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## Situations, Frames, and Stereotypes: Cognitive Barriers on the Road to Nondiscrimination

Marybeth Herald

*Thomas Jefferson School of Law*

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SITUATIONS, FRAMES, AND STEREOTYPES:  
COGNITIVE BARRIERS ON THE ROAD TO  
NONDISCRIMINATION

*Marybeth Herald\**

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INTRODUCTION

A study of the psychological literature can enhance legal theory by focusing attention on how the human brain perceives, distinguishes, categorizes, and ultimately makes decisions.<sup>1</sup> The more that we learn about the brain's intricate operations, the more effective we can be at combating the types of gender biased decisions that influence our lives.<sup>2</sup> In developing strategies to achieve equality, feminist, gay, lesbian, bisexual, transgender, and intersex activists would be wise to learn from the psychological literature. This Article highlights a few examples illustrating how this knowledge might re-direct strategic choices for combating gender inequality.

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\* Professor of Law, Thomas Jefferson School of Law.

1. The title of the conference where this Article was presented is "Rhetoric and Relevance: An Investigation into the Present and Future of Feminist Legal Theory."

2. See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., (Cambridge University Press 2000) (arguing that both the operation of current law and prescriptions for legal change should reflect social scientists' understanding of how people actually, not theoretically, make judgments).

First, consider that situational pressures have a powerful influence on our actions, despite the myth of the power of an individual's disposition.<sup>3</sup> Such influences can cause us to behave in ways that—viewed from outside the situation—would surprise us. When people make efforts to bring about change from the inside, they may find that the situation is a strong opponent, robustly resistant to such change even when legal rules and good-faith commitments to gender equality have ostensibly leveled the playing field.<sup>4</sup> The problem is, in part, that the underlying organization of the workplace is often sculpted to suit traditional male needs. The environment is capable of changing the participants more than the participants are capable of changing the environment. To be effective, change must be made to this structure, and it is unlikely that the participants will be able to accomplish that feat.

Second, reflexive biases govern more of our lives than we may understand or care to admit. For much in our lives, the automatic pilot of our brain works well. But it can negatively affect how we make some decisions. For example, how an issue is framed can bias our understanding of the issue. Certain words and phrases highlight concepts that the brain uses to quickly understand the issue, incorporating a spontaneous ability to stereotype that is hard to override.<sup>5</sup> When groups have the label “disorder” or “dysfunction” attached to them, the negative connotations can affect understanding of the issue in important ways. Both the intersex and transgender movements struggle with these labels. Moreover, for feminists, the ability to trigger gender stereotypes through dress codes is also a problem because the biases operate silently but very effectively, even when stereotypes appear benevolent.<sup>6</sup>

Finally, although transsexual, gay, lesbian, and bisexual plaintiffs have found Title VII to be available as a remedy against discrimination under a gender nonconformity theory, it is a legal theory that requires the repetition of stereotypes to succeed in proving discrimination. Although the gender nonconformity theory is based on a recognition of the pernicious nature of gender stereotypes, the theory serves to rein-

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3. See generally Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *Situational Character*]; Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*].

4. See generally JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 64–113 (Oxford Univ. Press 2000).

5. See discussion *infra* Part II.

6. See Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 320–27 (2007).

force them by measuring discrimination against an engrained binary and heterosexual system.<sup>7</sup>

## I. SITUATIONAL PRESSURES AND THE STRUGGLE IN THE WORKPLACE

### A. Situational Pressures

Stanley Milgram demonstrated the power of the situation in his famous experiments in the 1960s. He managed to get ordinary people to act in extraordinarily distressing ways by manipulating their situation. The participants agreed to deliver what they thought were increasingly high voltage shocks to another subject (really an actor) in order to help “teach” that innocent subject a series of words. The phony machinery had a high level of 450 volts, notably marked “XXX Danger.” At 75 volts, the “learner” in the next room began grunting in apparent pain. At 150 volts, he said: “Stop, let me out! I don’t want to do this anymore.” Milgram discovered that his subjects were surprisingly amenable to orders from the experimenter even when they were being ordered to inflict pain on an unwilling recipient with a heart condition.<sup>8</sup> Under the right conditions, an experimenter could successfully command about 65% of adults to administer the final 450-volt shock as part of what they thought was a learning experiment. Other studies, though limited by subsequent ethical rules regarding the use of human subjects, show that the percentage of participants who are prepared to inflict fatal voltages remains remarkably constant, 61–66 percent, regardless of time or place.<sup>9</sup>

The Stanford prison experiment was another famous demonstration of the principle that our individual dispositions may not always govern our actions. Psychologists took twenty-four mentally healthy, male volunteers and divided them into prisoners and guards in the

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7. See discussion *infra* Part II.C.

8. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 371 (1963); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN RELATIONS 57, 57–76 (1965).

9. Subsequent researchers have examined factors that contributed to the results and have found that the subjects were affected by the unfamiliar situation, time pressure, and whether they believed themselves to be responsible for the shocks or the experimenter accountable. See Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1 (2009); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 275 (Random House 2007).

basement of the Stanford Psychology Department.<sup>10</sup> Starting as an experiment to investigate how healthy persons react in the confines of a prison environment, the results were stunning in their demonstration of the power of the situation.<sup>11</sup> The subjects quickly changed into abusive and sadistic guards tormenting depressed and dysfunctional prisoners.

What these and other experiments highlight is that we are all more sensitive to situational pressures than we might realize.<sup>12</sup> In a society seduced by the notion of the power of individual will, it can be a difficult principle to accept. But figuring out why ordinary people were willing to shock strangers or abuse them in a fake prison might help explain why gender inequalities in the workplace persist.

### *B. The Workplace Struggle*

In the early days of feminism, a major problem was the accepted belief that certain roles were not acceptable for women (single, breadwinner, CEO, doctor) while others (wife, mother, secretary, nurse) were desirable. The movement has focused in part on removing legal barriers and opening opportunities to women in previously male fields. Important battles were won, including the removal of explicit barriers to the employment of women, but many problems remain. Economic gaps in wage earning stubbornly persist, as does the difficulty of balancing work with family.<sup>13</sup>

When women entered male dominated fields, they came to a workplace tailored for men and few alterations were made. These traditional designs of workplace and home are strong influences.<sup>14</sup> Biases built into the current structure operate subtly, but effectively, to change us.<sup>15</sup> In the work environment, for example, rules are designed for males with wives that stay home. A maternity leave policy, for example, that focuses all the child rearing on women, while leaving men to continue business as usual in the work world, fosters a gender division that deep-

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10. See Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69-73 (1973).

11. See ZIMBARDO, *supra* note 10.

12. See generally Hanson & Yosifon, *Situational Character*, *supra* note 3; Hanson & Yosifon, *The Situation*, *supra* note 3.

13. WILLIAMS, *supra* note 4.

14. See generally Hanson & Yosifon, *Situational Character*, *supra* note 3; Hanson & Yosifon, *The Situation* *supra* note 3.

15. See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 409 (2003) ("People and jobs both are gendered, which gives stereotypes a profound effect on everyday interactions in the workplace.").

ens over time and escalates into full-scale role conflict.<sup>16</sup> Men take on less care giving, concentrating on work outside the home, making it less likely that they will take on care giving or see the need to engineer changes in the workplace. Workplace limitations that cater to a workforce freed of primary childcare responsibilities, including a lack of flexible time schedules and excessive overtime, contribute to the conflict. Women with children who enter this environment have to work a double shift.<sup>17</sup> It is no wonder that women, who have an economic choice, may feel the need to jump off the double time track to keep their mental health. With their additional child rearing burdens and disappearance from career paths during childbearing years, women lose opportunities in the workplace, while male counterparts continue to sow and reap at the office.<sup>18</sup>

Women who do work outside the home face schools that are designed for children with stay at home moms—in hours of instruction, after school care, emphasis on the mother contributing to the classroom (e.g., “room mothers”), and summers off. These designs put women in an untenable position and contribute to women’s feelings that they are both bad mothers and bad workers.

Managers, who are under pressure to produce results that were possible with an all-male single-minded workforce, may find themselves less than happy when they have to make adjustments for pregnancy leave and time off for sick children. In general, the workplace design, left over from previous generations, contributes to the pressures women and men feel to conform to traditional roles.<sup>19</sup> Although women are legally free to work outside the home and bring in a paycheck, many find themselves tethered to the hearth in a marketplace designed for the fleet and free.<sup>20</sup>

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16. See, e.g., Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 6 (2003) (noting problems of employer “benevolent” stereotyping when “the employer polices men and women into traditionalist bread-winner/housewife roles—clearly an inappropriate role for an employer to play.”). Even parental leave policies—ostensibly gender neutral—have that effect, according to studies, because the situational effect is that men do not feel free to use them.
  17. ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT* 3–4 (Viking Penguin 1989) (discussing competing claims in the workplace and home that lead women to working a “second shift” as unpaid labor in the home).
  18. See WILLIAMS, *supra* note 4, at 213–17 (stating that masculine norms are the basis of merit and application of law).
  19. *Id.* at 64–113 (discussing the dominance of masculine norms in the workplace).
  20. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1452, 1472–79 (2001) (discussing women’s choice of primary care giving as constricted by institutions, identities and perceptions);

Realizing that our environment exerts a powerful influence on us is the first step toward remedying what might look like a dispositional lack of will (e.g., women leaving the workplace). Although law and society have concentrated efforts on getting women accepted into the workforce, the other parts of the equation—having men accept roles in the home and adapting the outside workspace to fit new patterns of parental responsibility—were left unchanged and out of balance. The resulting rift between the roles of mothers and fathers is not all biological, but the result of social, cultural, and legal practices forcing the actors into situations that reinforced division, etching deeper differences, and providing an excellent breeding ground for self-fulfilling prophecies.<sup>21</sup>

Of course, the lesson of situational pressures is valuable for other groups as well. Consider the possibilities of same-sex marriage. For better or worse, the importance of marriage as an institution in our society, e.g., for property, inheritance, child custody and tax rights—has driven gay, lesbian, and bisexual rights groups to focus on legalizing same-sex marriage.<sup>22</sup> When accomplished, the question will be the degree to which these individuals change the institution of marriage or whether the institution changes them. The roles of “husband” and “wife” are heavily gendered concepts and the risk of buying into the institution is that situational pressures may produce undesirable role modeling rather than a reinvention of the institution as an equal adult partnership.<sup>23</sup>

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Mary Becker, *Caring for Children and Caretakers*, 76 CHI-KENT L. REV. 1495, 1526–27 (2001).

21. Known as the “Pygmalion effect,” the most famous studies of this phenomenon involve teacher and student expectations of student performance, finding the higher the expectation, regardless of the baseline diagnostic information, the higher the student performance. See SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 234–35 (McGraw Hill 1993). See also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997); ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS’ INTELLECTUAL DEVELOPMENT* (Holt, Reinhart and Winston, Inc. 1968).
22. See DANIEL R. PINELLO, *AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE* (Cambridge Univ. Press 2006).
23. See generally Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI-KENT L. REV. 379 (2009)(discussing history of the debate over the wisdom of setting marriage as a priority on the gay and lesbian community agenda when marriage as an institution was flawed). See also Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK: NAT’L LESBIAN & GAY Q., Fall 1989, at 9, 9–13 reprinted in WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 678 (3d ed. 2008); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK: NAT’L LESBIAN & GAY Q., Fall 1989, at 9, 14–17 reprinted in RUBENSTEIN ET AL., *supra*, at 683.

## II. FRAMING AND STEREOTYPES

### *A. Why Framing is Important*

How an issue is framed matters because we are vulnerable to how our choices are described.<sup>24</sup> People will view the same problem differently depending on how it is stated.<sup>25</sup> For example, people are more likely to undergo a risky medical procedure if they are told, “ninety percent [of people who undergo this procedure] are alive in five years” than if they are told, “ten percent [of people] are dead after five years.”<sup>26</sup> The frame affects the answer because it provides the mental structure that our brain uses to connect to other ideas, including presenting the choice as a gain or a loss.<sup>27</sup> In the first example, highlighting survival appeals to a brain thinking about a medical procedure because it involves a gain. In the second example, death provides the less popular frame because it involves a loss (of life). Once the brain has a frame highlighted, the image sticks. In the medical procedure question, focusing on either survival or death will influence consideration of the issue for the risk averse. Whether the person chooses to have the operation may depend on how the doctor asked the question more than the cold hard statistics of survival and death rates. The question’s appeal to underlying biases manipulate the preferences of the responder. What may seem like word games is based on an understanding of how the brain operates and some. Advertisers understand this cognitive bias well,<sup>28</sup> as do political

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24. See Richard R. Lau & Mark Schlesinger, *Policy Frames, Metaphorical Reasoning, and Support for Public Policies*, 26 *POL. PSYCHOL.* 77, 80 (2005).

25. See, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

26. See Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 *MINN. L. REV.* 1556, 1590 (2004).

27. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, in *CHOICES, VALUES, AND FRAMES* 1, 3 (Daniel Kahneman & Amos Tversky eds., 2000).

28. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 *HARV. L. REV.* 1420, 1451 (1999) (“One way in which ‘an adroit marketer can influence the buyer’s perception’ is through the use of framing effects, which refer to the tendency for information format (as opposed to content) to influence perceptions and behavior. Manufacturers of food products, for instance, have learned that labeling a food product seventy-five percent non-fat instead of twenty-five percent fat can greatly increase sales.”(quoting Gerald E. Smith & Thomas T. Nagle, *Frames of Reference and Buyers’ Perception of Price and Value*, 38 *CAL. MGMT. REV.* 98, 100 (1995)); SHELDON RAMPTON & JOHN STAUBER, *TRUST US, WE’RE EXPERTS!: HOW INDUSTRY MANIPULATES SCIENCE AND GAMBLES WITH YOUR FUTURE* (Penguin Putnam Inc. 2000).

parties. Republicans, and somewhat lagging behind them, Democrats, have relentlessly pursued the strategic framing game for years.<sup>29</sup>

Framing is critical for any social movement. Policy makers usually have an in depth understanding of the issues and might be less likely to be swayed by framing effects. But those less knowledgeable are heavily influenced by the framing of an issue.<sup>30</sup> Their brains, in coping with unfamiliar concepts, hook onto familiar ones and use them as tools to slog their way towards an understanding of the issue.<sup>31</sup> Hence, a patient that does not understand all the risks of a medical procedure, searches for an understanding of what it means by hooking onto the frames of life or death and the subtleties get lost in translation. The use of words of a frame can increase understanding by comparison, or limit understanding by comparison.

### *B. The Intersex Movement and the Problem of Frames*

A major focus of the intersex movement has been on ending surgical interventions on children identified as having an intersex condition. These surgeries are viewed as unnecessary and unharmed.<sup>32</sup> The usual protocol when doctors identified a newborn with an intersex condition was to surgically alter his or her genitalia, administer hormones as needed, and instruct the parents to raise the child in his or her medically created persona. The working thesis was that the baby was a neutral being and that gender identity was flexible. In addition, sometimes when a newborn's anatomy is atypical, surgery to alter penises and vaginas would be viewed as a way to reduce future trauma to the child.<sup>33</sup> The

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29. See generally GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE (CHELSEA GREEN PUBLISHING COMPANY 2004) (discussing effective use of frames in political discourse). It can be as simple as the use of the term "foreign aid" when giving aid to foreigners might not be seen as useful. A more recent example is whether actions taken on behalf of financial institutions in trouble were labeled a "bailout" (taxpayers giving money to undeserving CEOs) or an economic stimulus (public money going to help the economy recover for everyone).

30. See PLOUS, *supra* note 21, at 54 ("When [people] know fairly little about an issue . . . they are more easily influenced by [variations in the question asked.]"); *id.* at 75 ("[Q]uestion wording and framing often make a substantial difference [in people's expressed opinions], and that it pays to be aware of their effects.").

31. See generally PLOUS, *supra* note 21.

32. Throughout this Article, I use "intersex" to refer to persons whose reproductive or sexual anatomy is not clearly male or clearly female. I use "transsexual" to refer to persons whose reproductive and sexual anatomy do not match the person's self-identified gender.

33. See, e.g., ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 56-66 (Basic Books 2000); Hazel Glenn Beh & Mil-

results of these experiments resulted in poor outcomes for some of the children.<sup>34</sup> Experts now believe that there is not that much plasticity in gender identity.

The intersex movement has tried to increase understanding of these critical issues and that focus, in turn, has led to the development of strategies specific to the medical community. In dealing with medical personnel, the intersex movement has on occasion adopted language labeling intersex conditions as “disorders of sexual development.”<sup>35</sup> This medical model frames the issue in a manner that doctors can understand because doctors, based on their training, understand disease, disorders, and dysfunction.

Yet when persons with an intersex condition are labeled as persons with a disorder, the use of the term “disorder” may activate negative stereotypes. As noted above, how you frame an issue is critical because it emphasizes the important points for the brain to focus upon. Here, the brain will focus on disorder, which may trigger stereotypes of illness and dysfunction.

Psychologists understand stereotyping—placing people and things in categories—as an automatically activated<sup>36</sup> survival mechanism. We are constantly assessing things based on whether they tend to be like or not like a category of items.<sup>37</sup> Hidden from our view, the brain silently but efficiently controls the ways we categorize, organize, and manage a

ton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 63 (2000).

34. These effects included scarring, infections, impairment of sexual pleasure, and emotional distress. See Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER, L. & JUST. 59, 61, 66–67, 69–71 (2006).
35. See Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488 (2006), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;118/2/e488>; Intersex Soc'y of N. Am., *Why Is ISNA Using “DSD”?* (May 24, 2006), available at <http://www.isna.org/node/1066>; INTERSEX SOC'Y OF N. AM., *CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEXUAL DEVELOPMENT IN CHILDHOOD: CONSORTIUM ON THE MANAGEMENT OF DISORDERS OF SEXUAL DEVELOPMENT* (2006), available at <http://www.dsdguidelines.org/files/clinical.pdf>.
36. See TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 52–53 (Belknap Press of Harvard Univ. Press 2002).
37. Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 20 (Daniel Kahneman et al. eds., 1982) (describing heuristics of representativeness, availability, and anchoring that influence decision-making and “are highly economical and usually effective, but they lead to systematic and predictable errors”); see also WILSON, *supra* note 36, at 4–11.

continuous flow of information in order to make decisions.<sup>38</sup> Once our brain places an item in a category, it also attaches other known characteristics of the category to that item.<sup>39</sup> We see something slithering on the ground during a hike and we think snake, and take appropriate precautions because snakes generally are dangerous, although many may not be.<sup>40</sup> Stereotyping might save our life in the snake example, but it is not always such a benign mechanism. Because our categorization system is often broad and imprecise, it can lead us to the wrong conclusions while its subliminal operation allows these mistakes to escape our attention.

Although the term “disorder” compresses a complex medical issue inside a convenient label, those important intricacies may escape attention while the mind makes the association with illness.<sup>41</sup> Those persons labeled as “disabled,” for example, inherit a package of harmful associations.<sup>42</sup> Negative implications of an abled vs. disabled dichotomy include a view of people with disabilities as people needing to be fixed to fit into a society (through medical intervention or specialized institutions or schools) rather than perceiving the need to fix society to be more inclusive of all its members. Negative and paternalistic stereotypes permeate movies, books, and social attitudes about persons with disabilities. We all learn complex rules of association both implicitly and quickly through these sources, without thoughtful reflection. We may not be able to rec-

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38. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics* 88 CAL. L. REV. 1051, 1143 (2000) (“[P]eople are boundedly rational. To save time, avoid complexity, and generally make dealing with the challenges of daily life tractable, actors ofte[n] adopt decision strategies or employ heuristics that lead to decisions that fail to maximize their utility.”); see generally Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION, 27 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).
39. This mental shortcut is known as the representative heuristic. Tversky & Kahneman, *supra* note 37, at 4–6.
40. We are equally cautious, for example, when confronting sharp objects and unfamiliar animals because we have learned that those categories are associated with danger. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163–64 (1995).
41. See generally Colin Camerer et al., *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LITERATURE 9, 11 (2005) (“Because people have little or no introspective access to [the brain’s automatic] processes, or volitional control over them, and these processes evolved to solve problems of evolutionary importance rather than respect logical dicta, the behavior these processes generate need not follow normative axioms of inference and choice.”).
42. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397 (2000); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999).

ognize that we learned a rule or even articulate the principles involved within the rule, but our brain implicitly makes these associations.<sup>43</sup> A “disorder” reflexively calls up categories with negative connotations.

Studies suggest that certain stereotypes may harm our performance by just being “in the air,”<sup>44</sup> as part of our environment. Such stereotypes shape our actions, cabin our ability to make counter associations, and contribute to prejudicial attitudes.<sup>45</sup> Significantly, most of this processing goes on behind the scenes in our minds, and there are no observable symptoms of reflective consideration.<sup>46</sup> Once we place something in a category, it is not easy to pull the plug on our stereotyping mechanism, deciding, for example, to cleanse our minds of disability or gender bias.<sup>47</sup>

Use of the “disorder” frame risks imposing a stigma on the members of the community and their families in the minds of the public because it links them with a negative image rather than positive information. More specifically, parents, who are making decisions for their children, are one avenue to reducing unwanted surgeries because by gaining their understanding of the issue, they refuse consent for surgery. Yet the “disorder” label might lead them to seek medical treatment because that is what you do with a disorder. Of course, “intersex” may be unsatisfactory because it brings forth an image of someone between sexes. Parents might feel this leaves the child neither male or female, but ‘disorder’ is not a move in the right direction.

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43. See WILSON, *supra* note 36, at 26–27 (discussing implicit learning experiments).

44. See Steele, *supra* note 21; see also John T. Jost & Aaron C. Kay, *Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification*, 88 J. PERSONALITY & SOC. PSYCHOL. 498, 498 (2005) (“Social stereotypes are indeed powerful environmental stimuli that do not depend on conscious, personal endorsement for their effects to be palpable.”).

45. See Ad Van Knippenberg & Ap Dijksterhuis, *A Posteriori Stereotype Activation: The Preservation of Stereotypes Through Memory Distortion*, 14 SOC. COGNITION 21, 46–48 (1996).

46. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994) (“Although people cannot observe rhinoviruses, a stuffed-up nose tells them they have a cold. If one is wondering whether a gallon of milk is fresh or spoiled, a quick whiff will reveal the answer. There are seldom such observable symptoms, such as smell, temperature, or physical appearance, indicating that a human judgment is contaminated. As a result, people are often unaware that their judgment is ‘spoiled,’ in Jacoby and Kelley’s (1987) terms. Human judgments—even very bad ones—do not smell.” (citing Larry L. Jacoby & Colleen M. Kelley, *Unconscious Influences of Memory for a Prior Event*, 13 PERSONALITY AND SOC. PSYCHOL. BULL. 314 (1987))).

47. See generally Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 185 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES] (discussing the difficulty of reducing bias in human judgment).

Even doctors are affected by these reflexive reactions.<sup>48</sup> If the goal is to encourage doctors to take a more watchful approach and not be quick with a surgical solution, just the label “disorder” could be a hindrance because it implies a condition in need of treatment.

Of course, other groups have struggled with the “disorder” issue as well. Gays, lesbians, and bisexuals successfully fought to get homosexuality removed from the Diagnostic and Statistical Manual as a disorder in 1973.<sup>49</sup> Transsexuals often need to navigate the medical system as persons with a “gender identity disorder,” a condition listed in the DSM-IV.<sup>50</sup> In order to receive identity documents in their self-identified gender, it is often necessary for them to adopt the medical language of “disorder.” The term “disorder” has been imposed as an affirmative condition of getting needed services.<sup>51</sup>

Unlike this group, however, the intersex movement’s voluntary adoption may be an unwise long term strategy despite any short term considerations. Women secured some legal protections in the workplace early in the 20th century through being labeled as the more fragile sex,<sup>52</sup>

48. See JEROME GROOPMAN, *HOW DOCTORS THINK* (Houghton Mifflin 2007); See also Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women’s Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285 (2005) (noting the lack of understanding in the medical community of issues affecting women).

49. AM. PSYCHIATRIC ASS’N, *HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II, 6TH PRINTING, PAGE 44, POSITION STATEMENT (RETIRED)*, APA Document Reference No. 730008, 1 (1973), available at [http://www.psychiatryonline.com/DSMPDF/DSM-II\\_Homosexuality\\_Revision.pdf](http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf); see also Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51, 69 (1999).

50. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 532–38 (4th ed. 1994).

51. Even progressive legislation such as the Gender Recognition Act, passed by the British parliament in 2004, which allows transgender persons to marry in their self-identified status without undergoing surgery, requires the applicant to demonstrate “gender dysphoria.” Gender Recognition Act, 2004, c. 7 (U.K.).

52. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 412 (1908) (justifying protective legislation that reduced women’s working hours). The Supreme Court in *Muller* justified its result by noting:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

*Id.* at 421.

with medical community input. They then spent much of the later part of the century fighting the image of the “weaker sex.” Even ostensibly benevolent stereotypes can provide support for a system of inequality.<sup>53</sup> Stereotypes play a powerful but silent role in discrimination. They should not be underestimated.

Beyond the problems of the stereotypes that terms like “disorder” raise, stereotypes plague gender roles generally because once labeled male or female, our brain begins an extensive cross-referencing of implicit associations that influence our evaluations of persons and groups<sup>54</sup> that reflect stereotyped views of male and female.<sup>55</sup> Commentators have pointed out the shortcomings of the legal system for Title VII plaintiffs in remedying gender (and race) discrimination because discrimination is often the product of employers’ embedded biases, as opposed to conscious action, and such discrimination is difficult to prove under current law because implicit biases hide from even the actor’s own consciousness.<sup>56</sup>

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53. For example, seeing women as warm and empathetic, good qualities, “may actually undercut perceptions of their competence.” See Jost & Kay, *supra* note 44, at 508 (discussing the role of stereotyping in maintaining support for the status quo and finding that “[t]emporary activation of culturally available gender stereotypes does lead women—and in some circumstances men—to embrace the system (with its attendant degree of inequality) more enthusiastically than they otherwise would.”); see also Sandra Monk Forsythe et al., *Dress as an Influence on the Perceptions of Management Characteristics in Women*, 13 HOME ECON. RES. J. 112 (1984); Barbara L. Frederickson & Tomi-Ann Roberts, *Objectification Theory: Toward Understanding Women’s Lived Experiences and Mental Health Risks*, 21 PSYCHOL. WOMEN Q. 173, 179 (1997) (“[T]heories of socialization would predict that with repeated exposure to the array of subtle external pressures to enhance physical beauty, girls and women come to experience their efforts to improve their appearance as freely chosen, or even natural.”).
54. See Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 364 (Daniel T. Gilbert et al. eds., 4<sup>th</sup> ed. 1998); Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493, 511–13 (1995); Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136, 140–41 (1996). See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing implicit attitudes and stereotypes); Williams, *supra* note 16, (discussing studies); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Value*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (finding that implicit biases correlate with actual behaviors).
55. See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 196–97 (1995).
56. See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005); Krieger, *supra* note 40.

*C. Employment Discrimination, Transsexuals,  
and the Nonconformist Frame*

Title VII prohibits discrimination “because of sex.”<sup>57</sup> But when transsexuals sued on the basis of discrimination, the early cases held that discrimination “because of sex” meant discrimination because one was a male or a female, not transsexual.<sup>58</sup> Nor did gay and lesbian plaintiffs fare any better because the courts reasoned that the discrimination was based on sexual orientation and not sex.<sup>59</sup> The lower courts seemed engaged in a Clintonesque effort to narrow the meaning of the word sex.

The Supreme Court, which notoriously had declared in a past case that pregnancy had nothing to do with sex,<sup>60</sup> also weighed in on the meaning of sex but in a different context. In *Price Waterhouse vs. Hopkins*,<sup>61</sup> the Supreme Court recognized that an employer discriminated against the employee when it denied her a promotion because she was “too macho” and “should walk more femininely, talk more femininely, and wear some jewelry and makeup.”<sup>62</sup> The partners had nothing against females, they just wanted a real one, which, in their opinion, was more Barbie and less GI Joe. The Supreme Court’s opinion focused on the stereotypes that were at the heart of the partners’ actions. The majority found discrimination because of sex, stating, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>63</sup> This “sex stereotyping” theory recognized some of the complexity embedded in gender discrimination claims. The partners could not deny Ann Hopkins membership because she did not conform to gender stereotypes, opening up potential claims on behalf of gays, lesbians, and transgender persons. Sex discrimination involves not only discrimination because someone is male or female, but because someone does not conform to stereotypes about his or her sex, including who men and women have sex with (gay, lesbian, and bisexual persons), and what his or her gender identity will be (transsexuals).

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57. 42 U.S.C. § 2000e-2 (2006).

58. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977).

59. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 331–32 (9th Cir. 1979).

60. See *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

61. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

62. *Hopkins*, 490 U.S. at 235.

63. *Hopkins*, 490 U.S. at 251.

*Price Waterhouse* proved a successful litigation tool for transsexual, gay, and lesbian and plaintiffs,<sup>64</sup> attempting to come within Title VII's protection against discrimination because of sex. The transsexual plaintiffs framed discrimination against them as discrimination based on their failure to conform to the employer's stereotype of a male or female. One court considering the issue agreed that "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."<sup>65</sup> Similarly, the gay and lesbian plaintiffs framed the claim as discrimination based on a failure to conform to the stereotype of males having sexual attraction to females and females to males.<sup>66</sup> Feminists expanded on the theory as well. They were able to show that employers discriminated against them based on stereotyped notions about a woman's commitment to her job versus her family.<sup>67</sup>

Although there have been victories in each of these types of cases, there is still the problem that sex stereotyping needs to refer to the binary system and its embedded stereotypes for success. Thus, to state the claim, one needs to reinforce the stereotype.<sup>68</sup> Ultimately, what plaintiffs seek in a Title VII discrimination case is to be treated as individuals.<sup>69</sup>

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64. See, e.g., *Smith v. Salem, Ohio*, 378 F.3d 566, 572–73 (6th Cir. 2004) (holding that a transgender plaintiff can bring gender stereotyping claim); *Barnes v. Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (same as in *Smith v. Salem, Ohio*); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass 2002); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002).

65. *Smith*, 378 F.3d at 575.

66. *Centola*, 183 F. Supp. 2d at 403; *Heller*, 195 F. Supp. 2d at 1212.

67. See *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004).

68. Some commentators have referred to this as the "anchor" gender. See Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 465 (2004); Elizabeth M. Glaser & Zachary A. Kramer, *Trans Fat*, Law & Soc. Inquiry (forthcoming 2010), (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337129)). The same problem of referencing and reinforcing the existing binary occurs in "masculinities" theory. See generally Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201 (2008); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004).

69. See *L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978) (striking down the requirement that female employees make larger contributions than male employees to the pension fund based on the statistical determination that females live longer than males, and requiring individualized treatment of employees rather than assessment of risk based on sex). Dismissing the statistically provable fact that women generally live longer than men, the Court explained "[e]ven a true generalization about the class is an insufficient reason for [discrimination]," and "[i]t is now well

Early feminists did hold that as a goal, reflected most minimally in Marlo Thomas' album and show for kids "Free to be... you and me."<sup>70</sup> Although the court attempts to honor that freedom in *Price Waterhouse*, the baseline that it establishes—its frame of reference—is gender conformists or those who act according to stereotypes. That frame is critical because the connection that is made in the listener's mind is a person who acts contrary to the rules of society. But if the goal is to move away from rigid stereotypical role models, then the nonconformity frame does not serve the purpose well in cognitive terms because it reinforces the stereotypes by using them as baselines. It is also ironic to label the "macho" Ann Hopkins a nonconformist in her male dominated environment. She conformed to the situation just as early feminists strove to dress in the male uniform and conform as much as possible to the workplace culture.<sup>71</sup>

Choice of a gendered baseline may not be surprising given another cognitive bias—the status quo bias.<sup>72</sup> All things being equal, humans tend to place more value on the position that they presently occupy.<sup>73</sup> We often erroneously overvalue our present position because it *is* our present position and not because it is the better option.<sup>74</sup> So too, we are likely to use that present position as the basis of comparison for any changes. But when we make this comparison, we inevitably reinforce the status quo. Reinforcement of the status quo is an especially unnecessary detour under Title VII cases for transsexuals because, as one district

recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Manhart*, 432 U.S. at 708, 707.

70. MARLO THOMAS AND FRIENDS, *FREE TO BE . . . YOU AND ME* (Bell Records 1972).

71. See Jane M. Siegel, *Thank You, Sarah Palin, for Reminding Us: It's Not about the Clothes*, 17 VA. J. SOC. POL'Y & L. 144, 166–171 (2009) (noting the 1970's "uniform" suit outfit prescribed for women in the workplace was replaced in the 1980's by the equally masculine "power dressing," following the general advice "to downplay femininity.")

72. Daniel Kahnemann et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199–203 (1991); Russell Korobkin, *The Status Quo and Contract Default Rules*, 83 CORNELL L. REV. 608, 625–30 (1998).

73. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (explaining that the "status quo bias" refers to an individual's tendency "to prefer the present state of the world to alternative states, all other things being equal" and citing, as an example, Williams Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988)).

74. See, e.g., Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in *HEURISTICS AND BIASES*, *supra* note 47, at 120, 120–138 (discussing the concept of anchoring and noting that it "appears to be both prevalent and robust[, and the] contaminating effects of irrelevant anchors can be observed in numerous real-world contexts").

court recently recognized, discrimination based on sex includes discrimination because the plaintiff was transsexual.<sup>75</sup> There is no need to explore the intricacies of gender nonconformity theory. Rather, there is a need to correct the misstep in the early cases that failed to recognize this discrimination comes within Title VII's language.

### CONCLUSION

Studies in psychology expose the rational thinker as an urban myth. The myth persists because our brains conduct a lot of work behind the scenes. Our situation can influence us to behave in ways that we think counter to our general disposition. Language choice can guide us to erroneous decisions, and we categorize our world in ways that often lead to imprecise judgments. To continue the job of rooting out gender inequality requires deliberate thought and understanding of how embedded that inequality may be in our own brains. ♣

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75. *Schroer v. Billington*, 577 F.Supp.2d 293, 306–08 (D.D.C. 2006) (“Imagine that an employee is fired because she converts from Christianity to Judaism [and] her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ . . . Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion.”).

