensity to initiate negotiations, researchers recently conducted a meta-analysis—or a study of studies—in which they analyzed 55 studies involving 17,504 study participants. Across these studies, they found that women were significantly less likely than men to initiate negotiation.<sup>34</sup> They also examined moderator variables and found that gender differences were far smaller in certain circumstances, notably when there was minimal situational ambiguity about

28. *Id.* at 2–3. See also Fiona Greig, *Propensity to Negotiate and Career Advancement: Evidence from an Investment Bank that Women Are on a “Slow Elevator”*, 24 *NEG. J.* 495 (2008) (finding that women working at a major investment bank had a lower propensity to negotiate than men and that this asking gap correlated to men receiving promotions an average of seventeen months sooner).

29. BABCOCK & LASCHEVER, *supra* note 12, at 3.

30. See, e.g., Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 *J. PERSONALITY & SOC. PSYCH.* 600, 601 (2007) (finding that when situations are framed as an opportunity to *ask* rather than to *negotiate*, women were just as likely to initiate as men).

31. *Id.* at 603–04.

32. *Id.* at 603–07.

33. See BABCOCK & LASCHEVER, *supra* note 12, at 2.

34. Katharina G. Kugler et al., *Gender Differences in the Initiation of Negotiations: A Meta-Analysis*, 144 *PSYCH. BULL.* 198, 210, 214 (2018).

the appropriateness of initiating negotiation<sup>35</sup> and when the situational cues aligned with a stereotypical female gender role rather than a stereotypical male gender role.<sup>36</sup> But in the main, they found that “women are less likely to initiate negotiation than men” and estimated that “*men initiate negotiations roughly one and a half times more often than women.*”<sup>37</sup>

Likewise, in the academy, researchers have assessed differences in the propensity of students to request and receive grade changes from their instructors. The researchers found that male students were 18.6 percent more likely than female student to receive grade changes.<sup>38</sup> In a follow-up survey of students and instructors, the researchers found that male students were more likely than female students to have asked for these grade adjustments.<sup>39</sup>

Researchers have not tested law applicants, but the population of men and women applying to law school is likely very similar to the populations previously studied. Most studies have involved college students, some portion of whom undoubtedly enrolled in law school, and other populations of graduate students.<sup>40</sup> In age, education level, life experience, and socioeconomic status, these populations are similar to, and in some cases include, law school applicants. While we recognize that *law school graduates* might differ from these populations based on the training they receive in law school, there is no reason to believe *law school applicants* do. Stated differently, the asking gap is just as likely to affect prospective law students as the students who have participated in prior studies.

Researchers hypothesize that this asking gap reflects internalized gender roles<sup>41</sup> as well as an aversion to negotiation in some contexts due to fear of social backlash associated with behaving contrary to gender stereotypes.<sup>42</sup> Whatever

35. *Id.* at 206-07, 213.

36. *Id.* at 207-08, 213-14.

37. *Id.* at 214 (emphasis added).

38. Paul Caron, *Male Students Ask For - And Get - Grade Changes Far More Frequently Than Female Students*, TAXPROF BLOG (Feb. 25, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/02/male-students-ask-for-and-get-grade-changes-far-more-frequently-than-female-students.html](https://taxprof.typepad.com/taxprof_blog/2020/02/male-students-ask-for-and-get-grade-changes-far-more-frequently-than-female-students.html).

39. *Id.*

40. See Andrea Kupfer Schneider et al., *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL'Y 363, 381 (2010); Kugler et al., *supra* note 34, at 200-03 (twenty-three of forty-seven studies included within the meta-analysis were focused upon a sample comprised exclusively of students).

41. Under social role theory, beliefs about gender role arise when individuals observe gender-specific behavior and infer that men and women have distinct social roles within their society. Once these gender role beliefs are internalized, they become a part of an individual's identity and begin to guide their behavior. See Schneider, *supra* note 23, at 701-02; Wendy Wood & Alice H. Eagly, *Two Traditions of Research on Gender Identity*, 73 FEMINIST F. REV. ARTICLE 461, 462-63 (2015).

42. The “backlash effect” is a social sanction of sorts that arises when an individual violates one's gender role expectations. See Amanatullah & Morris, *supra* note 22, at 257-58. See also Amanatullah & Tinsley, *supra* note 22, at 111-12.



the underlying explanations, the asking gap exists. The research suggests that male law school applicants may be one-to-two times more likely than female applicants to try to negotiate for additional merit scholarship money.

### III. Closing the Aid Gap

The gender-based wage and wealth gaps that have attracted so much attention in recent years have proven persistent, but there is nothing inexorable or inevitable about the aid gap identified in this Essay. We can easily eliminate or at least minimize the aid gap, and we urge the American Bar Association to do so.

#### A. ABA Ban

The ABA is the authorized accrediting agency for U.S. law schools. In performing its accrediting role, the ABA promulgates minimum “standards” that it regularly reviews and revises.<sup>43</sup> In recent years, the ABA has been particularly active in addressing perceived deficiencies in legal education, including learning assessments,<sup>44</sup> experiential education,<sup>45</sup> and employment reporting.<sup>46</sup>

We urge the ABA to amend Chapter 5 of the Standards to prohibit Law Schools from engaging in merit scholarship negotiation. The ABA is not averse to taking a “command-and-control” approach in which it prohibits some behaviors and requires others. For example, the ABA requires law schools to admit only those applicants who appear capable of completing the degree and passing the bar.<sup>47</sup> It prohibits law schools from admitting applicants who have not taken a valid and reliable entrance test.<sup>48</sup> It requires law schools to provide debt counseling to student borrowers at the beginning and end of the degree program.<sup>49</sup> And it requires law schools to “demonstrate by concrete action a commitment to diversity and inclusion.”<sup>50</sup>

43. ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2019-2020), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) [hereinafter ABA STANDARDS AND RULES].

44. *Id.* at 15-16 (Standard 301. Objectives of Program of Legal Education and Standard 302. Learning Outcomes).

45. *Id.* at 16-18 (Standard 303. Curriculum and 304. Experiential Courses: Simulation Courses, Law Clinics, and Field Placements).

46. *Id.* at 33-34 (Standard 509. Required Disclosures and *Interpretation 509-2*). *See also* ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2018 EMPLOYMENT QUESTIONNAIRE: DEFINITIONS & INSTRUCTIONS (2018), [https://www.fordham.edu/download/downloads/id/10376/aba\\_2018\\_employment\\_questionnaire\\_definitions\\_and\\_instructions.pdf](https://www.fordham.edu/download/downloads/id/10376/aba_2018_employment_questionnaire_definitions_and_instructions.pdf).

47. ABA STANDARDS & RULES, *supra* note 43, at 29 (Standard 501(b). Admissions).

48. *Id.* at 31 (Standard 503. Admissions Test).

49. *Id.* at 32-33 (Standard 507. Student Loan Programs).

50. *Id.* at 12 (Standard 206(a). Diversity and Inclusion).

Consistent with this command-and-control approach, the ABA could, and *should*, revise the standards to proscribe merit scholarship negotiation altogether. If it did so, the ABA could put an end to the practice overnight. This, in turn, would require law schools to offer initial scholarship awards that reflect the full measure of merit they think appropriate based on the student's credentials and characteristics. In short, the ABA could, and should, close the aid gap.

### *B. ABA Mandatory Disclosure*

Negotiation scholars have found that context affects whether men and women will initiate negotiation. In conditions of ambiguity or uncertainty, men are much more likely than women to initiate negotiation, but when circumstances make clear that it is appropriate to initiate negotiation, the gender disparity in the propensity to ask seems to disappear.<sup>51</sup>

This research suggests that the ABA could limit, if not eliminate, the aid gap by requiring law schools to disclose their merit scholarship negotiation practices and to invite all of their admitted students to ask for adjustments to their scholarship awards.

The ABA Standards are replete with mandatory disclosure obligations of this type. Standard 509, for example, requires law schools to report their admissions data, tuition and fees, living costs, financial aid, enrollment data, course offerings, class sizes, employment outcomes, bar passage data, etc.<sup>52</sup> Perhaps of greatest relevance to this Essay, Standard 509 requires law schools to disclose information about “conditional scholarships.” A conditional scholarship is a “financial aid award, the retention of which is dependent upon the student maintaining a minimum grade point average or class standing.”<sup>53</sup> Rather than banning conditional scholarships, the ABA requires law schools to report conditional scholarships on their websites. Law schools must identify not only the number of students to whom they award conditional scholarships but also the number of students whose scholarships they reduce or eliminate because the students fail to meet minimum GPA or class standing criteria.

During the 2017-2018 academic year, for example, Tulane Law School enrolled 173 students with conditional scholarships and eliminated or reduced conditional scholarships for 35 other students.<sup>54</sup> Gonzaga Law School

51. Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment*, 61 *MGMT. SCI.* 2016 (2015) (finding no gender differences in propensity to ask when there was an explicit statement that the wages are negotiable). *See also* Kugler et al., *supra* note 34, at 213 (finding that gender differences are far smaller when there is minimal situational ambiguity regarding the appropriateness of negotiation); Jens Mazei et al., *A Meta-Analysis on Gender Differences in Negotiation Outcomes and Their Moderators*, 141 *PSYCHOL. BULL.* 85, 93-97 (2015) (finding that differences in the propensity to ask were reduced when the bargaining range was shared with the negotiator).

52. ABA STANDARDS AND RULES, *supra* note 43, at 33-34 (Standard 509. Required Disclosures).

53. *Id.* at 34 (*Interpretation 509-3*).

54. TUL. U., STANDARD 509 INFORMATION REPORTS 2 (2018), <https://law-dev.tulane.edu/sites/>

enrolled 115 students with conditional scholarships and eliminated or reduced conditional scholarships for 28 other students.<sup>55</sup> Baylor Law School enrolled 143 students with conditional scholarships but did not reduce or eliminate any conditional scholarships that year.<sup>56</sup> And other schools, like Boston College<sup>57</sup> and the University of Kentucky,<sup>58</sup> did not award any conditional scholarships at all. The ABA requires law schools not only to disclose this information on their websites but also to provide it directly to any prospective student to whom they offer a conditional scholarship.<sup>59</sup>

Consistent with its approach to conditional scholarships, the ABA should, at a minimum, require each law school to provide both the public and admitted students with information about merit scholarship negotiation at that school. Further, the ABA should mandate that each school disclose not only a qualitative description of its merit negotiation policies and practices but also the quantitative data on scholarship adjustments. Specifically, the ABA should require each school to report the number of students who requested adjustment to their aid awards, the number of adjustments granted, and the dollar amounts of those adjustments (perhaps at the 25<sup>th</sup>, 50<sup>th</sup>, and 75<sup>th</sup> percentiles).

Several law schools have taken it upon themselves to inform applicants about some aspects of their scholarship “reconsideration” processes. For example, the University of Texas School of Law devotes a section of its website to the “Scholarship Reconsideration Process for Incoming Students.”<sup>60</sup> There, it makes clear that the school “will not engage in a bidding competition,” but provides a “one-time review . . . limited matching opportunity” in order to “consider scholarship offers from similarly ranked schools along with other factors such as merit and need.”<sup>61</sup> Likewise, the University of California Berkeley School of Law provides a “formal process to request reconsideration” of a scholarship award “in light of an offer from another law school,” but limits

law.tulane.edu/files/Files/ABA%20Reports/std509info-report-65-65-12-07-2018-14-40-48.pdf.

55. GONZ. U., STANDARD 509 INFORMATION REPORT 2 (2018), <https://www.gonzaga.edu/-/media/Website/Documents/Academics/School-of-Law/About/Consumer-Information/2018-509-Standard-Report.ashx?la=en&hash=E4980352385C646FF36327B457042E3D886B812B>.
56. BAYLOR U., STANDARD 509 INFORMATION REPORT 2 (2018), <https://www.baylor.edu/law/doc.php/269444.pdf>.
57. B.C., STANDARD 509 INFORMATION REPORT 2 (2019), <https://www.bc.edu/content/dam/bc1/schools/law/about/facts/Std509InfoReport.pdf>.
58. U. KY., STANDARD 509 INFORMATION REPORT 2 (2018), <http://law.uky.edu/sites/law.uky.edu/files/Marketing/Standard%20509%20Report%20-%202018.pdf>.
59. ABA STANDARDS AND RULES, *supra* note 43, at 34 (Standard 509(d)).
60. U. TEX. AUSTIN SCH. L., *Applying for Financial Aid*, <https://law.utexas.edu/financial-aid/the-financial-aid-process/> (last visited Jan. 27, 2019).
61. *Id.*

the process to a window between March 20 and May 1.<sup>62</sup> The University of Georgia School of Law<sup>63</sup> invites admitted students to request reconsideration of the current scholarship offer through a form wherein they may upload documentation of other scholarship offers. The Chicago-Kent College of Law does the same, but limits documentation to a maximum of four competing offers and promises a response “within one or two weeks.”<sup>64</sup> Meanwhile, the Northwestern Pritzker School of Law provides admitted students a form upon which they may submit their “top competing offer” from select schools—Chicago, Columbia, Duke, Harvard, Michigan, NYU, Penn, Stanford, UC Berkeley, UVA, and Yale.<sup>65</sup> Students can upload supporting documentation as well as an essay in which they can explain why they would attend Northwestern over the other school in the case that the two scholarship offers are equal.<sup>66</sup>

Similarly, the SMU Dedman School of Law offers admitted students a “one-time” scholarship reconsideration request, though it makes clear that “[a]s a general rule” it will “not negotiate scholarship offers, nor . . . adjust awards based on other offers received.”<sup>67</sup>

We applaud those law schools that disclose information about merit scholarship negotiation, but we do not believe these disclosures are sufficient for two reasons. First, some law schools provide disclosures, but others do not. Second, even those schools that disclose some information about their merit scholarship reconsideration practices do not provide enough information to guide applicants. If the ABA were to adopt a mandatory disclosure regime, it could address both of these deficiencies by requiring that all law schools disclose specified information in a uniform way in public and in scholarship offer letters to admitted students. That information should include a description of each school’s merit scholarship negotiation policy and detailed information on outcomes. In so doing, the ABA would ensure that applicants are aware of their opportunity to ask for additional aid as well as the likelihood of success in doing so.

62. U. CAL. BERKELEY SCH. L., *Scholarships*, <https://www.law.berkeley.edu/admitted-students-jd/apply-for-a-scholarship/> (last visited Jan. 27, 2019).

63. U. GA. SCH. L., *University of Georgia School of Law Scholarship Offer Reconsideration*, <http://law.uga.edu/scholarship-offer-reconsideration> (last visited Jan. 27, 2019); *see also* CAP. U. LAW SCH., *Scholarship Comparison*, <http://law.capital.edu/ScholarshipComparison/> (last visited Jan. 27, 2019) (limiting applicants to “copies of scholarship offers from the top 2 institutions that are being considered in addition to Capital Law”).

64. CHI. KENT C. L., *Scholarship Appeals*, <https://www.kentlaw.iit.edu/current-students/tuition-and-financial-assistance/scholarships/scholarship-appeals> (last visited Jan. 27, 2019).

65. NW. PRITZKER SCH. L., *Scholarship Reconsideration Form 2018*, <https://apply.law.northwestern.edu/register/JDreconsideration2018> (last visited Jan. 27, 2019).

66. *Id.*

67. SMU DEDMAN SCH. L., *Paying for Law School: Incoming Students*, <https://www.smu.edu/Law/Admissions/AdmittedStudents/Paying-for-Law-School> (last visited Jan. 27, 2019) (stating that the “The Committee will not adjust awards based on prestige/rankings of other schools/offers”).

*C. If the ABA Passes . . .*

We believe the aid gap calls for a regulatory solution, so we recommend that the ABA ban merit scholarship negotiation, or, at a minimum, require law schools to disclose merit scholarship negotiation practices and outcomes. But we recognize the ABA may be unwilling or unable to regulate merit scholarship negotiation. In that event, we urge other legal education stakeholders to attempt to fill the void.

The Law School Admissions Council (LSAC) is a member services organization that does not regulate law schools but provides admissions support to law schools and applicants. The LSAC promulgates a “Statement of Good Admission and Financial Aid Practices” that prescribes how the admissions officers at member law schools are expected to conduct themselves.<sup>68</sup>

The LSAC’s Statement, like the ABA standards, addresses admissions and financial aid practices and policies in various ways. It underscores that “access to legal education often depends on access to financial assistance” and advises law schools to ensure that the financial aid process provides “accurate, coherent, and complete information” to admitted students and applicants. The LSAC’s Statement also recognizes that some law schools engage in merit scholarship negotiation, and it advises law schools to “develop fair, coherent, and consistent policies in their scholarship awarding process and (if applicable) *scholarship revision or reconsideration requests*.”<sup>69</sup>

The LSAC could take this a step further and advise against merit scholarship negotiations altogether or at least delineate merit scholarship negotiation disclosures it expects of admissions and financial aid offices. Though the Statement is non-binding, it has considerable normative force in the admissions world. There is good reason to believe that a strong assertion by the LSAC would shape how admissions and financial aid officers behave.

Law schools, too, can take steps to address the aid gap. Law schools can individually decide to cease merit scholarship negotiation or, alternatively, to provide extensive disclosures about their own merit scholarship negotiation practices and outcomes. Law schools could also band together to eliminate the practice. Although often in competition with one another, law schools have occasionally collaborated on issues of concern to legal education writ large. Most recently, law schools joined forces to advocate for flexibility in

68. LSAC, *LSAC Member Law Schools’ Statement of Good Admission and Financial Aid Practices* (2017), [https://www.lsac.org/sites/default/files/media/statement-of-good-admission\\_o.pdf](https://www.lsac.org/sites/default/files/media/statement-of-good-admission_o.pdf).

69. *Id.* (emphasis added).

admissions testing<sup>70</sup> and to propose a new clerkship hiring plan.<sup>71</sup> In much the same way, law schools could agree amongst themselves to prohibit the practice of scholarship negotiation.

Law schools can also play a role by encouraging the negotiation experts on their faculties to teach negotiation to undergraduates or to do negotiation workshops for the pre-law groups on their campuses. Universities often teach negotiation at the graduate or professional level—in law schools, business schools, public policy schools, and so forth—but seldom at the undergraduate level. This is unfortunate because negotiation researchers have found that negotiation training can eliminate or at least reduce the gender-based asking gap.<sup>72</sup> Indeed, when women lawyers are trained to negotiate, gendered differences in negotiation vanish.<sup>73</sup> By training prospective law students to negotiate at the undergraduate level, law schools could minimize any subsequent gender differences in the merit scholarship negotiation process in law schools.

### Conclusion

In this Essay, we have argued that the practice of merit scholarship negotiation in *law schools* can lead to an aid gap *based on gender*. We have focused on law schools because those are the schools we know best, and we have focused on gender because the research literature on gender and the propensity to negotiate is robust.

But the problem we have identified in this Essay is likely much larger than we have indicated for at least two reasons. First, although the research on gender in negotiation is more mature and voluminous, there is research suggesting that students from other historically disadvantaged populations—racial and ethnic minorities, disabled students, LGBTQI students, and poorer students—are also likely to face an aid gap.<sup>74</sup> Second, merit scholarship negotiation is a common practice not only in law schools but also in other

70. David M. Klieger et al., *The Validity of GRE® General Test Scores for Predicting Academic Performance at U.S. Law Schools*, ETS RES. REP. SERIES 1 (2018), <https://onlinelibrary.wiley.com/doi/full/10.1002/ets2.12213>; Stephanie Francis Ward, *After Withdrawal of Law School Admissions Test Rule Revision, Will Fewer Schools Accept the GRE?*, ABA J. (Aug. 9, 2018, 6:10 AM), [http://www.abajournal.com/news/article/following\\_withdrawal\\_of\\_admissions\\_test\\_rule\\_revision\\_will\\_fewer\\_schools\\_acc](http://www.abajournal.com/news/article/following_withdrawal_of_admissions_test_rule_revision_will_fewer_schools_acc).

71. See, e.g., *Federal Law Clerk Hiring Plan*, OSCAR, [https://oscar.uscourts.gov/federal\\_law\\_clerk\\_hiring\\_pilot](https://oscar.uscourts.gov/federal_law_clerk_hiring_pilot) (last visited Jan. 27, 2019).

72. See, e.g., Schneider et al., *Likeability*, *supra* note 40, at 381.

73. *Id.*

74. See Taylor *supra* note 17, at 48–49; Michael Z. Green, *Negotiating While Black*, in *THE NEGOTIATOR'S DESK REFERENCE* 563, 565–67 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) (recounting studies finding that minority individuals were induced to pay much higher prices when purchasing a car and that uncertainty about whether a salary was negotiable led to wage gaps).

graduate and undergraduate schools,<sup>75</sup> suggesting that there are aid gaps, based on gender as well as other protected statuses, not only in law schools but across educational institutions.

The ABA, LSAC, and law schools can play a pivotal role on campus by acknowledging the aid gap and taking steps to close it. We have argued here that the ABA should simply ban the practice, but if the ABA resists command-and-control regulation, it can mandate disclosure, which would go a long way toward ensuring transparency and fairness in the process. Concurrently, the LSAC and the law schools themselves can take steps to reduce, if not eliminate, the practice in law schools. In so doing, legal education can lead the way on campus. Given the emphasis our discipline places on transparency, non-discrimination, and justice, this would be fitting.

75. Ron Lieber, *Appealing to a College for More Financial Aid*, N.Y. TIMES (Apr. 4, 2014), <http://www.nytimes.com/2014/04/05/your-money/paying-for-college/for-many-families-college-financial-aid-packages-are-worth-an-appeal.html> (discussing the process of requesting scholarship and financial aid reconsideration at undergraduate institutions).