5-1-2013

The Main Obstacle to Female Leadership at the Executive Level and in Traditionally Masculine Fields: How We Can Erase Implicit Discrimination Through the Law

Grace Sang-Eun Hong

THE MAIN OBSTACLE TO FEMALE LEADERSHIP AT THE EXECUTIVE LEVEL AND IN TRADITIONALLY MASCULINE FIELDS: HOW WE CAN ERASE IMPLICIT DISCRIMINATION THROUGH THE LAW

Grace S. Hong

I. INTRODUCTION

In recent years, studies have shown that organizations in which women are more strongly represented at board or top-management levels have seen more economic success.[1] However, performance models and expectations remain male oriented, creating barriers to women's entry into these influential positions.[2] The schism between these expectations and women's gender[3] and sex create a number of problems generally foreign to their male counterparts, including the double burden syndrome (having to juggle both home and work life, though men are increasingly reporting that they too feel this burden), difficulty finding a mentor, and difficulty identifying with success or even taking responsibility for success.[4] These problems are reflected statistically: women in high and mid-level management positions are more likely to feel discriminated against (27% of women compared to 7% of men), to be single (33% compared to 18% of men), and childless (54% of women compared to 29% of men).[5]

Existing laws have proven unhelpful in changing the male-oriented models in the workplace, and in many cases have supported their continued existence.[6] Antidiscrimination laws have mainly focused on differences in biology, treating these as more legitimate than differences based on gender or the cultural manifestations of

[1] GEORGES DESVAUX, ET AL., WOMEN MATTER 1 (2007).
[2] *Id.* at 7.
[3] *See infra* Part II.A (referring to the cultural manifestations of biological sex).
[4] *See* DESVAUX, *supra* note 1 at 7.
[5] *Id.*
[6] *See infra* Parts II, III, IV.

characteristics of the male and female label.[7] In this way, laws have failed to acknowledge that most sex discrimination cases are in fact responses to gender performance[8] or an individual's specific manner of self-presentation.[9] This "disaggregation of sex and gender" results in a legal system that perpetuates inequality in the workplace by holding people to different standards of appropriate gender performance based on whether they present themselves as male or female.[10]

This problem becomes even more insidious—and harder to see—at the leadership level. Leadership, like many of the most elite occupations, has been historically characterized by masculinity, making such roles more difficult to attain for women who do not fit the masculine portrait.[11] While women's continued advancements in education will undoubtedly increase their presence in *formal* leadership roles and leadership roles that are easily influenced by popular culture, the law should intercede to the extent that it is informed by historical notions, and to the extent that it fails to address the issue of female leadership at the highest levels and in certain male-dominant fields, including, for example, the world of finance or the legal profession.

This paper will proceed in the following manner. Part II will focus on defining gender generally and will present a brief legislative and political history of discrimination based on sex, showing how courts have been inconsistent in their interpretations of gender/sex in a way that has perpetuated sexual inequality. It will also specifically

---

[7] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 10-11 (1996)(discussing the focus on biological sex by courts based on the belief that Congress had left no legislative history and biological recognition as the goal of Title VII).

[8] *See infra* Parts II, III, and IV.

[9] *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990)(arguing that gender is a manifestation of concepts garnered from society rather than the expression of a prior reality).

[10] Franke, *supra* note 7, at 11.

[11] *See infra* Part IV.

highlight the way definitions of both sex and gender are used in transgender cases in order to emphasize the incredible impact inconsistent use of these terms has when applied to people who do not neatly fit into generalized expectations of what it means to be a man or a woman. While transgender rights are not the focus of this paper, it is important to note that they are automatically implicated by a conversation about defining gender and sex in a uniform manner simply because of the categorically dualistic nature of sex and gender. Part III will show how the workplace often requires women to maintain very specific gender identities, and how these expectations negatively impact women, particularly in historically male-dominant fields. Part IV will examine how masculine expectations in leadership roles are keeping women out of these roles and present a unique danger to the development of equality in the workplace. Part V will conclude by focusing on women's positive influence in organizational excellence and why these changes are crucial in today's society.

II. DEFINING GENDER AND REVEALING INCONSISTENCIES

A. A Brief Political and Legislative History

The term gender has not always meant what we think it means today. John William Money, a pioneer in the field of sexology, can be credited for permanently broadening our understanding of this term.[12] Prior to his work in the 1950's, gender was only associated with grammar[13] and it wasn't until 1972 that Money was able to popularize the notion that sex and gender were two distinct concepts.[14] Today, the layperson is more than familiar with the term "gender." In the day-to-day, many use the

[12] J. Richard Udry, *The Nature of Gender*, 31 DEMOGRAPHY NO. 4 561, 561 (1994)(explaining the bio-social origin of gender in females).
[13] *See Id.* (referring to a subclass of nouns in languages that contain a system of noun classification).
[14] ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 3 (2000)(describing the political, scientific, and sociological history of gender and sexuality).

term synonymously with biological sex, though the term as Money popularized it refers to the cultural manifestation of biological sex.[15] Nonetheless, the expansion of the definition of gender has proven to be both a blessing and a curse in the context of contemporary sex discrimination jurisprudence. As Katherine M. Franke points out in her 1995 article *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, our sex discrimination jurisprudence grounds itself in the notion that sex and gender are two distinct aspects of human identity and further still, that "sex, conceived as biological difference, is prior to, less normative than, and more real, than gender."[16] This has led to inconsistent and confusing results in cases of sex discrimination, and has rendered the law less than effective as a means of breaking the barriers to women's rightful place in the workforce and in leadership roles.[17] Thus, while the designation of "gender" as something separate from biological sex has helped to generally spread the understanding of a social aspect of sex, its later introduction has lessened its importance in the scheme of the law.

A quick glance at our sex discrimination jurisprudence more than justifies Franke's claim. The treatment of sex and gender in the case law is circumstantial and inconsistent.[18] However, the confusion and disparate treatment of the terms have a clear source. While the legislative history of the Civil Rights Acts of 1964 is extensive in its determinations concerning race and ethnicity, the term "sex" was included belatedly on

---

[15] JOHN MONEY & ANKE A. EHRHARDT, MAN & WOMAN, BOY & GIRL: DIFFERENTIATION AND DIMORPHISM (1973)(arguing that gender and sexuality differentiation be based in individual biography and achievement rather than biological differentiation alone).
[16] Franke, *supra* note 7, at 1.
[17] *See infra* Parts II, III, and IV.
[18] *See Id.* Courts vary between explaining discrimination as a product of differentiating based on biology and discrimination as a product of gross stereotyping.

the floor of the House of Representatives just before the legislation was passed.[19] This has led many courts to conclude that they were on their own to define the word in line with the "plain meaning" rule of statutory construction.[20] However, the belief that the courts had no guidance in defining the term "sex" meant they would ignore the political and legislative history outlining the fight for equal rights for women that began long before the Act was passed—a history that is crucial to understanding what "sex" really means. This history is critical because after their failure to get an equal rights amendment solely for the rights of women passed, early feminist ultimately used their lobbying powers to have "sex" included in Title VII instead.[21]

The first equal rights amendment (ERA) was introduced in 1923 by the National Women's Party (NWP), but was immediately met with opposition from the Women's Bureau in the Department of Labor, as well as from several other women's organizations.[22] Opposition was based in the concern that the ERA as introduced would abolish protective labor laws that many women felt were still necessary.[23] But the beginning of World War II and a shortage of domestic workers meant that women were occupying a greater portion of the wage-labor market than ever before.[24] These changes brought to light a need for both "recognition and compensation" for the war-time work

[19] *See Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1167 (1971)(describing how the prohibition against sex discrimination was added without any prior hearings or debate in the House).
[20] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 56, 63-64 (1986)(finding that Title VII was added at the last minute and that Courts have little legislative history for guidance); Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984)(finding that sex was added as the "gambit of a congressman seeking to scuttle adoption of the Civil Rights Act"); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.4 (9th Cir. 1977)(stating that there is a "dearth of legislative history" regarding the addition of sex in Title VII).
[21] *See generally,* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 Law & Ineq. J. 163 (1991)(explaining how the inclusion of "sex" was ultimately the byproduct of the women's movement for equal rights).
[22] *Id.*
[23] *Id.* at 165-70.
[24] *Id.*

that women were doing, and thus the National Women's Party gained strength and support.[25] An Equal Rights Amendment including women's rights was lobbied for more aggressively by the NWP.

From the 1940's through the beginning of the 1960's, Senator Pauli Murray suggested to both sides of the ERA struggle that the question of equality be taken to the courts.[26] It was Murray's understanding that receiving a Supreme Court ruling under the Equal Protection Clause could clarify the basic rights for women and do away with laws that arbitrarily impeded women's presence in the public sphere.[27] This compromise ultimately led to the litigation of the most seminal Supreme Court cases relating to equal protection for women: *Reed v. Reed,*[28] *Frontiero v. Richardson,*[29] *Schlesinger v. Ballard*,[30] and *Craig v. Boren*.[31] These cases created a constitutional right to equality for women while also delineating the differences between the sexes and sex discrimination from the differences seen in race and racial discrimination.[32] These cases therefore represent a significant part of the history of sex-based discrimination and in fact reveal to the careful historian that the protection accorded by the Supreme Court to women in the name of biological sex were in fact in response to discrimination based on gender roles.[33]

---

[25] Freeman*, supra* note 21, at 170.
[26] *Id.*
[27] Franke, *supra* note 7, at 22.
[28] 404 U.S. 71 (1971).
[29] 411 U.S. 677 (1973).
[30] 419 U.S. 498 (1975).
[31] 429 U.S. 190 (1976).
[32] Franke, *supra* note 7, at 23.
[33] *See Reed v. Reed*, 404 U.S. 71 (1971)(holding that Idaho statute preferring male estate administrators based on the history of their better qualification violated the equal protection clause of the Constitution); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(holding that statute putting extra requirements on female members of armed forces to prove financial status before receiving certain benefits violated the Equal Protection Clause); *Schlesinger v. Ballad*, 419 U.S. 498 (1975)(holding that distinction between male and female officers standards of discharge for men and attrition for women were legitimately based on differences in service roles); *Craig v. Boren*, 429 U.S. 190 (1976)(holding

This is illustrated by the fact that the cases revolve around problems with sex-based protective wage and hour rules, divorce, childrearing, and familial support obligations, all of which are representations of cultural norms adopted by men and women. While it could be argued that these norms arise from a biological difference, to the extent that they are social manifestations of biological differences, it is clear that the Supreme Court understood that sex-based discrimination was an impermissible acknowledgement of the social manifestations of biological difference. Thus, it would be disingenuous to suggest that the courts were without guidance in defining "sex" in the context of Title VII, when these cases were a meaningful step in the fight to include sex in Title VII at all. After all, it was only through continuous lobbying efforts over the course of an extend time period before Title VII to pass an equal rights amendment that allowed "sex" to be included at the eleventh hour with success.[34]

Therefore, a closer look at the fight for equality makes plain that the courts were not in fact, without guidance in the determining what Congress meant by "sex" in Title VII. The inclusion of sex was not haphazard and unplanned, but the result of a long battle for recognition largely powered by the NWP. However, the history does point out that certain implications of its inclusion had not been considered, namely questions regarding transgendered people and transsexualism. But to the extent that gender is a modern notion that only recently found its place in discourse and human understanding, it becomes clear that prior to the distinction between sex and gender, sex had been interpreted to include what gender connotes today, and therefore remains a loaded term that courts could mold

---

that statistical evidence based on driving differences between men and women do not support drinking age discrimination between males and females).

[34] LEILA J. RUPP & VERTA TAYLOR, SURVIVAL IN THE DOLDRUMS: THE AMERICAN WOMEN'S RIGHTS MOVEMENT, 1945 TO THE 1960S 191 (1987)(recounting the history of the women's movement).

to fit their needs. That some courts continue to refuse to acknowledge something beyond a biological definition of sex, reasoning that they have no guidance to believe otherwise, implies that the law probably would not be able to reach many individuals who have been discriminated against based on their sex or gender in the context of promotions and leadership positions.

B. Sex Discrimination Based on Stereotyping

In looking at the disparate treatment of the idea of gender and sex in case law, I will utilize a sample of cases in which various courts explain their own definitions in ways that are at odds with definition used by other courts. As will be garnered from this sampling, courts generally take one of two approaches: (1) they define gender/sex as either solely referring to biological or anatomical characteristics, leading to a finding of discrimination only in the context of biological distinction; or (2) they define sex/gender as an immutable characteristic and discrimination as a byproduct of improper stereotyping. These variations suggest that definitions of gender and sex are in fact circumstantial to the litigation at hand, with people at the fringes of their gender suffering the most.

In *Price Waterhouse v. Hopkins*[35] the Supreme Court acknowledged that the definition of sex includes cultural and social notions, or gender in its primary definition. The Supreme Court is explicit: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[36] In *Price Waterhouse*, a female senior manager was denied a promotion because she was

[35] 490 U.S. 228 (1989).
[36] *Id*. at 248.

considered too masculine. Her superiors suggested that she take "a course at charm school" and that, were she more feminine, she would have a better chance of attaining the promotion.[37] The Supreme Court held that "in the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[38] Here, it is clear that the Court had moved beyond a simple biological distinction and acknowledges that the term "sex" as Congress intended, did in fact include the social and cultural manifestations of sex.

Even prior to *Price Waterhouse*, the Supreme Court had already implicitly affirmed the notion that "sex" incorporated both biological and cultural understandings of sex/gender in both *Frontiero v. Richardson*[39] and *Schlesinger v. Ballard*.[40] In *Frontiero*, the Court went into a lengthy consideration concerning the improper use of "common knowledge" ideas of women's inferior status that *Reed v. Reed*[41] resulted in the Idaho Legislature's decision that "in general men are better qualified to act as administrator than are women."[42] The court states in *Frontiero*, "[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and, indeed, throughout much of the 19th century the position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes…."[43] The court further explains that a "sex characteristic frequently bears no relation to ability to perform or contribute to society."[44] Similarly, in *Schlesinger*, the court explained again that "archaic and overbroad generalizations" could not be tolerated

[37] *Id.* at 235.
[38] *Id.* at 250.
[39] 411 U.S. 677 (1973).
[40] 419 U.S. 498 (1975).
[41] 404 U.S. 71 (1971).
[42] 411 U.S. at 683.
[43] *Id.* at. 685.
[44] *Id.* at 686.

under the Constitution.[45] There, a male naval officer claimed discrimination based on a statute that subjected only male naval officers to automatic discharge when they weren't promoted consecutively was unconstitutional discrimination based on sex.

This line of cases is significant because they affirm what other courts attempt to deny—that "sex" as included in Title VII does not merely refer to someone's anatomical or biological characteristics, but also to the social implications of associating with the male or female label.[46] When courts *do* acknowledge that "sex" in Title VII includes something more than biological traits, they are coming much closer to the reality of gender and sex as we experience them in every day settings. The term "female" does not necessarily have to connote femininity and being "male" does not necessarily implicate masculinity. Therefore, to the extent that leadership has been historically characterized by masculinity,[47] courts must define sex and gender expansively in the context of Title VII discrimination cases in order to assure that they are not penalizing claimants for failing to conform with idealized notions of masculine and feminine behavior.

C. Courts Define 'Sex' in Title VII as Referring to Biological or Anatomical Characteristics

On the whole, it seems that courts prefer to define gender and sex in terms of biological and anatomical differences when the issue presented is one of discrimination based on transgender or gender identity confusion. When courts rely on biology, they generally find discrimination only when a person is treated differently because of their

[45] 419 U.S. at 508.
[46] *See infra* Parts II.C, III.B.
[47] *See infra* Part IV.B.

anatomical characteristics.[48] As a preliminary issue, courts explain that they must take on the "plain meaning" approach and start off their inquiry by suggesting that Congress could not have meant to protect transsexuals under Title VII.[49] And as can be seen from the political and legislative history accounted above, it is in fact true that the addition of "sex" did not necessarily consider the plight of transsexuals. Nonetheless, the way that the Supreme Court has ultimately construed "sex" in the context of equal rights and the 14th Amendment does suggest that courts must respond to cultural understanding of proper social roles.[50] To that end, when courts take on this "plain meaning" approach of statutory construction, they *should* be considering whether the person that is being discriminated against is being treated differently for failing to conform to their expected gender roles like the Supreme Court did in *Reed, Fronteiro,* and other equal protection cases. However, as will be shown, Courts refrain from this broadened interpretation of sex and gender when considering marginalized groups, or people who do not fit into the neat little categorizations of what has historically been understood as "male" and "female". The implication would be that even members of the population who do not suffer from gender dysphoria or recognize themselves as transgender may be denied protection under Title VII if they fail to conform to expectations of how they ought to behave as representatives of their sex.

In *Ulane v. Eastern Airlines, Inc.*,[51] a transsexual pilot brought suit, alleging discrimination after she was fired from her job as a pilot for the airline. The Seventh

---

[48] *See generally* Ulane v. E. Airlines 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007); Dobre v. Nat'l R.R. Passenger Corp. 850 F.Supp. 284 (1993).
[49] *Id.*
[50] *See supra* Part II.A.
[51] 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985).

Circuit addressed the lack of a legislative history explaining the term "sex" and the lack of any intent to protect transsexuals as a class of people under Title VII.[52] The court then explaind that why the discrimination that Ulane experienced did not amount to sex discrimination:

> If Eastern had considered Ulane to be female and had discriminated against her because she was female (i.e. Eastern treated females less favorably than males), then the argument might be made that Title VII applied, but this is not the case. It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear female.[53]

The court here very clearly draws a distinction between sex discrimination as dependent on the original biological status of the person and demands that femininity belong to biological females and masculinity to biological males.

Similarly, in *Dobre v. National R.R. Passenger Corp. (Amtrak)*,[54] a transsexual employee alleged discrimination based on her transsexualism. Here, the court immediately attempts to distinguish sex from gender and states that the term "sex" as used in Title VII is not synonymous with the term "gender," and that Congress's use of "sex" was simply in reference to "an individual's distinguishing biological or anatomical characteristics," whereas gender would have encompassed discrimination based on sexual identity.[55] The court then clarifies that a transsexual person would have a claim for sex discrimination if the person were discriminated against because of his or her sex, that is, if Amtrak had actually considered Dobre to be female and discriminated against her "on

[52] *Id*. at 1084.
[53] *Id.* at 1087.
[54] 850 F.Supp. 284 (1993).
[55] *Id.* at 286.

that basis."[56] But from there the analysis takes a different turn, and the court backtracks from their "biology only" distinction to state that discrimination based on stereotypic conceptions about a woman's ability to perform a job or discrimination based on conditions common to women alone *could* constitute discrimination.[57] The court then determines that Dobre was discriminated against because she was perceived as a male who wanted to become female,[58] without realizing that based on their logic, Dobre had a legitimate claim for discrimination as a man: Dobre was penalized for not falling in line with stereotypic conceptions about men's abilities and conditions common to man.

More recently, in *Etsitty v. Utah Transit Authority*, a male diagnosed with gender identity disorder (GID) was fired because of concerns as to which bathroom he would be using while on the job (employees used public restrooms.)[59] The Tenth Circuit, again recounting the lack of legislative history and any congressional intent to protect transsexuals under Title VII, concluded like many other courts, that "sex" was in reference to the binary conception of sex and could not include transsexuals.[60]

Prior to the Tenth Circuit's affirmation of the Utah District Court's decision, the Utah Court went to great lengths to distinguish itself from the Sixth Circuit,[61] where two cases involving transsexuals were treated as having legitimate claims under Title VII by extension of the rationale used in *Price Waterhouse v. Hopkins*.[62] The court explains that there is a "huge difference" between an unfeminine woman and a man who is attempting to become a woman, and announces that such drastic changes should not be characterized

---

[56] *Id.* at 287.
[57] *Id.*
[58] *Id.*
[59] 502 F.3d 1215 (10th Cir. 2007).
[60] *Id.* at 1221.
[61] No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah Civ. R. 7-2 June 24, 2005).
[62] *Id.* at 4.

as "failure to conform to stereotypes."[63] It further cited the DSM-IV, the American Psychiatric Association's Manual for Mental Disorders, to support its conclusion that GID goes beyond nonconformity to touch upon stereotypes.[64] The court then noted that even after *Price Waterhouse*, the narrower *Ulane* approach to "sex" in Title VII continues to be followed. The court went on to explain that allowing this "failure to conform to stereotypes" as legitimate reasoning in the finding of discrimination is essentially a "slippery slope":

> In fact, if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII.[65]

This type of thinking about gender and sex highlights courts' reluctance to broaden sex-related discrimination statutes beyond biology. The findings in cases like *Dobre* and *Ulane* take on a view that Professor Katherine Franke stated most eloquently, in which "one's inside—is immutable—whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gender identity—one's inside—is experienced as immutable."[66]

And so it seems that there are genuinely two distinct ways to understand sex discrimination as defined by our courts. One approach equates simple differentiation between the sexes as discrimination, while the other equates the *generalization* of

---

[63] *Id.* at 5.
[64] *Id.*
[65] *Id.*
[66] Franke, *supra* note 7, at 35.

differences as discrimination.[67] But no matter which approach a court takes in its explanation of sex discrimination, the law assumes a natural and biological foundation to sexual difference, ignoring the reality that gender norms, not biological facts, are at the core of the differences we recognize in the two sexes. As Franke points out in her article, when women are denied employment, very rarely is it because the discriminator genuinely believes that the Y chromosome is necessary for the job.[68] To that end then, Franke is correct in stating that biology and genitals are simply "false proxies for the real rules of both gender attribution and sexual identity in our culture."[69] In the context of leadership, I argue that it is these types of people – people who do not generally meet societal expectations of their gender/sex, that are most likely to be overlooked for promotions and leadership positions. Moreover, to the extent that they attempt to look to the courts for a remedy, they will be unlikely to succeed so long as courts continue to use varying definitions of sex and gender.

III. THE PROBLEM OF IDENTITY WORK FOR WOMEN

When considering leadership and the workplace, the normative views on gender and biological sex become extremely problematic, as leadership itself has historically been characterized by masculinity.[70] The dualistic thinking about gender/sex is a legitimate concern because it makes it harder to see the interrelated-ness of male and female, masculinity and femininity. So as long the legal system continues to equate femininity with females and masculinity with males, sex discrimination at the leadership level will be difficult to prove, since men, by virtue of being male, would seemingly be a

[67] *See generally supra* Part II.B.
[68] *See* Franke, *supra* note 7, at 12 n.143(explaining cases and studies by which actual biology is a factor, namely pregnancy).
[69] *Id.* at 38.
[70] *See infra* Part V.

better fit for those roles. Furthermore, the courts are unable to take into account the amount of mental maintenance work women are ultimately required to do in the workplace in order to overcome masculine workplace expectations. This suggests that courts do not take into account the negative impact this type of maintenance and identity work[71] has on women. As a result, these women are less likely to receive promotions and offers to important leadership positions—positions which are essential to influencing large groups of people and changing the way we view women's proper role in society.

A. Understanding the Effects of Identity Work on Women

Identity work is the concept that people have to negotiate between their sense of self and external pressure to behave a certain way.[72] It is called "work" because it requires and consumes resources from the person in the form of time and effort.[73] For example, in order to conform to a particular work environment, a woman might invest in an entirely new wardrobe. This would cost both time and money, and therefore is a type of "work." While it is true that *everyone* must perform identity work in order to navigate their social setting, "outsider groups," like women and minorities, perceive themselves as being subject to stereotypes that must be overcome.[74] This expands the amount of work that they must do. To that end, a woman generally has to commit to a greater amount of work in order to maintain her identity in male-dominant fields and signal to the dominant group that she in fact is a member the group.

---

[71] *See infra* Part III.A (defining identity work as the idea that we must negotiate between a sense of self and external pressures to behave a certain way. Called work because it consumes resources in the form of energy and time).
[72] *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, n.2 (2000)(explaining basic identity concepts and stating that everyone does identity work).
[73] *Id.*
[74] *Id*. at 1262; *see also* CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE (2010)(discussing the actual similarities and differences we see in men and women and the significant effects of stereotyping on women).

Dr. Cordelia Fine explains this phenomenon as "stereotype threat" or "the real-time threat of being judged and treated poorly in settings where a negative stereotype about one's group applies."[75] The significance of stereotype threat is best illustrated through sociological studies, whereby simply lowering the threat changes the performance ability of individuals.[76] For example, when a calculus test was presented to a group of men and women in the standard manner by which most tests are administered, women did not perform as well as their male counterparts. However, when that same test was administered and the exam takers were told beforehand that the exam had proven to be equally hard for men and women, women actually performed better on the same test.[77] These types of studies show that by simply changing the perceived level of threat, we can enhance or reduce the ability of a given group of people. Dr. Fine further explains that triggering the realization that a negative stereotype about one's group is in effect can occur in "disquietingly natural" ways:

> Stereotype threat effects have been seen in women who: record their sex at the beginning of a quantitative test; are in a minority as they take the test; have just watched women acting in air-headed ways in commercials, or have instructors or peers who hold—consciously or otherwise—sexist attitudes. Worse still, subtle triggers for stereotype threat seem to be more harmful than blatant cues, which suggests the intriguing possibility that stereotype threat may be more of an issue for women now than it was decades ago, when people were more loose-lipped when it came to denigrating female ability.[78]

In the same vein, Dr. Fine points out recent studies revealing that recognition of a stereotype's applicability to one's social group in the course of one's work makes that individual perform worse because it takes extra mental resources to suppress those

[75] *See* FINE, *supra* note 74, at 30.
[76] *Id.*
[77] *Id.* at 31.
[78] *Id.*

negative ideas and anxieties about themselves.[79] This is an important consideration in the promotion context because it is likely that the more a woman feels that she might be stereotyped as a bad leader or unfit for the job by virtue of her womanhood, the more likely it is that she will actually *be* a bad leader. This can be a rather serious problem because in order to perform well in leadership capacities, she needs to remain focused and confident, yet while working under the threat of stereotype, it is more likely that she will be distracted by "self-doubts and anxieties" that impede her abilities.[80]

Another significant consequence of stereotype threat is that it creates a "failure-prevention mindset":

> "The mind turns from a focus on seeking success (being bold and creative) to a focus on avoiding failure, which involves being cautious, careful, and conservative (referred to as promotion focus and prevention focus, respectively). With horrible irony, the harder women try to succeed in quantitative domains, the greater the mental obstacles become for several reasons.... Also, the more difficult and nonroutine the work, the more vulnerable its performance will be to the sapping of working memory, and possibly the switch to a more cautious problem-solving strategy."[81]

Again, stereotype threat and the extra burden in negotiating it is by no means a "women's problem." Stereotype threat will work against *any* person who stands at odds with whatever the norms are in his/her specific social environment. But because leadership positions are those that yield a high degree of influence and power, overcoming the damaging effects of stereotype threat to women and minorities who are attempting to gain these positions (positions which have been historically denied to them) cannot be a simple feat. Complicated studies that have looked into the effects of ambition and drive in relation to higher testosterone levels suggest that the negative stereotype of women's

[79] *Id.* at 33.
[80] FINE, *supra* note 74, at 33.
[81] *Id.* at 37 n.36.

lesser ability when compared to men's is even more harmful to the type of woman who is already struggling to rise in the ranks of her field.[82] A woman exposed to negative stereotypes about her group's ability can suffer from a "cognition-impairing mismatch" between her desire for high status and the low status that the stereotype ascribes to her.[83] In these areas, the implicit stereotyping of gender and the existing gender gap mutually reinforce and feed into one another.[84]

In sum, the identity work and negotiating that women must do in attempts to gain leadership positions or even just to fit into the culture of their workplace present a genuine obstacle mostly overlooked by anti-discrimination laws in their current form. Devon W. Carbado and Mitu Gulati, professors of law at UCLA and Duke University respectively, suggest that there are three distinct barriers that women face as a direct result of the identity work they have to do, barriers that current anti-discrimination law does not consider in their findings of discrimination.[85] First, because anti-discrimination laws aim to compensate the victims of discrimination for the costs and burdens the discrimination caused in their lives, the failure of these laws to take into account the way masculine norms burden non-masculine women (and non-masculine men!) in the workplace means that they do not take into consideration the extra costs of trying to "blend in" to the culture of her work environment.[86] In other words, the more a woman tries to negotiate her identity to make "insiders," or the dominant group, comfortable, the more difficult it would be for her to prove that she had been subject to discrimination.

---

[82] *Id.* at 38.
[83] *Id.*
[84] *Id.* at 39.
[85] *See* Carbado, *supra* note 72, at 1293(explaining how identity work is detrimental to minorities brining antidiscrimination claims).
[86] *Id.* at 1294.

Carbado and Gulati call this the "capture problem" since there is a failure in the law to capture or grasp the full costs of discrimination for these women.[87] Similarly, Carbado and Gulati point out an "evidentiary problem": so long as a woman successfully engages in negotiating her identity to fit the workplace, she is undermining her ability to bring a claim for discrimination thereafter.[88] Finally, antidiscrimination law adopts the presumption that if the employer can show that it has hired or promoted several outsiders who belong to the same social minority as the particular employee, it can serve as proof that the failure to promote in the individual case was not motivated by discriminatory reasons.[89] Carbado and Gulati call this the "doctrinal problem," explaining that it ignores the reality that employers are responding to not only the identity status of the woman, but also to her conduct, and whether she is a positive or negative reflection of other women.[90] To that end, acceptance into a certain community requires more than just fitting into general stereotypes, but fitting into the specific stereotypes shared by the members of that community about what it means to be a man and woman.

Thus, a court's definition of "sex" may not be the only factor in determining whether or not a female claimant can succeed in a discrimination case in the context of promotions and access to leadership positions. So long as laws fail to consider the full spectrum of behavior that is required of a woman in order to prove herself worthy of traditionally masculine positions, courts are unlikely to find that she had been the victim of discrimination, or even that she objectively qualified for a leadership position, based

[87] *Id.*
[88] *Id.*
[89] Carbado, *supra* note 72, at 1295 n.98.
[90] *Id.* at 1297.

on the belief that a "female identity" is at odds with the masculine characteristics of leadership.

B. Identity Work in Discrimination Cases

This is not to say that the courts have never considered identity work in discrimination cases. Courts have in fact considered various aspects of gender performance, but whenever it is considered, it is sharply limited or curtailed. These cases considering performance are called the "sex plus" cases in that they find discrimination when based on a policy that is directed at sex "plus" some other characteristic.[91] For instance, in *Phillips v. Martin Marietta Corp.*,[92] a woman was denied employment by virtue of her status as a woman and mother to a young child. The Supreme Court recognized that just because the employer had employed other women did not mean they were allowed to discriminate against a sub-category of women, in this case, women with young children.[93] The court ruled that Phillips could not be treated differently based on this one aspect of her identity.[94] Clearly, Phillips' employer believed, and not without reason, that her identity as a young mother would impede her ability to meet the expectations of her job, as though the mere fact that she had a young child guaranteed that she would be unfit to meet the needs of her occupation. The Supreme Court tells us, in so many words, that this type of assumption is not appropriate in the context of employment. Similarly, the Sixth Circuit recognized in *Allen v. Lovejoy*[95] that suspending a female employee for refusing to adopt her husband's last name in the work place was

---

[91] *See* Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis Under Title VII*, 13 HOFSTRA LAB. &EMP. L.J. 269, 276-77 (1996)(explaining the history of "sex-plus" cases in the courts in cases were men or women were discriminated by employer's work policies).
[92] 400 U.S. 542 (1971).
[93] *Id.* at 544.
[94] *Id.*
[95] 553 F.2d 522 (1977).

sex discrimination.[96] Again, the court seems to be aware that the employer was penalizing the plaintiff for defying their expectation as to proper behavior for female employees. This, they determined, constituted discrimination.[97]

Nevertheless, the court's willingness to recognize the inappropriateness of discrimination based on gender/identity performance in this arena ends there, as courts have been opposed to extending the doctrine to cover performances of identity in the every-day context. Courts have consistently rejected challenges to employers' dress-and-appearance requirements, insisting that such requirements are "trivial" matters reflecting "personal preference" that are completely under the employee's control.[98] Some courts have even gone as far as to limit the sex-plus doctrine explicitly to cases that involve biological characteristics, the exercise of a constitutional right, or serious deprivation of opportunities.[99]

Courts have also overlooked the difficulty of identity work by requiring that gender performance be in accordance with the will of majority or dominant group, or whoever is responsible for dictating the social environment.[100] By doing so, the courts in essence affirm the notion of a "right" way to be woman and a "right" way to be man. This idea is best illustrated in sex discrimination cases wherein plaintiffs are denied their claims.[101] The courts in their decisions are solidifying the notion that both they and employers have the authority to decide which generalized notions of male and female are

---

[96] *Id.* at 524.
[97] *Id.*
[98] Carbado, *supra* note 72, at 1299, n.106.
[99] *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605-06 (9th Cir. 1982); *Willingham v. Macon Tel. Publ'g. Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975); *Arnett v. Aspin*, 846 F.Supp. 1234, 1239 (E.D. Pa. 1994).
[100] Franke, *supra* note 7, at 29.
[101] *See generally Lanigan v. Bartlett & Co. Grain*, 466 F.Supp 1388 (W. D. Mo. 1979); *Reed v. Shepherd* 939 F.2d 484 (7th Cir. 1991); *Weinsheimer v. Rockwell*, 754 F. Supp. 1559 (M. D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

acceptable or unacceptable. In a group of cases aptly named the "haircut" cases, many courts determined that sex discrimination could not be found based on employer standards regarding hair length for men.[102] The courts take the stance that hair length is a matter of choice, not an immutable characteristic, and therefore employers have a right to exercise their discretion in this area.[103] The Fifth Circuit in *Willingham v. Macon* explains: "Distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of Title VII."[104]

In line with the belief that the courts and employers can determine proper gender performance, in *Lanigan v. Bartlett & Co. Grain*, the court found there was no violation of Title VII when a female secretary was fired for wearing pantsuits.[105] The court determined that wearing pantsuits was something that the plaintiff did because she wanted to and that the policy did not perpetuate a stereotype about her gender but merely reflected the plaintiff's personal beliefs.[106] The Supreme Court has also affirmed this belief in addressing gender performance in *Meritor Savings Bank.*[107] While the Court there did ultimately hold in favor of the discriminated employee, the court also made clear that a plaintiff's performance could be relevant in a sexual harassment claim to address the question of whether the harassing conduct was "welcomed" by the plaintiff: "While voluntariness in the sense of consent is not a defense to a sexual harassment claim, it does not follow that a complainant's sexually provocative speech or dress is

[102] *See* Franke, *supra* note 7, at 27 n.318-20.
[103] *Id.*
[104] 507 F.2d at 1092.
[105] 466 F.Supp 1388 (W. D. Mo. 1979).
[106] *Id.* at 1392.
[107] 477 U.S. 57 (1986).

irrelevant as a matter of law in determining whether he or she found particularly sexual advances welcome."[108]

Based on the rationales noted in the above cases, it seems that courts are unwilling to acknowledge that conforming to workplace expectations may require a significant amount of identity work. Men and women may be required to engage in behavior that is not in line with either their own identities, or on the other hand, engage in behavior that is not in line with general social expectations of how females and males ought *no*t to behave as representatives of their social group. While the court found that the plaintiff in *Lanigan* could be penalized for wearing pants in blatant disregard of the employer's preference for more stereotypically feminine women,[109] in *Meritor* the court acknowledges that a woman with a tendency to be sexually provocative in speech or dress may be denied her claim to sexual harassment, in that it may be probative of whether she welcomed sexual advances, although both types of actions could easily be seen as a type of identity work a woman had to do in order to preserve her job or preserve her sense of dignity. Nevertheless, the courts are willing to place the burden of conformity entirely on the claimants of discrimination both for the failure to conform and for conforming "too well." If either type of woman (a woman who conforms and a woman who does not) were to make a claim for discrimination in the workplace, both could easily fail to meet the legal standard of discrimination, whether by virtue of a finding that discrimination can only be based on biological sex, or by virtue of a failure to prove that she was in fact discriminated against because she blended herself by partaking in the workplace culture.

---

[108] *Id.* at 69.

[109] Assuming that skirts/dresses are more closely aligned with femininity and females.

In the same vein, courts have also found that women who are masculine are inviting harassment or that women who try to accommodate their work environment by engaging with their harassers have in fact welcomed it.[110] One particularly grotesque example of this understanding is encapsulated in *Reed v. Shephard*, where the court determined that that the plaintiff had lost her claim by using offensive language, engaging in "exhibitionistic" behavior, giving "suggestive gifts" and otherwise engaging in sexualized conduct with her harassers.[111] What the court failed to take into consideration was the instigating actions of the plaintiff's harassers and how Reed was attempting to negotiate her identity in order for her harassers to accept her into an existing work community that was already sexually charged.[112] Reed stated explicitly that she did not complain about the harassment because she wanted to be accepted by her peers: "It was important to me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut."[113]

Similarly in *Weinsheimer v. Rockwell*, the plaintiff was a female employee working in the largely male-dominant field of engineering.[114] The Court denied Weinsheimer's claim of sexual harassment, explaining that much of her problem with the behavior of her harassers had to do with the fact she, for whatever reason, "perceived" herself as not being held to the same standard as her male counterparts, implying it was a problem within herself.[115] Further, the court stated that while in fact the harassing behavior that Weinsheimer was complaining about did occur, Weinsheimer was one of

---

[110] *See* Carbado, *supra* note 72, at 1295, n.98 (explaining that courts often find evidence of joking with harassers as relevant in discrimination claims).
[111] 939 F.2d 484 (7th Cir. 1991).
[112] *Id.* at 490.
[113] *Id.* at 492.
[114] 754 F. Supp. 1559 (M. D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).
[115] *Id.* at 1565.

the chief participants in the creation of the sexually charged atmosphere with her "confrontational and abusive" personality as evidenced by the way Weinsheimer interacted with her boyfriend and by the way she responded to sexual speech with equally sexual speech.[116]

It is difficult to reconcile such cases that so obviously enforce a standard of "commonly accepted social norms" and reification of "female = femininity, male = masculinity" with a legislative mandate that courts also say was intended "to strike at the entire spectrum of disparate treatment of men and women" resulting from stereotypes.[117] The fact that the approach a court may take has differed over time and place further shows the difficulty courts have had in separating a person from socially contrived understandings of "appropriate" behavior based on their gender, and the actual relationship the division of appropriateness has to biological sex and discrimination. Thus, when considering identity work in the context of sex-based discrimination, one can wonder whether women have actually been further disadvantaged by a legal system that is supposed to help them overcome the difficulties of a male-dominant workplace.

While ignorance to identity work and stereotype threat is clearly a general danger present at every level of social interaction, perhaps having seen the insidious nature of discrimination makes it easier to understand why even after all these years, women have yet to climb the ranks of leadership with the ease of their male counterparts. Male dominance in the workforce and in particular areas of work is a historical relic and to the

---

[116] *Id.* at 1564(Weinsheimer states that she responded to her harrasser's pointing to her crotch and asking her to "Give him some of that stuff" by saying, "No, that's my boyfriend's and it's just like new, hardly been used").

[117] Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993)(restating Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

extent that that law holds onto those notions of gender propriety, women will continue to struggle to find their place at the top.

IV. LEADERSHIP: CHANGING DEFINITIONS TO RESPOND TO CRISIS

A. Understanding Leadership as a Social Construct

For too long, the concepts of leadership and successful leadership have been dominated by polarized thinking. As patriarchies became the mainstay for complex economies, the notion that there was a proper place for an individual based on her gender, ethnicity, and social class slowly settled into the basic framework of everyday life.[118] To be sure, these are historical relics, notions that have been passed on generation to generation through societal and group norms. But as barriers to education and opportunity were broken and equality became the standard promise, what was once a "concrete wall" gave way to the concept of merit-based advancement.[119]

Today, most Americans want to believe that people are hired, fired, and promoted in the workplace based on individual abilities and accomplishments.[120] They believe that people should not be disqualified from positions at any level merely because of superficial characteristics or personal beliefs. Reflecting these convictions, barriers that minority groups encounter no longer take the obvious form of exclusion at a particular level. Instead, they have become embedded in our notions of identity, belongingness, and success.[121] These implicit associations[122] limit society's ability to move forward by acting

---

[118] *See* ALICE EAGLEY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS (2007)(explaining why women's presence in powerful roles is still rare and the historical changes that have led to limited advancements).
[119] *Id.* at 3.
[120] *Id.* at 8.
[121] Desvaux, *supra* note 1, at 2.
[122] *See generally* Anthony G.Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995)(explaining implicit associations as automatic associations that have been solidified in memory overtime based on experiences, but are

as mental block to what one can or cannot do. They define what pathways are inappropriate or appropriate based on characteristics that are not as static as people are led to believe.[123] By being more conscientious of an individual's capacity to achieve outside of socially constructed notions of ability, individuals can help produce a more productive and effective society—people could reach their true potential.

It goes without saying that ethnicity does not affect the inherent ability of a person. The idea that someone might even limit another based on his or her race or nationality is abhorrent to most of us. Moreover, life-experiences help solidify the notion that one is not incapable or lesser because of race. And yet this perception does not seem to reach the realm of gender. The idea that biological sex and therefore gender plays an enormous role in innate abilities and skills is not only embraced, but also justified with science. Men and women are different because they have different brains, they say. And it's true; MRI scans of a male brain and female brain will show stark differences.[124] But if difference is hardwired from birth, how in the world could a man and a woman share the same ideas and abilities? Can persisting inequalities in gender really be blamed on the brain?

The main problem with science-based theories on gender differences is that they justify separation of roles for men and women. They suggest that people have an appropriate place within society based on their inherited biological nature. This perception reigns even for leadership roles: only 13% of all employed women occupy

---

unconscious to the individual in that they are not available for immediate self-report or introspection).

[123] *Id.* at 5-6.

[124] *See* EAGLEY, *supra* note 118, at 31; *see also* FINE, *supra* note 74, at XVI-VIII (highlighting various studies and scientific recognition of hard-wired differences between male and female brains).

management positions, compared with 16% of employed men.[125] What is more, the perception that women are more socially oriented and empathetic has relegated them as mainstays in support areas of corporate businesses rather than in line for executive positions.[126] What must be fundamentally understood is that any overarching patterns of differences based on social group we see today are in fact socially constructed and perpetuated. After all, gender, just like ethnicity, is simply a grouping of select characteristics that we associate with biological characteristics. Beyond that, it is difficult to suggest that characteristics of gender are inherent. Therefore, the continued exclusion of women in significant leadership roles today ought to be carefully scrutinized in an effort to insure that such exclusion is objectively legitimate and not simply a result of implicit associations or a reliance on older notions of what men and women are capable of doing better (or worse) than their counterparts.

B. Origins of Gender and Gender Characteristics in Relation to Leadership Qualities

In order to clarify the socially constructed nature of leadership as well as the socially constructed nature of supposedly "masculine" characteristics, looking at biological foundations may be helpful. By impressing upon the law the truth that biology does not necessarily define the characteristics that a man or woman will show in his/her behavior, the law will be forced to look more objectively at the qualifications that make a person more or less suitable for a particular leadership position instead of focusing on whether the claimant is barred from making a claim based on the way that they perform their gender. This truth can be garnered by looking at studies of prenatal and infant

[125] EAGLEY, *supra* note 118, at 17.
[126] *Id.* at 19.

development. Babies are not born with an understanding of gender or race; they are blank slates ready to learn from their own experiences. At birth, there are only a handful of characteristics that distinguishes a female baby and a male baby.[127] Notably, at birth, boys are larger than girls, and their brains are 9% larger.[128] Meanwhile, female infants develop faster beginning from midgestation and ending with their earlier entry into puberty.[129] And that about sums up the essential differences between male and female babies at birth. Any inherent differences that we see in personality are small differences that are largely shaped by learning.[130] So while girls and boys enter the world with slight variations in social and emotional styles, it is the reaction of the person who encounters these differences that ultimately trains the way these children respond—social tendencies become selectively reinforced by the parents who raise their children.[131] In other words, parents tend to treat male and female babies differently, not because they actually are so different, but because of their own preconceived notions of what it means to be male or female.[132] Furthermore, the rest of society will continue to engage with babies and children in response to their sex thereby perpetuating the societal norms and behaviors deemed appropriate to them, and thereby solidifying the child's conceptions of gender and appropriateness.[133]

So if femininity and masculinity are largely taught, and is not inherently embedded into every person, then the psychological differences we experience every day should be explained as the result of years of masculine or feminine ideology inflicted

[127] LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT 56 (2010).
[128] *Id.* at 57.
[129] *Id.* at 27.
[130] *Id.* at 83.
[131] *Id.*
[132] ELIOT, *supra* note 127, at 84.
[133] *Id.* at 85.

upon the brain until the differences becomes more or less permanently ingrained.[134] The Bio-Social Origins theory of psychological sex differences as adopted by social psychologists Wendy Wood and Alice Eagly suggests that psychological sex differences stem mainly from the types of roles filled by men and women within societies.[135] The ability to perform various roles depended on inherited physical attributes—women raised children because they were physically able to carry them to term and nurse them. This gave men the initial freedom to fill the other social roles as the need arose.[136] Moreover, men's greater size and strength gave them an advantage in fulfilling many of the roles associated with production tasks before industrialization. These roles then gave them control over resources and helped them to amass social power. [137]Over time, as division of labor became less rigid, men and women have been able to equally show their ability to contribute in different areas of society, and the boundary between gender roles began to fade. Nevertheless, the notion of appropriateness of social roles persisted in some areas as though division of labor was still required. Thus, as "men and women continue to divide important life tasks by sex, no one should be surprised by the continuing existence of psychological sex differences."[138]

Descriptions of "good" leaders show that the concept of leadership has been infused with concepts of masculinity and manliness.[139] For example, in identifying six activities required of managers in business organizations, management scholar John Miner, explains that managers must behave assertively, stand out from the group, be able

---

134 See Alvaro Pascuale-leone, et al, *The Plastic Human Brain Cortex*, 28 ANNU. REV. NEUROSCI. 377 (2005)(explaining brain plasticity as nature's way of adapting to the environment rapidly and escape restrictions of its own genome).
135 EAGLEY, *supra* note 118, at 34.
136 *Id.*
137 *Id* at 35.
138 *Id.*
139 *Id.* at 90.

to tell others what to do, and be willing to compete with their peers.[140] On the other hand, descriptions of *managers* have started to include some stereotypically feminine qualities such as being helpful and understanding.[141] Nevertheless, even with the gradual acknowledgement of the positive qualities typically associated with femininity into our understanding of leadership, there is still a demonstrated masculine nature to managing roles.[142] This is not to suggest that models of leadership are completely rigid, but instead that they vary with the context in which the leaders must act. In organizations built around hierarchies, rank will influence how the members understand leaders.[143] For example, the higher the level of rank or office, the more masculine qualities will dominate, whereas in middle level positions, traditionally feminine traits such as human relationship skills and other skills that foster cooperation and helping development of subordinates are considered better.[144] A good way to consider the difference is by comparing the role of an elementary school principle with that of a corporate CEO or military officer.[145] Nonetheless, ultimately, the most powerful and influential roles are identified most closely with agentic and masculine notions.

Consequently, men gain a ”double advantage” in leadership contests with women. Eagley explains the advantage thusly:

> First, he is of course immediately categorized as male, which activates masculine associations, which are similar to beliefs about leaders and thus increase the odds that he is regarded as a leader. Once a man is viewed as a leader, the qualities associated with leadership are further ascribed to him, giving him an additional edge in the competition for leadership roles—no such bolstering occurs for women. Even when women behave agentically,

[140] EAGLEY, *supra* note 118, at 91 n.30.
[141] *Id.*
[142] EAGLEY, *supra* note 118, at 92.
[143] *Id.* at 94.
[144] *Id.* at 95.
[145] *Id.* at 94.

> people may not recognize her behavior as competitive or assertive. Gender stereotypes aid men on their path to leadership but complicate the labyrinth that women negotiate on their way to positions of authority.[146]

In complete contrast, female leaders are *disadvantaged* from their status as both woman and leader, and instead are subject to covert forms of prejudice and discrimination. Unlike the double advantage that men have, women are confronted with the "double bind." Eagley defines the double bind as the conflict between the expectation of communal behavior from a woman and the expectation of agentic behavior as a leader.[147] No matter what she does, a woman in a leadership capacity will more likely be subject to criticism for either not being a good leader or not being a good woman. For example, in studies conducted by psychologists Ziva Kunda, and Steven Spencer, they found that helpfulness was met with approval when coming from men, but not when coming from women.[148] In the same vein, when men were unhelpful, they often got away with it, whereas unhelpfulness in women was met with criticism or some other penalty.[149] In a different organizational study conducted by Ziva Kunda and Paul Thagard, the psychologists found that when employees reported helping their organizations beyond levels required of them by their position, male employees received more promotions while the promotions female employees received had no relation to their self-reported helpfulness.[150] Studies have also consistently found that women who exert nonverbal

---

146 *Id.* at 93.

147 EAGLEY, *supra* note 118, at 102.

148 *Id.* at 103 n.4; *see also* Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do they Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCH. BULL. 522 (2003)(describing a theoretical framework that explains stereotypes as activated in the mind depending on the strength of comprehension and the self-enhancement goals that can be satisfied by stereotyping).

149 *Id.*

150 EAGLEY, *supra* note 118, 103; *see also* Ziva Kunda & Paul Thagard, *Forming Impressions From Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 PSYCH. REV. 284 (1996)(explaining how stereotypes, behaviors, and character traits affect one another and how

dominance (such as staring directly at the other while speaking, or pointing at others) are perceived more unfavorably than men who engage in such behavior.[151] Similarly, verbal intimidation has often worked to undermine women's chances of advancing in her career or even being hired.[152]

Unsurprisingly, the mere act of disagreeing can also serve to undermine a woman's appeal and influence while men who disagree often do not suffer from such consequences.[153] Multiple studies taken across nations have shown that communication styles of men, whether warm or dominant, have little consequence on their likability or influence.[154] However, women are deemed more likable only when they are warm and friendly, leaving assertive or more aggressive women to be penalized for their failure to be likable or feminine, at least as evidenced by warmth and friendliness.[155] Accordingly, female leadership is often met with far more resistance from men as well as other women, further limiting women who desire to be leaders from moving up the ranks as easily.[156] Unlike their male counterparts, female leaders often must overcome hostility and rejection from others in order to exert their influence and authority as well. [157] Eagley cites two studies, one in which people were told about a woman succeeding in the male-dominated occupation of electrical engineering.[158] The study showed that those people "assumed that the woman was less likable, less attractive, less happy, and less socially

---

viewing experiences with stereotypes, behaviors, and character traits as constraining one another may be advantageous to understanding).

151 EAGLEY, *supra* note 118, at 104.

152 *Id.*

153 *Id.; see generally* JOHN E. WILLIAMS & DEBORAH L. BEST, MEASURING SEX STEREOTYPES: A MULTINATION STUDY (1990)(identifying beliefs commonly held throughout nations in association with male and female characteristics).

154 *Id.*

155 EAGLEY, *supra* note 118, at 104.

156 *Id.* at 105.

157 *Id.*

158 *Id.*

desirable than a woman who succeeds in a typically feminine career."[159] In another study, when told about a group of "successful female managers," study participants labeled them as more "deceitful, pushy, selfish, and abrasive than 'successful male managers.'"[160]

On the other side of the double bind, when women are "too nice" or accommodating, people are more likely to raise questions as to their ability to lead thus requiring women to "outperform men to be seen as equally competent."[161] The earlier mentioned case of *Price Waterhouse v. Hopkins* presents a solid example of how one woman could be denied competence despite the fact that she had accomplished more than her male counterparts (in the form of securing a $25 million contract with the government, something none of the partnership candidates had done).[162] Similarly, Carly Fiorina, former CEO of Hewlett-Packard recalls her experience with the double bind thusly: "In the chat rooms around Silicon Valley, from the time I arrived and until long after I left HP, I was routinely referred to as a 'bimbo,' or a 'bitch'—too soft or too hard, and presumptuous, besides."[163]

The psychology surrounding leadership is undeniably complicated, but nonetheless is obviously influenced by the fact that men have historically been the only ones who *could* be leaders. While this is no longer the case today, the impact of male dominance still pervades many fields of employment and the way the general population understands successful leadership as well. The prejudice surrounding female leadership

---

[159] EAGLEY, *supra* note 118, at 105; *see also* Mary Ann Cejka & Alice H. Eagley, *Gender-Stereotypic Images of Occupations Correspond to the Sex Segregation of Employment,* 25 PERSONALITY AND SOCIAL PSYCH. BULL. 413 (1999).
[160] EAGLEY, *supra* note 118, at 105.
[161] *Id.* at 112.
[162] 490 U.S. at 234.
[163] EAGLEY, *supra* note 118, at 110.

therefore must be addressed by the law to the extent that the passage of time has not been able to correct these notions and to the extent that they are imbedded so deeply into our understandings of gender and behavioral propriety as well. Furthermore, unless the law intercedes, the costs of this generalized understanding of leadership as a masculine domain will continue to go unaddressed in discrimination claims raised by women who have failed to receive promotions or secure job offers in male-dominant fields.

C. The Costs of Masculine Understandings of Leadership in Case Law

Case law surrounding discrimination in the context of promotions highlights the disparity experienced by women in their male-dominant fields. In these cases, discrimination takes a far more insidious form rather than an outright dismissal of a woman for simply being female. Discrimination shows itself instead through more subtle forms, such as an attitudinal penalty, or lower scores in evaluations, or simply through the excuse that a woman is just "not the right fit" for the job or for the company—an approach many employers take successfully.[164]

In *Wilson v. B/E Aerospace* a female employee brought a claim for discrimination after she was not promoted despite her supervisor's admittance that she was "the obvious candidate" and "most qualified" for the job.[165] Her supervisor explained to her however that, "women aren't typically in that type of position."[166] The Court there ultimately ruled that Wilson had not made a prima facie case of discrimination.[167] More substantially, in *Jones v. Rivers*, the plaintiff Jones was denied a promotion in favor of a

[164] *Id.* at 96.
[165] 376 F.3d 1079, 1084 (11th Cir. 2004).
[166] *Id.*
[167] *Id.* at 1092.

male subordinate.[168] Both the male subordinate and the promoting officer, David Rivers, stated that Ms. Jones was "very helpful" "very patient" "cooperative" "intelligent" "compassionate" and "dedicated" but nevertheless did not have "leadership qualities."[169] The court recounts, "stating his preference for aggressive individuals, Rivers described Jonas as 'timid'" though she excelled in every aspect of her job in terms of performance.[170] Similarly, in *Greenbaum v. Handelsbanken*, a female plaintiff working in finance was consecutively denied a promotion to a vice-president position despite her consistently exceptional performance on the job and glowing evaluations and recommendations from her direct Supervisor at SNY, an international banking corporation.[171] Promotions were decided by a general management committee consisting of a few men acting as department heads, men who genuinely could not give a reason for their failure to promote, except that it wasn't discrimination.[172] For this reason, Greenbaum was able to succeed on her discrimination claim in this case, as did Jones, in her discrimination claim. However, it is significant to note that not all women can maintain the level of exceptionality that both Jones and Greenbaum had presented, which were ultimately the most essential elements in proving the prejudicial attitude the employers had been able to keep under wraps prior to these women's claims.[173]

Thus, these cases support the conclusion that in the context of leadership, polarized thinking continues to dominate and act as an obstacle to women's success in leadership roles and their ascent to positions of greater influence. The cases also suggest

[168] 722 F.Supp. 771 (D.D.C. 1989).
[169] *Id.* at 775.
[170] *Id.*
[171] 67 F.Supp.2d 228 (S.D.N.Y. 1999).
[172] *Id.* at 238.
[173] *Id.* at 250-252; 722 F.Supp at 790.

that people only respond to explicit evidence of a woman's substantial superiority over a man before deciding that the woman truly is qualified or better than a man at certain tasks. Interestingly, women who meet the high expectations placed on her as a leader are often assumed by others to have an even higher degree of individual competence than men who hold similar positions. As Eagly notes:

> People think that only extreme individual competence could allow women to surmount the challenges that they have overcome: – but only for their category, and then gender and racial stereotypes are likely to prevail. To the extent that people have an implicitly higher standard for women for success in masculine domains, female candidates have to work doubly hard to get recognized. Women generally have to have extraordinary track records in order to have career success.[174]

V. CONCLUSION

In today's society, very rarely do people intend to discriminate based on gender or biological sex. Far more common today is discrimination that results from a perceived mismatch between a person's gender and the role they are expected to play. To the extent that discrimination law fails to realize the insidious nature of discrimination, it will fail to rectify the discrimination where it is most dangerous—the leadership level. Granted that gender categorization is an unavoidable part of the way humans process information about one another, the law should intercede to the extent that gender and sex are defined solely based on biology or "drastic stereotyping" and therefore do not take into account the extensive identity work required of women. By incorporating the social manifestations of biological sex and acknowledging the fact that gender performance does not have to meet a rigid female=femininity and male=masculinity dichotomy, the

[174] EAGLEY, *supra* note 118, at 115.

law will not be able to penalize claimants of discrimination for their failure to conform to historical notions of what it means to be a man or a woman.

More than ever, gender diversity within the top-management levels of the business world is crucial. For one, women, more than men, have exhibited a style of leadership that is more in line with the way the most successful contemporary businesses are run.[175] Studies have shown that democratic, participative, and collaborative styles of leadership have been more successful and welcomed today than the old models of hierarchy.[176] Furthermore, today's companies must learn how to best adapt to innovation as technology advances at an ever-increasing speed. This requires that leaders increase the availability of knowledge by creating collaborative workflows and multidisciplinary teams. Leaders must also acknowledge the intensification of competition for talent that is globally present by adapting motivational behaviors such as "inspiration" and "expectations and rewards".[177] Of these behaviors that are particularly important today, three of the four (inspiration, participative decision making, and expectations and rewards), are observed more often in women than in men.[178] A change in the law then, may be the best and fastest way to bring about the change in leadership that we desperately need as a society.

One way to change the law would be a legislative requirement that courts apply a uniform definition of sex discrimination that is broad enough to acknowledge variations in gender performance and excludes impermissible stereotyping of what characteristics specifically belong to the male or female label. Another way to change the law would be

---

[175] *Id.*
[176] *Id.* at 10.
[177] DESVAUX, *supra* note 1, at 12.
[178] *Id.* at 3.

a change in the evidentiary standard that would allow considerations of any serious identity work that an employee had to engage in in order to navigate the work environment and become accepted by his/her co-employees. In this way, claimants of discrimination who had fought hard to blend in to the existing culture of her workplace before bringing a discrimination claim would not lose their claim for having done so, since courts would not be able to conclude that she "welcomed" any harassing behavior or participated in the culture to her own detriment. Such changes in the law would allow for a more unbiased approach to whether discrimination has occurred and take away from the courts any opportunity to insert their own judgments on what is or is not proper behavior befitting of a man or a woman. In light of the arguments for greater female presence at the leadership level, such an intervention by the law could potentially result in an improved American economy and better working conditions for every American.

And furthermore, while the world will continue to see women use their advanced educations to get ahead in *formal* leadership positions, their absence in the elite and highest level of leadership remain a threat to our society and reinforces the notion of gender hierarchy. Some people may object to changes in discrimination law, whether through a broadened definition of sex discrimination or by allowing identity work to be relevant evidence, primarily for two reasons. The first would be the fear that such changes would result in a flood of litigation from not only women, but the transgender community as well. Similarly, there would be a concern for trial efficiency, since the expansion of permissible evidence would probably result in longer trials. However, relying on society to correct itself seems unrealistic in light of the stability of the

unchanging demographics in positions of greatest power and influence.[179] And in the same vein, as much as transgender rights remain an issue that people are willing to fight for, courts should not be afraid of taking on these claims and solidifying the importance of equal rights for all, despite gender performance.

Good leaders are not special because they can simply bring in a profit or because they have great ideas. Good leaders are good leaders because they motivate us, encourage us, and set an example for what should be done.[180] Old models of leadership focused on managing and commanding have become obsolete,[181] and those that still subscribe to these notions are arguably failing to develop alongside the rest of our fast paced society.[182] Leadership now is less about managing people and more about effectively guiding people—people don't *want* to be managed and the best workers don't need someone to oversee their daily activities.[183] Leaders therefore must act as visionaries who can maintain their vision and purpose as a beacon to others who subscribe to that vision and purpose. For too long we have accepted the status quo of the idealization of masculine portrayals of leadership and the male-oriented models in the workplace, and the law in many cases have supported their continued existence. By addressing these problems directly through a change in the law, our society might finally see the kind of advances, both culturally and technologically, of which equal rights activists have only dared to dream.

---

[179] DESVAUX, *supra* note 1, at 1.
[180] *See generally* DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US (2011)(arguing that the secret to high performance and individual satisfaction revolves around autonomy, mastery, and purpose).
[181] DESVAUX, *supra* note 1, at 2.
[182] *Id.*
[183] PINK, *supra* note 180.