

**Make Room at the Top: Getting to the Heart of Women's Exclusion from
Science and the Profession**

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Abstract

The paper will address the following issues: (1) how recent developments in social psychology have transformed thinking about how discrimination occurs; (2) how this new understanding can be applied to understand the persistence of glass ceiling gender discrimination in the workplace; (3) how these ideas are creating a "paradigm shift" in the judicial system's approach to employment discrimination cases.

What's Law Got to Do with It? That was the title of my response to the Larry Summers controversy¹, and it's the question I am here to address today. What has law got to do with making room at the top? The answer is – a lot! More than you'd think, in fact. From my vantage point as an employment lawyer, the core of women's exclusion is the big “D” word, discrimination. Gender discrimination is the heart of women's exclusion from science and the professions.

What's law got to do with it? Law provides a structure for thinking about discrimination. (1) First, it provides a definition of unlawful conduct... In its simplest and most basic form, the classical legal definition of discrimination is disparate treatment on the basis of a protected category, like sex or race.

(2) Next, law provides a proof paradigm...in order to have the opportunity to prove the existence of unlawful conduct to a jury, you need, at a minimum, to establish three elements of proof...protected status, adverse action and causal nexus. In plain English this means you need to show that, in the case of gender, a woman was subjected to something bad, and that there is a causal relationship between her status as a woman and that bad treatment. That's it. Once you have established what is called the “prima facie” case, it's the employer's turn to articulate a legitimate nondiscriminatory reason for the decision, at which point it becomes the plaintiff's burden to show that the reason offered is a pretext for discrimination. Trial in a discrimination case is ultimately a contest between two explanations for the adverse action– the jury decides which is more believable.

(3) Law provides a remedy. In the case of discrimination, the remedy is known as “make whole”, i.e., if you win, you're supposed to be put in as good a position as you would have been had the discrimination not occurred.

Sounds pretty simple, right? But there is a catch. Over time discrimination law has evolved in ways that make it harder to vindicate women who are victims of discrimination. Because our current legal tools have been insufficient to penetrate the glass ceiling and the maternal wall, unless the legal paradigm changes to accommodate our changing understanding of how discrimination occurs, filling the “pipeline” with women and minorities will not insure that that the problem of exclusion at the top will be solved in the future.

What's law got to do with it? If we want to get to the heart of women's exclusion, we need carrots AND sticks, and law is the biggest stick around. Speaking of universities for the moment, there are lots of carrots around right now...funding from the ADVANCE program², extra FTE “target of opportunity” programs, and high level initiatives creating family friendly policies and “best practices” as fast as a computer can

¹ Charlotte Fishman “What's Law Got to do with It?” Common Dreams (February 23, 2005) www.commondreams.org/views05/0223-34htm [archived]

² ADVANCE: Increasing the Participation and Advancement of Women in Academic Science and Engineering Careers, is a program funded by the National Science Foundation.

spit out type. This is all extremely useful, creative, important work, and I have no desire to denigrate it...it's way past overdue.

Why, then do we need sticks? Because law part of the institutional frame of reference, the legal paradigm has power beyond the bounds of the courtroom. While lawsuits against universities are rare, and successful ones even rarer, the impact of a large judgment is huge, not only on the institution directly affected, but on others watching. Not that this would ever be acknowledged publicly, of course. But best practices are not adopted out of the goodness of an institution's heart! It is important to remember that, in addition to providing a structure for resolving disputes, law provides a platform upon which to base policy advocacy. The spectre of legal liability makes a large difference in your ability to persuade an administration to adopt a family friendly policy, or to provide centralized funding to departments to support "stop the clock" tenure leaves.

What then does law have to say about the relatively new developments in social psychology that we have heard described by Virginia Valian?³ At the moment, the answer is ... nothing. How can that be? Well, as Supreme Court Justice Sandra Day O'Connor has noted, law is a "reactive" institution -- rare is there a significant legal victory or legislative change that does not reflect an emerging social consensus.⁴ Do we have a social consensus on the notion that stereotyping is a normal cognitive process integral to human thought? Hardly. Well, maybe among social psychologists...and lawyers who are friends of social psychologists...but among the general public, no.

In fact, to the extent the legal paradigm for discrimination employs social psychological theory, it uses what Professor Gary Blasi at UCLA calls "folk psychology," a way of thinking about discrimination that we once believed was true, but is not consistent with current science.⁵ In "folk psychology," discrimination is the product of an overtly biased decision-maker, who exercises a conscious intent to act in accordance with that bias, at the moment of decision. Bias, on this view, is a stable trait of some individuals, and a moral failing. With this paradigm, proof of discrimination involves the search for a discriminatory "motive", and evil "intent."

Two things flow from this folk psychology. One is that, at this point in time, certainly in university and professional settings, the response of most people or institutions to a charge of discrimination is an immediate, offended denial...not me, not us! How could you even think such a thing?! Second, a paradigm that requires the existence of a biased decision-maker consciously exercising that bias at the moment of decision, severely under-identifies actual discrimination that occurs in the modern workplace. I am sure every one in this audience can think of a situation in which a woman's accomplishments were unconsciously devalued, rewarded less, or attributed to something like luck or chance, by otherwise well-intentioned decision-makers in a

³Valian, Virginia, Why So Slow? The Advancement of Women

⁴ Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice (Random House 2003)

⁵ Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology 49 UCLA L. Rev. 1241 (June 2002)

situation in which a man would receive accolades, greater rewards or attribution of his accomplishment to his great potential and/or intellectual ability.

If the legal paradigm for discrimination were to employ the modern social cognition theory view that stereotyping is a natural and largely unconscious human cognitive process used to organize information, and that stereotypes result in distortions of perception, interpretation, recall and evaluation undertaken by normal, everyday people, what difference would it make? First, by explaining how someone or a group of someones can perform a biased evaluation while truthfully denying a conscious intent to discriminate, the theory demonstrates that discriminatory decisions can occur whether or not the perpetrators act from an evil “motive” or “intent.”

So one result of this paradigm shift is that being accused of discrimination is less fraught with moral failing overtones and is more likely to be seen as a problem to be solved. This is beneficial to those working within institutions to create the needed changes, and it provides a roadmap for those who want to render what we now call “subtle” “unreflective” or “unexamined” bias visible so it can be addressed. Another benefit of the theory is that it widens the scope of behavior encompassed by discrimination to include the kinds of microinequities (first identified by co-panelist Nancy Hopkins and described in the 1999 M.I.T. report on the status of women scientists⁶), accumulations of small disadvantage (first described by co-panelist Virginia Valian in her book Why So Slow? The Advancement of Women⁷) that result in the exclusion of women and minorities from the top echelons of professional and scientific fields.

Why is this important? If we are serious about getting to the heart of women’s exclusion from science and the professions, then we need to do more than develop best practices and identify problematic behavior. What the legal paradigm matters even if you are not a plaintiff in a lawsuit, or a victim about the file a charge with the EEOC. It matters when you ask your chairman for a university-sanctioned leave, when you apply for a grant, or ask for a counter-offer. It matters when you sit on a hiring committee or you select the next dean or a provost. And we need it to matter in what Gary Blasi refers to as “the 500 hallway interactions” during the course of a career in which stereotyped assumptions affect perceptions, interpretations, recall and ultimately evaluation of a woman’s performance, just as much as it matters at the time of the up or out tenure or partnership decision.⁸

So how well is the legal paradigm as it exists today working? To what extent does it serve the project of “getting to the heart” of women’s exclusion and to what extent does it need to be changed in order to do so? Well here there is good news and there is bad news. The good news is that the bare bones paradigm I gave you in the beginning,

⁶ A Study on the Status of Women Faculty in Science at MIT (MIT 1999)
<http://web.mit.edu/fnl/women/women.pdf>

⁷ (MIT Press 1999)

⁸ Presentation at “Stereotyping and Gender Discrimination” seminar sponsored by the California Employment Lawyers Association and Equal Rights Advocates at UCLA September 28, 2004.

adverse action-protected status-causal nexus, is sufficient to do the job under proper conditions, and is in fact doing the job right now in some, if not all, circumstances.

When we view the legal paradigm as a search for “cause” as opposed to a search for “motive”, disparate treatment discrimination can be proved by presenting the accumulation of small disadvantages (“micro-inequities) that over time have a “macro” effect, or by showing that gender stereotypes cause women to be evaluated less favorably than similarly situated men. This paradigm is fully able to accommodate the new social psychology. Attorneys and other advocates simply need to become adept at “casting a wide net” to identify and marshal evidence of the myriad subtle as well as overt ways in which women are disadvantaged, and to draw the appropriate comparisons with similarly situated males. It opens the door to a more expansive view of what evidence to look for -- whether a process is tainted, as opposed to a decision-maker.

Over time, we can expect that with more public discussion of social cognition theory, and more carrot-like activities within the affected institutions, the result will be a social consensus about what discrimination looks like that will no longer brook a “cluelessness” defense, as Joan Williams calls it⁹. The best outcome would be a social and legal consensus that, while you may not be to blame for the fact that your cognitive processing equipment is hard wired to employ stereotypes, you can be held accountable for failing to control for their known bias effect. That fits under the pre-existing legal duty of employers to take all steps necessary to prevent discrimination from occurring, and it works very well as a spur to adopting stronger internal controls. A legal system incorporating these principles is fully able to provide redress for cognitive bias.

The bad news is that if we are not vigilant, the ability to use these concepts will disappear before these notions are firmly established in law. There is already backlash in the context of retaliation law... a concerted effort to redefine “adverse action” through the court system, to rule out precisely the type of context-specific microinequities that are critical for overcoming discrimination in science and in the professions. The defense bar is laboring mightily to alter the landscape of discrimination so that only “material and substantial” actions (hiring, firing, big events with direct economic consequences) will count.

To overcome women’s exclusion from science and the professions, lawyers and social psychologists have to work together to promote the idea that what has been heretofore called subtle or unconscious bias, chilly climate or hostile department culture, is in fact previously unrecognized, unreflective and unexamined discrimination that has been sanctioned for years. It must be rooted out of the workplace, just like other forms of more overt, hostile discrimination. There is historical precedent for this synergistic activity between lawyers and social psychologists. The most well known, is Brown v. Board of Education¹⁰, in which presentation of the psychological effect of segregation on

⁹ Joan Williams, “The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense 7 **Employee Rights and Employment Policy Journal** 401 (2003)

¹⁰ Brown v. Board of Education, 347 U.S. 483 (1954)

black schoolchildren was the basis for developing the legal doctrine that “separate but equal is inherently unequal.”

In conclusion, if we want to be successful in this enterprise, and I know we do, we must not forget the motivating force of law, and the importance of insuring that our legal tools are up to the task. We have a lot of work to do together. Thank you.

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