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All Work Cultures Discriminate

*Deborah M. Weiss**

Men compete with others while women care for them, and from this fundamental difference flows many dissimilarities in risk-taking, toughness, and trust. Such generalizations have long been invoked by traditionalists to explain why women will inevitably be drawn to some jobs rather than others, and why those jobs will be lower in pay and prestige than jobs predominantly held by men. This argument was famously advanced by the defendant in *Equal Employment Opportunity Commission (EEOC) v. Sears, Roebuck & Co.*¹: Sears suggested that women were inherently less interested than men in highly paid commission sales jobs and preferred lower paid salaried positions.

The *Sears* case immediately caused a furor and has continued to be a focal point for debates about women and work. Some feminists believe that sex differences should be acknowledged and accommodated. They believe that personality traits relevant to work are differently distributed in the current male and female population. However, they point out, the match between personality type and job is determined not only by intrinsic job characteristics but also by a firm's work culture. Work cultures are in part the product of employer choices, conscious or otherwise, and in any given industry, successful work cultures can vary greatly. Many work cultures developed when the labor market was dominated by men, and accommodationists propose that firms be encouraged or required to create work environments that are more congenial to the personality traits now common in women. Accommodationists include some scholars who

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1. The *Sears* litigation was complex and protracted. The EEOC first began its internal investigation into *Sears* in 1973. It filed suit in 1979, and in 1980 the District Court denied *Sears*' motion to dismiss. *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 276 (N.D. Ill. 1980) [hereinafter *Sears I*]. Commentary on the case frequently examines both the opinion of the District Court, 628 F. Supp. 1264 (N.D. Ill. 1986) [hereinafter *Sears II*], the opinion on appeal by the Seventh Circuit, 839 F.2d 302 (7th Cir. 1988) [hereinafter *Sears III*], and the dissent on appeal, *Sears III*, 839 F.2d at 360 (Cudahy, J., dissenting).

advocate sex-specific accommodations and others who advocate facially sex-neutral policies adapted to female-gendered traits. Many accommodationists are difference feminists² who advance an ethic of care conception of sex differences, thus sharing some common ground with traditionalists: both agree that men tend towards competitiveness while women, perhaps because of their role as mothers, strive for connection with others through care and nurturance.

Other feminist scholars emphasize the importance of resisting stereotypes. They focus on the costs of accommodation, arguing that efforts to base policy on any view of long-term sex differences will ultimately hurt women by bolstering the traditionalist view of sex roles. The ethic of care model, they argue, reinforces the view that women are intrinsically less suited than men to resource production and the public sphere. Workplace segregation, in this view, results primarily from discrimination that is in some sense intentional, and must be addressed through antidiscrimination policy, which will integrate workplaces and in turn solve the problem of work culture.

In this paper I examine the large body of recent empirical evidence on sex difference and its sometimes surprising results. I argue that this research points to a revised view of difference that reduces anti-stereotyping concerns. Both the ethic of care and the traditionalist models array the masculine and feminine along a single continuum whose ends are labeled "competitive" and "caring." They take the traits "competitive" and "caring" to imply a whole host of other traits such as individualism and motivation. Yet human personality cannot be described on a single dimension, and statistical sex differences are similarly richer and more complex than any one-dimensional theory suggests. The competition/care dichotomy does seem to describe some observed differences. The average man does in fact enjoy competitive situations and is stimulated by them to higher performance. But competitiveness has been inaccurately been equated with motivation. The average woman is not terribly competitive but she is ambitious. Women often exert greater effort and respond more to incentives than do men, and thus their effort is motivated not by the spur of competition but by self-discipline, conscientiousness, responsiveness to feedback, and enjoyment of the intrinsic value of a task.

Conversely, caring for others is neither the sole province of women nor a perfect proxy for all prosocial values. In comparison with the average man, the average woman does appear more reciprocal of kindness, more trustworthy and more willing to make sacrifices to avoid inequality. However, the average man is not wholly self-interested: Compared with the average woman he is more trusting and more likely to make personal

2. "Difference feminism" is the position that unless sex differences are acknowledged, "being equal means being like men," a definition of equality that will disadvantage women. See, e.g., Carol Gilligan, *Getting Civilized*, 63 *FORDHAM L. REV.* 17, 20-21 (1994).

sacrifices if those sacrifices would serve utilitarian rather than egalitarian goals.

The aggregation of these specific empirical findings I will call the empirical difference model. These research results are sure to be revised over time but are at present closer to the truth than traditionalism and the ethic of care model. This relative verisimilitude is, I argue, critical to balancing the costs of stereotyping against the benefits of accommodation, a determination central to deciding the role that considerations of difference should play in public policy. The empirical difference model tends to support some recognition of difference: It suggests that accommodation may provide significant benefits, and that stereotyping costs can be reduced by questioning traditional stereotypes and providing a more accurate account of sex differences.

The precise form that accommodation should take presents a more difficult problem. Sex-specific policies, even if based on accurate generalizations, may reinforce inaccurate views and stigmatize atypical individuals. Sex-neutral policies may present a reasonable compromise between sex-specific policies and doing nothing, but do not obviate the need for an accurate picture of differences. In order to help women, sex-neutral accommodation policies must be gender-conscious and based on a view of the female traits to be accommodated. The empirical difference model not only provides a more accurate view of what accommodations would be helpful, but indicates that these accommodations might not be as costly as they might seem. By making little allowance for female autonomy and ambition, the ethic of care model points towards work cultures that would impose enormous costs on employers, especially if adopted in high prestige jobs. For example, a strong version of the ethic of care suggests that businesses like Sears would have to all but eliminate commission sales. The empirical difference model provides a more complex picture of women who are motivated by incentives but do not relish conflict. Commission sales work is not inherently uncomfortable for the average woman, but the highly adversarial atmosphere that Sears created was.

Unfortunately, gender-conscious but sex-neutral policies have their own problems. If current sex differences were entirely cultural in origin, these policies would—along with encouraging women's aspirations and reducing discrimination—lead to convergence in the tastes of men and women and the integration of now-segregated occupations.³ Current research, however, suggests that in the long run statistical sex differences are likely to show some persistence, so that workers and firms will be best

3. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1839 (1989) [hereinafter Schultz, *Telling Stories About Women and Work*].

served by allowing different firms to adopt different practices and attract employees of both sexes with a congruent personality. Requiring all firms to adopt a single gender-neutral work culture may impose significant costs on firms and provide neither the average man nor the average woman with the optimal work culture. The accommodationist program faces a quandary. Sex-specific policies are strong medicine that must be sparingly administered to avoid reinforcing stereotypes or stigmatizing non-conformists. Leaving today's workplace governance in place disadvantages females, because the ground rules developed when males were the only competitors. Yet gender-conscious neutral policies are at best equally unfair to both sexes, and seem a poor long-run solution to the problem of work culture.

No elegant policy design can fully address these complexities: only messy pragmatic compromises are possible. The simplest step can be taken in cases in which employers, like Sears, raise the issue of sex differences when defending claims based on statistical evidence. Plaintiffs have generally responded by accusing defendants of trafficking in stereotypes, but this approach has not generally worked well with courts and another response is possible. Assertions of sameness, I argue, simply end up measuring women against male norms, a standard by which the average woman will be found wanting. Rather than deny the existence of sex differences, plaintiffs might question whether statistical sex differences take the particular form asserted by defendants, draw a picture of a work environment in which the average woman would excel, and note that the defendant chose not to provide this. This approach in turn requires the empirical difference model or something like it, since the ethic care model does not readily support plausible work cultures.

A more difficult question is whether defendant's choice not to provide a female-friendly environment is itself actionable. Courts will rightly resist any effort to make them the arbiters of every aspect of work culture. Such a role is both beyond their institutional competence and disturbingly authoritarian, since work culture involves social as well as business relations.⁴ Challenges to work cultures, I argue, should be considered only as applied to extreme behavior whose regulation can be justified on more general grounds. Such claims would be better regarded as a form of disparate impact than as a form of disparate treatment.

Perhaps the law should place little or no obligation on employers to accommodate each sex. Voluntary employer efforts thus become critical and the law must not interfere with voluntary efforts to devise work cultures that are congenial to women. Such experiments have been made more difficult by the Supreme Court's 2009 decision in *Ricci v. DeStefano*

4. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 625 (2005).

and I address how a modified affirmative action defense might permit desirable innovation in work cultures.

I. WORK CULTURES

A firm's work culture may be defined as the incentives and values that control the way firm members interact with each other and with outsiders. An employer's work culture includes both easily defined characteristics such as compensation systems and less tangible ones such as the use of consensus or adversary dispute as a means of reaching decisions. People with different personalities function best in different work cultures, and each work culture will tend to attract people whose temperaments are congruent.

Some means of classifying work cultures would be extremely useful in examining the claim that different work cultures benefit different personalities. Unfortunately, culture is an elusive concept in both the study of society and the study of organizations.⁵ In the absence of a satisfactory theoretical framework, I will describe some informal evidence of how work cultures might have different effects on the average male and female employee.

A. COMMISSION SALES

1. *EEOC v. Sears, Roebuck & Co.*

Sex discrimination lawsuits can provide case studies on work culture. Work culture is especially relevant to cases involving the lack of interest doctrine, in which an employer argues that a job category contains few women because women find the job unappealing and choose not to apply.⁶ The policy and doctrinal issues raised by the lack of interest defense will be discussed in more detail later. For the moment, these cases are useful as

5. Relatively little academic work examines the dimensions along which organizations are best characterized, and scholars have focused instead on what might be called systems issues: how cultures emerge, change and are transmitted. This emphasis can be seen by examining the topics covered in the classic surveys of organizational culture. See EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* (4th ed. 2010). The most popular approaches to characterizing the content of cultures develop a typology of organizations based on one or two especially salient characteristics. This approach has been rightly criticized as oversimplifying the many dimensions of work culture. *Id.* at 157. A more flexible survey approach examines a number of different dimensions, although it still tends to examine relatively broad constructs. See DANIEL R. DENISON, *CORPORATE CULTURE AND ORGANIZATIONAL EFFECTIVENESS* (1990). Unfortunately, the survey approach is not yet sufficiently developed to provide a framework for examining what personalities thrive in what cultures, or to provide a basis for systematic empirical work about the prevalence of different work cultures.

6. The lack of interest defense might in principle be relevant to any case based on statistical evidence, whether based on disparate impact or disparate treatment theory. See *infra* Section V.

illustrations of the factual characteristics of settings in which sex differences in personality may be important.

The best known and most controversial lack of interest case is the 1986 *EEOC v. Sears Roebuck & Co.*⁷ Sales positions at Sears were compensated on either a commission or a non-commission basis. The EEOC claimed that between 1973 and 1980 (the “disputed period”), Sears discriminated against women in hiring and promotion into commission sales,⁸ where compensation was on average much higher than in non-commission sales.⁹ Even many of us who regard the facts of the Sears case as troubling believe that the EEOC’s handling of the case was ethically deficient¹⁰ and its theory of liability was less than perfectly clear. In essence, the EEOC argued that Sears had intentionally excluded women from commission positions, or alternatively that the subjectivity of its employment practices facilitated discrimination by individual supervisors.¹¹ Sears responded that women lacked interest in commission jobs,¹² and the EEOC countered that women were not uninterested but rather discouraged from applying.¹³ The EEOC presented evidence of work culture to prove intent, not as a challenge to the nature of the work culture itself. In this Section, the EEOC evidence is recounted to examine the work culture in which Sears conducted its commission selling and how that culture compared with other retailers.

Throughout the disputed period, Sears made unusually concerted efforts to improve the position of women in its workforce.¹⁴ Employers frequently employ window dressing to create the appearance of a concern with diversity, but Sears’ efforts went far beyond this. In the late 1960’s Sears voluntarily submitted to the demanding affirmative action and recordkeeping requirements applicable to government contractors.¹⁵ The federal agencies implementing these requirements repeatedly found Sears to be in compliance with them and regarded Sears’ efforts as a model for other firms to follow.¹⁶ Sears set a long-term goal of representing women

7. *See supra* note 1.

8. *Sears II*, 628 F. Supp. 1264, 1278 (N.D. Ill. 1986).

9. *Id.* at 1289.

10. Judge Cudahy, who dissented in part, stated that “the EEOC’s internal machinations in initiating this case deserve condemnation.” *Sears III*, 839 F.2d 302, 360 (7th Cir. 1988) (Cudahy, J., dissenting).

11. The EEOC relied primarily on a disparate treatment theory. *Id.* at 312. It made what the trial court called “vague references” to disparate impact theory. *Sears II*, 628 F. Supp. at 1279. To the extent that the EEOC did assert a disparate impact claim, that claim was based on the subjectivity of Sears’ practices rather than its possible masculine bias. *Id.* at 1281–85. Since the court found that it had waived its right to assert this theory, evidence of masculine job typing was relevant primarily to buttress the claim of intent. *Id.* at 1285 n.7.

12. *Sears II*, 628 F. Supp. at 1305–15.

13. *Id.* at 1314.

14. *Id.* at 1292–94, 1306.

15. *Id.* at 1292.

16. *Id.*

in all company jobs in proportion to their representation in the general workforce, and it required that managers fill one out of every two new commission sales positions with women or minorities.¹⁷

Sears held local managers accountable by tying compensation to meeting program goals and disciplining those who made insufficient efforts.¹⁸ As a result, Sears managers actively attempted to persuade current female employees¹⁹ to accept commission selling, sometimes approaching every woman in the store.²⁰ A female employee who expressed an interest in commission selling was given priority over male employees when an opening occurred, and was sometimes guaranteed her former position if she changed her mind after trying a commission job.²¹

Despite these unusual efforts, managers had only limited success in attracting women to commission sales.²² Sears argued, and the trial court agreed, that women's lack of interest in commission sales resulted in part from greater aversion to financial risk.²³ Commission jobs did indeed carry more risk. Non-commission salespeople were compensated on a straight hourly rate plus 1% commission for full time salespersons. Each week, commission salespeople received a "draw" of about 70% of estimated commissions.²⁴ Commissions ranged between 6% and 9%. When commissions actually earned were below the weekly draw, the salesperson incurred a deficit that carried over to the next week, although if deficit was not eliminated by commissions earned in the following week the deficit would be cleared. After 1977, Sears changed its commission method as part of its effort to attract more women. Under the new system, the salesperson earned a salary plus a 3% commission.²⁵ This change

17. *Sears II*, 628 F. Supp. at 1293.

18. *Id.*

19. For most of the disputed period, the initial job application form did not ask whether the applicant was interested in commission or non-commission sales, and some of the controversy surrounded whether female applicants in fact expressed a serious interest in commission positions. *Id.* at 1291.

20. *Id.* at 1293, 1306.

21. *Id.* at 1306.

22. *Id.*

23. *Id.* at 1307.

24. *Id.* at 1293-94.

25. *Sears III*, 839 F.2d 302, 320 (7th Cir. 1988). The summary in text omits two issues considered in the trial court opinion. First, the court considers the relative reluctance of women to work long hours, raising at least implicitly the issue of family responsibilities. *Sears II*, 628 F. Supp. at 1312. Though an important issue, work-family balance is a complex problem that is beyond the scope of this article.

Second, the court's opinion is somewhat confused by repeated mention of the fact that women were less knowledgeable about and interested in the product lines sold on a commission basis, such as hard goods and men's clothing. *Id.* at 1306. No explanation is given of how lines were assigned to commission or non-commission sales. To some extent higher priced items were sold on commission but this does not entirely seem to explain Sears' decisions, since men's clothing was sold on commission while women's jewelry was not. *Id.* I speculate that the choice of compensation method was chosen, perhaps

coincided with some improvement in the level of women interested in commission sales.²⁶

Sears also argued that commission sales required personality traits that women were unlikely to have and behavior that women were unlikely to enjoy. The central factor in commission hiring was apparently an interview by a manager that attempted to assess whether the candidate possessed desired personality traits.²⁷ Of central importance was the candidate's "aggressiveness or assertiveness, competitiveness" and "personal dominance."²⁸ Sears and the trial court acknowledged but tried to minimize the importance of two other factors in hiring, a written description of the requirements for commission selling and several personality tests.²⁹ However, the general picture of Sears' goals presented by these factors was quite consistent with that suggested by the interview. Like the managerial interview, the written description of a desirable commission sales candidate stressed the importance of a dominant personality and "drive and physical vigor."³⁰ High scores on the "vigorousness" dimension of the personality tests were considered desirable and the relevant questions, in addition to a clear male orientation, equated vigor not simply with energy or even athleticism but with dominance and aggression, asking "Have you ever done any hunting?" and "Have you played on a football team?"³¹ Various studies by Sears' experts suggested that women currently employed at Sears lacked interest in commission selling because such positions involved "dog-eat-dog" competition³² and "cut-throat competitiveness"³³ that interfered with "friendships at work"³⁴ and the "social and cooperative aspects of the

unconsciously, to match the sex most interested in selling the line. I attach no nefarious purpose to this, but it makes the relative lack of interest of women in the commission product lines unsatisfactory as an explanation of why women were not in commission sales.

26. *Sears II*, 628 F. Supp. at 1309.

27. *Id.* at 1291.

28. *Id.* at 1290.

29. *Id.* at 1290–91. Both the interview criteria and the manual suggested a few factors not discussed in the text. Whether Sears (or the trial court) believed there were sex differences in these other characteristics is unclear. The interview criteria included maturity, the ability to communicate effectively, persuasiveness, an outgoing, social or extraverted personality, and self-confidence. *Id.* at 1290. The manual mentioned intellect, maturity and "the ability to react quickly to a customer's verbal suggestions and modify the approach accordingly." *Id.*

30. *Id.* at 1290.

31. *Id.* at 1300 n.29. The trial court stressed that the vigor criteria was waived for the purpose of hiring women for commission positions, which, if true may be relevant to the extent that deliberate intent is alleged. *Id.* My purpose here, however, is to paint a picture of the personality for whom this work culture was designed, and for this purpose the contents of the test and manual seem relevant.

32. *Id.* at 1307.

33. *Id.*

34. *Id.*

workplace.”³⁵ Sears’ hiring criteria also included a “strong desire to earn a substantial income”³⁶ and its expert witnesses testified that men were more likely than women to be motivated by the pay of a job than by the nature of the job and whether they enjoyed it.³⁷

Another factor given weight was the applicant’s “self-confidence” and “resilience and the ability to deal with rejection.”³⁸ Hiring decisions were based on applicant self-evaluation of their skill and experience, and women’s self-evaluations were lower than men’s.³⁹ Though potential sex differences in these respects were not discussed in the opinion, Section III will argue that they play an important role in the workplace.

2. Nordstrom

Nordstrom, a firm whose sales force is about 70% female and whose top hundred managers are about half female, takes a very different approach to commission sales.⁴⁰ The Nordstrom experience shows that highly successful commission sales personnel can have personalities quite different from those sought by Sears. Nordstrom’s sales culture is described in a book written with cooperation from Nordstrom management.⁴¹ While Sears placed a premium on self-confidence, toughness, and dominance, Nordstrom looks for humility and sensitivity. “You need to be humble to do service,” said senior executive Erik Nordstrom. “The moment you think you’re really good at it is when you’re not really good at it . . . [I]f you’re really sensitive to the customer, and . . . to the people on the frontline, you are aware of your shortcomings.”⁴² Nordstrom’s approach is to “hire the smile, train the skill.”⁴³ As current chairman Bruce Nordstrom put it, “We can hire nice people and teach them to sell . . . but we can’t hire salespeople and teach them to be nice.”⁴⁴

Sears used competition as the central mechanism for motivating its sales force. A competitive environment, it believed, foreclosed cooperation between sales personnel, and required self-sufficient employees who needed no external encouragement. In contrast, Nordstrom places great emphasis on “unselfish” mentoring, mutual encouragement, and recognizing and praising its sales force. Its philosophy accords with that of Mary Kay Ash, another famously successful manager of female sales

35. *Sears II*, 628 F. Supp. at 1308.

36. *Id.* at 1290.

37. *Id.* at 1308.

38. *Id.* at 1290.

39. *Id.* at 1322.

40. ROBERT SPECTOR & PATRICK D. MCCARTHY, *THE NORDSTROM WAY TO CUSTOMER SERVICE EXCELLENCE: A HANDBOOK FOR IMPLEMENTING GREAT SERVICE IN YOUR ORGANIZATION* 100 (2005).

41. *Id.*

42. *Id.* at xiv.

43. *Id.* at 91.

44. *Id.*

personnel, who remarked, "There are two things people want more than sex and money . . . recognition and praise."⁴⁵ The contrast between the Nordstrom and Sears culture is almost comical. Sears motivated employees by "dog-eat-dog competition," while Nordstrom managers inspire employees "by creating an emotional bond with their fellow employees through a potent blend of praise, recognition, and joy. And sometimes even tears."⁴⁶

Yet for all this warmth and fuzziness, Nordstrom is a very demanding place to work, and supporters of the Nordstrom way refer to its work culture as "a process of natural selection—a survival of the fittest that is purely Darwinian."⁴⁷ The entire sales force is on commission and the typical commission rate is 6.75%,⁴⁸ within the range of initial Sears' commissions and above the 3% rate towards the end of the disputed period. Salespeople are encouraged to set high personal goals for themselves and data on the sales of other workers are public.⁴⁹ Nordstrom has been so successful at motivating its workers that many work long hours off the clock, writing thank you notes and delivering merchandise to especially valued customers.⁵⁰

B. EQUAL OPPORTUNITY ABUSE

Problematic work cultures often do not result in readily identifiable employment decisions, and are thus prohibited, if at all, under hostile environment doctrine.⁵¹ Discussions of hostile environments often focus specifically on sexual behavior, one of the few issues for which the implication of sex differences for employment discrimination has received detailed consideration. Sexual behavior is not the focus of this article; Vicki Schultz has argued hostile environments of a nonsexual nature have received insufficient attention⁵² and it is these situations that this section examines.

Many courts have emphasized that Title VII does not prohibit abusive environments so long as the abuse is meted out on an equal opportunity basis.⁵³ The conduct in these cases is sometimes quite serious, as

45. SPECTOR & MCCARTHY, *supra* note 40, at 171.

46. *Id.* at 173.

47. *Id.* at 93.

48. *Id.* at 116.

49. *Id.* at 178–79.

50. *Id.* at 103–05.

51. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63–67 (1986).

52. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2172–90 (2002); Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL'Y 417 (2000); Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 2–3 (2006).

53. *See, e.g., Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) ("Accordingly, we must evaluate Gross' claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty

illustrated by the 2005 district court opinion in *Flowers v. Honigman Miller Schwarz & Cohn, LLP*. The plaintiff charged that attorney Joseph Polito had treated her in a degrading and abusive manner and provided supporting testimony from other female employees.⁵⁴ One woman recounted that Polito had “physically grabb[ed] her” and had “chas[ed] her on the freeway,”⁵⁵ while a second woman testified that Polito would throw objects at her and physically hit her. A third reported that Polito would call her a “worthless piece of shit,” and further testified that Polito would “pluck her in the back of her head with his finger hard enough to make a thumping sound.”⁵⁶ The court denied relief on the grounds that Polito’s treatment of male employees was equally abusive, but did not provide much factual detail, and it is hard for a reader to evaluate this conclusion.

Academic discussions of such degrading conduct sometimes suggest that bullying is primarily a mechanism for enforcing gender norms and that its targets are generally women and feminine men.⁵⁷ This conclusion is inadvertently reinforced by the relatively brief discussion in cases like *Flowers* of the treatment by abusers of employees outside the protected class. Abuse can surely police gender norms. Yet such conduct is also extremely common among heterosexual men. Men in male-dominated environments often develop hazing rites that range from relentless teasing and horseplay to abuse. A classic description of such rituals can be found in *Liar’s Poker*, Michael Lewis’s memoir of Salomon Brothers during the high flying 1980s.⁵⁸ Lewis describes the experience and behavior of his class of trainees:

The back row, from about the third day of class on, teetered on the brink of chaos. Even when they felt merely ambivalent about a speaker back-row people slept or chucked paper wads at the wimps in the front row. But if the back-row people for some reason didn’t

meeting, or on the floor of Congress, is tolerated in other work environments.”); *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1126 (10th Cir. 1993) (“In its findings of fact, the district court concluded that ‘the work environment at the Investigative Division of the Salt Lake County Attorney Office was that of an unusually rough, sexually explicit and raw atmosphere.’”); *Reine v. Honeywell Int’l Inc.*, 362 F. App’x 395, 397 (5th Cir. 2010) (unpublished), *cert. denied*, 131 S. Ct. 140 (2010); *Wolff v. Northrop Grumman*, 111 F. App’x 152, 153 (4th Cir. 2004) (unpublished); *Flowers v. Honigman Miller Schwarz & Cohn, LLP*, 2005 U.S. Dist. LEXIS 9062 (E.D. Mich. 2005). Of course, plaintiffs may prevail if the behavior directed toward protected class members was more severe. *Baker v. John Morrell & Co.*, 249 F. Supp. 2d 1138, 1152–55 (N.D. Iowa 2003).

54. *Flowers*, 2005 U.S. Dist. LEXIS 9062, at *2–3.

55. *Id.* at *4. The sexually charged harassment has been edited out to emphasize non-sexual abuse.

56. *Id.* at *14. Again, the text omits sexually charged harassment.

57. See, e.g., Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment Because of Sex*, 79 U. COLO. L. REV. 1151 (2008).

58. See MICHAEL LEWIS, *LIAR’S POKER: RISING THROUGH THE WRECKAGE ON WALL STREET* (1989).

care for a speaker, all hell broke loose.⁵⁹ . . . [One day] a back row person had beaned with a paper wad a managing director from bond market research, who had turned the color of raspberry sorbet and screamed for five minutes.⁶⁰

The story is striking in part because the perpetrators were trainees abusing their trainer, and thus were hardly exploiting a position of authority.

Lewis elaborates on the psychology of work environment. The back-row people, he suggests, “were victims of the myth, especially popular at Salomon Brothers, that a trader is a savage, and a great trader a great savage.”⁶¹ Many of their superiors lived by this myth: “[l]ife as a Salomon trainee was like being beaten up every day by the neighborhood bully.”⁶² After class, the trainees moved from class to the trading floor, “a minefield of large men with short fuses just waiting to explode if you so much as breathed in their direction.”⁶³ One day Lewis stepped on one of these mines:

Me: Hello.

Trader: What fucking rock did you crawl out from under? Hey, Joe, hey Bob, check out this guy's suspenders.

Me (reddening): I just wanted to ask you a couple of questions.

Joe: Who the fuck does he think he is?⁶⁴

The resulting humiliation of Lewis and other trainees was precisely the point of these interchanges. Still, subordinates were humiliated for a variety of different reasons. Lewis expresses respect for the harsh Socratic method, which could motivate hard work, but asks what purpose could be served by a “trader who threw a phone at your head every other time you passed his desk?”⁶⁵

A common pastime was practical jokes, some of which were actually funny. One poor trader named Matty stole some food from the Salomon cafeteria and made the mistake of bragging about it.⁶⁶ The next afternoon he received a phone call from a man who claimed to be a Securities and Exchange Commission (SEC) investigator whose jurisdiction included Wall Street cafeterias. He was calling, he said, to investigate a theft of food from the Salomon cafeteria. Matty laughed it off, but the next morning was confronted by a partner who claimed that he too had been

59. LEWIS, *supra* note 58, at 40.

60. *Id.* at 55.

61. *Id.* at 41.

62. *Id.*

63. *Id.* at 50.

64. *Id.* at 50–51.

65. *Id.* at 73.

66. *Id.* at 80–83.

contacted by the SEC about Matty's food theft and was quite concerned. He concluded by saying that he really did not know what would happen next and would get back to Matty. The next morning, Matty, already in a highly agitated state, was called into the offices of John Gutfreund himself, who expounded on the seriousness of cheeseburger larceny. Gutfreund informed him that after a "long and painful meeting" the executive committee had decided to let him stay "for now." Matty exited Gutfreund's office and sat at his desk, assuming his career was ruined. After a short time, other traders began to laugh hysterically, driving Matty out of the building with plans never to return. Of such incidents Lewis comments, this "cruelty . . . wasn't personal but ceremonial. Goofs were a rite of initiation."⁶⁷ There are indeed times when abusive behavior is deliberately targeted towards women because they are women, but sometimes abuse is simply an aspect of intra-male culture.

Regrettably, no female-dominated financial institution exists to serve as a comparator for Salomon as Nordstrom was for Sears, but the contrast between Nordstrom and Sears suggests that a female-oriented financial firm would not have a culture of hazing. Wall Street has proven to be one of the most difficult arenas for women to enter, and high profile suits against Wall Street firms are common; discomfort with hazing may well play a role in this.⁶⁸

II. SEX DIFFERENCES IN PERSONALITY TRAITS

Sears argued that commission sales required personality traits that were relatively uncommon among women. Both its personnel policies and its defense of this claim were premised on the idea that a number of diverse traits are highly correlated. In its view, a successful salesperson needs not only financial motivation but aggressiveness, assertiveness, competitiveness, self-confidence, and personal dominance. In aggregating these traits, Sears' position tracked traditionalist views as well as a considerable body of difference feminist literature, and indeed a prominent feminist testified in support of Sears.⁶⁹

The extensive use of commissions at Nordstrom suggests that these traits cannot be as strongly associated as Sears claimed. Still, the differences between female-dominated Nordstrom and male-dominated Sears and Salomon suggest that some more complex set of sex differences

67. LEWIS, *supra* note 58, at 80–83.

68. LOUISE MARIE ROTH, *SELLING WOMEN SHORT: GENDER AND MONEY ON WALL STREET* 72–74 (2008).

69. The expert, Professor Rosalind Rosenberg, was the object of intense criticism by other feminists for her testimony, yet the views she expressed were an accurate depiction of a large body of difference feminist literature. Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629, 1649–56 (1987).

may draw men and women to varying work cultures. This Section attempts to put that hypothesis on firmer ground by examining several bodies of research that suggest some correlations between personality and sex.

A. METHODOLOGY

Any study of sex differences in personality inherits general problems in the study of personality. Social scientists from many different disciplines study personality, and the terminology is not standard either across disciplines or among sub-fields within disciplines. The result is both the jangle fallacy, in which equivalent concepts are not recognized as such,⁷⁰ and the jingle fallacy, in which a single term is sometimes used to refer to different phenomena.⁷¹

This Section will adopt the taxonomy that has recently developed among experimental economists, which has had great success in resolving the apparently inconsistent results of earlier studies. At the same time, work in other disciplines such as personality psychology has made great contributions to our understanding⁷² and will be discussed with the basic analytic framework of experimental economics.

70. EDWARD L. THORNDIKE, AN INTRODUCTION TO THE THEORY OF MENTAL AND SOCIAL MEASUREMENTS 10 (1904); Jack Block, *A Contrarian View of the Five-Factor Approach to Personality Description*, 117 PSYCHOL. BULL. 187, 209 (1995) [hereinafter Block, *Contrarian View*].

71. T.L. KELLEY, INTERPRETATION OF EDUCATIONAL MEASUREMENTS 64 (1927); Block, *Contrarian View*, *supra* note 70.

72. While economists tend to focus on beliefs and behaviors, psychologists usually examine traits. Personality traits are "enduring patterns of perceiving, relating to, and thinking about the environment and oneself that are exhibited in a wide range of social and personal contexts." AMER. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 826 (4th ed. 2000). Traits are not themselves behaviors but are believed to predict behavior. The most commonly used framework for analyzing traits is the Big Five factor classification. Several separate research groups using slightly different methods arrived at five similar but not identical factors that can be further broken down into subclasses usually called facets. OLIVER P. JOHN & SANJAY SRIVASTAVA, *The Big-Five Trait Taxonomy: History, Measurement, and Theoretical Perspectives*, in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 102-11 (Oliver P. John and Lawrence A. Pervin, eds., 2nd ed. 1999); Paul T. Costa, Jr. & Robert R. McCrae, *The Revised NEO Personality Inventory (NEO-PI-R)*, in [2 PERSONALITY MEASUREMENT AND TESTING] THE SAGE HANDBOOK OF PERSONALITY THEORY AND ASSESSMENT 179 (Gregory J. Boyle et al., eds., 2008); John M. Digman, *Personality Structure: Emergence of the Five-Factor Model*, 41 ANN. REV. PSYCHOL. 417 (1990). Although the Big Five has proven useful in a wide variety of settings, it has drawbacks. The terminology for both factors and facets is not consistent among different versions of the Big Five and researchers disagree about how many traits lie outside the Big Five. Sampo V. Paunonen & Douglas N. Jackson, *What Is Beyond the Big Five? Plenty!*, 68 J. PERSONALITY 821 (2000); Kibeom Lee & Michael C. Ashton, *Psychometric Properties of the HEXACO Personality Inventory*, 39 MULTIVARIATE BEHAVIORAL RESEARCH 329, 331 (2004); Kibeom Lee et al., *Personality Traits Beyond the Big Five: Are They Within the HEXACO Space?*, 73 J. PERSONALITY 1437 (2005). Researchers also disagree about whether the data supports five factors rather than some other number. Jack Block, *Millennial Contrarianism: The Five-Factor Approach to Personality Description 5 Years Later*, 35 J. RESEARCH IN PERSONALITY 98 (2001). Some of the most contested issues involve traits that are critical in analyzing sex differences, such as

The experimental economics literature adopts the standard economic distinction between preferences and opportunities, and draws on the behavioral economics literature that considers limitations on rationality. Preferences are divided into social preferences, which concern other people, and self-regarding preferences, which concern our goals for ourselves. An important contribution of the new experimental work has been to bring some order into the previously confusing taxonomy of social preferences, to which we now turn.

B. SOCIAL CHOICES

1. Social Preferences

When an individual's well-being depends on the well-being of others, that individual is said to exhibit a social or other-regarding preference. Most of the debate over sex differences in personality concerns social preferences.⁷³ Both traditionalists and difference feminists often suggest that men focus on competing with others, while women focus on caring for them.

The new literature on social preferences distinguishes between preferences that are conditional and those that are unconditional.⁷⁴ Distributive preferences such as altruism and inequality aversion are independent of the actions of other people, or unconditional.⁷⁵ In contrast, a conditional social preference depends on the actual or anticipated actions

"impulsiveness." JOHN & SRIVASTAVA, *supra*, at 122. The factor "extraversion" is generally defined to include sociability, assertiveness, positive emotions and warmth. Aggregate sex differences in this category are probably not meaningful since its factors have strongly opposing gender effects. Women score higher in warmth, sociability, and positive emotions while men score higher in assertiveness. Paul T. Costa, Jr. et al., *Gender Differences in Personality Traits Across Cultures: Robust and Surprising Findings*, 81 J. PERSONALITY & SOC. PSYCHOL. 322, 326 (2001) [hereinafter Costa, Jr. et al., *Gender Differences*]. Trait analysis no doubt has important contributions to make to the understanding of sex differences, but those contributions must either be grounded on facet level analysis, not usually the practice now, or some more satisfactory factor level classification.

73. For excellent surveys, see Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LITERATURE 448 (2009); CATHERINE C. ECKEL & PHILIP J. GROSSMAN, *Men, Women and Risk Aversion: Experimental Evidence*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 510 (Charles R. Plott & Vernon L. Smith eds., 2008) [hereinafter ECKEL & GROSSMAN, *Experimental Evidence*].

74. In most of the well-known games usually used in laboratory experiments, an individual behavior depends on more than one of these traits. The multiplicity of traits at work, in combination with nonstandardized terminology, make interpretation and cross-experimental comparison difficult at best. However, one test, the dictator game, is relatively simple and depends only on unconditional preferences. By administering to each subject both the dictator game and a more complex game, the researcher can draw inferences about individual traits that would be obscured in the more complex games separately. James C. Cox, *How To Identify Trust and Reciprocity*, 46 GAMES & ECON. BEHAV. 260 (2004). The details of these inferences are described *infra* notes 80 and 83.

75. *Id.* at 262–63.

of others.⁷⁶ The most important of the conditional social preferences are trust, trustworthiness, and retributiveness.

For many years, studies of sex differences in distributive preferences found apparently inconsistent results, with women sometimes giving more and men sometimes giving more. These inconsistencies seem to be explained by a pattern reported by Andreoni and Vesterlund.⁷⁷ Women are more inequality-averse than men, even at a large personal cost or when equality decreases the size of the social pie.⁷⁸ Men are more utilitarian. If giving a small amount will greatly benefit the other party, so that altruism is inexpensive, men tend to give more than women.⁷⁹

Studies of conditional preferences also produced results that initially seemed inconsistent with each other, but which now have been explained by improved classifications and experimental methods. If my kind actions are driven by the assumption that you will treat me well in return, I am trusting.⁸⁰ In general, men are more trusting than women, although the

76. Cox, *supra* note 75, at 262–63.

77. James Andreoni & Lise Vesterlund, *Which Is the Fair Sex? Gender Differences in Altruism*, 116 Q.J. ECON. 293 (2001). Andreoni and Vesterlund used the dictator game, in which the proposer is given an amount of money to divide between himself and the recipient and the recipient must accept the offer. The game thus examines the distributive preferences of the proposer. A purely self-interested proposer would allocate nothing to the recipient. In fact, many proposers do allocate some money to the recipient. Proposer decisions can be caused by inequality aversion or altruism, but not by conditional preferences. *Id.* at 295–96.

78. *Id.* at 303.

79. *Id.* This result is consistent with earlier studies showing women more generous at the price predicted by Andreoni and Vesterlund. *Id.* at 304–05 (citing Catherine C. Eckel & Philip J. Grossman, *Are Women Less Selfish Than Men?: Evidence from Dictator Experiments*, 108 ECON. J. 726 (1998)). Women and men also respond differently to variations in the basic dictator game. Women are more inequality averse and men more utilitarian when they allocate resources between other players. David L. Dickinson & Jill Tiefenthaler, *What Is Fair? Experimental Evidence*, 69 SOUTHERN ECON. J. 414, 423 (2002). Women give less weight than men to whether resources are “earned,” *id.* at 424, and women are more likely to insure other people against losses. Reinhard Selten & Axel Ockenfels, *An Experimental Solidarity Game*, 34 J. ECON. BEHAV. & ORG. 517, 529 (1998). However, some circumstances reduce sex differences: these differences are lower in face-to-face rather than anonymous situations. Gary E. Bolton & Elena Katok, *An Experimental Test for Gender Differences in Beneficent Behavior*, 48 ECON. LETTERS 287 (1995) (imperfect anonymity, no sex difference in giving); Martin Dufwenberg & Astri Muren, *Generosity, Anonymity, Gender*, 61 J. ECON. BEHAV. & ORG. 42, 45 (2006) (almost no anonymity, no sex difference in aggregate donations though more women give something).

80. Cox, *supra* note 74, at 263. In trust games, player one chooses how much of his endowment to allocate to player two. The amount sent is multiplied by some fixed number and received by player two. Player two then decides how much money to return to player one. The amount sent by player one is determined by a combination of altruism, inequality aversion, trust, and fear of negative reciprocity. The amount returned is determined by a combination of positive reciprocity and altruism. An experiment that combines a trust game with dictator games (which depend only on altruism and inequality aversion) allows estimation of player one's degree of trust and player two's positive reciprocity. *Id.* at 262–63. The differences in the individual's behavior as dictator and trust-proposer provide a measure of trust, while the difference between behavior as dictator and trust-respondent

differences vary with circumstances and diminish as more information about the other party is made available.⁸¹ If I repay kind actions with my own kindness, I am trustworthy, or positively reciprocal.⁸² If I respond to unkind actions with more unkind actions, I am retributive or negatively reciprocal.⁸³ Women appear to be more reciprocal than men: they are usually more trustworthy, rewarding generosity more than men do, and they are also more negatively reciprocal, punishing stinginess more.⁸⁴ However, the degree of women's reciprocity seems to vary more with context than does that of men. One study found that women's positive reciprocity falls with the price of reciprocity and with their social distance from the recipient, and at high levels of social distance and price men are more generous.⁸⁵

2. Competition

A situation is said to be competitive if it is zero-sum, so that an outcome that is beneficial to one participant is detrimental to others.⁸⁶ An individual may enter a competitive situation to advance goals such as financial gain that could be satisfied in ways other than engaging in competition. Although a clear terminology has not fully developed, I will

provides a measure of positive reciprocity. James C. Cox & Cary A. Deck, *On the Nature of Reciprocal Motives*, 43 *ECON. INQUIRY* 623, 623, 625, 629–30 (2005) [hereinafter Cox & Deck, *Reciprocal Motives*].

81. Croson & Gneezy, *supra* note 73, at 458–60.

82. Cox & Deck, *Reciprocal Motives*, *supra* note 80, at 623. For experimental methods that estimate positive reciprocity, see *supra* note 80.

83. In an ultimatum game the proposer suggests an allocation of a given sum of money. The responder may accept the allocation, or reject the offer, leaving each party with zero. The amount sent results from inequality-aversion, altruism, or fear of negative reciprocity. Second movers may veto such proposals because of inequality-aversion or because of negative reciprocity. By combining ultimatum games with dictator games, which depend only on altruism and inequality aversion, the second movers' degree of negative reciprocity can be estimated. Cox & Deck, *Reciprocal Motives*, *supra* note 80, at 623.

84. Catherine C. Eckel & Philip J. Grossman, *The Relative Price of Fairness: Gender Differences in a Punishment Game*, 30 *J. ECON. BEHAV. & ORG.* 143, 151–54 (1996). See generally Croson & Gneezy, *supra* note 73, at 460–61 (surveying literature). One study distinguished between specific reciprocity, in which a subject rewards a particular individual who acted generously towards the subject, and general reciprocity, in which subjects respond to generous treatment by generosity towards third parties. Avner Ben-Ner et al., *Reciprocity in a Two-Part Dictator Game*, 53 *J. ECON. BEHAV. & ORG.* 333, 350 (2004). Specific reciprocity is associated with the personality traits agreeableness and neuroticism, which are more common in women, David P. Schmitt et al., *Why Can't a Man Be More Like a Woman? Sex Differences in Big Five Personality Traits Across 55 Cultures*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 168, 172 (2008), but no gender effects after controlling for these traits. Ben-Ner et al., *supra*, at 349. Women show more general reciprocity even after controlling for personality traits. *Id.* at 349–50.

85. James C. Cox & Cary A. Deck, *When Are Women More Generous than Men?*, 44 *ECON. INQUIRY* 587, 595–96 (2006).

86. See, e.g., MARTIN J. OSBORNE & ARIEL RUBINSTEIN, *A COURSE IN GAME THEORY* 21 (1994).

reserve the term “competitiveness” to refer to the enjoyment derived from participation in competitive situations wholly apart from any gain obtained.

Two important sex differences emerge with respect to competition. First, competitive settings generally increase the performance of males but not of females.⁸⁷ This conclusion is somewhat sensitive to environmental conditions. Second, men are far more likely than women to choose to engage in competition. One study examined a task chosen so that males and females performed on average equally under a noncompetitive piece rate scheme.⁸⁸ All subjects participated in a piece rate task and then in a tournament, in each case receiving only information on their absolute rather than their relative performance. Participants were then allowed to select whether to repeat the task in the piece rate setting or in the competitive tournament setting. While 73% of the men selected the tournament, only 35% of the women made this choice.⁸⁹ At least some members of each sex made choices that seem suboptimal from a strictly financial point of view. High ability women who performed well in the initial rounds chose a piece rate scheme when they would have done better in a tournament, and low ability men chose the tournament even when they would have done better under the piece rate.⁹⁰ Risk and feedback aversion explained only a small part of this difference, which appears to be caused by male overconfidence and greater preference for competition.⁹¹ In other words, the males appeared to enjoy the competition itself, regardless of its financial rewards, while the females conversely disliked the competition even when they would have done well.

3. Aggression

Aggression is often defined as an act that harms others.⁹² The harm can be gratuitous or it can be instrumental.⁹³ Ideally the study of aggression would be integrated into the conceptual framework used in the preceding sections, but at the moment it constitutes an entirely separate body of research. The studies of social preferences just described were conducted in the laboratory by psychologists and economists, but ethical considerations limit the experimental study of aggression. Aggression research thus often consists of field studies conducted by researchers in

87. Uri Gneezy et al., *Performance in Competitive Environments: Gender Differences*, 118 Q.J. ECON. 1049 (2003); Uri Gneezy & Aldo Rustichini, *Gender and Competition at a Young Age*, 94 AM. ECON. REV. 377 (2004).

88. Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q.J. ECON. 1067, 1078, 1097 (2007).

89. *Id.* at 1069.

90. *Id.* at 1069–70.

91. Niederle & Vesterlund, *supra* note 88.

92. John Archer & Sarah M. Coyne, *An Integrated Review of Indirect, Relational, and Social Aggression*, 9 PERSONALITY & SOC. PSYCHOL. REV. 212, 212 (2005).

93. Seymour Feshbach, *The Function of Aggression and the Regulation of Aggressive Drive*, 71 PSYCHOL. REV. 257 (1964).

ethology, anthropology, sociology, and evolutionary psychology. Despite the complications of comparing this work with lab studies, aggression is of tremendous importance to work culture, and so I summarize aggression research without attempting to make it fully commensurate with experimental work.

Aggression can be direct or indirect. Direct aggression can be either physical or verbal, but must involve an open confrontation with the intended victim. “Indirect” aggression is covert and is generally a “relational” or “social” attempt to ostracize the intended victim.⁹⁴ Research uniformly shows that physical aggression is dramatically more common among males than females, with the difference varying across age groups and peaking in late teens to early twenties.⁹⁵ This pattern shows strong cross-cultural consistency. Some studies show no difference in toddlers but the trend in recent research indicates a small difference at very young ages.⁹⁶ Direct verbal aggression is also more common among males than females, though the gap is smaller than for physical aggression,⁹⁷ and no strong age patterns have emerged. Indirect aggression displays a complex pattern that varies with the context and type of measurement. Sex differences appear to change with age, and females seem to use more indirect aggression than males in later childhood and adolescence.⁹⁸ Several factors seem to contribute to the greater aggressiveness of males. Both sexes experience approximately equal frequency and intensity of anger.⁹⁹ However, women may have a greater ability to control aggressive impulses.¹⁰⁰ In addition, men and women assess differently the costs and benefits of aggression. For all forms of aggression, provocation increases female aggression and sharply reduces sex differences,¹⁰¹ possibly because the other party is already antagonistic, lowering female assessment of the costs of aggression. Women show markedly more aggression in experimental than field studies, possibly because of the greater retaliation

94. Archer & Coyne, *supra* note 92, at 225–26 (indirect, social, and relational all measure essentially same phenomenon).

95. John Archer, *Sex Differences in Aggression in Real-World Settings: A Meta-Analytic Review*, 8 REV. GEN. PSYCHOL. 291, 310–11 (2004); Margo Wilson & Martin Daly, *Competitiveness, Risk Taking, and Violence: The Young Male Syndrome*, 6 ETHOLOGY & SOCIOBIOLOGY 59 (1985).

96. Archer, *supra* note 95, at 310–11.

97. *Id.*

98. Nicole H. Hess & Edward H. Hagen, *Sex Differences in Indirect Aggression Psychological Evidence from Young Adults*, 27 EVOLUTION & HUM. BEHAV. 231 (2006). See generally Archer, *supra* note 95, at 308–09.

99. Archer, *supra* note 95, at 308–09.

100. Daniel Strüber, *Sex, Aggression and Impulse Control: An Integrative Account*, 14 NEUROCASE 1 (2008).

101. B. Ann Bettencourt & N. Miller, *Gender Differences in Aggression as a Function of Provocation: A Meta-analysis*, 119 PSYCHOL. BULL. 422 (1996).

costs in real world situations.¹⁰² Female preference for indirect aggression may result from the perceived lower likelihood of retaliation.¹⁰³

C. SELF-REGARDING PREFERENCES

Self-regarding preferences are those that concern an individual's well-being apart from any interest taken in the welfare of others. This Section examines recent studies that suggest some statistical sex differences in these self-regarding preferences.

1. Risk Preferences

Studies by psychologists and sociologists examine a wide range of risky behaviors, from smoking to intellectual risk. These studies suggest that men are more risk-taking than women, although the degree of difference is somewhat task and context dependent.¹⁰⁴

Sex differences in risk-taking are partly explained by differences in risk perception. Studies differ about the extent to which different risk preferences are observed after taking perception into account. Women appear to be more risk-averse than men in abstract gambles with clearly stipulated stakes, in which differences in risk perception should in theory be irrelevant.¹⁰⁵ In contextual studies where subjects must assess risk, the results are more mixed. They suggest that sex differences in risk aversion vary with context, but account for a smaller proportion of differences in risk-taking than differences in risk assessment.¹⁰⁶

A final component of risk-taking behavior is the taste for risk, analogous to the taste for competition.¹⁰⁷ In the traditional economic model, rational agents do not enjoy either competitive or risky situations as such, but are willing to enter them to gain the rewards they may bring. However, just as some people enjoy the experience of competition, some enjoy the experience of taking risks, a trait sometimes referred to as "sensation seeking."¹⁰⁸ Evidence shows that males are on average significantly more sensation-seeking than females, a difference which may explain a considerable part of greater real world risk-taking by males.¹⁰⁹

102. Bettencourt and Miller, *supra* note 101, at 443.

103. Archer & Coyne, *supra* note 92, at 220.

104. James P. Byrnes et al., *Gender Differences in Risk-Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367, 377 (1999).

105. ECKEL & GROSSMAN, *Experimental Evidence*, *supra* note 73.

106. E.U. Weber et al., *A Domain-Specific Risk-Attitude Scale: Measuring Risk Perceptions and Risk Behaviors*, 15 J. BEHAV. DECISION MAKING 263, 282 (2002).

107. See *supra* Section II.B.2.

108. C.P. Cross et al., *Sex Differences in Impulsivity: A Meta-Analysis*, 137 PSYCHOL. BULL. 97, 98 (2011).

109. *Id.* at 98, 122.

2. Delay of Gratification

“Conscientiousness” is a tendency to plan, show self-discipline, control impulses, and aim for achievement. Studies that examine broad measures of conscientiousness sometimes, but not always, show somewhat higher levels of conscientiousness in women.¹¹⁰

Studies using more finely differentiated categories tend to find a female advantage. One meta-analysis of studies of children found girls stronger in several measures of “effortful control,” the ability to manage and regulate attention and inhibit their impulses,¹¹¹ though studies of adults indicate that sex difference may diminish with age.¹¹² Another study found a large female edge in self-discipline,¹¹³ and there is some evidence that females are motivated more by intrinsic enjoyment and less by external rewards than are males.¹¹⁴

Individual studies of delay of gratification seemed to produce a mixed picture, though a meta-analysis suggested that women have a small but highly significant advantage.¹¹⁵ One study with over two hundred participants found that many of the males and not a single woman made time-inconsistent decisions.¹¹⁶ This result may explain the confusing results of earlier studies, since time inconsistency implies that the relative patience of men and women depends on the time horizon under study.

110. Schmitt et al., *supra* note 84. No significant difference was found in Costa, Jr. et al., *Gender Differences*, *supra* note 72 (new data using NEO-PR-I). See also Alan Feingold, *Gender Differences in Personality: A Meta-Analysis*, 116 PSYCHOL. BULL. 429, 442 (1994) (meta-analysis of studies from a wide variety of frameworks, showing no sex differences in the broadly-defined category of “impulsiveness,” which aggregated all traits labeled impulsiveness, self-control, restraint and cautiousness); Cross et al., *supra* note 108, at 119 (small difference in aggregate measures).

111. Nicole M. Else-Quest et al., *Gender Differences in Temperament: A Meta-Analysis*, 132 PSYCHOL. BULL. 33, 60–61 (2006).

112. One meta-analysis of adults found a small female advantage in “effortful control” in emotionally charged situations but no sex difference in “executive function.” Cross et al., *supra* note 108, at 119–22.

113. Angela Lee Duckworth & Martin E.P. Seligman, *Self-Discipline Gives Girls the Edge: Gender in Self-Discipline, Grades, and Achievement Test Scores*, 98 J. EDUC. PSYCHOL. 198 (2006).

114. Catherine F. Ratelle et al., *Autonomous, Controlled, and Amotivated Types of Academic Motivation: A Person-Oriented Analysis*, 99 J. EDUC. PSYCHOL. 734, 737 (2007); Katrin Bätz et al., *Differences Between Boys and Girls in Extracurricular Learning Settings*, 5 INT’L J. ENVTL. & SCI. EDUC. 14 (2010).

115. Irwin W. Silverman, *Gender Differences in Delay of Gratification: A Meta-Analysis*, 49 SEX ROLES 451 (2003).

116. Jeffrey Prince & Daniel L. Shawhan, *Is Time Inconsistency Primarily a Male Problem?*, APP. ECON. LETTERS 501 (2011).

D. COGNITIVE DIFFERENCES

1. Self-Evaluation

On average, men are substantially more self-confident than women.¹¹⁷ This finding of course raises the question of the accuracy of each group's self-perception. Most research suggests that both men and women tend to be overconfident¹¹⁸ but men more so.¹¹⁹ Overconfidence may take a number of forms that show little correlation,¹²⁰ but men exceed women on all. Men are more likely to overestimate their own accuracy in comparison to true values (miscalibrate); to overestimate their own accuracy relative to that of other people (the better-than-average effect); and to believe they exercise more control over events than they do (illusion of control).¹²¹ These findings are especially pronounced in masculine-typed tasks.¹²²

Women and men are equally likely to change their self-evaluation in response to unambiguous feedback. Women are more likely than men to change their self-evaluation in response to ambiguous or noisy feedback, regardless of whether the feedback is positive or negative, and show symmetric responses to positive or negative feedback. Men's self-evaluation responds positively to positive feedback and little or even positively to negative feedback.¹²³

A related phenomenon is self-handicapping, the creation or claiming of obstacles to successful performance in order to blame subsequent failure on the handicap. Claimed self-handicapping shows no sex differences.

117. A survey of the literature can be found in Mary A. Lundeberg & Paul W. Fox, *Highly Confident but Wrong: Gender Differences and Similarities in Confidence Judgments*, 86 J. EDUC. PSYCHOL. 114 (1994).

118. However, on very difficult tasks both sexes believe that they perform worse than they actually do. Don A. Moore & Deborah A. Small, *Error and Bias in Comparative Judgment: On Being Both Better and Worse than We Think We Are*, 92 J. PERSONALITY & SOC. PSYCHOL. 972, 972 (2007).

119. Sylvia Beyer & Edward M. Bowden, *Gender Differences in Self-Perceptions: Convergent Evidence from Three Measures of Accuracy and Bias*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 157 (1997) [hereinafter Beyer & Bowden, *Gender Differences in Self-Perceptions*]; Sylvia Beyer, *Gender Differences in the Accuracy of Self-Evaluations of Performance*, 59 J. PERSONALITY & SOC. PSYCHOL. 960, 966 (1990) [hereinafter Beyer, *Accuracy of Self-Evaluations*].

120. Markus Glaser & Martin Weber, *Overconfidence and Trading Volume*, 32 GENEVA RISK & INS. REV. 1, 29–31 (2007).

121. Lundeberg & Fox, *supra* note 117; S. Lichtenstein et al., *Calibration of Subjective Probabilities: The State of the Art up to 1980*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 306 (1982); Beyer, *Accuracy of Self-Evaluations*, *supra* note 119; Beyer & Bowden, *Gender Differences in Self-Perceptions*, *supra* note 119.

122. Beyer, *Accuracy of Self-Evaluations*, *supra* note 119; Beyer & Bowden, *Gender Differences in Self-Perceptions*, *supra* note 119. One study found male overconfidence on the typically female task of social skills. K.V. Petrides & Adrian Furnham, *Gender Differences in Measured and Self-Estimated Trait Emotional Intelligence*, 42 SEX ROLES 449, 458 (2000).

123. Tomi-Ann Roberts & Susan Nolen-Hoeksema, *Sex Differences in Reactions to Evaluative Feedback*, 21 SEX ROLES 725, 741 (1989).

However, women engage in far less behavioral self-handicapping, or the actual creation of obstacles, and judge such behavior more harshly in others.

2. Risk-Perception

Higher levels of male risk-taking were initially attributed to greater male preference for risk. However, risk-taking is a function of both risk assessment and risk preferences, and recent studies find that a considerable amount of the difference in risk-taking occurs because females rate risk levels higher than males.¹²⁴ The magnitude of the sex difference may vary with the context, but the overall pattern of difference seems strong. Unfortunately, relatively few studies examine which of the two approaches leads to more accurate assessment of risk: Do men underestimate risk more than women overestimate it? Some evidence suggests that males are better forecasters of risks that do not involve self-assessment,¹²⁵ while women are better at forecasting the extent to which they can control risk.¹²⁶

E. SUMMARY

At the present time, men and women exhibit significant differences in personality. To some extent those differences are consistent with the assertion that men are more competitive than women. Men indeed seem far more likely than women to enjoy competition as an end in itself. However, research does not support the view that competition is highly correlated with motivation and ambition. Women respond strongly to individualistic incentives. On average, women are more self-disciplined and conscientious than men, and are more likely to be motivated by the intrinsic value of a task. The normative value sometimes assigned to traits more often found in men may also be debated. Men are in fact more confident than women, and in part for this reason, are more inclined to take risks. However, their self-estimates are often contradicted by evidence, and the wisdom of the risks undertaken because of excessive self-confidence may be questioned.

Conversely, women have no monopoly on social virtue. On average, women are more willing than men to sacrifice their own interests to reduce inequality. Women are also more trustworthy in the sense that they reciprocate acts of kindness. Men, however, are more trusting and more willing to make sacrifices that increase overall social well-being but do not

124. Loretta M. Hillier & Barbara Morrongiello, *Age and Gender Differences in School-Age Children's Appraisals of Injury Risk*, 23 J. PEDIATRIC PSYCHOL. 229, 235 (1998).

125. Donald Vandegrift & Paul Brown, *Gender Differences in the Use of High-Variance Strategies in Tournament Competition*, 34 J. SOCIO-ECON. 834, 843-44 (2005).

126. Brad M. Barber & Terrance Odean, *Boys Will Be Boys: Gender, Overconfidence, and Common Stock Investment*, 116 Q.J. ECON. 261, 288-89 (2001). For evidence of the general connection between overconfidence and excess trading, see Meir Statman et al., *Investor Overconfidence and Trading Volume*, 19 REV. FIN. STUD. 1531 (2006).

decrease inequality. One sex difference is ambiguous in its normative implications: women are more likely to respond negatively to an act that hurts them. The social value of retribution is much debated: my own view is that it is sometimes destructive but sometimes a necessary evil that increases social cohesion.

Last but not least, we must try to resist the temptation that many of us feel to bend the results to various agendas. For example, though I find myself inclined to regard male overconfidence in a negative light, research consistently shows that depressed individuals have a far more realistic self-image than non-depressed individuals, and irrational self-confidence seems to have distinct mental health advantages.¹²⁷ Confronted with evidence of each other's tastes, both men and women are likely to feel some impatience. Men may feel that women need to toughen up and stop being so sensitive. Women may find men's antics childish, and wonder why they need competition as a substitute for self-discipline. Both, I hope, will suppress these impulses. Neither set of motivational mechanisms is inherently better than the other, and both should be accepted with a minimum of judgment.

III. PERSONALITY IN WORK CULTURES

Just as personality traits cannot be arrayed along a single dimension, neither can work cultures. Employers can invest their work cultures with a wide variety of attributes that will have different effects on workers with different personalities and thus different effects on the average man and the average woman. No single work culture is uniquely optimal for inducing high performance and the personnel literature reinforces a central message of the previous section: competition as such is not a critical element of all successful work cultures.

A. PERSONNEL ECONOMICS

The central problem of personnel management is the inability of firms to observe perfectly either how hard employees work or their basic abilities.¹²⁸ Employers have two ways to address the problem of imperfect information: They can invest in evaluating worker performance or they can create incentives for effort by performance compensation such as the commissions at issue in *Sears*. The best combination of monitoring and incentives varies with the characteristics of the employee, and if those characteristics vary statistically by sex then the ideal employer policy will not be the same for the average woman and the average man.

127. Peter M. Lewinsohn et al., *Social Competence and Depression: The Role of Illusory Self-Perceptions*, 89 J. ABNORMAL PSYCHOL. 203, 210, 212 (1980).

128. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 780 (1972).

1. Monitoring Versus Incentives

Supervisors can observe a certain amount of information about employee performance without any special expenditure. Investing in personnel methods can improve the quality of performance information, although the cost of obtaining perfect information is generally prohibitive. Monitoring allows the employer to discharge poor workers,¹²⁹ and an employer that expends little effort to obtain information runs the risk of attracting workers who shirk.¹³⁰

Most employers will therefore attempt to improve their information about workers through performance evaluation. With perfect agreement between employee and employer, an employment relationship based on performance evaluation can be satisfactory to both parties. However, the difficulty of accurate performance measurement may lead to disagreements, leading the employment relationship to break down.¹³¹ Employees who feel unappreciated may become demoralized and resentful, leading them to reduce their productivity or quit and thus destroying any employer investment in their training.

Even with initially diverging views, performance evaluation may be useful if employers and employees each change their assessment of the employee's performance after hearing input from the other side.¹³² In real workplaces, mutual improvements in assessment are an important goal of employment evaluations, which are intended not only to reward past performance but to improve future performance. However, employer and employee evaluations will tend to converge only if worker self-assessments are not systematically biased and workers update those assessments based on employer input.

To avoid the problem of disagreement, employers may choose a relatively objective measure of performance such as sales, and use that measure as the basis of incentive compensation. Incentive contracts can be classified as individualistic or relative. Individualistic incentive contracts are based solely on the output of the individual worker and include sales

129. Although monitoring and discharge are obviously options, the principal agency literature has typically treated compensation as the principal incentive mechanism available to the employer and monitoring mechanisms have not received the attention they deserve. Jeffrey S. Banks & Rangarajan K. Sundaram, *Optimal Retention in Agency Problems*, 82 J. ECON. THEORY 293, 293–94 (1998).

130. This parallels the important observation of Edward Lazear that hawks will not self-sort away from dove firms but doves will self-sort away from hawk firms. Edward P. Lazear, *Pay Equality and Industrial Politics*, 97 J. POL. ECON. 561, 571 (1989).

131. W. Bentley MacLeod & James M. Malcomson, *Implicit Contracts, Incentive Compatibility, and Involuntary Unemployment*, 57 ECONOMETRICA 447, 448 (1989); Clive Bull, *The Existence of Self-Enforcing Implicit Contracts*, 102 Q.J. ECON. 147, 156–57 (1987). For present purposes, it is not important whether the relationship breaks down by a lawsuit, a quit or discharge, or by failure of cooperation in an ongoing relationship.

132. The formal models of personnel economics have not to date examined this possibility.

commissions and piece rates, in which workers are paid a fixed amount for each piece of output they produce.¹³³ A relative compensation scheme, sometimes called a competitive scheme, bases wages on performance in comparison to other workers.¹³⁴ In real world employment, relative compensation schemes are especially common in the promotion rather than the pure compensation setting: Job hierarchies may be arranged so that a group of employees knows that only one winner can be promoted to the next level.

All incentive schemes improve effort, but they inefficiently shift the risks of production away from risk-averse firms and towards risk-averse workers who require a risk premium in the form of higher wages.¹³⁵ Relative compensation schemes can serve a purpose by screening out production risks common to all workers,¹³⁶ but often production risks can be more effectively netted out by using measures such as overall firm performance that do not rely on comparisons with other workers.

Perhaps the most surprising result of the literature on relative compensation is that the self-interested worker is motivated only by absolute earnings. Relative earnings are of use only in the information they provide to the employer, and competition has no intrinsic motivational

133. Alternatively, workers may be paid a rate based on output that increases or declines as output rises; they may be required to meet a specified quota; or they may be paid some complex combination of these schemes. If the worker's only choices are the amount of labor to supply and the amount of effort to exert, labor contracts should make use of any available information. Bengt Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74, 89 (1979) [hereinafter Holmstrom, *Observability*].

134. No weight is given to the absolute level of individual output. Tournaments may provide winner-take-all prizes; loser forfeits all sanctions; or some more complicated scheme that includes different prizes or sanctions for different relative ranks. Tournaments have a complex effect on the risk borne by workers. They reduce risk to the extent they screen out factors like market conditions outside the control of the worker. On the other hand, tournaments may have a higher variance in payoffs than piece rates schemes, since low-ranked players may receive nothing at all. Barry J. Nalebuff & Joseph E. Stiglitz, *Prizes and Incentives: Towards a General Theory of Compensation and Competition*, 14 BELL J. ECON. 21, 22–23, 26, 40 (1983).

135. Since output levels can be confounded by forces like market conditions outside the worker's control, they are an imperfect measure of worker effort. In a manufacturing setting such risks include machine failure, while in a sales commission setting, an important risk would be fluctuation in demand for the product sold. Given fixed information, the usual optimum is a linear combination of fixed salary and piece rates based on all available signals of output level and only a second best is possible. Holmstrom, *Observability*, *supra* note 133, at 89. If additional information besides output is available, such as even imperfect observation of effort or of production risks, using that information will improve the compensation scheme. *Id.*

136. Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 842 (1981) (two agents); Jerry R. Green & Nancy L. Stokey, *A Comparison of Tournaments and Contracts*, 91 J. POL. ECON. 349, 351 (1983) (multiple agents); Nalebuff & Stiglitz, *supra* note 134, at 23.

value. In the words of Bengt Holmstrom, a founder of modern personnel economics, “Competition per se is worthless.”¹³⁷

2. Sex Differences

The relative merits of evaluations and incentive contracts appear to be different for the average male and average female worker. Low-powered incentives that use minimal evaluation and performance pay are likely to work better for the average woman than for the average man. Statistically, women seem to shirk less than men and to have an edge in conscientiousness, intrinsic motivation, self-discipline, and trustworthiness.¹³⁸ Two real world examples of this are the increasingly large female advantage in academic achievement and the higher repayment rates of female borrowers in microfinance settings.¹³⁹ Low shirking makes low monitoring more attractive. Low-powered incentives may also appeal to the average woman’s preference for lower risk and more egalitarian pay schemes. However, low-powered incentives run the risk of attracting workers who shirk. An employer who prefers a work culture with low-powered incentives will be tempted to discriminate against male workers, and such a culture will be most likely to succeed in jobs whose intrinsic characteristics tend to attract women rather than men.

The importance of agreement suggests that work practices based on subjective evaluation are more likely to work with the average woman than with the average man. On average, both men and women tend to be overconfident, but men substantially more so. If supervisory evaluations are on average accurate, then those evaluations will diverge more from the self-evaluations of male workers than of female workers, and subjective evaluations will be less useful in employment contracts with males.¹⁴⁰ If employees update their self-assessment, then evaluation-based work practices may be more suited to female than male workers. Women’s self evaluations are not only more accurate to begin with but are more readily and symmetrically updated in response to both positive and negative feedback.

Because output measures are relatively clear, incentive contracts reduce disputes about performance, but at the cost of higher than ideal risk-

137. Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324, 324 (1982) [hereinafter Holmstrom, *Teams*]. This result is an implication of most of the papers discussed in this section: “competition among agents . . . has merit solely as a device to extract information optimally.” *Id.* Rank order tournaments that use only relative measures of output are useful only when absolute measures are hard to obtain. *Id.* at 334–36.

138. *See supra* Section II.

139. Bert D’Espallier et al., *Women and Repayment in Microfinance: A Global Analysis*, 39 WORLD DEVELOPMENT 758, 769–70 (2011); Duckworth & Seligman, *supra* note 113, at 205.

140. This conclusion is complicated by the possibility of bias in subjective ratings. However, my purpose in this paper is to examine the problems that would remain even if bias of the usual sorts had ended.

bearing by employees.¹⁴¹ Men are more likely to dispute evaluations than women, making incentive compensation relatively more attractive for male than female workers. Men also tolerate higher levels of risk, even though the source of this (risk assessment or preferences) is unclear.

Some jobs have features that create powerful incentives to use either evaluations or incentives regardless of employee characteristics. For example, the value of incentive pay is highest when an employee's output can be readily measured, and sales are among the clearest metrics in the modern economy. However, evaluations or incentives may be implemented in many ways, and the preferable form may depend on employee characteristics. Even though women are more risk-averse than men, Nordstrom uses incentive commissions. Yet while commissions are the centerpiece of the Sears system, Nordstrom takes considerable pains to ensure that employees receive other forms of monitoring and evaluation. This additional input reduces the risk that an employee will suffer long-term career consequences because of chance factors, such as fluctuations in traffic during assigned shifts.

In other jobs where output is less measurable, evaluations will necessarily play an important role. However, evaluations may be formulated and delivered to employees in many different ways. Even if workers are biased in their self-evaluation and tend to resist employer input, subjective contracts may work if employers behave strategically. Employers can compensate for overconfidence by applying a deflation factor to self-evaluations and by providing employees with highly negative feedback. The harsh methods employed by Salomon might have been rational efforts to deflate the egos of the would-be Masters of the Universe drawn to the firm. But strategic feedback that undervalues performance to achieve the desired response in the average man will be taken at face value by the average woman, who will consequently be unnecessarily discouraged.

Employee self-evaluations will reflect overconfidence from both sexes but more from men. Any rule that interprets the self-evaluations of men and women neutrally will tend to disadvantage women. Sears' decision to hire women into commission jobs depended in part on self-evaluations, and this practice would seem to place women at a disadvantage. Differences in self-evaluation may also contribute to the well-known tendency of women to ask for less in negotiations, and a work culture in which workers are

141. Employers also bear another cost. Like all output contracts, individualistic output contracts distort behavior towards readily observable tasks and away from less observable ones, a phenomenon known as multitasking. A salesperson may obtain high sales by means such as misrepresentation that ultimately hurt the employer. Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. 24, 25 (1991); George P. Baker, *Incentive Contracts and Performance Measurement*, 100 J. POL. ECON. 598, 599 (1992).

expected to negotiate on their own behalf will tend to disadvantage women.¹⁴²

B. THE SOCIAL AND EMOTIONAL CONTEXT OF WORK

The austere models of personnel economics assume a rational and wholly self-interested individual who is devoid of emotions and social preferences, both positive and negative.¹⁴³ These models provide some insight into work culture and how it might be linked to sex differences. This analysis, however, also leaves much unexplained. If competition per se serves such a limited purpose, why did Sears place such a high value on competitiveness? Why did Salomon Brothers tolerate and even encourage not merely competitiveness but abuse? Why does Nordstrom invest such effort in recognition, praise, mentoring, and mutual encouragement?

The answer to these questions begins with a distinction that is often obscured in ordinary usage, in which the term “competitive” is used almost synonymously with “motivated.” Distinguishing between these two constructs is critical to understanding the implications of sex differences for work cultures. Personnel economics provides a starting point for understanding this distinction. Employee performance can often be improved through incentive contracts, although these contracts unavoidably shift more risk than is desirable to employees. Improved motivation can be obtained solely by individualistic rewards for performance that are not in the strict sense competitive since they do not depend on the outcomes of others; only relative rewards are truly competitive and these have no motivational value to a rational self-interested agent. Relative compensation can serve the informational goal of screening for common risk but such screening can often be more effectively accomplished through measures that do not require competitive relative compensation.

If game theorists recognize that “competition per se is worthless”¹⁴⁴ to a rational profit-maximizing employee, its critical role in male workplaces must have a nonfinancial function. The studies that examine competitive behavior indicate that the average man seems to enjoy competition as an end in itself even when a piece rate would produce higher payoffs. In the words of Joe Paterno, Penn State’s legendary football coach, “We strive to be No. 1. . . . But win or lose, it is the competition which gives us pleasure.”¹⁴⁵

142. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 131, 132, 142 (2003); Fiona Greig, *Propensity To Negotiate and Career Advancement: Evidence from an Investment Bank that Women Are on a “Slow Elevator,”* 24 *NEGOTIATION J.* 495, 497 (2008).

143. In principle the implications of social preferences might be modeled, but at the moment only more informal analysis is possible.

144. Holmstrom, *Teams*, *supra* note 137, at 324.

145. THOMAS A. TUTKO & BILL BRUNS, *WINNING IS EVERYTHING AND OTHER AMERICAN MYTHS* 205 (1976).

The average woman, in contrast, avoids competition even when it would generate higher payoffs. In research studies, the taste for competition has nothing to do with a taste for work; the alternative to competition is not a fixed payment but rather a high-powered piece rate incentive. Competitive situations attract men and repel women because of the pure value each places on being ranked higher than someone else.

The recreational value of competition presumably explains why practical jokes like those inflicted on poor Matty are so common in male environments.¹⁴⁶ Yet competition performs another role. Competition does no more than piece rates to motivate the wholly self-interested individual, but it does spur those with a social preference for competition to accomplish more. The recreational and motivational aspects of competition are not easy to separate, and may reinforce each other. Michael Lewis asks why the Salomon partners tolerated the back row hooliganism. And why, one might also wonder, did they let competition escalate into aggression by tolerating traders who threw phones at trainees? Perhaps they believed that recreational and motivational competition feed on each other, and perhaps there is an element of truth in their belief. Obviously not all men require an environment with this level of antagonism to perform at high levels: The environment can do much to shape human personality. Yet environmental forces do not operate on a blank slate or without cost, and modulating the aggressive tendencies of males is neither a simple task nor one with an obvious end point.

The same competitive environments that improve men's performance do nothing to improve women's performance. In impersonal laboratory settings, competition does not actually decrease women's performance, leaving an interesting question as to why women avoid such environments even when they would be beneficial. One possibility is that women are more inequality-averse than men and dislike the ranking that is inherent in competition. Female avoidance of real-life competitive environments is easier to understand. In these environments, the instrumental competition that motivates is often combined seamlessly with recreational aggression that the average woman may find unpleasant. Women are more responsive to feedback and more likely to worry that hazing rituals have some real significance. And when horseplay becomes physical, women are far more likely than men to feel real anxiety.

Sears insisted, correctly, that the average man is more competitive than the average woman. From this premise, it proceeded to conclude that women are intrinsically uncomfortable with commission sales, an inference at odds with the use of significant commissions by Nordstrom. Women were deterred from applying to sales positions at Sears not primarily because of the use of commissions, but because the Sears culture

146. See *supra* Section I.

encouraged salespeople to see themselves in a contest with other salespeople rather than as part of a cooperative venture.

IV. POLICY TOWARDS DIFFERENCE

Research clearly indicates that the average man and woman today exhibit differences in personality traits. The appropriate policy response to such differences is less clear. If sex differences are purely a cultural artifact, acknowledging differences may have the effect of reinforcing them. This Section outlines the case that sex differences in personality have some heritable component, so that differences in ideal work environments are likely to persist over time. To some extent the problem of work culture may sort itself out; eventually the labor market will tend to produce specialized cultures that serve the needs of different personality types, albeit at the cost of less than fully integrated work places. The most critical problem facing public policy is the near-term rigidity of market institutions. Work cultures that evolved in accord with male preferences do not provide an atmosphere in which women can flourish, creating a vicious circle of lower female achievement. The goal of public policy should be to push employers to experiment with new work cultures, not to create a permanent regime to regulate the work environment.

A. ACCOMMODATION AND STEREOTYPING

Under Title VII, policy towards the sex differences observed today can take two basic forms.¹⁴⁷ First, employers might be permitted to choose freely among all non-sex-specific practices, regardless of whether those practices tend to favor the average male or female. Second, employers might be permitted or required to use gender-conscious practices that, though neutral in form, were designed with sex differences in mind.¹⁴⁸ Permissible gender-conscious practices could not be designed to favor men, but might attempt either not to favor either sex or to redress the problems historically faced by women.

The choice among these policies towards work cultures depends in part on whether observed sex differences have some heritable component. To the extent that current sex differences are the result of discrimination, any gender-conscious policy, even one that is formally sex-neutral, may seem problematic because of its tendency to preserve the status quo by reinforcing stereotypes. The position of women may best be improved by

147. A third option is possible: employers might be permitted to choose any sex-specific policy they wanted. This is prohibited by Title VII, and the wisdom of this prohibition will not be reexamined here.

148. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 73–75 (1995); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 939 (1987).

reducing discrimination and encouraging women to take nontraditional paths¹⁴⁹: As discrimination falls, the differences between men and women will lessen, and the problem of work culture will solve itself. However, even if sex differences result entirely from discrimination, two considerations must be balanced against stereotyping costs. First, under current circumstances, a neutral but male-oriented system will operate to women's disadvantage and if change seems slow, accommodation may be worth the risk of some stereotyping. Second, though female traits may be the product of discrimination, they may nonetheless be valuable, and there may be a general social interest in encouraging a more androgynous culture. The view that sex differences result primarily from discrimination thus points to sex-neutral practices but perhaps ones that are gender-conscious.

If, however, sex-differences have a heritable component, no long-run policy option is very attractive. Even after intentional discrimination has been eliminated, the average man and the average woman will be most comfortable in somewhat different work environments and a single uniform culture will serve neither well. Unregulated markets cannot be counted on to provide female-friendly environments: The males who continue to dominate high status jobs may, even with the best intentions, fail to produce cultures congenial to women, at least for very long time of transition. Yet regulation too has no mechanism for producing desirable pluralism. The law cannot realistically require each firm to provide a diverse set of internal work environments to accommodate the average member of each sex: Many aspects of work culture are indivisible, and each workplace has a certain tone that affects all who work there. And there is simply no way to legislate pluralism between firms. The law must set a single standard, and cannot tell some firms to adopt one kind of policy and other firms to adopt another. The next two sections will argue that the evidence supports a role for heritability, and that the resulting difficult problems must be faced. The next two sections will argue that the evidence supports a role for heritability, and that the resulting difficult problems must be faced.

B. NATURE AND NURTURE

Among biologists there is virtually complete agreement that some sex differences in personality have both an environmental and a heritable¹⁵⁰

149. Schultz, *Telling Stories About Women and Work*, *supra* note 3, at 1839.

150. "Heritability" is the proportion of observed variation in a population that is attributable to genetic variation among individuals. To say that X "is genetic" implies that it is solely genetic in origin, like the fact that humans have opposable thumbs. To say that X "is heritable" more clearly conveys the joint role of genes and environment, as does the phrase "has a genetic component." The word "biological" is not really equivalent to "genetic" or "heritable." Any physiological phenomenon can be called biological although most are the result of both heritable and environmental forces.

basis, though the exact roles of environment and genetics are hard to disentangle.¹⁵¹ The literature on this subject is large and expanding rapidly, and what follows is a cursory survey.

1. Physiology

A large body of evidence, including sibling studies and physiology, suggests some genetic basis for personality traits in general¹⁵² and for the statistical differences observed between men and women. Significant differences have been observed in the physiology of male and female brains. Sexual dimorphism has been found in brain chemistry¹⁵³ and in the amount¹⁵⁴ and distribution¹⁵⁵ of various types of brain tissue. The best understood mechanism¹⁵⁶ of neural sex differentiation occurs around the seventh week of fetal development.¹⁵⁷ The newly formed testes start to secrete testosterone that operates on androgen receptors in some regions of the brain to produce both structural and functional sex differences that are called “organizational” because they persist regardless of subsequent hormone levels. Further organizational changes from internally produced hormones occur during puberty. Except at such critical periods, temporary levels of hormones in the bloodstream generally do not have permanent structural effects, but may have activational effects on behavior during the time they are present.

151. Melissa Hines, *Sex-Related Variation in Human Behavior and the Brain*, 14 TRENDS COGNITIVE SCI. 448, 448 (2010) [hereinafter Hines, *Sex-Related Variation*]. Hines’s perspective is especially interesting because she is an important researcher and has urged caution in drawing inferences that sex differences in behavior have a genetic basis. MELISSA HINES, BRAIN GENDER 155–56 (2004).

152. See, e.g., Randy J. Nelson & Brian C. Trainor, *Neural Mechanisms of Aggression*, 8 NATURE REV. NEUROSCIENCE 536, 541–42 (2007); Kai MacDonald & Tina Marie MacDonald, *The Peptide that Binds: A Systematic Review of Oxytocin and Its Prosocial Effects in Humans*, 18 HARVARD REV. PSYCHIATRY 1, 2, 4, 8–10 (2010).

153. Kelly P. Cosgrove et al., *Evolving Knowledge of Sex Differences in Brain Structure, Function, and Chemistry*, 62 BIOLOGICAL PSYCHIATRY 847, 850–52 (2007); Larry Cahill, *Why Sex Matters for Neuroscience*, 7 NATURE REV. NEUROSCIENCE 477, 481–82 (2006).

154. Cosgrove et al., *supra* note 153, at 850–52.

155. Ruben C. Gur et al., *Sex Differences in Brain Gray and White Matter in Healthy Young Adults: Correlations with Cognitive Performance*, 19 J. NEUROSCIENCE 4065, 4067–69 (1999); Richard J. Haier et al., *The Neuroanatomy of General Intelligence: Sex Matters*, 25 NEUROIMAGE 320, 321–26 (2005).

156. Recent research suggests that other genes also contribute to sexual dimorphism. Arthur P. Arnold, *Sex Chromosomes and Brain Gender*, 5 NATURE REV. NEUROSCIENCE 1, 6–7 (2004); Arthur P. Arnold et al., *Minireview: Sex Chromosomes and Brain Sexual Differentiation*, 145 ENDOCRINOLOGY 1057, 1061 (2004); Ian W. Craig et al., *The Genetic Basis for Sex Differences in Human Behaviour: Role of the Sex Chromosomes*, 68 ANNALS HUM. GENETICS 269, 269, 280–81 (2004).

157. For excellent recent surveys, see Melissa Hines, *Early Androgen Influences on Human Neural and Behavioural Development*, 84 EARLY HUM. DEV. 805 (2008) [hereinafter Hines, *Early Androgen Influences*]; Hines, *Sex-Related Variation*, *supra* note 151.

The circulating hormone levels that have both organizational and activational consequences have a significant heritable component, but are also influenced by environment. For instance, feedback from success or failure tends to depress testosterone.¹⁵⁸ Differences in the levels of positive reinforcement given to boys and girls could have activational effects and also influence the organizational changes that occur at puberty. The effect of environment on testosterone levels also complicates analysis of the activational effects on testosterone, since causal conclusions cannot be drawn simply from observation of correlations.

Levels of prenatal exposure to hormones have been linked to sex-differentiated behaviors including childhood play and personality characteristics such as empathy and aggression.¹⁵⁹ The concept of effect size is tricky in these contexts, but measured in terms of standard deviations these sex differences are much larger than observed differences in cognition.¹⁶⁰

2. Cross-Cultural Evidence

Cross cultural studies show that the degree of sex differences in personality traits varies widely among societies.¹⁶¹ Environment thus clearly plays a role in sex differences. However, a surprising piece of evidence suggests a role for heredity. Sex differences in personality traits appear to be *larger* in more affluent egalitarian cultures that provide women with opportunities relatively comparable to those of men.¹⁶² These societies also have greater sexual dimorphism in non-personality traits such as height and blood pressure.¹⁶³ A number of explanations for this have been explored, and the most persuasive appears to be the general principle that better environments drive up the importance of genetics. Within poor societies, even small differences in each individual's environment can create large variation in individual outcomes. However, improvements in environment presumably have a diminishing marginal effect. As the quality of the average environment rises, variation in environment within the society has less effect, and genes become more important in explaining all types of interpersonal variation.¹⁶⁴

158. See, e.g., Sari M. Anders & Neil V. Watson, *Social Neuroendocrinology: Effects of Social Contexts and Behaviors on Sex Steroids in Humans*, 17 HUMAN NATURE 212 (2006).

159. Hines, *Early Androgen Influences*, *supra* note 157; Hines, *Sex-Related Variation*, *supra* note 151.

160. Hines, *Sex-Related Variation*, *supra* note 151.

161. Schmitt et al., *supra* note 84; Costa, Jr. et al., *Gender Differences*, *supra* note 72.

162. Schmitt et al., *supra* note 84; Costa, Jr. et al., *Gender Differences*, *supra* note 72.

163. Schmitt et al., *supra* note 84, at 176.

164. *Id.* at 179–80.

3. Evolutionary Psychology

The field of evolutionary psychology attempts to explain many aspects of human behavior, including sex differences, as the product of evolutionary pressures. One school of evolutionary psychology—the Man the Hunter approach—argues that men will inevitably dominate the workplace.¹⁶⁵ Like all evolutionary perspectives on sex roles, it begins with the theory of parental investment.¹⁶⁶ Parental investment theory is grounded on the observation that each sex faces a different set of physiological constraints, and postulates that these affect its optimal resource allocation.¹⁶⁷ Through gestation and lactation, female mammals are obligated to make a far greater investment in their offspring than males, and parental investment theory infers that males will compete for the scarce resource of female reproductive capacity.¹⁶⁸

The Man the Hunter approach argues that human male competition consists primarily of efforts to provide females with resources such as food.¹⁶⁹ Because of their long dependency, human children require the complete long-term attention of their mothers, who must depend on males for resource provision. From this perspective, a male orientation in work cultures is simply a consequence of greater male involvement in resource production.

Other scholars have questioned the Man the Hunter paradigm, noting that parental investment theory is consistent with an enormous range of mating patterns.¹⁷⁰ Mate competition may consist of many behaviors, including resource provision, but also including killing or dominating members of the same sex, mate guarding, and enticing the opposite sex by displays of genetic fitness. Resource provision is actually rather uncommon in species like mammals where fertilization occurs internally, making paternity relatively uncertain: no male resource provision at all is found in ninety-five percent of all mammalian species.¹⁷¹ In the human

165. Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995).

166. Robert L. Trivers, *Parental Investment and Sexual Selection*, in SEXUAL SELECTION AND THE DESCENT OF MAN, 1871–1971, at 136 (Bernard Campbell ed., 1972).

167. *Id.* at 139–40.

168. *Id.*

169. Richard B. Lee & Irven DeVore, *Problems in the Study of Hunters and Gatherers*, in MAN THE HUNTER 3, 11 (Richard B. Lee et al., eds., 1968).

170. A number of evolutionary psychologists have noted both this flexibility and its implications for political issues surrounding sex roles. Barbara Smuts, *The Evolutionary Origins of Patriarchy*, 6 HUM. NATURE 1 (1995); Sarah Blaffer Hrdy, *Sex Bias in Nature and in History: A Late 1980s Reexamination of the “Biological Origins” Argument*, 33 AM. J. PHYSICAL ANTHROPOLOGY 25 (1990); J.B. Lancaster, *A Feminist and Evolutionary Biologist Looks at Women*, 34 AM. J. PHYSICAL ANTHROPOLOGY 1 (1991). In the legal literature, this point is made in Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL’Y 369 (1994); Katharine Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805 (1999).

171. T.H. CLUTTON BROCK, *THE EVOLUTION OF PARENTAL CARE* 132 (1991).

foraging societies of special interest to evolutionary theory, mothers provided about one third of the food supply.¹⁷²

Evolutionary psychology thus does not support the view that males will inevitably tend to monopolize resource provision through competition. It is consistent with a great deal of flexibility of sex roles between societies. Still, it does suggest that sex roles may exhibit certain general tendencies. Mate competition implies that males are far more likely than females to engage in unprovoked aggression, especially physical aggression. The possibility of pregnancy may tend to make females less trusting of strangers. Thus, the role that women play in resource provision will depend not on their interest in resource provision as such but on whether the work environment is designed to meet their other personality traits.

4. Policy

Any attempt to extract generalizations about sex differences from empirical research must be conducted with great care. Scientific evidence suggests that sex differences are complex and subtle and no doubt some of the results described in previous Sections will be later revised. Although there is evidence that some sex differences have a heritable component,¹⁷³ environment clearly also plays an important role. Even to the extent that robust conclusions can be reached, the temptation to characterize an essential male or female nature must be resisted. Essentialism is empirically unfounded, since the evidence supports statistical differences only, and may stigmatize individuals who deviate from some supposed norm. Indeed, even statistical generalizations may lead to is-ought confusions.

Just because one sex shows a “natural” tendency towards a trait does not mean that trait is immutable or should be encouraged. On the contrary, there are strong arguments in favor of at least some efforts to socialize both males and females to be more like each other. Even heritable traits can be environmentally modified, as witnessed by the extraordinary success that many societies have had in reducing the violence that characterized early social groups.¹⁷⁴ Sometimes society chooses to fight natural tendencies, sometimes to celebrate them, and sometimes simply to go along with them. Modification, however, requires some understanding of the baseline traits with which one is working. Quite apart from the question of sex differences, no one method of upbringing works with all children, as any parent of even two children can attest. The same approach will have utterly

172. Frank W. Marlowe, *The Mating System of Foragers in the Standard Cross-Cultural Sample*, 37 *CROSS-CULTURAL RESEARCH* 282, 290 (2003).

173. See *supra* Section IV.A.

174. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). Pinker's argument is developed through the book's over eight hundred pages, but a summary can be found in Chapter 1. *Id.* at 1–30.

different effects on an anxious child and an impulsive one. Whether we choose to allow heritable tendencies to play out or to fight them, we must have some sense of what they are and how they work.

C. THE MARKET FOR WORK CULTURE

At the moment, work cultures reflect a history of male domination of market labor. However, the past decades have seen increasing numbers of women in positions of leadership where they might effect change in work cultures, and so it is worth considering whether market forces will tend to create the multiplicity of work cultures needed to accommodate both the average man and the average woman.

1. Work Cultures in Perfect Markets

The production of work cultures by firms and the resulting occupational concentration¹⁷⁵ by sex depends on many factors.

a. Internal Cultures in Single-Job Firms

Many dimensions of culture are by definition collective: a firm cannot easily have both a competitive- and a consensus-oriented culture, though it can have an intermediate between the two. Thus, along many dimensions, a uniform culture will tend to prevail within individual firms. With an industry more variation is possible. Individual firms may develop cultures that are congenial to specific personalities.¹⁷⁶ In securities markets, the clientele effect is the tendency of investors with certain needs to purchase the stocks of certain boutique firms, and a similar effect draws workers to firms whose cultures they find hospitable.

The implications of these principles can be seen by making some simplifying assumptions. Assume that internal firm work cultures are monolithic and indivisible. There are both males and females with an aptitude for each occupation, though in different proportions in each occupation.¹⁷⁷ The aptitude for each job is binary—you either have it or you don't. Each firm employs workers in only a single occupation. The traits that determine occupational aptitude are uncorrelated to those that

175. In labor economics, the term “occupational segregation” is used to describe how men and women are distributed across occupations. In this setting the term “segregation” is purely descriptive and does not imply any particular hypothesis about the cause of segregation, such as discrimination. Outside of labor economics, however, the term “segregation” is often understood to imply discrimination or even legal compulsion, and so I avoid it here.

176. The economic value of sorting by tastes has been frequently noted by Richard Epstein. *See, e.g.,* RICHARD EPSTEIN, *FORBIDDEN GROUNDS* 60–69 (1992). Epstein is in my view quite correct to insist on the importance of sorting; my views differ from his in our characterizations of the nature of sex differences and our expectations about how fast markets will adjust to social changes.

177. The evidence for heritable differences in aptitudes is summarized in Deborah M. Weiss, *The Annoyingly Indeterminate Effects of Sex Differences*, 19 *TEX. J. WOMEN & L.* 99 (2010).

determine work culture preference. However, all men work best in work culture XY and all women in work culture XX.

Assume for the moment a so-called frictionless market with perfect information and no adjustment costs. No participant in the market has a taste for discrimination and the only forces that tend to produce occupational concentration by sex are differences between the average members of each sex. With these assumptions, the market will tend to produce fully specialized firms, each with a pure form of work culture XX or XY. But though each firm will employ disproportionately high numbers of one sex, the market will be meritocratic. Most members of each sex will be able to find a suitable environment to maximize their earnings potential.¹⁷⁸ Only where one sex has an extreme comparative advantage in the underlying occupation will able individuals of the less-able sex have difficulty finding a suitable work culture.¹⁷⁹

With no institutional rigidities, this equilibrium should generally be reached even from a discriminatory or at least historically different starting point. Suppose women are initially outside the labor market in household production. When they enter the labor market, they will initially find themselves in cultures that do not maximize their potential and they will therefore underperform. Enterprising firms, however, will soon realize that cheap labor can be obtained by offering a female-friendly work culture; women will perform well in these environments. Other firms will adopt the new culture, bidding up women's wages, and a meritocratic though not fully integrated market equilibrium will be attained.

b. Team Production

No real firm has only one type of job, and workers who hold various jobs typically function together in work groups or teams. Within each

178. A related argument has recently been made in an interesting article by Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense To Pay Too Little*, 76 U. CHI. L. REV. 797 (2009). They note that compensation packages may have both cash and in-kind components such as pensions, note that two groups of workers may place different valuations on each compensation type, and examine the extent to which these taste differences are likely to produce sorting into different firms. *Id.* at 808–12. Suppose that firms have a cost advantage in producing the in-kind good, as they do with pensions and health insurance. By providing a mixed compensation package, some fraction of firms can attract all workers who value the good at a lower cost than by providing cash only. The remainder of firms will provide cash only packages. This will lead to complete segregation of the two types of workers. This analysis assumes that workers differ in their consumption utility but have identical marginal products across work environments and incentive packages. A work culture analysis assumes identical consumption utility but differences in productivity in different environments. The basic static result is the same in work culture and compensation cases. Differences among workers can make segregation efficient without imposing monetary costs on either group of workers or on firms. Past this point, compensation and culture raise some different issues that I will discuss later.

179. This problem will be exacerbated if occupational ability is correlated to work culture preferences.

work group,¹⁸⁰ a firm's ability to provide different cultures to different job classifications is limited by the need for team production. An office in which the top management operates under pressure is likely to be a high stress environment for the support staff, and methods for differentiating incentives within a job are even more limited. The more that members of each occupation must work together, the less divisible work culture will be. This will tend to dampen polarization into extreme work cultures and produce cultures that are hybrids of the pure XX and XY types. Since sex differences in work culture preferences are statistical rather than universal, a hybrid work culture should reduce within-firm occupational concentration by sex. For instance, some males in occupation A who could not function well in a pure XX environment might be able to tolerate a hybrid environment induced by combining the cultures of occupation A and B. On the other hand, integration may be purchased at a price: everyone has to compromise and no one gets the work culture that they value most highly.

Firms may have some ability to create different work cultures for various jobs within work groups by different work rules and by different incentive structures. Such techniques will produce a result that is intermediate between the team production case and the single job case: each job will have more work culture specialization and more occupational concentration by sex. Again, there is a trade-off between catering to the preferences of each group and occupational integration.

c. Multiple Internal Cultures

Even within a given occupation, it is possible to imagine a firm giving employees a few choices. For example, Sears might have given sales personnel the choice between straight salary and a riskier but higher mean commission scheme. The ability to tailor culture within jobs should create a mosaic of specialized work cultures within the job and decrease concentration by sex within the job, the firm, and the industry.¹⁸¹ Such fine-tuning may be the only way around the trade-off between occupational concentration and providing each group with its preferred work culture. Whether firms can realistically give employees such choices is a more difficult and as yet unanswered question.

180. Different work groups might have different cultures so that jobs in the front office may feel different from those in the loading dock.

181. Work culture and compensation cases raise slightly different divisibility problems, and compensation appears to be far more divisible than work culture. Often there seems to be no reason why firms cannot offer both a cash and a mixed compensation package, and indeed such choices have been increasing as shown by the trend away from traditional pensions and towards 401(k)s. In a few cases though, the firm's cost advantage requires mandatory participation. Allowing employees to opt out of health coverage would create the same adverse selection found in the private insurance market, and adverse selection may explain the trend away from firms offering annuity options in pension plans.

D. POLICY

A frictionless market will tend to produce work cultures that are occupationally concentrated by sex at the firm level but less concentrated and more meritocratic at the industry level. The tendency towards specialized cultures is partially offset at the firm level by team production but at the cost of providing the average member of each sex a less than ideal work culture. This trade-off between firm level concentration by sex and accommodating each sex can only be avoided to the extent that firms can tailor each worker's individual environment to that individual's tastes.

The exact welfare analysis of this market is complex but on the whole there would seem to be no strong case for interference absent the question of fairness to women.¹⁸² Precisely what such fairness requires is not an easy question. Some might regard de facto sex segregation at the firm level as an evil in itself. However, I would not personally be disturbed by a concentration by sex that resulted from individual choice, that did not result from the underestimation of female ability, and that tended to enhance female achievement by providing environments conducive to success.

The strongest case for legal interference in work culture rests not on the intrinsic value of sex integration but on the history of female exclusion from the labor market, especially from the most prestigious positions. As circumstances have changed, women have entered the labor market in greater numbers. In a frictionless market, firms would quickly recognize the advantages of providing work cultures congenial to this new pool of workers. Real markets are not frictionless, and various impediments will slow the movement of the market towards an equitable equilibrium. The adjustment of the labor market depends on the quality of information that firms have about women workers. Some of this information is gathered by observing the performance of female workers. Yet when women first enter the labor market, they must often function in work cultures that have developed to motivate males. Women underperform in such environments, thus slowing the revision of rational but inaccurate generalizations about female potential. The persistent conflation of competitiveness with motivation testifies to how hard male norms are to revise. Historical

182. Quite apart from the issue of sex equality, some people will have personalities that are out of sync with their talents: A mathematician who enjoys pro wrestling and monster trucks may feel permanently out of place at work. Welfarist ethical theories may support some compensation for inconvenient tastes. See generally Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). The Second Theorem of Welfare Economics suggests that redistribution may be better left to the tax system, but the analysis of this proposition has turned out to be far more complex than it first appeared and redistribution through interference in labor markets cannot be ruled out. Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUDIES 797 (2000). Thus, a case might be made for encouraging work cultures that are less specialized than what the market would produce. Nonetheless, such tinkering seems unlikely to do much good.

circumstances can create a vicious circle. Even employers without any animus, using sophisticated updating strategies, correctly observe that women perform worse than men and therefore statistically discriminate against them. This discrimination in turn discourages women from acquiring relevant skills, perpetuating a true generalization about ability and leaving the market in a stable but inefficient equilibrium. The vicious circle problem has been extensively analyzed in the somewhat simpler context of pure human capital acquisition, without the complication of work culture.¹⁸³ The phenomenon of work culture would seem to exacerbate this problem, since the viability of new work cultures requires a critical mass of qualified workers.

The adjustment of market work cultures is further slowed by the generally poor dissemination of information in the labor market. Workers are less fungible than commodities like capital, and so the information requirements of the labor market are unusually high. At the same time, as Cynthia Estlund has recently pointed out, legal disclosure mandates are relatively rare in the labor market.¹⁸⁴ Neither workers nor competitors have a good idea of what is going on in any given firm. This impedes the sorting of workers by firm culture and the diffusion of information about innovations in firm cultures. Contractual anomalies such as the at-will rule further blunt employer incentives to collect information about worker performance.¹⁸⁵ Without good information, employers have limited ability to modify their workplaces to improve worker performance.

If work cultures are relatively slow to evolve, the legal system might do well to prod them in some way. Yet this brings us back to the conundrum that opened this section: the ultimate goal of policy is a world with multiple cultures that provides environments where all can flourish. But pluralism is hard to legislate: The law must set one standard for all. The next section will examine whether any legal rules might nonetheless hasten the evolution of work culture.

V. THE LAW GOVERNING WORK CULTURE

Work cultures intended to keep out women are surely prohibited by Title VII, but what of those that disadvantage women not by design but by historical accident? This section suggests that legal intervention in male-oriented work culture is worth considering, but that it is best confined to

183. Amy Farmer & Dek Terrell, *Discrimination, Bayesian Updating of Employer Beliefs and Human Capital Accumulation*, 34 *ECON. INQUIRY* 204 (1996); George J. Mailath et al., *Endogenous Inequality in Integrated Labor Markets with Two-Sided Search*, 90 *AM. ECON. REV.* 46 (2000); Lawrence E. Blume, *Learning and Statistical Discrimination*, 95 *AM. ECON. REV.* 118 (2005).

184. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 *STAN. L. REV.* 351 (2011).

185. Deborah M. Weiss, *Discrimination and Failure in the Marketplace of Ideas* (2013) (unpublished manuscript) (on file with author).

extreme behavior that might also be regulated on grounds unrelated to its effect on women. Plaintiffs might also indirectly challenge such cultures by a new approach to the lack of interest defense. Rather than denying the existence of sex differences, plaintiffs might instead question whether sex differences take the particular form asserted by defendants. Finally, the Supreme Court's 2009 decision in *Ricci v. DeStefano* has the potential to interfere with voluntary employer efforts to devise work cultures that are congenial to women, and this section proposes a modified affirmative action defense that would permit desirable innovation.

A. WHAT MUST EMPLOYERS DO?

1. Two Theories

Employer obligations under Title VII are governed by two theories of recovery, disparate treatment and disparate impact. Disparate treatment liability requires a showing of intent to discriminate, while disparate impact does not.¹⁸⁶ Title VII's prohibition of disparate treatment is virtually absolute and intentional sex discrimination is permitted only if it falls under one of a few specified exceptions, all of which are carefully circumscribed.

In contrast, the plaintiff in a disparate impact case does not claim that the employer discriminated intentionally but rather that one of defendant's employment practices had a disparately negative effect on members of the protected class.¹⁸⁷ This claim is typically supported by statistical evidence of the effects of the practice on the protected group and others. If the plaintiff succeeds in showing a disparate effect, the defendant has the opportunity to provide evidence that the practice is job-related and consistent with business necessity.¹⁸⁸

186. (a) Employer practices. It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, H.R. 7152, 88th Cong. § 703(a) (1964) (codified as amended at 42 U.S.C. § 2000e-2(a) (2012)). Disparate impact theory has been partly codified by later legislation, though in an unsystematic way. 42 U.S.C. § 2000e-2(k).

187. 42 U.S.C. § 2000e-2(k)(1) (2006).

188. *Id.* § 2000e-2(k)(1)(A)(i). This section, added by the Civil Rights Act of 1991, does not set out standards for business necessity and job-relatedness, but rather selectively incorporates by reference parts of the previous case law. 137 CONG. REC. 28622 (1991).

The line between disparate impact and disparate treatment theories is less clear than it might first appear.¹⁸⁹ I next examine a few policy considerations common to both.

2. Targeted Conduct

Judicial micromanagement of firm culture would be ill-advised. Courts lack the institutional competence to serve as managers.¹⁹⁰ Certain aspects of work culture are entwined with voluntary social behavior, and detailed oversight would impinge unacceptably on associational freedoms.¹⁹¹

Close supervision of work culture is especially undesirable if sex differences have a heritable component, so that both men and women are best served by a diverse menu of specialized work cultures. Both disparate impact and disparate treatment must impose a uniform standard on all firms. They might require that work cultures adopt an androgynous compromise between the needs of men and women; they might require choice in divisible components of work culture; or they might require cultures with a female bias. The one thing the law cannot do is to require certain firms to provide female cultures and others to provide male cultures, and yet this is what seems desirable in the long run.

The limits of our current knowledge about sex differences also suggest caution in devising gender-conscious policies. More open discussion of statistical sex differences is critical to further progress for women in the workplace. However, these differences are complex and incompletely understood. Liability based on evidence of sex differences crystallizes in a legal precedent a particular view of these differences. This view may be difficult to dislodge as scientific evidence evolves. Even if the scientific community reaches a relatively stable consensus on some point, the courtroom has not proven to be an ideal setting to convey the state of scientific research, and research findings may end up in legal opinions in an overgeneralized form that reinforces undesirable stereotypes.¹⁹²

For all these reasons, a firm's compensation policies, its competitive tone, and most other features of work culture should generally be immune from direct regulation. In one area, however, some intervention deserves consideration. Men no less than women deserve a workplace that helps them realize their potential, and their preferred environment may seem harsh by female standards. However, human preferences are neither fixed nor deserving of complete deference.¹⁹³ A useful perspective on

189. George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2313 (2005) [hereinafter Rutherglen, *Essentially Contested Concept of Equality*].

190. Green, *supra* note 4, at 676.

191. *Id.* at 631.

192. A similar concern has been expressed by Tristan Green. *See id.* at 672–74.

193. Some feminists may be uncomfortable with a discrimination policy that embodies values beyond respect for individual choice, but Kimberly Yuracko has convincingly

malleability can be gained by a quick survey of the history of violence, which indicates that modern society has done a remarkable job of suppressing some of our aggressive impulses.¹⁹⁴ No simple formula can determine the optimal level of workplace aggression, but there is little support today for allowing the physical violence and intimidation that is at issue in a surprising number of cases. The average man may always thrive in more adversary environments than the average women, but the physically aggressive work cultures that are problematic for women are also more generally socially undesirable.

Improvements to work culture may need to begin long before young people enter the labor market. Socialization of both sexes towards—though not necessarily to—an androgynous norm would reduce conflicts in the workplace. Ironically such socialization may best be achieved through sex-segregated education. Girls may need gentle encouragement to become more competitive,¹⁹⁵ while boys may best be civilized in an environment that meets their needs for aggression.

But even adults can be channeled towards desired behavior, and the regulation of work culture may be part of this process. Intimidating Socratic interrogation and compensation by commission may be useful tools for managing men, but when equal opportunity abuse includes physical attacks and intimidation¹⁹⁶ the law may wish to place a ceiling on the acceptable level of workplace aggression.

Liability at the margins for extreme conduct will not cause immediate and widespread changes in other aspects of work culture but perhaps it does not have to. Even circumscribed liability may prompt a few firms to consider more general modifications to their culture, and a few successful models may provide a catalyst for others to adopt policies more congenial

argued that feminists cannot successfully develop their case independent of a conception of social value. KIMBERLY YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* (2003). In her words, “feminists’ arguments are driven by perfectionism, not neutral principles.” *Id.* at 5.

194. See ERIC ARTHUR JOHNSON & ERIC H. MONKKONEN, *THE CIVILIZATION OF CRIME: VIOLENCE IN TOWN AND COUNTRY SINCE THE MIDDLE AGES* (1996); TED ROBERT GURR, *VIOLENCE IN AMERICA: THE HISTORY OF CRIME* (1989); PINKER, *supra* note 174.

195. Anson Dorrance coached the American women's soccer team to its first world title, and the University of North Carolina at Chapel Hill women's soccer team to eighteen collegiate championships. John M. Silva III, *Psychological Aspects of Competition: An Interview with Anson Dorrance Head Women's Soccer Coach at The University of North Carolina*, 11 J. EXCELLENCE 88, 88 (2006). In an interview, he commented that the “biggest concern with the females is they don't naturally compete,” and credited the success of his program to fact that “we train them to compete.” *Id.* at 97. To do so, however, he adopts an approach quite different from what he would have used with men. “A part of what motivates a man,” he said, “is for the coach to actually scream at him during the game,” while the identical approach with a woman athlete “will actually shatter her confidence.” *Id.* at 99. With female athletes, he concluded, “[Y]ou've got to be overwhelmingly positive.” This difference pervades his coaching process: “We use videotape to show women they can play. With men, we show them they can't.” *Id.* at 100.

196. See *supra* Section I.

to women. Not all firms will or should adopt these innovations. The goal is not to make all firms female-friendly but to make enough.

3. Disparate Treatment or Disparate Impact?

A work culture practice adopted for the conscious purpose of excluding one sex would constitute disparate treatment, even if that work culture also served some legitimate business purpose.¹⁹⁷ Such situations are rare, and the facts described in *Liar's Poker* and *Sears* are more typical. Male-oriented work cultures typically develop primarily at the times when a workplace is populated primarily by males, and they function to regulate intra-male relations.

The issue of practical importance is whether Title VII should reach practices that do not target women but that impair the average woman's performance. Virtually all courts have taken the view that disparate treatment doctrine does not bar any work policy or conduct directed even-handedly to male and female employees.¹⁹⁸ Only one circuit court (the Ninth, of course) has taken a different approach. In *EEOC v. National Education Association (NEA), Alaska*, the defendant was a teacher's

197. The statutory text is quite clear: since the Civil Rights Act of 1991, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, S. 1745, 102d Cong. §107 (1991) (codified as amended at 42 U.S.C. §2000e-2(m) (2012)). Gelbach, Klick, and Wexler reach a different conclusion, suggesting that "as currently conceived, disparate treatment claims seemingly do not prohibit the employer from using group-based characteristics . . . to treat individuals similarly in hopes that such treatment will encourage applicants from disfavored groups to sort themselves out of a job." Gelbach et al., *supra* note 178, at 833. Their principal support for this is a 1993 opinion by Judge Richard Posner, which indeed supports their claim. *EEOC v. Consolidated Serv. Sys.*, 989 F.3d 233 (7th Cir. 1993). However, the years at issue were prior to the Civil Right Act of 1991, and as authority Posner cites *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), which does tend to preclude any liability, but is now superseded by statute.

Gelbach, Klick, and Wexler also argue that employers may use group characteristics to discourage the disfavored group in the more specific situation where the discrimination takes the form of a benefits or compensation policy. Gelbach et al., *supra* note 178, at 828. In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1086, 1089-91 (1983), the Supreme Court found in violation of Title VII a plan that required sex-differentiated contributions to compensate for women's greater longevity. See also *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 712 (1978) (invalidating a plan that required women to make equal contributions but receive lower benefits). Gelbach, Klick, and Wexler suggest correctly that the effect of *Norris* and *Manhart* was tacitly to approve a plan that was facially neutral but provided higher net benefits to women, and argue that *Manhart* and *Norris* "foreclose[] the avenue of pursuing passive discrimination claims as disparate treatment in fringe benefits or compensation." Gelbach et al., *supra* note 178, at 828. But in neither *Norris* nor *Manhart* was there any suggestion that the plan had been instituted with the purpose of discriminating against either women or men. Faced with evidence of intent to discriminate and a neutrally framed plan with a discriminatory effect, a court would almost surely find disparate treatment.

198. A rare exception to this principle is dress codes. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (2006).

union.¹⁹⁹ One supervisor, Thomas Harvey, frequently “yelled”²⁰⁰ and “screamed”²⁰¹ at employees in a hostile manner, often without provocation.²⁰² On only one occasion did Harvey actually touch an employee, grabbing her shoulders and yelling that she should get back to her office.²⁰³ However, both male and female employees testified that they perceived his behavior as physically threatening to themselves or to others. He frequently invaded employees’ personal space, sometimes lunging and shaking his fist.²⁰⁴ The record is not entirely clear about whether Harvey’s conduct was different towards men and women.²⁰⁵ What is clear, however, is that their response differed. One female employee filed a police report expressing her concerns about the possibility of assault,²⁰⁶ and many witnesses agreed that the women in the office felt “in jeopardy” and “physically threatened” most of the time.²⁰⁷ In contrast, although one male employee testified that on one occasion Harvey once “scared the hell out of” him, men in general were far more comfortable with Harvey’s conduct.²⁰⁸

A difference in Harvey’s conduct towards men and women would clearly have constituted disparate treatment. The Ninth Circuit, however, went further. It had already held that harassment of an explicitly sexual—in the sense of erotic—nature should be evaluated from the perspective of the victim, and that the average woman might be disturbed by sexual behavior that did not disturb the average man.²⁰⁹ In *NEA, Alaska*, it extended that holding to non-sexual abusive behavior, holding that even if the abuser treats both sexes identically, a different subjective response by one sex can give rise to a disparate treatment claim.²¹⁰

199. *EEOC v. Nat’l Educ. Ass’n (NEA), Alaska*, 422 F.3d 840, 842 (9th Cir. 2005). That the defendant was a teacher’s union is itself a striking fact, since few professions are more female dominated than teaching.

200. *Id.* at 843.

201. *Id.* at 844.

202. *Id.* at 843.

203. *Id.*

204. *Id.*

205. *Id.* at 846.

206. *Id.* at 843.

207. *Id.* Bhend testified that Harvey’s behavior at her evaluation meeting put her in a “state of panic,” that she “felt that [she] was in jeopardy,” and that she felt “physically threatened most of the time.” *Id.* Indeed, Bhend went so far as to omit submission of a number of her overtime hours because she “was too scared of Mr. Harvey to turn them in to him.” Chamara also testified that Harvey created a general atmosphere of intimidation in the workplace that was “like working with a ticking time bomb because you’re sitting by and you’re waiting for your turn to be next.” Jeff Cloutier testified, without prompting, to the “general fear of the women at our office.” *Id.* at 843–44.

208. *Id.* at 846.

209. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

210. *NEA Alaska*, 422 F.3d at 845–46. The Ninth Circuit reaffirmed this rule in *Davis v. California Department of Corrections & Rehabilitation*, 2012 U.S. App. LEXIS 11399, at *6, *8 (9th Cir. June 6, 2012).

The Ninth Circuit rule stretches the limit of what can properly be called disparate treatment. A practice that is adopted without discriminatory intent and administered with an even albeit abusive hand seems by definition not to raise a disparate treatment claim, even if it hurts one sex more than the other. Admittedly, the proper boundaries between disparate impact and disparate treatment remain complex and controversial,²¹¹ but several policy other concerns suggest that disparate impact is a more appropriate theory. Discrimination law reflects not one but several different normative principles. At its core is the proposition variously known as formal equality or the neutrality principle: employment decisions cannot be made because of the employee's membership in a protected class.²¹² As George Rutherglen has argued, only the neutrality principle commands essentially unanimous support in American society and it is the foundation on which the political legitimacy of discrimination law rests. The neutrality principle finds its fullest expression in disparate treatment doctrine, and disparate impact doctrine can be justified on neutrality grounds only to the extent that it is used as a means of smoking out intentional discrimination.²¹³ Much of disparate impact law extends beyond the neutrality principle to embrace principles of substantive equality. These principles command less consensus than the neutrality principle,²¹⁴ and because violations of them seem less morally blameworthy,²¹⁵ the damages available in disparate impact suits are far less extensive than those available in disparate treatment cases.²¹⁶ Limited damages serve pragmatic purposes as well: They reduce the costs of

211. Rutherglen, *Essentially Contested Concept of Equality*, *supra* note 189, at 2325.

212. *Id.*

213. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299–1311 (1987) [hereinafter Rutherglen, *Disparate Impact Under Title VII*].

214. Rutherglen, *Essentially Contested Concept of Equality*, *supra* note 189; Rutherglen, *Disparate Impact Under Title VII*, *supra* note 213.

215. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 971 (1993); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1647–48 (2007) (liability inappropriate for defendants who adopt best practices that prove less than fully effective); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1243–46 (1995) (recommending two-tier liability, with limitations on damages when no conscious intent to discriminate proved); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 983–84, 1001–02 (2005) (proposing modified disparate impact and noting its similarity to Oppenheimer's proposal); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1436–39 (2009).

216. For disparate impact cases, the original provisions of the 1964 Act were retained and monetary damages were limited to certain kinds of back pay. The Civil Rights Act of 1991 provided for compensatory and punitive damages against a defendant who engaged in "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." Civil Rights Act of 1991, S. 1745, 102d Cong. § 1977A (1991) (codified as amended at 42 U.S.C. § 1981a(a)(1) (2012)).

admitting liability, encourage settlement and actively engage employers in the redesign of personnel policies to reduce future discrimination.²¹⁷

Liability for neutral but violent work cultures falls outside not only the narrow definition of disparate treatment but its broader purposes. A doctrine of discriminatory work culture that embodies a vision of equality based on difference will not command the same consensus as one based on the neutrality principle. Placing violations of a difference-based principle in the same class as violations of neutrality risks popular and judicial support for discrimination law.

At the same time, disparate impact theory seems well-suited to attack physically abusive environments. A key aim of disparate impact liability is to reduce unnecessary obstacles to the success of protected groups,²¹⁸ and carefully limited use of disparate impact doctrine to limit violent work cultures seems to further this goal.²¹⁹ Damage limitations may reduce judicial and political resistance to a novel theory, and encourage the employer cooperation that is critical when the behavior to be deterred may be hard to monitor and prevent.

Only a small fraction of abusive work cultures can be reached by disparate impact doctrine, and for this reason Kerri Lynn Stone has advocated regulating abuse at work not by Title VII, but by a sex-neutral statute.²²⁰ Although she makes a powerful argument that broader sex-neutral regulation would be useful,²²¹ a narrow Title VII cause of action is important to establish that the accommodation of differences is a permissible goal of Title VII. Recent developments in the law threaten to limit voluntary employer changes to make work cultures more female-friendly.²²² Even circumscribed disparate impact liability for work cultures can be used to establish the legitimacy of actions designed to take into account statistical sex differences in personality.

4. The Lack of Interest Defense and the Relevant Labor Market

Evidence of sex differences already has a place in the law of disparate treatment. In a systemic disparate treatment suit, the plaintiff must show that the defendant has a policy, pattern, or practice of discriminating

217. Two other provisions further the remedial purpose of the statute. In both disparate impact and disparate treatment cases, courts have broad injunctive powers and prevailing parties may obtain attorney's fees and costs. Civil Rights Act of 1964, H.R. 7152, 88th Cong. § 706(g) (1964) (codified as amended at 42 U.S.C. §§ 2000e(g), (k)).

218. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

219. For proposal to apply disparate impact doctrine to a broader range of masculine work cultures, see Case, *supra* note 148, at 78–95.

220. See generally Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009).

221. Countervailing reasons to limit the legal system's intrusion into work culture are discussed in Section V.A.2.

222. See Section V.

against a protected group.²²³ To do this, plaintiffs almost always²²⁴ provide statistical evidence that the proportion of a protected class in the employer's workforce is significantly different from the "qualified . . . population in the relevant labor market."²²⁵

The relevant labor market should reflect the set of choices truly available to the employer and must include only people who are both qualified and interested.²²⁶ The relevant market can be defined broadly (retail sales personnel generally) or narrowly (those selling a particular line of merchandise or those on commission). Typically the more narrowly defined labor market contains a lower proportion of protected class members and plaintiffs will argue for a broader definition, claiming that the narrow characterization simply perpetuates market-wide discrimination. Defendants respond that a broad market definition fails to allow for actual differences in the qualifications and interests of men and women.²²⁷ Views on discrimination and difference thus always lurk in the background when choices are made among various labor market definitions.²²⁸

A defendant is said to raise a lack of interest defense if its principal challenge to the plaintiff's statistics focuses on women's ostensible lack of interest in the jobs at issue. Like most defendants who rely on this theory, Sears introduced a wide array of expert witnesses, some of whom provided what would now be called "social framework evidence"²²⁹ of the different preferences of men and women in society as a whole. A prominent feminist historian, Professor Rosalind Rosenberg, testified in support of

223. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Strictly speaking, "pattern or practice" suits are suits brought by the United States government under section 707 of Title VII, 42 U.S.C. § 2000e-6 (2012). However, class actions by private plaintiffs are for most purposes equivalent to "pattern or practice" suits through the use of class actions. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). In these cases, plaintiffs usually also provide individual class members who describe their experiences of discrimination by the employer. A plaintiff may prevail through statistics alone if the discrepancies are sufficiently extreme. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977). But individual testimony brings "the cold numbers convincingly to life." *Int'l Bhd. of Teamsters*, 431 U.S. at 339. The EEOC in *Sears* failed to introduce such evidence, and this omission was one of many errors that doomed its case. *Sears III*, 839 F.2d 302, 310 (7th Cir. 1988).

224. Statistical evidence is not an absolute requirement in systemic disparate treatment cases. *Pitre v. Western Elec. Co.*, F.2d 1262, 1267 (10th Cir. 1988).

225. *Hazelwood Sch. Dist.*, 433 U.S. at 308.

226. See generally RAMONA L. PAETZOLD & STEVEN L. WILLBORN, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES* § 4.3 (2007).

227. Perhaps only actual applicant data, reduced to exclude the unqualified, should be used. This option does not eliminate the problem of background assumptions though. Using actual applicant data will eliminate members of the pool with no interest in the job but it may exclude some who are interested if the employer's history of discrimination dissuaded members of the protected class from even applying.

228. Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1737-39.

229. The concept was first introduced in Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

Sears' claim that women are uncomfortable with the competitive atmosphere of commission selling.²³⁰ An expert on polling data examined national surveys and polls and concluded that women were less interested in jobs with financial risk or involving a high degree of competition among salespersons.²³¹ Witnesses for the EEOC countered that the evidence did not support the view that significant differences existed between the interests and career aspirations of men and women: women's different career paths, they argued, were the result of limited opportunities rather than different preferences.²³²

Cases in which defendants rely primarily on a lack of interest defense were once common²³³ but have become less so.²³⁴ The *Sears* opinion created a furor,²³⁵ and subsequent defendants may have decided that raising the defense explicitly was imprudent. The question of lack of interest lives on, though somewhat under the radar, in the reports of defense expert witnesses on the proper definition of the qualified workforce.²³⁶ Plaintiffs typically respond that the lack of interest argument promotes stereotypes.²³⁷ The "stereotype promotion" argument has not fared well with courts, which typically regard evidence of lack of interest as relevant.²³⁸ Plaintiffs might do better to acknowledge that statistical sex differences exist while challenging the traditional characterization of those differences. For the most part, employers have no obligation to change their work cultures to meet the needs of women, but they should be challenged if they claim, as *Sears* did, that they could not do so because their cultures reflect intrinsic job characteristics. The trier of fact may well defer to an employer who argues that changing practices to help women would drastically lower the productivity of male workers. But fact-finders might also conclude that

230. *Sears II*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986).

231. *Id.*

232. *Id.* at 1314 nn.61–63.

233. Schultz, *Telling Stories About Women and Work*, *supra* note 3, at 1776 (finding forty-three published lack of interest cases between 1978 and 1989); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1095 (1992).

234. Neil Dishman, *Defending the Lack of Interest Defense: Why the Title VII Should Recognize Differing Job Interests Between the Sexes*, 14 GEO. MASON U. C.R. L.J. 189, 190 n.3 (2004) (finding only seven published lack of interest cases between 1991 and 2004).

235. *See, e.g.*, Schultz, *Telling Stories About Women and Work*, *supra* note 3, at 1753; Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 297 (1991); Haskell & Levinson, *supra* note 69.

236. *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 638 (N.D. Cal. 2007) (Dr. Margaret Stockdale and Dr. Casey Mulligan on women's lack of interest in relevant job); *EEOC v. Morgan Stanley*, 324 F. Supp. 2d 451, 465 (S.D.N.Y. 2004) (Dr. June O'Neill on lack of interest).

237. *Morgan Stanley*, 324 F. Supp. 2d at 465.

238. *Id.*; *Ellis*, 240 F.R.D. at 638.

this failure to change was part of a larger pattern of intentional discrimination or that accommodation costs were not that high.²³⁹

A more nuanced response to the lack of interest defense would improve plaintiffs' chances of prevailing, and would also serve purposes perhaps even more important. The limits of our present scientific knowledge as well as the unsettled status of scientific evidence in the courts caution against the widespread use of disparate impact theory to challenge work cultures. Incremental improvements may produce work cultures congenial to women and make legal intervention unnecessary. But if that does not come to pass, a more aggressive use of disparate impact would be helped by an established body of evidence and doctrine on sex differences, and lack of interest suits today can lay the foundation for this.

B. VOLUNTARY EMPLOYER ACTS

Judicial edict cannot be the main mechanism for making workplaces more congenial to women. Ultimately, the voluntary actions of employers must be the main engine of change. Such voluntary efforts, however, might be challenged by male workers. As part of its effort to attract more women to commission sales, Sears reduced the proportion of compensation attributable to commissions. Suppose a highly successful male salesperson challenged this change as discrimination against men. On its face, such a claim seems absurd, yet at present it stands some chance of succeeding.

1. *Ricci v. DeStefano*

Until recently there was no reason to think that the law would place any obstacles in the way of employer efforts to make workplaces friendlier to women. This changed after the 2009 case *Ricci v. DeStefano*,²⁴⁰ in which the Supreme Court considered a decision by the City of New Haven not to certify the results of a fire department promotional exam after whites and Hispanics passed at a much higher rate than blacks. After reviewing the facts, Justice Kennedy announced what has been called the *Ricci* premise²⁴¹: "Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."²⁴² The City of New Haven claimed that its fear of disparate impact liability constituted such a defense, and the Supreme Court held that such fear could not justify the City's action unless it had a "strong-basis-in-evidence."²⁴³

239. See Green, *supra* note 4, at 664 (suggesting a similarly modest role for lack of interest doctrine in addressing the problems of work culture).

240. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

241. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343 (2009).

242. *Ricci*, 557 U.S. at 579.

243. *Id.* at 582.

The *Ricci* court refers to the City's action as "race-conscious,"²⁴⁴ and interpreted broadly, the *Ricci* premise classifies as disparate treatment any decision to modify a practice that considers the effect of the practice on a protected group. However, Title VII only prohibits action taken "because of" protected status, and action that is "race-conscious" might not be taken "because of" race. Suppose an employer notices that practice has a disparate impact and is thus motivated to examine the practice more carefully. Upon closer examination the practice appears flawed wholly apart from its disparate impact. The disparate impact has served as a diagnostic tool that motivated the employer to find some more general problem with the practice. The decision to change the practice is thus not "because of" race or sex, but because of other problems with the practice. Language in the opinion supports this narrower reading.²⁴⁵

Interpreting the *Ricci* premise narrowly to apply only when there is strict causation expands somewhat the options available to employers. If the City's search for the cause of the racial disparity uncovered widespread cheating, the City would surely have been free, even obligated, to throw out the test. Even in *Ricci*, closer examination of the test at issue revealed a number of flaws from a wholly non-racial perspective. In making its case, the City chose not to emphasize these flaws,²⁴⁶ and so its action was susceptible to characterization as purely race-conscious.

Yet a strict causation requirement in the *Ricci* premise may not help an employer who wishes to voluntarily restructure its work practices to make them more congenial to women. The disparate impact that a competitive environment has on women is not diagnostic of a general flaw in such environments, which may well be optimal for men. Statistical sex differences imply unavoidable trade-offs, and some forms of restructuring intended to help women will hurt men.²⁴⁷ An employer who changes a practice to help women will sometimes be acting strictly "because of" sex. Sears made it perfectly clear that changes in its commission structure were motivated by a desire to increase the number of women in its commission sales force, and that admission seems to trigger the *Ricci* premise.

244. *Ricci*, 557 U.S. at 581, 585.

245. "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." *Id.* at 585.

246. George Rutherglen, *Ricci v. DeStefano: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 88 (2009). The City did not even argue that the test was invalid, only that it might be found to be invalid. *Ricci*, 557 U.S. at 585. To put it bluntly, the City was apparently too proud to admit it might have administered a bad test.

247. Such trade-offs are not unique to changes to allow for sex differences, and at least until *Ricci*, employers had been permitted or even required to make changes that deviated from a purely meritocratic ideal. J. Hoult Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1401 (2003) (citing Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 694 (2001)).

To avoid invalidating such changes, those of us sympathetic to workplace restructuring may be inclined to see a problem in the *Ricci* premise itself and to propose that it be further limited. But the *Ricci* premise is not clearly wrong. Suppose Sears had increased the amount of compensation attributable to commissions with the conscious purpose of increasing the proportion of males. Presumably this would constitute disparate treatment absent some defense. If the only difference between a pro-male and pro-female change is whose ox is being gored, then both cases are properly labeled disparate treatment though only one is a potential candidate for some defense.

But which defense? I argued earlier that disparate impact doctrine should be used only sparingly to attack work cultures that disadvantage women. As a result, employers adopting a female-friendly work culture will seldom have a “strong-basis-in-evidence” for expecting liability. By far the most important alternative possible defense is that the challenged acts are legitimate affirmative action.

2. Affirmative Action

In spirit, *Ricci* is an affirmative action case.²⁴⁸ The opinion notes the importance of safeguarding the rights of workers outside the protected class, and affirmative action doctrine is the only part of Title VII law that provides a coherent framework for thinking about this problem. Doctrinally, however, *Ricci* is not an affirmative action case. The issue of affirmative action was not raised by the City and the only opinion that mentions it (briefly) is Justice Ginsburg’s dissent.²⁴⁹ Affirmative action doctrine thus remains intact as a potential defense when employer acts are characterized as disparate treatment under the *Ricci* premise.

The case law of affirmative action has primarily examined numerical goals, although the term “affirmative action” in theory encompasses many steps that an employer might voluntarily take to increase the numbers of historically underrepresented groups in its workforce. The last time the Supreme Court addressed this issue under Title VII was in the 1987 case *Johnson v. Transportation Agency, Santa Clara County*.²⁵⁰ Elaborating on the earlier *United Steelworkers of America v. Weber*,²⁵¹ *Johnson* upheld the employer’s plan on the grounds that it had four characteristics. First, the

248. *Ricci*, 557 U.S. at 626 (Ginsburg, J., dissenting).

249. *Id.* Justice Ginsburg’s *Ricci* dissent simply asserted without analysis that “if the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer’s reasonable effort to comply with Title VII’s disparate-impact provision by refraining from action of doubtful consistency with business necessity.” *Id.* On closer examination the explicit application of affirmative action doctrine might have helped the City somewhat, but, as the rest of this section will discuss, perhaps not as much as Justice Ginsberg implied.

250. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616 (1987).

251. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

plan was “consistent with Title VII’s objective of ‘[breaking] down old patterns of racial segregation and hierarchy.’”²⁵² Second, the plan sought to remedy a “manifest imbalance” resulting from historical discrimination,²⁵³ although there was no evidence of discrimination on the employer’s part.²⁵⁴ Third, the plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement.²⁵⁵ Fourth, the plan was temporary, intended to eliminate imbalance rather than to maintain balance.²⁵⁶

Most work culture changes do not unnecessarily trammel the rights of other employees. They erect no absolute bar to advancement, and under both disparate treatment and disparate impact the establishment of work culture is, unlike hiring and promotion, generally within an employer’s prerogatives. Few courts would regard a change in Sears commission policies as the equivalent of a numerical goal.

Johnson also requires a “manifest imbalance” in the work force.²⁵⁷ The *Johnson* court emphasized that the discrepancy need not be enough to constitute a prima facie statistical case,²⁵⁸ but how much less the discrepancy may be is far from clear. In practice, affirmative action plans that have been upheld usually involve discrepancies that are relatively close to the prima facie case level.²⁵⁹ *Johnson* may thus not give employers all

252. *Johnson*, 480 U.S. at 628 (quoting *United Steelworkers of Am.*, 443 U.S. at 195).

253. *Johnson*, 480 U.S. at 631. See also *United Steelworkers of Am.*, 443 U.S. at 197 (“manifest racial imbalance”).

254. *Johnson*, 480 U.S. at 632.

255. *Id.* at 630 (quoting *United Steelworkers of Am.*, 443 U.S. at 208).

256. *Johnson*, 480 U.S. at 630 (quoting *United Steelworkers of Am.*, 443 U.S. at 208). The affirmative action framework helps explain two otherwise puzzling aspects of the *Ricci* opinion: the critical role played by the City’s decision to discard the test *after* it was administered, and the burden that a second test would have placed on plaintiffs who had already invested significant time and money in study. Neither the timing of the decision nor the size of the resulting harm seems relevant to whether the City’s decision constituted intentional discrimination. Both are, however, clearly relevant to affirmative action analysis, specifically to whether the employer’s action unnecessarily trammelled the rights of other workers. The Court was evidently incorporating affirmative action reasoning without saying so, and clear articulation of this would have sensibly narrowed the practical effect of *Ricci* while protecting the interests of all employees. Contrary to Justice Ginsburg’s suggestion, had New Haven asserted an affirmative action defense in *Ricci*, its actions might still have been invalidated because they unnecessarily trammelled the rights of plaintiffs by imposing a second set of preparation costs. I believe that Justice Ginsburg made a serious and somewhat uncharacteristic strategic mistake in focusing entirely on the reasons that *Ricci* itself should have come out differently. The goal of a future narrow interpretation would have been better served by a dissent or even a concurrence that focused in more detail on affirmative action principles and stressed how they should operate to limit the *Ricci* principles.

257. *Johnson*, 480 U.S. at 631. See also *United Steelworkers of Am.*, 443 U.S. at 197 (“manifest racial imbalance”).

258. *Johnson*, 480 U.S. at 632.

259. See, e.g., *United States v. N.Y.C. Bd. of Educ.*, 448 F. Supp. 2d 397, 425–26 (E.D.N.Y. 2006); *Honadle v. Univ. of Vt. & State Ag. Coll.*, 56 F. Supp. 2d 419, 426 (D. Vt. 1999).

that much more latitude than *Ricci*.²⁶⁰ To be sure, a plaintiff who proves a prima facie statistical case can only prevail with either additional proof of intent or the absence of job-relatedness, and *Johnson* permits affirmative action when these other two requirements are not met. Still, the manifest imbalance test seems unduly stringent when work culture changes rather than numerical goals are at issue.

A third prong of the *Johnson* analysis requires that affirmative action be temporary,²⁶¹ a rule that makes some sense for numerical goals, since permanent numerical goals clearly contravene the spirit of non-discrimination. However, policy considerations suggest that there is no reason to make work culture changes temporary and every reason to expect that some of them should be permanent. The inherently lower burden of work culture changes on those outside the protected class can be seen as a justification for the dilution or abandonment of the *Johnson* requirements that sex-conscious changes be temporary and in response to a manifest imbalance.

Finally, *Johnson* requires that a plan be “consistent with Title VII’s objective of ‘[breaking] down old patterns of racial segregation and hierarchy.’”²⁶² That affirmative action be consistent with the goals of Title VII seems fair enough. That those goals be conceived entirely in terms of integration is less clear. The inclusion of race and sex in the same statute may have been unfortunate; in this regard the flexibility of the sliding constitutional standard would have been preferable. Some recognition of personality differences in disparate impact theory would give a foothold in Title VII to the principle that such differences may be recognized without doing unacceptable damage to neutrality principles. Perhaps it would be better to require that any change be consistent with Title VII’s objective of achieving a more equitable workplace for women.

VI. CONCLUSION

Since its passage, courts and commentators have typically characterized Title VII as requiring no more and no less than the neutral treatment of men and women. Neutrality has much to recommend it as a normative principle and for many years the neutrality paradigm served women well as a legal strategy.

A requirement of neutrality, however, might take several forms. The law might permit any neutral employment practice, whether or not it is more congenial on average to members of one sex. Such strong neutrality principles tend to perpetuate the male-oriented status quo.

260. Unlike *Ricci* however, a *Johnson* defense does not require any showing of a possible causal relationship between the observed discrepancy and the practice that the employer wishes to change.

261. *Johnson*, 480 U.S. at 630 (quoting *United Steelworkers of Am.*, 443 U.S. at 208).

262. *Johnson*, 480 U.S. at 628 (quoting *United Steelworkers of Am.*, 443 U.S. at 195).

Alternatively, the law might limit the range of permissible neutral practices, excluding at least some that excessively favor traits typically associated with one sex or the other. This gender-conscious neutrality must inevitably rest on some vision of which traits are gendered and how persistent sex differences are likely to be. Central to developing potential limits is the study of empirical evidence on differences between men and women. Advocating gender-conscious rules that emphasize the ethic of care may invite the response, "Well, then, maybe you belong at home with your children." The empirical difference model suggests that sex differences are not arrayed on a simple continuum of care and competition, and that accommodation may require modulation rather than radical restructuring of work practices such as commission schemes.

Translating strong neutrality into a policy agenda is relatively straightforward, and much of the appeal of strong neutrality is its simple clarity. Gender-conscious neutrality will look clumsy and complex in comparison. Yet evasion of the issue of sex differences has led to the stagnation in Title VII doctrine, as courts rightly observe that strong neutrality does not imply the relief requested by plaintiffs. The quest for alternatives to strong neutrality is not an easy one, and must evolve along with our changing understanding of statistical sex differences. The development of alternative principles must therefore proceed slowly and cautiously, one small step at a time. In this article I have proposed a few such steps: a new response to the lack-of-interest defense; a reform of principles of affirmative action as applied to non-numerical actions, and the tentative introduction into disparate impact doctrine of evidence of sex differences. Only experience can suggest what might follow after this. Perhaps employment law has reached a limit, and the problem of work culture can best be addressed by policies outside of employment law. Male-friendly work cultures developed in firms founded by men, and perhaps female-friendly work cultures will fully flourish only when more firms are founded by women.