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STEREOTYPES AS CHANNELS AND THE SOCIAL MODEL OF DISCRIMINATION

MARCIA L. MCCORMICK*

I. INTRODUCTION

The “glass ceiling” is one of many metaphors we use to talk about systematic inequalities in particular workplaces, the labor force more generally, and the distribution of social goods along identity lines most broadly. It was first coined in 1986 to describe the phenomenon of an invisible barrier that women did not seem to be able to cross in their efforts to ascend to the highest positions in businesses and government.¹ The focus of most research and discussion of the glass ceiling has glossed over important race-based inequalities among women; more recently, the barrier that women of color face has been called the “concrete ceiling.”² This shift in language is important not just to highlight disparities among women, but also to account for the realities of stalled progress and the debate about how to fix gender gaps. A glass ceiling can be shattered by a single woman with a hammer, but a concrete ceiling “need[s] a door and there need to be other people on the other side of that door” to help a person through.³

* Thanks to Claire Wiltse for inviting me to participate in this excellent symposium. This essay is an outgrowth of research that I have been doing for years connected with other projects, and many research assistants have helped along the way, including James Bertucci, D’Ann Bey, Anne Blake, John Bowen, Hayley Collins, Jesse Packard, Jillian Plescia, Jessica Scales, and Robert Zimmerman. The thoughts in this essay have also benefitted from discussions and workshops on these topics at the annual Colloquium on Scholarship in Labor and Employment Law, the annual meeting at the Southeastern Association of Law Schools, and internal faculty workshops at the Saint Louis University School of Law.

1. Carol Hymowitz & Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can’t Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs*, WALL ST. J., Mar. 24, 1986, at 1; see also ANN M. MORRISON ET AL., *BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA’S LARGEST CORPORATIONS?* (1987) (studying women in Fortune 100 companies).

2. Jo Piazza, *Women of Color Hit a “Concrete Ceiling” in Business*, WALL ST. J., Sept. 27, 2016, at R9. In addition to the concrete ceiling, “bamboo ceiling” is a term coined specifically to describe the barriers to progress for people of Asian descent. JANE HYUN, *BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS* (2005).

3. Piazza, *supra* note 2 (quoting Annalisa Adams-Qualtiere, a leader in human resources departments for a number of large organizations).

This essay's focus will be on the ways that identity matters to advancement at work, particularly as it is tied to stereotyping and its connection with gender discrimination. I think we all have a sense about the meaning of these concepts – of what identity is, what stereotypes are, and how they might work to discriminate against some historically disempowered groups. And the law, because we create it, embodies those concepts. Title VII, for example, prohibits discrimination on the basis of sex,⁴ and the Supreme Court has long recognized that at least some sex stereotyping, penalizing a woman for not fitting a stereotype, for example, can be a form of sex discrimination.⁵

Despite that understanding and the legal recognition of the pernicious nature of stereotypes, as the other contributors to this symposium document, sex-based gaps in occupational categories, in level of achievement, in pay, and in wealth persist. The law, as it is, is not fixing what is broken. And part of the reason for the law's ineffectiveness is that much of what we think we know about identity, what stereotypes are, and how they operate is likely wrong, or at least not entirely accurate. Our common understanding does not accurately assess what social science has revealed to be true. As a result, the law as it is currently enforced does not do a very good job of getting at the cause of inequality.

First, I have to make a disclaimer because I am a lawyer – and that actually is the disclaimer. I am a lawyer, not a psychologist, but most of what I am going to write about is psychological research about the human decision-making process in a social context. So why am I talking about the science of decision-making, you might ask? Maybe this is really obvious, but it is because human decision-making in a social context is central to the way that paid work is distributed. In other words, some human's (or group of humans) choice is usually the gatekeeper to jobs. Understanding how those decisions get made is central to understanding what is causing them to be made in a way that contributes to continuing inequalities.

This essay will explore the effects of stereotypes from two standpoints: their effects on the actions of the person making the decision, and their effects on the actions of people subject to the decision. Stereotypes influence cognitive processes in ways the decision-maker may not realize, and being a subject of stereotyping changes the performance of an actor in ways related and unrelated to the stereotype. Most of the literature on stereotypes is focused on only one of these. Looking at both helps us see some reasons why our current approach to anti-discrimination law, focused mostly on fully self-aware prejudice and putting the burden on the person subject to discrimination to recognize and challenge it, is not working to erase inequality and in fact has institutionalized it.

4. 42 U.S.C. § 2000e-2(a) (2012).

5. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

II. STEREOTYPES OF OUTSIDERS

Most of us think of the core of identity as being something fairly fixed and innate⁶ – things people are born with that cannot or should not be changed. Our sense of identity is who we are and who we believe we have always been. While we might acknowledge that our identity has been shaped by experiences, to some extent, we mostly view that as reactive, with those experiences having happened to us in a way at least somewhat out of our control.⁷ The courts tend to adopt this view as well. We treat sex and race as part of this core. In the words of the Supreme Court, these are immutable characteristics with discrete boundaries.⁸ Those categories carry with them more than a simple label, although as discussed in Part III, even a simple label has powerful consequences. These categories have baggage. They bring with them a whole group of social meanings that many people believe link the identity characteristic with behaviors, feelings, and sometimes abilities. And we all get stuck with that baggage as a function of our interaction with each other.

What I am describing is what stereotypes are and what effects they have, but most people do not think of *all* of that baggage as stereotyping – at least not the discriminatory kind of stereotyping. Most of us probably think of stereotypes as the “Archie Bunker” kind of stereotype, which embodies what we recognize as overt prejudice. Archie Bunker was a character in the groundbreaking television situation comedy “All in the Family,” a television series that ran through most of the 1970s.⁹ Archie, the father of the family, was a white blue-collar worker whose vocal prejudices were used to explore controversial issues like racism, sexism, gay rights, reproductive health, and the Vietnam War.¹⁰

Prejudice like this often comes in the form of descriptive stereotypes, descriptions of what people *are* like, that are often negative and inaccurate.

6. Philosophers have been debating what identity is for centuries, and it is a somewhat problematic concept because our bodies change over time and defining the mind is difficult. *See generally* Eric T. Olson, *Personal Identity*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Aug. 20, 2012), <http://plato.stanford.edu/archives/spr2016/entries/identity-personal/>.

7. *See generally* ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950) (describing identity formation as the effort by an individual to integrate experiences and characteristics into a stable sense of self).

8. *See e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (contemplating searching review under the Fourteenth Amendment for “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

9. *All in the Family* (CBS television broadcast Jan. 12, 1971–Apr. 8, 1979).

10. *Id.*

These are also tied to prescriptive stereotypes about what people *should* be like. So a stereotype that women cannot stand up to men or should defer to men or that women cannot do the physically demanding and dangerous work of firefighters and should not want to do the physically demanding and dangerous work of firefighters is clearly discrimination. And when many people think about stereotypes as discrimination, it is this kind of thing they imagine: a supervisor who is a throwback to an earlier era, skeptical that women can be good engineers, for example, and so not taking seriously women who apply for an engineering position. We think that stereotypes are these explicit prejudices and that they operate as part of people's conscious decision-making processes, so that if you asked that supervisor why he did not look at women candidates and he was honest about it, he would say that it was because he did not think that woman could be good engineers.

That kind of stereotyping does exist, and this kind of discrimination happens more than we like to think still.¹¹ But that is really just the tip of the iceberg about what stereotypes are and how they influence human behavior. Stereotypes are not always part of our fully conscious decision-making process, but they still shape what we believe, what we think, and what we do. Part of the way that our brains work to navigate the world is by creating categories (or schema) for things that operate as cognitive shortcuts.¹² According to cognitive psychology research, this process is hard wired into our brains.¹³ The things in our world vary incredibly, and if we had to start from scratch to understand the properties of each variation we encountered, we would not be able to act.¹⁴ So to function, we generalize about things – objects and people both – based on a few encounters with them, use those generalizations to define categories, and in the future, quickly sort new things into those categories without reflection.¹⁵ You can imagine why this is useful with a concrete example. I do not have to think about whether this particular round firm object is edible if it has the characteristics of the category in my mind called “apple.” And if I have two round, firm, hand-sized objects, but one has fuzz on the outside, and rebounds slightly when I grip it, I know not to take a bite out of it because it is a tennis ball, not an apple. So we use the definitions

11. See, e.g., Michael Selmi, *Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J 1 (2005).

12. See JEAN MATTER MANDLER, *STORIES, SCRIPTS, AND SCENES: ASPECTS OF SCHEMA THEORY* 1–10 (1984).

13. See *id.* (describing the process of categorization schemas as automatic).

14. See Eleanor Rosch, *Human Categorization*, in *STUDIES IN CROSS-CULTURAL PSYCHOLOGY* 1, 1–2 (Neil Warren ed., 1977) (“Since no organism can cope with infinite diversity, one of the most basic functions of all organisms is the cutting up of the environment into classifications by which nonidentical stimuli can be treated as equivalent.”).

15. Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION* 27, 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

of our categories to define the thing we have encountered and to predict how that thing is likely to act or what we can do with it.¹⁶ This sorting function lets us make quick judgments, makes the world seem more predictable, and allows us to act.

Although this process is important to our ability to function, relying on categories for quick thinking – in other words, creating group identities – has deep consequences. Assigning an object to a group makes us see that object more like other things within that group and less like things outside of that group.¹⁷ This process works the same way when people are given group identities. Even when the distinction we make is arbitrary, for example where people are randomly assigned to teams, those people view members of their own group (the in-group) as more like themselves, and others (the out-group) as more different from them than if the others had no group identity.¹⁸ We not only assign other people to groups; we assign or identify ourselves as part groups as well, and that process has similarly important consequences. People who identify as part of a group are also far less able to see differences among members of the out-group even when they have identical information about individuals in the out-group and individuals in the in-group.¹⁹

16. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188–89 (1995).

17. See Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 J. ABNORMAL & SOC. PSYCHOL. 350, 355 (1956) (finding that when nonsense syllables were linked to a spot on a spatial continuum, participants tended to judge syllables linked to another spot as more different from the first than if no syllables had been linked to any spot); Krieger, *supra* note 16, at 1186 n.103 (describing two studies and citing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101, 104 (1963) (when lines were grouped, participants judged their comparative length as more similar when they compared lines within the same group and more different when compared to one in the other group than the same people did when they compared the length of lines not assigned to any group) and Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969) (describing the above experiment in more detail)).

18. Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 58, 61 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Ann Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup -Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

19. David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION AND RACISM 127, 131 (John F. Dovidio & Samuel L. Gaertner eds., 1986). Many studies that support this point are summarized in Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception*, in PREJUDICE, DISCRIMINATION AND RACISM, *supra* at 165, 168–73. Some of these studies asked members of student groups to rate the similarity of members of their own and other groups and to assess the traits of members of their own and different groups, asking people to assess how likely someone in their group would fit a

As you can probably predict from this description, one consequence of these cognitive structures is the tendency to stereotype, but the stereotype I am describing does not sound like the prejudice used as part of conscious processing that we all recognize as discriminatory. Stereotypes are more powerful than that. They are cognitive shortcuts – part of the process of perceiving, processing, and remembering information – that link personal traits with salient characteristics to simplify thinking.²⁰ Once set, these cognitive shortcuts “bias[] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people,” and they influence judgment continuously.²¹ These cognitive shortcuts create expectations that actually change how we perceive others, remember things about others, and interpret motivations for the actions of others.²² We tend to remember the things a person actually did *only if those actions fit our stereotypes* of that person; we tend to *believe we remember* a person doing things consistent with the stereotypes *even if the person never did them*; and we tend to *forget* the things that *did not conform* to those stereotypes.²³ Additionally, we tend to assume that a person who acts consistently with a stereotype acted because of innate characteristics – they are this type of person, so they will usually act this way – but a person who acts inconsistently with a stereotype acted because of transitional or situational factors – that they are not this type of person and so will not usually act this way.²⁴

Groups or categories are created by our choice of what characteristics matter – which are salient.²⁵ Once a characteristic, such as gender or race, becomes salient to a person, that characteristic defines a group.²⁶ But what becomes salient is neither inevitable nor natural. Individuals define what is salient in any given context. Thus at some point, individuals choose what makes something a group and who will belong in those groups, although that

stereotype and how likely someone outside of their group would, and asking people with a particular opinion to rate the similarity of people with the same or a different opinion. *Id.*

20. Krieger, *supra* note 16, at 1187–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321–22 (2000). This description of stereotypes may sound harmless, but in a society like ours with persistent gaps and inequalities, stereotypes may perpetuate and even aggravate those gaps.

21. Krieger, *supra* note 16, at 1188.

22. Krieger, *supra* note 16, at 1200–09.

23. Krieger, *supra* note 16, at 1207–09 (summarizing research on stereotypes and memory); see also Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41–45 (1977).

24. Krieger, *supra* note 16, at 1204–07.

25. See Krieger, *supra* note 16, at 1190.

26. See Krieger, *supra* note 16, at 1190.

choice may not be one taken after reflection, but instead may be something learned from others in society.²⁷

Let me give a description of how stereotypes operate in this way.²⁸ Imagine that you work in an office that starts with a group meeting every morning at 9 AM. Today, two people, both in their early thirties, were late: Donna and Jim. Why was Donna late—what do you think the boss and maybe their coworkers will assume? Getting the kids out the door and to daycare or school must have been a challenge this morning. You might notice that Donna looks a little tired. That is probably because her kids kept her up. Maybe one has been sick. She is having a hard time juggling it all. And she is going to keep having a hard time because she is going to keep juggling. So is Donna likely to have a chronic problem of not prioritizing work?

Why was Jim late? Who thinks it is because he had a hard time getting the kids out the door and to daycare or school? We are likely to attribute Jim's lateness to traffic, something out of his control. If Jim looks tired is it more likely because of caregiving or because he has been working too hard? And if we assume traffic made Jim late and he has been working hard, is Jim likely to have a chronic problem of not prioritizing work?

The way this plays out is that the person calling the meeting is likely to interpret the exact same conduct differently depending on whether it was done by a woman or a man. That person may “remember” Donna's lateness even if she is almost never late, and may not remember Jim ever being late before even if he has been. Donna's lateness is more likely to be attributed to her choices and as part of who she is – as a woman, she is assumed to put her family before her job. And Jim is assumed to put his job before his family – or as supporting his family through his devotion to work – and as persistently making that choice. I hope you can see how the effects of these cognitive shortcuts can lead to real job consequences for both men and women. Is now the right time for Donna to get a promotion if we assume she is juggling work and family? Doesn't Jim seem the more natural choice?

27. See, e.g., H.J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 35 (1973) (“Stereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society.”); David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, in 12 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 53, 64 (Leonard Berkowitz ed., 1979) (describing how behaviors get attributed to groups); Richard Nisbett & Kaiping Peng, *Culture and Systems of Thought*, 108 *PSYCHOL. REV.* 291, 291–92 (2001) (describing their review of the literature on how societies differ in systems of thought and drawing conclusions about how those differences influence cognitive processes).

28. This example is adopted from 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, 433–34 (2003).

The challenge here is that well-intentioned people have cognitive shortcuts that cause them to interpret information differently depending on the identity of the person acting.²⁹ And especially because most people are well-intentioned and believe they are not consciously using different standards, they might be more resistant to recognize that their decisions might be flawed.³⁰ Yet study after study shows how well-meaning people discriminate on the basis of sex and race in making employment decisions.

And these externally directed decisions are not the only kind that have effects on the workplace. Stereotypes also have important effects on the actions of people who are stereotyped. The next section explores those effects.

III. STEREOTYPES INTERNALLY

Stereotypes are even more pernicious than the prior section described. They do not just affect people making decisions about other people; they affect how people themselves perform in different contexts.³¹ In other words, cognitive biases affect how I perceive others, but stereotypes can also affect how I behave in ways that are difficult for me to control. This phenomenon is known as “stereotype threat.” This label is imperfect because it suggests that a person’s performance is affected because he or she is afraid it will fulfill a stereotype,³² which in turn could suggest that the solution is for that person simply to ignore the stereotype and conquer the fear.³³ The label thus implies that the performance effects are caused by fully self-aware choices. But like with cognitive biases, this is not the case. I will illustrate by describing some

29. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

30. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (“[T]he human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.”); *id.* at 331-36.

31. See generally Sandra Lipsitz Bem, *Gender Schema Theory: A Cognitive Account of Sex Typing*, 88 PSYCHOL. REV. 354 (1981) (describing how children learn to define themselves and learn to evaluate their adequacy as people by gender schema).

32. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995). The conclusions that are drawn from this study by the authors and others who rely on it as they relate to cognitive performance are somewhat controversial because of the methodology used in the study. See, e.g., Paul R. Sackett et al., *On Interpreting Stereotype Threat as Accounting for African American-White Differences on Cognitive Tests*, 59 AM. PSYCHOL. 7 (2004); Lee Jussim, *Is Stereotype Threat Overcooked, Overstated, and Oversold?*, HETERODOX ACAD. (Dec. 30, 2015), <http://heterodoxacademy.org/2015/12/30/is-stereotype-threat-overcooked-overstated-and-oversold/>.

33. See CLAUDE M. STEELE, *WHISTLING VIVALDI* 46 (2010) (describing how an “observer’s perspective” on the cause of underperformance of stereotyped groups leads to conclusions that the cause is some character or willpower deficiency in the person stereotyped).

studies that show how stereotypes affect performance in ways difficult to control.

Many of these studies have been conducted in the context of race, but some have also been specifically focused on sex. I want to talk mostly about a couple of race studies, though, because the results are so powerful. You may be familiar with studies that show African Americans tend to get lower scores than white people on some standardized tests like the SAT.³⁴ And women tend to get lower scores than men on the math portion of the SAT.³⁵ What you may not know is that both groups perform differently if they are told something different about what the test is measuring.³⁶

You may also only know about stereotype threat studies affecting historically disadvantaged groups – which tend to give the impression that it is an issue only for those groups and not for white people when it comes to race or men when it comes to sex. But this phenomenon works the same way for majorities, also. My favorite illustration is a set of studies involving white and black subjects and miniature golf.³⁷ These studies looked at two different stereotypes, one that was about black people performing more poorly, and one that was about white people performing more poorly.³⁸ The study actually found stereotype threat affected both white and black subjects.³⁹

Two groups of golfers, one white and one black, were told before they began golfing, that the experiment they were a part of was testing the analytical skills of the participants.⁴⁰ A control group of each was not told the purpose of the experiment.⁴¹ The white golfers did significantly better than the black golfers in the experimental group.⁴² And the black golfers in the control group did significantly better than the black golfers in the experimental

34. See generally THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998).

35. See Hannah-Hanh D. Nguyen & Ann Marie Ryan, *Does Stereotype Threat Affect Test Performance of Minorities and Women? A Meta-Analysis of Experimental Evidence*, 93 J. APPLIED PSYCHOL. 1314, 1325–26 (2008).

36. Nguyen & Ryan, *supra* note 35, at 1315, 1316 tbl.2, 1325, 1328; Steele & Aronson, *supra* note 32, at 798, 808-10; see also Steven J. Spencer, et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOCIAL PSYCHOL. 4 (1999) (showing that women performed better on difficult math tests when they were told that the tests had been proven not to have disparate gender performance compared to the control group which was not told the same thing about the test).

37. The studies are reported in Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999).

38. Stone et al., *supra* note 37, at 1215–16.

39. Stone et al., *supra* note 37, at 1219, 1223–24.

40. Stone et al., *supra* note 37, at 1216.

41. Stone et al., *supra* note 37, at 1216.

42. Stone et al., *supra* note 37, at 1217 tbl.1.

group.⁴³ The second set of experimental groups, again, one white and one black, were told that the experiment was measuring natural athletic ability.⁴⁴ In this experimental group, the black students outperformed the white students, and the white students in the experimental group performed significantly worse than the white students in the control group.⁴⁵ For both groups, being told that the test would measure something that was a negative stereotype resulted in substantially lower performance, and for both groups, being told that the test would measure something that was a positive stereotype resulted in better performance.

This is one set of important studies about the specific role of stereotypes linked with specific traits, and there are others that suggest that negative stereotypes can also influence performance more broadly. For example, in the educational context, African American students tend to underperform academically; they have poorer grades and other academic outcomes than white students with the same SAT scores.⁴⁶ And at least sometimes, stigma that embodies a number of negative stereotypes has effects on tasks unrelated to any particular stereotype. So, for example, members of socially disadvantaged groups who believe their identity is secret perform puzzle-solving tasks more effectively than members of socially disadvantaged groups who believe their identity is known to the person evaluating that performance.⁴⁷ So stereotypes can have effects on behavior linked to them and effects on behavior not linked with them.

Thus, stereotyping affects not just how people make decisions about others, it also affects how those subject to decisions perform. The cumulative effect of both sides of this equation has significant implications for anti-discrimination law. The next section explores the law's ability to address them.

IV. ACCOUNTING FOR STEREOTYPES IN LAW

Now that we have an idea of the cumulative effect of stereotypes and how they might impact the workplace, what do we do with this? One answer is for

43. Stone et al., *supra* note 37, at 1217 tbl.1.

44. Stone et al., *supra* note 37, at 1216. A second experiment designed to delve more deeply into the effect of stereotypes on white people focused solely on white people and athletic ability. Stone et al., *supra* note 37, at 1219–21.

45. Stone et al., *supra* note 37, at 1217 tbl.1. In the study of only white test takers, the white test takers in the group were told that the test measured hand-eye coordination performed substantially worse than the control group who were told that the test measured general sports performance. Stone et al., *supra* note 37, at 1221–22.

46. See STEELE, *supra* note 33, at 19–20.

47. See, e.g., Karla Hoff & Priyanka Panday, *Discrimination, Social Identity, and Durable Inequalities*, 96 AM. ECON. REV. 206 (2006).

the law to provide some correction, usually in the form of some penalty.⁴⁸ This is more challenging than it might first appear. Scholars and advocates have been pushing courts to incorporate this science of human decision-making into the definition of what discrimination is since at least the late 1990's,⁴⁹ and some judges have accepted that.⁵⁰ So far, the Supreme Court has not explicitly done so, and in fact has rejected its relevance in many discrimination cases from *Price Waterhouse v. Hopkins* – which was the first case to recognize sex stereotyping as discrimination and where the Court mostly ignored the expert evidence, and focused on the most clearly prejudiced statements as sufficient to prove sex discrimination⁵¹ – to the Court's most recent discussion in *Wal-Mart Stores, Inc. v. Dukes* – which rejected a version of the implicit bias research as relevant to whether the culture of Wal-Mart produced sex discrimination in promotions and pay.⁵²

Our legal model of discrimination defines what is unlawful in an extremely narrow way, a way that does not actually reflect how people behave. Anti-discrimination law penalizes acts that are otherwise perfectly legal if those acts are done because the actor was motivated by one limited aspect of the identity of the injured party.⁵³ Let me be more concrete, using employment law as an

48. Not everyone agrees that the kind of discrimination that is not the fully self-aware prejudice type of stereotype should be penalized by law. *See, e.g.*, Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130–34 (1999) (arguing that there should be no remedy for the kind of discrimination that is caused by implicit bias). But others point out that not every legal wrong requires motive as the state of mind. Marc Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 464 (analogizing liability for discrimination caused by cognitive bias to the law related to dangerous conditions on land); Michael Selmi, *Response to Professor Wax Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1234 (1999).

49. *See, e.g.*, Krieger, *supra* note 16.

50. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (implying that “subconscious stereotypes and prejudices” were a problem that disparate impact discrimination could reach); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) (recognizing stereotypes as a form of cognitive bias and discrimination); Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 151–52 (2010) (recognizing the power of implicit biases and their role in decision-making, but limiting employment discrimination prohibitions to conscious bias).

51. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255–56 (1989) (holding that sex stereotyping played a role in the employer's decision, but finding that the expert evidence of how stereotypes infect thinking in not fully self-conscious ways was unnecessary because enough comments showed explicit bias).

52. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–55 (2011).

53. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609–10 (1993); *see* *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278–79 (1979) (holding that disparate treatment under the Fourteenth Amendment required discriminatory purpose, which was “more than intent as volition or intent as awareness of consequences”).

example of what is true in a variety of contexts. It is perfectly lawful to fire a person for a good reason, no reason, a stupid reason, or even a morally bad reason.⁵⁴ Under federal law, there are only a few bad reasons that will turn that lawful act into an unlawful one, and even only a few identity characteristics that will do so: race, sex, national origin, religion, color,⁵⁵ age,⁵⁶ disability unimportant to the particular work at issue,⁵⁷ genetic makeup,⁵⁸ and membership in the military.⁵⁹

And we give defendants the benefit of every doubt for a number of reasons. Some are formal and built into the system, like the normal structures of liability, which provide that plaintiffs bear the burden to prove their allegations.⁶⁰ There are also informal structures too, and one of the most powerful is the way most of us conceive the world. Many Americans embrace the *just world theory* as a core belief. The just world theory posits that good people are rewarded and bad people are penalized, and vice versa; if a person is rewarded it was because that person did something good, and if someone is penalized, that person must have done something bad to cause the penalty.⁶¹ This ideal is woven into the American fabric in the form of the American Dream: that hard work and perseverance will lead to well-being and prosperity.⁶² When something bad happens to a person, like that they do not get a job or a promotion or are disciplined or fired, our strongest instinct is to believe the person did something wrong to cause such a thing unless the context clearly suggests otherwise.

Relatedly, the concept of discrimination, especially for race, but to some extent for sex, too, is abhorrent for many white people.⁶³ It brings up mental pictures of the Holocaust, firehoses and dogs trained on school children, and

54. See *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 606 (2008).

55. 42 U.S.C. § 2000e-2 (2012).

56. 29 U.S.C. § 623 (2015).

57. 42 U.S.C. § 12112 (2012).

58. 42 U.S.C. § 2000ff-2 (2012).

59. 38 U.S.C. §§ 4311-19 (2012).

60. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513–20 (1993) (discussing the importance of keeping the burden of proof on the plaintiff in a discrimination case).

61. See generally MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980) (positing the just world theory as a description of the way people find meaning in their experiences).

62. See Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics*, 121 Q. J. ECON. 699, 699–702 (2006).

63. I single out white people here purposefully. White people and people of color tend to define racism differently, with white people defining it as an internal affective state, like fully self-aware prejudice, and people of color seeing racism in the effects of systems and institutions. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 8, 11–12 (2d ed. 2006); see also PEW RESEARCH CTR., *ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART* 11 (2016).

black men hung from trees. You can imagine the power of that aversion being multiplied and personalized when an outsider is asked to evaluate a decision made by someone else. If the evaluator identifies with the person in power, something it is more likely for white people and men to do,⁶⁴ the evaluator will have an incentive to deny that race or sex had anything to do with the decision.⁶⁵ To admit the possibility of discrimination in a situation where I identify with the decision-maker is to admit that I might discriminate, which is morally wrong and which I cannot admit to myself even that I would ever do. So white people, at least, tend to assume that decisions in the workplace are not made discriminatorily unless there is fairly strong evidence to suggest otherwise.⁶⁶

The combination of these core values works to place an extra thumb on the scale for defendants. First, if a bad thing happened to an employee, it is easier to think that something the employee did wrong caused that bad thing to happen. Second, it is easier to think that even if the employee did nothing wrong, at the very least, the defendant was motivated by something other than the race, sex, or other specially protected identity characteristic of the employee. For some identity characteristics – particularly race, color, and national origin, but sometimes also sex, religion, and age – the common approach is to assume a person would never do that because it is so morally

64. See DANIEL BYRD & BRUCE MIRKEN, POST-RACIAL? AMERICANS AND RACE IN THE AGE OF OBAMA 16-18 (2011), available at <http://greenlining.org/wp-content/uploads/2013/02/AmericansandRaceinAgeofObama.pdf> (describing how racial resentment and the belief that hard work leads to success causes more white people to believe that institutions treat black people the same as or better than white people); see also Pat Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (reporting on empirical study showing that white judges ruled differently on racial harassment cases than black judges did, regardless of political affiliation); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (reporting on empirical study that showed that plaintiffs in sex discrimination cases were twice as likely to prevail if a woman was on the appellate panel); Renée Nicole Souris, *The Impact of Panel Composition on Sex Discrimination Case Outcomes at the U.S. Circuit Courts 6* (unpublished manuscript) (on file with author), available at <https://www.american.edu/spa/publicpurpose/upload/Panel-Composition-on-Sex-Discrimination-Case-Outcomes-2.pdf> (citing some support that gender shapes judges' attitudes and influences case outcomes).

65. See Lawrence, *supra* note 30, at 323, 331–36 (explaining how people who agree that racism is morally wrong will repress, deny, and sublimate to avoid acknowledging that their actions or views are racist).

66. A wonderful example of this is Justice Scalia's statement in *Walmart Stores, Inc. v. Dukes* that, "left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids . . . discrimination – would select [n]eutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all" even if some managers would take actions that cause disparate impacts and others would engage in disparate treatment. 564 U.S. 338, 355 (2011).

wrong. A person would only do that if they have a character defect, and that character defect would always be on display.

There are even a number of analytical heuristics deployed in employment discrimination cases that embody these widely shared assumptions. The *stray remarks doctrine* discounts the probative effect of explicitly discriminatory statements, for example, providing that unless a biased statement is explicitly linked to the employment decision at issue, it is, at the very least, not direct evidence of discrimination, and may not be probative at all.⁶⁷ A similar heuristic is the same decision-maker defense; if the person who makes a negative employment decision made a positive employment decision for the plaintiff before, the court assumes that discrimination cannot be the motive for the negative decision because a discriminator would never make a positive decision.⁶⁸ Finally, courts tend to infer that intra-group discrimination is unlikely, at best, so that a female supervisor will not discriminate against women on the basis of sex,⁶⁹ and that if even one member of the employee's group is treated well, then the employer did not discriminate in this instance.⁷⁰

Given the multiple thumbs on the scales in favor of defendants, the law seems particularly ill-suited to remedy decisions driven by stereotyped thinking. And because the law – at least the lawsuit as a tool to coerce wrongdoers to remedy injuries they cause – is focused on changing the conduct of wrongdoers who harm others, it seems even more ill-suited to provide a remedy for the way that stereotypes operate to channel a stereotyped person's behavior.

There is one legal remedy in the antidiscrimination law toolbox that may be suited to this task: the prohibition on employment practices that cause disparate impacts on protected groups without a sufficiently necessary business justification for using those practices. In addition to prohibiting “intentional” discrimination, Title VII prohibits employment decisions that have discriminatory effects without considering the employer's motives.⁷¹ In other

67. Nancy J. Gertner, *Loser's Rules*, 122 YALE J. ONLINE 109, 118–21 (2012); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 159–60 (2012).

68. See John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 1017 (1991) (laying out the economically grounded argument that discrimination is based on tastes and assuming those tastes are persistent); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 126–31 (2011).

69. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80–81 (1998) (recognizing the possibility that same-sex harassment would violate Title VII, but listing forms of evidence that were mostly linked to inter-group comparisons).

70. See generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

71. 42 U.S.C. § 2000e-2(a)(2) (2012); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

words, criteria that do not explicitly include sex or race, but which negatively impact men of color or women of all colors are also barred unless those practices are job related and consistent with a business necessity.⁷²

Employers have always had the motivation to predict employee value with information about the potential employee that was easy to get at little cost, and they used protected classes as proxies for ability in particular fields until federal law prohibited that.⁷³ Thus, once explicit consideration of race and sex was prohibited, employers shifted to other proxies for abilities, like educational credentials or standardized tests, but those proxies were not always good predictors and their use frequently weeded out or devalued women and all people of color.⁷⁴ As noted above, at least partly because of the effects of being stereotyped, acquisition of credentials and performance on standardized ability tests can mean historically underrepresented groups look less qualified.⁷⁵ This sounds like it is a tailor-made remedy to offset the effects stereotypes have on those stereotyped, but there are at least two problems with using disparate impact. First, not all discriminatory effects can be remedied, only those that cannot be demonstrated to be sufficiently job related.⁷⁶ Second, because intentional discrimination is the model for what counts as discrimination, courts and at least some members of the public, are hostile to the idea that these kinds of cases should be allowed to be brought.⁷⁷

The Supreme Court, Congress, and the EEOC together have tailored the disparate impact doctrine to balance the negative effects of using credentials or tests against employers' business interests.⁷⁸ An employer can use a credential or test that disparately affects a protected group if the credential or test predicts

72. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003); *Griggs*, 401 U.S. at 424.

73. *E.g. Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (explaining that the goal of the ADEA was to prohibit discrimination not based on animus, but on stereotypes of older people as less productive); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding that sex cannot be used as a proxy for longevity for purposes of pension benefits); *see Griggs*, 401 U.S. at 424 (describing employer's historical practice of segregating black employees into lowest paying jobs and replacement of that system with a high school diploma requirement and the use of intelligence tests for higher paying positions).

74. *Dothard v. Rawlinson*, 433 U.S. 321, 329–32 (1977) (rejecting height and weight requirements which were used as a proxy for strength that screened out a much larger proportion of women than men because such requirements were better assessed by testing strength directly).

75. *See generally Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Dothard*, 433 U.S. at 329–31; *Griggs*, 401 U.S. at 430.

76. *See* 42 U.S.C. § 2000e-2(k).

77. *See Ricci*, 557 U.S. at 577 (stating “[a]s enacted in 1964, Title VII’s principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today” and ignoring the original statutory text prohibiting actions that had discriminatory effects).

78. *See* 42 U.S.C. §§ 2000e-2(h), (k); 29 C.F.R. pt. 1607 (2016); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 451–52 (1976); *Griggs*, 401 U.S. at 431.

success in the position it is used for.⁷⁹ For professionally developed tests, the test must be valid for its use; it must accurately measure or predict what it is supposed to measure or predict.⁸⁰ In addition, an employer must first do an analysis of the job in question to decide what skills or attributes a person needs.⁸¹ But if that has been done, evidence that the test was carefully designed may satisfy the need to demonstrate its validity.⁸² This is often not a very demanding standard.

And the current hostility to disparate impact is serious. The best example of that hostility is the Supreme Court's decision in 2009 in *Ricci v. DeStefano*, where the Court held that a city's decision to throw out the results of a promotional test because of the serious racial impact the test had was actually discrimination against white applicants.⁸³ The Court denigrated the validity of the disparate impact remedy, stating “[a]s enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today.”⁸⁴ In making that assertion, the Court cited to the first paragraph of prohibited employment practices, which prohibits “fail[ing] or refus[ing] to hire or . . . discharge[ing] any individual, or otherwise . . . discriminat[ing] against any individual . . . because of such individual's race, color, religion, sex, or national origin.”⁸⁵ The Court ignored

79. *Griggs*, 401 U.S. at 436.

80. *Id.* The EEOC guidelines provide that the American Psychological Association's generally accepted professional standards govern a validity analysis, at least for standardized tests, and that criterion-related, construct, or content validity studies will suffice. 29 C.F.R. §§ 1607.5(B), (C). The EEOC defines these concepts this way:

Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance . . .

Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated . . . Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

Id. § 1607.5(B).

81. *Albemarle Paper Co.*, 422 U.S. at 429–36; *Griggs*, 401 U.S. at 431.

82. *See Ricci*, 557 U.S. at 592–93 (holding that because the tests at issue were carefully created, they were valid enough that the employer lacked a strong basis in evidence to believe it might lose a disparate impact case).

83. *See id.* at 579–92 (assuming that avoiding disparate impact liability would be disparate treatment and finding no strong basis in evidence that the city would be liable for the disparate impact its test caused).

84. *Id.* at 577.

85. *Id.* (citing 42 U.S.C. § 2000e-2(a)(1) (2012)).

the next paragraph of the original statutory text that prohibited actions that “would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status* as an employee, because of such individual's race, color, religion, sex, or national origin,” language that clearly reaches discriminatory effects.⁸⁶ In addition to the majority's dismissal of the validity of the disparate impact cause of action, Justice Scalia, in a separate concurrence, argued that prohibiting disparate impact discrimination violated the Equal Protection clause because it required employers to consider the race and sex of employees and applicants in evaluating employment standards.⁸⁷

Although Justice Scalia's concerns about disparate impact have not been mentioned by any other Justices, the hostility to disparate impact seems clear. In the next Supreme Court case to involve disparate impact in the employment context, the Court failed to even address the disparate impact claim.⁸⁸ Since then, the Court did recognize the viability of disparate impact under the Fair Housing Act, so the doctrine is not completely moribund.⁸⁹ It still is endangered, though. The Chief Justice and Justices Alito, Scalia, and Thomas dissented, all essentially arguing that disparate impact was not real discrimination and penalizing it was bad policy.⁹⁰ Given the Republican sweep of the recent presidential and congressional elections and the appointment of conservative judge Neil Gorsuch to the Supreme Court, it is likely that the conservative view of disparate impact will become the majority relatively soon.

V. CONCLUSION

Because the law as it is applied seems to fall short of correcting for the effect of stereotyping, something more fundamental needs to happen. One possibility is an amendment of Title VII to explicitly define discrimination to incorporate how stereotypes actually work, in connection with greater support for legal interventions to remedy harmful effects. And we need greater willingness to accept that the way we've ordered our society is not neutral.

One last issue in connection with identity is important to discuss, and that is what identity characteristics really are. In this essay, I have focused mainly on sex and a little bit on race, and though there are differences, there are a lot of similarities to those identity statuses. We resort to the same main ways to describe these identities: genes, biological or phenotypical generalities, and

86. 42 U.S.C. § 2000e-2(a)(2) (2012) (emphasis added); *see Griggs*, 401 U.S. at 426 n.1 (quoting 42 U.S.C. § 2000e-2(a)(2)).

87. *Ricci*, 557 U.S. at 594–96 (Scalia, J., concurring).

88. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

89. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2511 (2015).

90. *Id.* at 2526 (Thomas, J., dissenting); *Id.* at 2532 (Alito, J., dissenting).

finally, cultural constructs. For race, the scientific community has reached a fairly broad consensus that there is as much genetic and biological diversity within so-called racial groups and maybe more, as there is between them. Race is pretty clearly a social construct, but it is one with sticking power and real world effects. Sex is more strongly linked to genetics and biological and phenotypical generalities, but there is much more variation among humans than our culture tends to recognize. Much of what we think of as sex turns out to be socially constructed, just as for race.

And this highlights the stereotype dilemma well. Stereotypes have “external” effects that injure us when other people make decisions about us, and they have “internal” effects, when we do not perform as well as we could on tasks our group is stereotypically bad at and maybe even other tasks there is no specific stereotype for. Similarly, identity is a complicated negotiation between the individual and society. To some extent, society or some outsider is the labeler of race or sex, and to some extent, individuals can self-label. External and internal labels interact to influence how others treat us and how we behave. We can choose to perform our identities in ways that meet expectations about those identities sometimes and to defy expectations other times. That may not always feel like a choice, and the performance is not always accepted as possible (or passible) by others. In other words, while I may have some control over the race or sex I identify as, I cannot completely control the race or sex others see me as having, and that label and the public attitudes towards that identity shape my behavior and performance of all kinds of tasks, not just performance of identity.

This interplay of society and the individual sounds exactly like the social model of disability, which the disability rights movement used successfully to advocate for greater access and structural change in a civil rights context. The key insight of the social model of disability is that while an impairment can be defined as existing within the body of the individual, the disadvantage or advantage because of that impairment is not located within the body of the individual, but instead in how society structures itself. Difficulty walking only becomes an obstacle when there is a step to surmount. A ramp would not pose the same difficulty. Like for disability, the markers for race and sex can be located within the individual, but they do not become a disadvantage or advantage until they interact with social structures.⁹¹

The core concept here may just be another way to talk about a male norm or a white norm, but those concepts do not seem to have had a lot of traction with the courts or the general public. Maybe this is because, as the discipline of masculinities studies tells us, individual men do not feel powerful. And as critical race studies tell us about white privilege, it is difficult for all of us of

91. SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 18 (2009).

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any race, color, sex, or class, to see privileges we may have. Perhaps changing the terms we use will help us recalibrate our understanding of discrimination and make progress towards equality. Until we make some progress there, the law will not really be able to touch that glass ceiling.