

# Different but Equal? Inequalities in the Workplace, the Nature-Based Narrative, and the Title VII Prohibition on the Masculinization of the “Ideal Worker”

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## I. INTRODUCTION

Many of the barriers that traditionally excluded women from educational and occupational attainment have vanished. Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”) provides women with the legal ammunition necessary to sue employers who refuse to hire them

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or who otherwise treat them differently because of their sex.<sup>1</sup> Similarly, the Equal Pay Act of 1963<sup>2</sup> and the Pregnancy Discrimination Act of 1978<sup>3</sup> prohibit discriminatory practices in the workplace that have traditionally impeded women's ability to achieve occupational parity with their male coworkers. The enactment of these laws, along with others, served to overturn de jure obstacles to equality, while the Women's Liberation Movement of the 1980s took aim at de facto inequalities caused by societal prejudices.

Labor statistics evidence a changed landscape for the American woman. Women's labor force participation increased from 43.3% in 1970 to 59.2% in 2010.<sup>4</sup> Furthermore, the percentage of employed women who either entered or graduated from college has tripled from 1970 to 2010.<sup>5</sup> In fact, today, women receive both bachelor's degrees and master's degrees at a rate surpassing that of men.<sup>6</sup>

With the vast improvement in women's educational attainment, there should be a corresponding improvement in workplace equality between the sexes. Surprisingly, however, many aspects of the American workforce remain unchanged. Employment industries are, on average, still sex-segregated. Inequalities between men and women in terms of wages and rank continue to persist, especially in male-dominated occupations, which tend to be those that are the highest paying and most prestigious.<sup>7</sup> Across all occupations in 2010, women earned, on average, 81.2% of what men earned.<sup>8</sup> Furthermore, the women-to-men earnings ratios reported for the higher paying and more prestigious occupations were much lower than the average total earnings ratio. The lowest earnings ratio was found among personal financial advisors, with women making 58.4% of what men made in 2010.<sup>9</sup> But, in the lowest paying and least prestigious occupations, which continue to be female-dominated,

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<sup>1</sup> Title VII of the Civil Rights Act of 1964, 7 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful for an employer "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.").

<sup>2</sup> 29 U.S.C. § 206(d) (2006).

<sup>3</sup> 42 U.S.C. § 2000e(k) (2006).

<sup>4</sup> BUREAU OF LABOR STATISTICS, WOMEN AT WORK 13 (2011), available at [http://www.bls.gov/spotlight/2011/women/pdf/women\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf).

<sup>5</sup> In 1970, only 22.1% of women, ages 25 to 64, in the civilian labor force had either entered or graduated from college. By 2010, this percentage had increased to 66.7%. *Id.* at 14.

<sup>6</sup> In 1975, 25.2% of men ages 25 to 29 had obtained a bachelor's degree, while only 18.7% of women ages 25 to 29 had done so. By 2010, the percentages had changed to 27.8% and 35.7%, respectively. Furthermore, by 2010 8.5% of women ages 25 to 29 had received a master's degree, whereas only 5.2% of men ages 25 to 29 had done so. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 230 (2011), available at <http://nces.ed.gov/pubs2011/2011033.pdf>.

<sup>7</sup> The three occupations with the highest usual median weekly earnings (including pharmacists, lawyers and computer software engineers in descending order) employed some of the lowest numbers of women. BUREAU OF LABOR STATISTICS, *supra* note 4, at 9.

<sup>8</sup> *Id.* at 7 (discussing average earnings total).

<sup>9</sup> *Id.* Occupations that reported the lowest women-to-men earnings ratio in 2010 included postsecondary teachers, lawyers, insurance sales agents, real estate managers, retail salespersons, and personal financial advisors. *Id.*

the women-to-men earnings ratios exceeded the average total earnings ratio.<sup>10</sup> Nonetheless, on average, women still earned less than men in these occupations.<sup>11</sup>

Furthermore, sex segregation by employment industry continues. The low number of women in both blue-collar jobs and government jobs has remained approximately the same since 1964.<sup>12</sup> In fact, in 2009, only 0.9% of employed women worked in certain “blue-collar” industries, including the natural resources, construction, and maintenance industries.<sup>13</sup> The education and health services industries, as well as the trade, transportation, and utilities industries have remained the largest employers of women since 1964.<sup>14</sup> In fact, in 2009, women continued to make up the vast majority of employees in certain traditionally female-dominated occupations, including registered nurses (92%), elementary and middle school teachers (81.9%), and childcare workers (95.1%).<sup>15</sup>

If the educational attainment of men and women has become more or less equal and traditional barriers to occupational attainment have been razed through legislative action, why do workplace inequalities between the sexes persist? In this Note, I will argue that the answer lies in an unchanged societal psyche, mired in generations of prejudices that have served to subordinate and marginalize women. Although the overt sexism of past generations has diminished, its substantive underpinnings persist. Society has told similar stories about the differences between men and women for generations.

One popular assumption is that workplace gender gaps in both status and pay, as well as sex segregation in employment industries, are manifestations of the natural differences between women and men. This assumption is buttressed by scientists who purport to have discovered structural differences between the male and female brain, which they conclude cause men and women to exhibit divergent behavioral traits. For example, Cambridge University psychologist Simon Baron-Cohen explains in his 2003 book, *The Essential Difference*, that gender differences are the natural result of a predetermined biological schema: “The female brain is predominantly hard-wired for empathy. The male is predominantly hard-wired for understanding and building systems.”<sup>16</sup> Baron-Cohen explains further that the divergence in male and female

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<sup>10</sup> Occupations which reported the highest women-to-men earnings ratio in 2010 included food preparation and serving workers, bill and account collectors, stock clerks, postal service workers, and social workers. In fact, women earned more than men in the first three occupations mentioned. *Id.*

<sup>11</sup> For example, women made 86.5% of what men made as registered nurses. *Id.*

<sup>12</sup> WOMEN AT WORK, *supra* note 4, at 11.

<sup>13</sup> WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, WOMEN IN THE LABOR FORCE IN 2009 1 (2009), available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-09.htm>.

<sup>14</sup> WOMEN AT WORK, *supra* note 4, at 11.

<sup>15</sup> WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN (2009), available at <http://www.dol.gov/wb/factsheets/20lead2009.htm>.

<sup>16</sup> SIMON BARON-COHEN, THE ESSENTIAL DIFFERENCE: THE TRUTH ABOUT THE MALE AND FEMALE BRAIN 1 (2003).

brain structures causes the sexes to pursue distinctive life and career paths: "People with the female brain make the most wonderful counselors, primary-school teachers, nurses, careers, therapists, social workers, mediators, group facilitators, or personnel staff."<sup>17</sup> Such scientific explanations fuel popular media lore, which results in the production of hyperbolic accounts such as *Men are from Mars, Women are from Venus*.<sup>18</sup>

This view purports that sex discrimination cannot explain the statistical differences between the sexes in the workplace because it no longer exists.<sup>19</sup> Without sex discrimination, women are provided with the opportunity to achieve occupational parity with their male counterparts. Therefore, proponents of this view go on to argue, any statistical differences must be attributed to the biological differences between the sexes, which in turn inform men and women's divergent life and career choices. This story is the most recent addition to a genre of cultural stories, which I call the "nature-based narrative."

The nature-based narrative is a collection of stories that have been told to justify observed inequalities by appealing to the concept of what is natural and therefore what is normal. This narrative, as it is used today to explain workplace inequalities, is a wolf in sheep's clothing. The narrative is comprised of the same stories that were used to justify female inferiority and subordination since long before the tenets of American equality were dreamt up.<sup>20</sup> Today, our enlightened society no longer explains sex differences as an extension of the natural inferiority of women, but rather does so through the politically correct view that women and men are different but equal.<sup>21</sup> However, history informs us that "difference entails inequality . . . and even multiple differences devolve to two: dominant and subordinate."<sup>22</sup>

In this Note, I argue that workplace inequalities are the result of society's continuous adherence to the millennia-old nature-based narrative. The most recent addition to this narrative is informed by the work of scientists who claim that there are inherent neurological differences between the sexes that account for men and women's respective behavioral traits and choices. This "neurosexism" is the new

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<sup>17</sup> *Id.* at 185.

<sup>18</sup> See JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (2003) (arguing that couples must acknowledge and accept the existence of pervasive gender differences in order to develop better relationships).

<sup>19</sup> See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION* 271 (1992) (arguing that the biology of differences between the sexes informs virtually every aspect of human conduct).

<sup>20</sup> For example: "[O]ther studies, pursuits, and occupations assigned chiefly or entirely to men, demand the efforts of a mind endued with the powers of close and comprehensive reasoning..." THOMAS GISBORNE, *AN ENQUIRY INTO THE DUTIES OF THE FEMALE SEX* 21 (1797).

<sup>21</sup> Here I analogize to the "separate-but-equal" doctrine that was used by courts to justify racial segregation. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (upholding laws that permitted, or even required, separation of whites and blacks).

<sup>22</sup> SALLY L. KITCH, *THE SPECTER OF SEX: GENDERED FOUNDATIONS OF RACIAL FORMATION IN THE UNITED STATES* 22 (2009).

vogue in the modern nature-based narrative.<sup>23</sup> Like the science of the past, it perpetuates inequality by providing a scientific justification for the status quo. However, many scientific studies that add to this narrative fail to recognize that social conditioning itself can have a dramatic effect on brain function. I argue that a woman's choices are not predetermined by a fixed brain structure, but rather that they are the result of brain functioning in constant flux depending on the environment. The contemporary landscape is one that socializes children into a gender dichotomy that is laden with the pressures of stereotype threat and that demands observance of strictly defined gender roles. Choices that are made within this environment are not the result of a predetermined biological impetus, but rather are the function of a society confined within the fictions of the nature-based narrative. Thus, the modern nature-based narrative is comprised of an untrue syllogism. The syllogistic reasoning goes as follows: (1) From birth, males and females are neurologically dissimilar, (2) which causes women and men to exhibit divergent behavioral traits and to make different choices, and (3) therefore, workplace inequalities are caused by inherent gender difference, and not by sex discrimination. In this Note, I argue that both of the premises are flawed. However, neurosexism is so deeply engrained into the American psyche that it might be exceedingly difficult to divest society of these beliefs. Therefore, activists should challenge the conclusion by asserting that natural gender differences do not inevitably cause the workplace gender gap. It is entirely possible to narrow the gender gap while remaining within the confines of the premises.

Part II of this Note examines the roots of the nature-based narrative and discusses how it is used today to justify sex inequality in the workplace. Part III analogizes the nature-based narrative as it is used to justify sex discrimination to nature-based narratives that have been used by past generations to justify racial subordination and slavery. Part IV questions the first premise of the nature-based narrative—that there are inherent neurological differences between the sexes. Part V examines the second premise of the nature-based narrative and questions studies that purport to establish a causal link between brain structure and behavior. Part VI argues that the conclusion of the nature-based narrative is flawed regardless of whether or not one accepts the truth of its premises. Ultimately, the Note argues that workplace inequalities may be remedied under either paradigm if employers commit to a revaluation of feminine traits and broaden job descriptions, and if courts are willing to find that the masculinization of the ideal worker is unlawful sex discrimination under Title VII.

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<sup>23</sup> British psychologist Cordelia Fine coined the term neurosexism in her 2010 book *Delusions of Gender*. Neurosexism refers to the widespread belief that the brains of women and men are structurally different, which in turn justifies the inequalities between the sexes as natural and unalterable. See CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* (2010).

## II. THE NATURE-BASED NARRATIVE: HOW OUR GENDERED CULTURE COLLIDES WITH SCIENCE TO JUSTIFY SEX INEQUALITY IN THE WORKPLACE

Claims that females are the naturally inferior sex can be traced back to the beginnings of the written word.<sup>24</sup> For millennia, learned men purported to find evidence of women's inferiority in their distinctive physical traits, which, they argued, must be the cause of their inferior behaviors and temperament. For example, Aristotle argued that the lack of heat in a woman's body was capable of thwarting embryonic development and causing a female embryo to form instead of a male embryo.<sup>25</sup> Furthermore, he argued that this lack of heat caused defective traits in women.<sup>26</sup> Then scientific reasoning, as opposed to logical reasoning, became the proof *du jour* of the natural inferiority of women. In 1871, Darwin used his newly developed theory of natural selection to explain the biological inferiority of women: "In short, women are less evolved. Men reach a 'higher eminence' in any field . . . because they have on average greater mental capacity, a product of their age-old struggle for the females."<sup>27</sup> The modern nature-based narrative was born from historical misconceptions of inherent female inferiority.

The modern nature-based narrative is a syllogism: (1) Men and women differ neurologically; (2) these inherent differences cause the sexes to exhibit divergent behaviors and to make different choices, and (3) therefore, perceived inequalities between men and women are merely a result of such natural behaviors and choices, rather than a result of sex discrimination. Societal assumptions about the biological differences between men and women are no longer used to conclude that women are inferior. Instead, feminine and masculine traits are considered different but equal. In this view, a woman's biologically determined traits include "expressive, warm, and submissive," whereas a man's biologically determined traits include, "instrumental, rational, and dominant."<sup>28</sup> According to proponents of the nature-based narrative, it just so happens that the natural traits of men are best suited for employment in the highest paying and most prestigious occupations. On the other hand, the natural traits in women make them great housewives, mothers, and part-time employees. It seems that the modern different-but-equal paradigm is effectively identical to the inferior-female paradigm of the past. All that

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<sup>24</sup> According to the Book of Genesis, Eve was responsible for original sin through succumbing to her temptation—a direct result of her feminine weak-mindedness. See Genesis 3:1-24. The Book of Genesis dates back to the 15<sup>th</sup> Century B.C.E. KITCH, *supra* note 22, at 19.

<sup>25</sup> KITCH, *supra* note 22, at 19.

<sup>26</sup> *Id.*

<sup>27</sup> James Moore & Adrian Desmond, *Introduction to CHARLES DARWIN, THE DESCENT OF MAN*, at xlviii (Penguin Classics 2004) (1871) (describing Darwin's theory of male superiority in terms of natural selection).

<sup>28</sup> Jan E. Stets & Peter J. Burke, *Femininity/Masculinity*, in *ENCYCLOPEDIA OF SOCIOLOGY* 997, 998 (Rev. ed. 2000).

has changed is that society's belief in female inferiority has been masked by the veneer of twenty-first century tact. Society continues to devalue feminine traits, as evidenced by the fact that such traits are not worth as much on the market.

The science-based sexism that persists today is not as pronounced as that of the past, but it is just as harmful to women since it is now concealed by the perceived authoritativeness of neuroscience.<sup>29</sup> Today, as in the past, the general public regards scientific theories as unquestionably reliable, which is a dangerous notion when combined with its apparent malleability. Scientists have consistently set out on self-fulfilling prophetic quests to discover evidence of the natural differences between the sexes. As scientific theories of female inferiority have been debunked throughout the ages, new theories have popped up in their place.<sup>30</sup> In the past, measuring skulls and weighing brains (now regarded as crude forms of science) were the scientific methods *du jour* by which scientists found proof of the natural differences between the sexes.<sup>31</sup> Today, the methods used are fMRIs, PET scans and human genetic analysis.<sup>32</sup> Modern scientists involved in such quests often ignore alternative explanations and conclusions, extrapolate too readily from studies of animals to human behavior, and seek out difference rather than similarity. Scientists do not exist in a separate world of white lab coats; they are very much a part of our gendered culture, and therefore, their subjective prejudices and gendered expectations might seep into their "objective" studies. Cordelia Fine sums up this subset of scientific study in the term neurosexism: "Neurosexism reflects and reinforces cultural beliefs about gender—and it may do so in a particularly powerful way. Dubious 'brain facts' about the sexes become part of the cultural lore."<sup>33</sup>

A clear example of neurosexism at work is psychologist Simon Baron-Cohen's 2003 book *The Essential Difference*.<sup>34</sup> Baron-Cohen adopts a Darwinian approach to sex difference and argues that there are clear survival and reproductive advantages to a female brain being a high empathizer but low systemizer, and the male brain being a low empathizer but high systemizer.<sup>35</sup> He argues that the advantages of the empathetic female brain cause women to be great at making friends, mothering, gossip, social mobility, and reading their partners facial

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<sup>29</sup> "[N]euroscience easily outranks psychology in the implicit hierarchy of 'scientificness.' Neuroscience, after all, involves expensive, complex machinery." FINE, *supra* note 23, at 169.

<sup>30</sup> "Some scientists from the 19th century were convinced that intelligence was located in the frontal lobe of the brain, and therefore believed that women should have smaller frontal lobes. . . . It was soon found, however, that the frontal lobes in women were generally larger than those of men, and therefore male scientists concluded that not the frontal lobe but the parietal lobe of the brain should be the seat of intelligence." BRYAN BUNCH & ALEXANDER HELLEMANS, *THE HISTORY OF SCIENCE AND TECHNOLOGY: A BROWSER'S GUIDE TO THE GREAT DISCOVERIES, INVENTIONS, AND THE PEOPLE WHO MADE THEM, FROM THE DAWN OF TIME TO TODAY* 419 (2004).

<sup>31</sup> See FINE, *supra* note 23, at xxiv–xxv.

<sup>32</sup> See *id.* at 134–35.

<sup>33</sup> *Id.* at xxviii.

<sup>34</sup> BARON-COHEN, *supra* note 16.

<sup>35</sup> *Id.* at 117–31.

expressions.<sup>36</sup> According to Baron-Cohen, a person that is a good systemizer is good at “understanding, using, and constructing tools” and “understanding and exploiting natural resources.”<sup>37</sup> Furthermore, the natural “drive to systemize is essentially the drive to control or understand a system to the highest level,” which makes high systemizers great candidates for power and control positions in society.<sup>38</sup> Unlike the male brain, the female brain is, on average, not as evolved for systemizing.<sup>39</sup> In keeping with his overarching argument that male and female brains are different but equal in the advantages that they confer, Baron-Cohen struggles to explain why having a low-systemizer brain might not be a maladaptive trait in women. He settles on the weak argument that although “a low systemizer would find it difficult to use tools or fix things,” her ability to empathize meant, “when a system needed fixing ... [low systemizers] had all the social skills to persuade a good systemizer to come and help them sort it out.”<sup>40</sup>

Scientists are only one of the constituencies engaged in the modern nature-based narrative discourse. The judiciary, appurtenant to the surrounding cultural environment, has also long been engaged in such discourse.<sup>41</sup> And judges have the uncanny ability, like scientists, to spin the tenets of the nature-based narrative into a shared reality. Recently, courts have used choice rhetoric to justify the status quo, which focuses on the behavioral result of biological differences between the sexes, rather than on the entire causal relationship between neurological and behavioral attributes (a task usually left to the scientific realm). To the general public, and apparently also to the courts, the fact that women and men differ neurologically is an unquestioned reality. For example, in *EEOC v. Sears, Roebuck & Co.*, the district court justified the statistical disparities between male and female employees as merely a result of their differing occupational preferences.<sup>42</sup> The court seemingly adhered to the implicit principle that these choices were the result of fixed biological differences and were therefore natural and normal. It found that there was not any sex discrimination to remedy.

The district court in *Sears* held that the Equal Employment Opportunity Commission (EEOC) failed to prove its Title VII claim that “Sears engaged in a nationwide pattern or practice of sex discrimination . . . by failing to hire female applicants for commission selling on the same

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<sup>36</sup> *Id.* at 126–30.

<sup>37</sup> *Id.* at 118.

<sup>38</sup> *Id.* at 123.

<sup>39</sup> See BARON-COHEN, *supra* note 16, at 126–30.

<sup>40</sup> *Id.* at 130.

<sup>41</sup> See e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state protective labor legislation that restricted the number of hours a woman could work in a day due to the inherent physical limitations of the female body).

<sup>42</sup> See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1315 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (accepting defendant’s evidence that a disparity between men and women in commission sales positions reflected the preferences of women applicants for noncommission positions).



basis as male applicants, and by failing to promote female noncommission salespersons into commission sales on the same basis as it promoted male[s].”<sup>43</sup> During the time period in question, Sears hired both commission and noncommission salespersons.<sup>44</sup> Commission salespeople earned “substantially more” than noncommission salespeople.<sup>45</sup> During interviews for commission salespeople, “managers looked for a number of important qualities, including aggressiveness or assertiveness, competitiveness . . . personal dominance, [and] a strong desire to earn a substantial income . . . .”<sup>46</sup>

The EEOC based its Title VII sex discrimination claim on statistical evidence, which showed that women constituted a disproportionately small percentage of the commission salespeople.<sup>47</sup> However, the district court found that these statistics were not persuasive because they were based on the faulty assumption that “all male and female sales applicants [were] equally likely to accept a job offer for all commission sales positions at Sears.”<sup>48</sup> Instead, the court adopted Sears’s explanation for the EEOC’s statistics, concluding that the evidence did not prove that Sears had engaged in sex discrimination, and confirming that men and women make different choices depending on their divergent interests and goals.<sup>49</sup> The court was convinced by Sears’s argument that it tried to remedy the statistical disparities, but women employees were just not interested in the commission jobs: “[S]pecific surveys of the interests of Sears employees reveal that far more men than women are interested in commission sales.”<sup>50</sup> The court found that the women employees, on average, made a choice to work in the departments which sold “soft lines of merchandise,” which happened to be the departments that did not offer a commission-based salary.<sup>51</sup> Thus, the court held that Sears had proved its point “that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in commission sales jobs.”<sup>52</sup> However, the only substantive (or non-self-reported) testimony that Sears produced to this effect was testimony from Dr. Rosalind Rosenberg, an American historian, who opined that “it is not surprising that men and women differ in their expectations concerning work [and] in their interests as to the types of jobs they prefer or the types of

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<sup>43</sup> *Id.* at 1278.

<sup>44</sup> *Id.* at 1289.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1290.

<sup>47</sup> The EEOC presented evidence that “while women were over 60% of full-time sales applicants . . . women only comprised 1.7% of full-time commission sales hires in 1973 and between 10.5 % and 5.3 % thereafter.” *Sears*, 839 F.2d at 321.

<sup>48</sup> *Sears*, 628 F. Supp. at 1305 (numbers omitted).

<sup>49</sup> See *id.* (“Sears has proven, with many forms of evidence, that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in commission sales jobs in general at Sears . . .”).

<sup>50</sup> *Id.* at 1309.

<sup>51</sup> *Id.* at 1306. The “soft lines of merchandise” included clothing, jewelry, and cosmetics. *Id.*

<sup>52</sup> *Id.* at 1305.

products they prefer to sell . . . . It is naïve to believe that the natural effect of these differences is evidence of discrimination by Sears.”<sup>53</sup> None of the evidence explains or backs up this conclusory analysis. Both Sears and the court fed into the nature-based narrative by making the implicit assumption that there are natural differences between the sexes, which in turn inform their occupational choices. According to Vicki Schultz’s account of the Sears case, “[t]he judge credited various explanations for women’s ‘lack of interest’ in commission sales, all of which rested on conventional images of women as ‘feminine’ and nurturing, unsuited for the vicious competition in the male-dominated world of commission selling.”<sup>54</sup> The court fails to question whether perhaps these choices were not a result of nature, but rather were a result of the way Sears was internally structured and managed.<sup>55</sup>

### III. WHAT WERE THEY THINKING?: THE NATURE-BASED NARRATIVE AS IT WAS USED TO JUSTIFY THE SUBORDINATION OF AFRICAN-AMERICANS

In 1861, just weeks after the secession of a number of southern states, confederate Vice President Alexander Stephens made his Cornerstone Speech. In the speech, Stephens justified the subordination of African-American slaves by appealing to nature: “Our new Government is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his *natural* and moral condition.”<sup>56</sup>

In order to justify slavery, pre-emancipation southerners often invoked the nature-based narrative in arguing that African Americans’ natural condition was one of enslavement, and that they were therefore happiest in that condition: “We are often told that the condition of the slave is a happy one; preferable to that of the laboring whites in the North.”<sup>57</sup>

Additionally, past generations used science to explain and justify

<sup>53</sup> Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, ¶ 24, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4273), *reprinted in* 11 SIGNS 757, 766 (1986).

<sup>54</sup> 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, 1753 (1990).

<sup>55</sup> See *infra* Part VI for an analysis of Sears’s working environment as one structured to masculinize the “ideal worker.”

<sup>56</sup> Alexander H. Stephens, Cornerstone Address (Mar. 21, 1861), *in* 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS WITH DOCUMENTS, NARRATIVES, ILLUSTRATIVE INCIDENTS, POETRY, ETC., 44, 46 (Frank Moore ed. 1861) (emphasis added).

<sup>57</sup> William J. Snelling, Speech Before the New England Anti-Slavery Society, *in* THE ABOLITIONIST, Mar. 1833, at 35, 36 (1833); see generally HARRIET BEECHER STOWE, UNCLE TOM’S CABIN (Bantam Classics 1982) (1852) (“Sambo” was a caricature of the “happy slave.”).

racial difference and inferiority. For example, in an 1858 article, Dr. Samuel Cartwright wrote: "Africans are endowed with a will so weak, passions so easily subdued, and dispositions so gentle and affectionate that they have an instinctive feeling of obedience to the stronger will of the white man."<sup>58</sup> Cartwright posited that African Americans were afflicted with the disease *Dysaesthesia Aethiopica*, which was characterized by a partial insensitivity to pain and diminished intellectual capacity.<sup>59</sup> He argued that this disease caused African Americans to "slight their work" and to "raise disturbances with the overseers."<sup>60</sup> Even the courts partook in this dialogue by upholding the constitutionality of state anti-miscegenation laws, which aimed to prohibit interracial relations, based on the belief that races belonged to different species.<sup>61</sup>

Cartwright's rhetoric is quite similar to that historically used to justify the subordination of women. Cartwright's conclusion that the disease *Dysaesthesia Aethiopica* caused African Americans' inferior behavioral traits is comparable to Jean-Jacques Rousseau's reasoning that "women's disorder" was "found in the female body's natural cycles," and caused "women's inherent untrustworthiness."<sup>62</sup> Cartwright and Rousseau both concluded that the targeted "inferior" group was afflicted with a disease or disorder, which caused members of that group to exhibit physical and behavioral maladies.<sup>63</sup> The nature-based narrative, as it was used in the context of both race and sex, maintained that the very biological nature of the "inferior" group caused their behavioral traits, which resulted in the belief that women and African Americans were suited to fulfill particular roles in society. In her book on gender ideology, Sally Kitch observes that men considered both women and African Americans "subordinate because of their inherent—not imposed—characters, behavior, and qualities."<sup>64</sup>

After centuries of racist theories rooted in nature and science, the conception that there are marked biological differences between the races has been put to rest. Today, if someone were to remark that a particular

<sup>58</sup> William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1058 (1993) (quoting Samuel Carter, *On the Caucasians and the Africans*, 25 DEBOW'S REV. 45 (1858)).

<sup>59</sup> *Diseases of American Negroes*, THE LANCET, Vol. 1, No. 1 at 103 (1857), available at <http://books.google.com/books?id=3g0CAAAAYAAJ&lpg=PA103&ots=lpQ523uvJC&dq=%22diseases%20of%20american%20negroes%22%20lancet&pg=PA441#v=onepage&q=%22diseases%20of%20american%20negroes%22%20lancet&f=false>.

<sup>60</sup> *Id.*

<sup>61</sup> Anti-miscegenation laws made it illegal for people of different races to marry, cohabit or engage in sexual relations. See, e.g., *Pace v. State*, 69 Ala. 231, 233 (1881) (holding that the government had an interest in preventing interracial relations because "[i]ts result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization."), *aff'd*, 106 U.S. 583, 585 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964).

<sup>62</sup> KITCH, *supra* note 22, at 24.

<sup>63</sup> See *Diseases of American Negroes*, *supra* note 59, at 556 (claiming blacks suffered from a disease that caused laziness and a lack of pain); cf. KITCH, *supra* note 22, at 24 (claiming Rousseau believed that women suffered from political incapacity based in part on an observation about women's natural cycles).

<sup>64</sup> KITCH, *supra* note 22, at 22.

racial group was biologically different and as a result had distinctive behavioral traits, he or she would most likely be labeled a racist and ridiculed. Studies now show that racial categories are malleable, and are a product of sociopolitical contexts rather than genetics.<sup>65</sup> In 2008, a multidisciplinary group of Stanford faculty “caution[ed] against making the naïve leap to a genetic explanation for group differences in a complex behavioral trait, where environmental and social factors clearly can and do play major roles.”<sup>66</sup>

Unfortunately, the use of science to justify sex inequalities is still very much a part of our society. Thus, the belief in inherent differences between the sexes continues to be deeply engrained. A comparison of *EEOC v. Sears*<sup>67</sup> and *International Brotherhood of Teamsters v. United States* provides evidence of this reality.<sup>68</sup> In *Sears*, the court relied heavily on Sears’s argument that women employees were not interested in the higher-paying, male-dominated commission sales jobs.<sup>69</sup> Therefore, even though the court was presented with significant statistical evidence that showed a vast disparity between men and women employees in the commission versus the non-commission sales jobs, the court held that Sears had not discriminated against women because of their sex in violation of Title VII.<sup>70</sup> In *Teamsters*, minority truck drivers claimed that “the company had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers.”<sup>71</sup> Statistics showed that minorities were mostly employed in the less desirable, lower-paying jobs such as servicemen or local city drivers, and were underrepresented in the higher-paying line driver jobs.<sup>72</sup> The Court, unlike the *Sears* court, had no problem with using the existence of a significant statistical disparity between white and minority line drivers to find that the company had committed racial discrimination in violation of Title VII.<sup>73</sup> There was no mention of choice or job interest in the entire case.<sup>74</sup> If the Court had denied Title VII protection based on finding that the minority employees were just not as interested in the higher-paying line driver jobs as their white counterparts, the opinion would have been considered ridiculous. However, that is exactly what the *Sears* court did when the case involved a sex discrimination claim.

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<sup>65</sup> See Sandra SJ Lee et al., *The Ethics of Characterizing Difference: Guiding Principles on Using Racial Categories in Human Genetics*, 9 GENOME BIOLOGY 404 (2008), available at <http://genomebiology.com/2008/9/7/404>.

<sup>66</sup> *Id.*

<sup>67</sup> *Sears*, 628 F. Supp. at 1264; see also *supra* Part II for a full analysis.

<sup>68</sup> 431 U.S. 324 (1977).

<sup>69</sup> See *Sears*, 628 F. Supp. at 1302–12.

<sup>70</sup> See generally *id.*

<sup>71</sup> *Teamsters*, 431 U.S. at 329.

<sup>72</sup> *Id.* at 337–38.

<sup>73</sup> See *id.* at 337.

<sup>74</sup> See generally *id.*

#### IV. ARE THERE INHERENT NEUROLOGICAL DIFFERENCES BETWEEN THE SEXES?

The first premise of the modern nature-based narrative is that men and women, from the point of conception, develop inherently different brain structures. Contemporary neuroscientists such as Norman Geschwind have posited that structural brain differences are the result of prenatal exposure to testosterone. Geschwind theorized that the massive influx of fetal testosterone that male fetuses encounter leads to the quick embryonic development of the right hemisphere of the brain as compared with the left hemisphere.<sup>75</sup> Simon Baron-Cohen supports Geschwind's theory citing evidence suggesting that males tend to have superior right-hemisphere skills while females tend to have superior left-hemisphere skills.<sup>76</sup> He bases this assertion on a study he cites to in which pregnant rhesus monkeys were injected with testosterone.<sup>77</sup> The monkeys gave birth to genetically female offspring (with two X chromosomes) that developed male genitalia and engaged in more of the observed behavior "play-fighting," which Baron-Cohen theorized was a sign of lower empathy (a "left brain" skill).<sup>78</sup> Thus, Baron-Cohen posited that this study proves that fetal testosterone exposure causes rapid right brain development, which in turn leads to certain right brain behavioral traits.

The methodological problem with Baron-Cohen's study and conclusion is that he uses a post-natal behavioral study of rhesus monkeys to prove the truth of a theory about the cause of pre-natal brain formation in humans. It is never proper scientific methodology to start with a conclusion (Geschwind's theory), and then to ex post seek evidence to prove the truth of that conclusion. The problem with using a post-natal fact to reach back and prove the truth of a conclusion about pre-natal brain structure is that the post-natal fact could very well have been caused by intervening factors, such as those found in the environment. At most, Baron-Cohen has proven a correlation, as opposed to causation, between "play-fighting" and fetal testosterone exposure in rhesus monkeys. Furthermore, even assuming that the introduction of pre-natal testosterone was the cause of the increased "play-fighting" among the genetically female rhesus monkeys, it does not prove that the influx of pre-natal testosterone in humans also causes such right brain behavior.<sup>79</sup> Using animal studies as evidence of human behavior is dangerous because we tend to "assume that animals have attributes just like ours,"<sup>80</sup> and because we fail to take into account the differences in our respective levels of complex brain functioning. Assuming that fetal

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<sup>75</sup> BARON-COHEN, *supra* note 16, at 99.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> One also must assume that "play-fighting" is properly labeled a "right brain" behavior.

<sup>80</sup> BARON-COHEN, *supra* note 16, at 95. This tendency is called "anthropocentrism."

testosterone exposure is greater in male embryos, and that the rhesus monkey study provided evidence that human boys are more likely to engage in “play-fighting,” that still does not prove Gerschwind’s theory that fetal testosterone *causes* the right brain to be more developed in boys. Baron-Cohen has failed to prove a connection between observed behaviors and a more developed right hemisphere brain.

Baron-Cohen also performed a study in which he measured the levels of fetal testosterone in amniotic fluid, and then observed toddlers whose mothers had provided these samples.<sup>81</sup> He found that the toddlers who had been “identified as having lower fetal testosterone, now had higher levels of eye contact and a larger vocabulary.”<sup>82</sup> Baron-Cohen argues that this is proof that a higher level of fetal testosterone causes lower empathizing skills and increased systemizing abilities (proof of a more developed right hemisphere brain).<sup>83</sup>

There are several problems with this study and its conclusion. First, it is very difficult to accurately measure levels of eye contact and vocabulary. For example, how long did the toddler have to maintain eye contact, who did the toddler have to look at, and was each toddler subjected to the same type of environment? Baron-Cohen does not account for any of these factors, which would likely cause an introduction of methodological bias. Second, Baron-Cohen does not take into account environmental factors that might have caused the varying levels of eye contact and vocabulary; after all, these toddlers had been out of the womb and in our gendered society from between twelve to twenty-four months.<sup>84</sup> Third, he does not explain why lower levels of eye contact and vocabulary are evidence of a more developed right hemisphere of the brain. The only conclusion one can draw from this study is that there are varying levels of fetal testosterone in amniotic fluid. Baron-Cohen has proved neither that the level of fetal testosterone contributes to brain structure, nor that it causes certain behavioral traits.

Not all scientists agree with Baron-Cohen’s conclusion. Dr. Lise Eliot, an Associate Professor in the Department of Neuroscience at the University of Chicago Medical School, explains:

The [fetal testosterone] surge begins just six weeks after conception and finishes before the end of the second trimester. By birth, there is little difference in boys’ and girls’ testosterone. . . . Nonetheless, the brief four-month window of testosterone exposure before birth is enough to masculinize male babies down between the legs and—to some degree—up in their developing brains.<sup>85</sup>

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<sup>81</sup> *Id.* at 100.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 100–101.

<sup>84</sup> *Id.* at 100.

<sup>85</sup> LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME

A baby's sex is decided at the moment of conception based on whether the sperm is carrying an X or a Y chromosome, but "[s]exual differentiation begins about midway through the first trimester."<sup>86</sup> Despite these early determinations, "[f]etuses take their time before presenting themselves as clearly male or female on the outside."<sup>87</sup> Furthermore, sex differentiation inside the brain is even slower than the physical manifestations attributed to an X or Y chromosome.<sup>88</sup> In male fetuses, the "sex-determining region of the Y chromosome," or the SRY, causes testes to form, which in turn are responsible for the prenatal testosterone surge.<sup>89</sup> The surge of testosterone in male fetuses causes them to "grow more quickly than girls from early on in gestation" and as a result, "boys are larger, heavier, and physically sturdier than girls at birth, with thicker skulls, and, yes, bigger brains."<sup>90</sup> Conversely, "girls' bodies mature faster physiologically, adding up to a clear advantage for females by the end of gestation."<sup>91</sup>

Besides creating physical differences between boy and girl fetuses, what effect does the prenatal testosterone surge, or lack thereof, have on developing brains? According to Eliot, scientists presume that the prenatal testosterone "begins shaping circuits for later male behavior," but that "the evidence is still largely lacking."<sup>92</sup> She argues that whatever prenatal structural brain differences are in fact present at birth, "when these small, immature brains meet our inexorably gender-divided culture . . . sex differences become quickly magnified."<sup>93</sup>

## V. DOES BIOLOGY EXPLAIN BEHAVIORAL DIFFERENCES BETWEEN THE SEXES?

Many scientists have studied the effects of prenatal testosterone on young rats and monkeys in order to find a causal link between prenatal testosterone exposure and subsequent behavioral differences among human children.<sup>94</sup> At birth, rats are much less developed than humans; they "are still in the midst of their testosterone surge" and their brains are "uniquely open to sexual differentiation during just a brief period in early

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<sup>86</sup> *Id.* at 20.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 25.

<sup>90</sup> ELIOT, *supra* note 85, at 45–46.

<sup>91</sup> *Id.* at 46. Some people believe that because men have, on average, 9% larger brains than women do, that this indicates that men have greater cognitive abilities. However, as Eliot points out, "it is not clear how this relates to the different mental abilities of the two sexes." *Id.* at 57.

<sup>92</sup> *Id.* at 53.

<sup>93</sup> *Id.* at 54.

<sup>94</sup> See ELIOT, *supra* note 85, at 30–38.

development.”<sup>95</sup> Thus, researchers can easily manipulate the testosterone level in young rats to test how it affects behavior. However, Eliot explains that we cannot extrapolate rodent data to human behavior because “the critical period for testosterone action on the human brain takes place exclusively *before* birth.”<sup>96</sup> In monkeys, to which humans are far more developmentally similar than rats, “sex hormones exert very little effect after birth on either male or female monkeys’ behavior.”<sup>97</sup> In fact, “exposing females to high levels of testosterone prenatally does not make them start pouncing on their peers . . . [n]or does [it] lessen females’ interest in babies or increase their tendency to mount other monkeys, two other traits that differ dramatically between young male and female monkeys.”<sup>98</sup> Eliot explains that prenatal hormones have very little impact on monkeys, as compared to rats, because “[t]he bigger the brain, the less instinctive the behavior, and the more the brain’s abilities are influenced by learning.”<sup>99</sup> Furthermore, the human brain is even larger and more complex than that of monkeys, and therefore, presumably, prenatal hormones would have even less of an impact.

The only way to discover if and how hormones shape behavioral differences between the sexes is by studying humans.<sup>100</sup> Due to rare medical conditions, some “children have been raised as the opposite sex of what their chromosomes (or prenatal hormone exposure) would have dictated.”<sup>101</sup> For example, children with androgen insensitivity syndrome lack the receptors for testosterone, but are genetically male (they have one X and one Y chromosome).<sup>102</sup> Children with this condition look like normal girls, are raised as females, and do not have issues with female identity or heterosexuality.<sup>103</sup> This shows that the presence of male genes alone does not seem to cause stereotypically masculine behavioral traits. However, it does not show what effect the presence of prenatal testosterone has on the brain and behavior. Dr. Heinz Meyer-Bahlburg conducted a 2005 study of 77 people who were genetically male, but who had been raised as females for a variety of medical reasons.<sup>104</sup> He found that only 17 had chosen to revert back to the role determined by their genetic sex and away from the role into which they were socialized.<sup>105</sup> Meyer-Bahlburg concluded that “[t]hese data do not support a theory of full biological determination of gender identity development by prenatal hormones and/or genetic factors, and one must conclude that gender assignment and the concomitant social factors have

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<sup>95</sup> *Id.* at 30–31.

<sup>96</sup> *Id.* at 32.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> ELIOT, *supra* note 85, at 32–33.

<sup>100</sup> *Id.* at 33.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> ELIOT, *supra* note 85, at 35.

<sup>105</sup> *Id.*



a major influence on gender outcome.”<sup>106</sup> Eliot suggests that the age at which a genetically male child is reassigned to a female identity is critically important to whether the person will accept this reassignment or will later revert back to the genetically dictated role.<sup>107</sup> If the reassignment occurs very close to birth, then it is more likely that the reassignment to a female role will stick: “[B]abies . . . already know a great deal about the difference between male and female, already prefer gender-appropriate toys, and are often already consciously aware of their own sex.”<sup>108</sup>

From the abovementioned studies and theories, it is unclear to what degree prenatal testosterone, or lack thereof, has a significant effect on boy-girl behavioral traits in terms of types of play and toy preferences among children.<sup>109</sup> But the most important question remains: do prenatal hormones dictate fixed behavioral traits and cognitive abilities among adults? If the answer is yes, then the nature-based narrative may be correct in its assumption that biological sex differences cause men and women, on average, to have divergent abilities and occupational aspirations. Scientists have studied opposite-sex twins to provide the answer. Girls who share the womb with a male fetus will be exposed to androgens, and may or may not be exposed to higher-than-normal levels of testosterone.<sup>110</sup> Additionally, while there is some “evidence for the slight masculinization of certain anatomical and physiological traits” among girls with twin brothers, “most research has been unable to identify reliable differences in the behavior and mental skills of girls with twin brothers compared with those with twin sisters.”<sup>111</sup> A few studies of behavior and cognitive skills in girls with twin brothers found that they “are more prone to aggression and risk taking or are better at spatial skills than girls with female twins.”<sup>112</sup> However, it seems unlikely that these studies would be able to rule out the “possibility that girls with boy twins act or think a little more like boys because of the time they spend with their twin brothers *after* birth.”<sup>113</sup> In fact, Brenda Henderson and Sheri Berenbaum introduced a comparative group of non-twin girls with older brothers into such a study, and found that “[o]lder brothers of girls . . . do not share their prenatal testosterone with their sisters, and yet apparently they encourage an even stronger shift toward toy trucks, balls, and sports than the twin brothers do.”<sup>114</sup> Furthermore, as Eliot reports, “the bulk of such research has found no significant difference: girls with

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<sup>106</sup> *Id.* at 35.

<sup>107</sup> *See id.* at 34–35 (comparing two boys who underwent gender reassignment, one at two months and the other at two years, and observing that the boy whose gender was reassigned earlier more effectively accepted the reassigned gender).

<sup>108</sup> *Id.* at 34.

<sup>109</sup> ELIOT, *supra* note 85, at 35.

<sup>110</sup> *Id.* at 38.

<sup>111</sup> *Id.* at 39.

<sup>112</sup> *Id.* at 40.

<sup>113</sup> *Id.*

<sup>114</sup> ELIOT, *supra* note 85, at 41.

male twins . . . score no higher on math and other male-type cognitive skills than girls with female twins.”<sup>115</sup>

Researchers—including Baron-Cohen, Steven Pinker, and Louann Brizendine—have studied “babies’ abilities to recognize or discriminate facial expression in others” and have concluded that female infants consistently outperform male infants in this regard.<sup>116</sup> They claim that these studies prove that “the female brain is predominantly hard-wired for empathy,” which is why a large proportion of women find themselves in “more interpersonally sensitive careers.”<sup>117</sup> However, these conclusions are flawed because these scientists presumed a causal link between pre-birth neurological differences and post-birth behavioral traits. Furthermore, they presumed that observed differences in adulthood are the result of the same biological factors that caused such differences at infancy—this ignores the many years of life experienced in a highly gendered culture. Psychologist Erin McClure argues with this conclusion, and explains “that girls are indeed more capable of detecting others’ emotions in infancy, but their advantage is mostly a matter of neurological maturation. . . . [and] [w]ith time, and experience with other people, the gap closes, and boys and girls are not so different in their sensitivity to others’ feelings during the rest of childhood.”<sup>118</sup>

Therefore, research shows that inherent biological differences, such as prenatal testosterone exposure in male but not in female fetuses, cause physiological differences, and may cause slight behavioral differences among children in terms of type of play and toy preference. However, the majority of the research remains inconclusive about whether these biological differences are truly the causal force behind the observed differences in behavioral traits and cognitive abilities into adulthood. In fact, studies have reported small behavioral anomalies where a sex-determined biological factor had been altered in male and female fetuses, but concluded that environmental factors were far more likely to have affected the subsequent behavior.

What causes workplace inequalities between men and women if they are not the result of inherent biological factors? In *Delusions of Gender*, Cordelia Fine provides evidence that our gendered culture is a far more likely culprit.<sup>119</sup> Fine cites social psychology studies that found that the implicit mind automatically associates “communal words,” such as “connected and supportive,” with female names, and associates “agentive words,” such as “individualistic and competitive,” with male names.<sup>120</sup> Other such studies have shown that “men, more than women,

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<sup>115</sup> *Id.* at 40.

<sup>116</sup> *Id.* at 77.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 77.

<sup>119</sup> See FINE, *supra* note 23.

<sup>120</sup> *Id.* at 5. An implicit association test measures a person’s particular implicit bias by measuring the time it takes him or her to accurately pair the words or categories as instructed: “The small but significant difference in reaction time this creates is taken as a measure of the stronger automatic and

are implicitly associated with science, math, career, hierarchy, and high authority.”<sup>121</sup> Conversely, “women, more than men, are implicitly associated with the liberal arts, family and domesticity, egalitarianism, and low authority.”<sup>122</sup> These implicit associations are the result of our gendered environment—every brain “picks up and responds to cultural patterns in society, media, and advertising.”<sup>123</sup> We all have a certain level of implicit bias in the traits and roles that we typically associate with women as opposed to those we associate with men. As a result, our brains assign a sense of normalcy to the status quo. If the status quo seems ordinary, we are more apt to believe that it is a result of nature, and is therefore incapable of change.

Someone who adheres to the nature-based narrative might argue that these implicit biases are simply a result of the natural order; we form associations based on the status quo, which is merely the result of biological inevitabilities. However, studies have shown that by making small changes in the environment, stereotypical attributes of men and women that are described by the nature-based narrative as “natural” and “fixed” are capable of drastic change. An implicit bias is bolstered by its own creation of self-fulfilling prophecy; a person will behave how the implicit bias expects them to behave, thus feeding back into the implicit bias loop. Women’s actions and behavioral traits are influenced by their own implicit biases about themselves as women. Psychologist Stacey Sinclair has shown through a “string of experiments that people socially ‘tune’ their self-evaluations to blend with the opinion of the self held by others,” and therefore, when one comes into contact with a person who holds a stereotypical view of them, their “self-conception adjusts to create a shared reality.”<sup>124</sup> In one experiment, women tended to socially tune themselves differently depending on the description of the type of man that they were told they were about to spend time with.<sup>125</sup> One group of women were told they were about to spend some time with “a charmingly sexist man” and the other group were told they were going to “interact with a man with a more modern view of their sex.”<sup>126</sup> The former group subsequently “regarded themselves as more stereotypically feminine” compared with the latter group. Sinclair called this phenomenon a “shift in self-concept.”<sup>127</sup>

A shift in self-concept can also lead to changes in skill level upon manipulation of the environment. For example, Fine cites to a mental rotation test used to test visuospatial skills. Performance on this test is significantly stratified along gender lines: “In a typical sample, about 75

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unintended associations between women and communality, and men and agency.” *Id.*

<sup>121</sup> *Id.* at 5–6.

<sup>122</sup> *Id.* at 6.

<sup>123</sup> FINE, *supra* note 23, at 6.

<sup>124</sup> *Id.* at 10.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 10–11.

<sup>127</sup> *Id.* at 11.

percent of people who score above average are male.”<sup>128</sup> Male superiority in this domain has been used to explain “males’ better representation in science, engineering, and math.”<sup>129</sup> However, studies have shown that mental rotation ability is malleable. In one such study, one group of participants were primed to believe that performance on the mental rotation test is “probably linked with success on such tasks as ‘in-flight and carrier-based aviation engineering . . . nuclear propulsion engineering, undersea approach and evasion, [and] navigation.’”<sup>130</sup> Not surprisingly, men outperformed women on this test.<sup>131</sup> However, the gender gap was reduced to an insignificant difference when the test was administered to another group that was primed to believe the test measured abilities in “clothing and dress design, interior decoration and interior design . . . decorative creative needlepoint, creative sewing and knitting, crocheting [and] flower arrangement.”<sup>132</sup> Many other studies have reported similar findings.<sup>133</sup> Social psychologist Claude Steele and his colleagues argue that women’s poorer performance on certain tests is a result of “stereotype threat” or the “real-time threat of being judged and treated poorly in settings where a negative stereotype about one’s group applies.”<sup>134</sup>

Furthermore, the same reduction in stereotype threat has proved to increase women’s interest in typically male-dominated occupational fields. Women, on average, tend to find such jobs off-putting, as they feel like they do not belong. Research has shown that a simple repackaging of job descriptions into more gender-neutral or feminine terms, and away from masculinized terms, is an effective way of drawing more women into these fields.<sup>135</sup> For example, computer programming used to be “a job done principally by women and was regarded as an activity to which feminine talents were particularly well suited.”<sup>136</sup> Indeed, “[i]t was not until the 1980s that individual heroes in computer science, such as Bill Gates and Steve Jobs came to the scene, and the term ‘geek’ became associated with being technically minded.”<sup>137</sup>

<sup>128</sup> FINE, *supra* note 23, at 27.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 28 (quoting Matthew J. Sharps, Jana L. Price & John K. Williams, *Spatial Cognition and Gender: Instructional and Stimulus Influences on Mental Image Rotation Performance*, 18 PSYCHOLOGY OF WOMEN QUARTERLY 413, 424–25 (1994)).

<sup>131</sup> FINE, *supra* note 23, at 28.

<sup>132</sup> *Id.* (internal quotations omitted) (quoting Sharps, *supra* note 130, at 424–25).

<sup>133</sup> See FINE, *supra* note 23, at 28–29 (referencing studies by Matthew McGlone, Joshua Aronson, and Angelica Moe).

<sup>134</sup> *Id.* at 30 (internal quotations omitted) (quoting Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 379, 385 (2002)). In one study, researchers administered a math test to two groups, one of which was placed under a stereotype threat. In the group in which the stereotype threat had been removed, the women outperformed the men in both the stereotype threat and non-stereotype threat groups. FINE, *supra* note 23, at 30.

<sup>135</sup> *Id.* at 45–46.

<sup>136</sup> *Id.* at 45.

<sup>137</sup> *Id.* (citing interview with Sapna Cheryan, psychologist, Washington University, November 25,

Occupational aspirations and choices may very well be a product of which gendered terms society has associated with a particular industry. Such choices, therefore, are not a product of biological nature, but rather are the result of societal indoctrination.

Based on the abovementioned studies (and others found in Fine's book, *Delusions of Gender*), which provide evidence that the gender gap in cognitive abilities and occupational goals can be reduced through small changes in the environment, Fine concludes:

As the arguments that women lack the necessary intrinsic talent to succeed in male-dominated occupations become less and less convincing, the argument that women are just less interested has grown and flourished. . . . It is remarkably easy to adjust the shine of a career path for one sex. A few words to the effect that a Y chromosome will serve in your favor, or a sprucing up of the interior design, is all that it takes to bring about surprisingly substantial changes in career interest.<sup>138</sup>

It seems, therefore, that the modern-day gender gap is not a product of inherent biological differences between the sexes. The gender gap is a malleable aspect of social reality that closely corresponds with the ebb and flow of societal beliefs.

## VI. MEN ARE FROM MARS, WOMEN ARE FROM VENUS: SO WHAT?

The conclusion that the workplace gender gap is the result of inherent biological differences between men and women emerges from the aggregation of the two premises of the modern nature-based narrative. In this view, because modern society affords women equal educational and occupational opportunities to men, any remaining workplace inequalities cannot be attributed to supposed enduring remnants of sex discrimination, but rather must be the result of differing abilities and choices. However, this conclusion is incorrect whether or not one accepts the premises of the modern nature-based narrative as true.

As explained in Parts IV and V, the premises of the modern nature-based narrative are fallacious, and therefore its conclusion cannot stand. Furthermore, there is a superior alternative conclusion in that the gender gap can be explained by our gendered culture and its complementary discriminatory practices and beliefs. The nature-based narrative has evolved over time and closely follows the contemporaneous conception of gender roles. This reality points to the fact that the nature-based narrative is not grounded in ultimate truth, but is the function of a

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<sup>138</sup> *Id.* at 52.

continuous cross-generational effort to justify the status quo. For example, in the 1870s women were seen as unfit to practice law.<sup>139</sup> Additionally, in the 1970s there was a pervasive belief that women were naturally unfit for military service.<sup>140</sup> Today, neither of these assertions appears natural. Social realities morph across time and therefore cannot be a function of certain fixed biological truths. This phenomenon serves to debunk the reasoning that gives credence to the nature-based narrative.

However, even if society continues to cleave to the truth of the premises of the nature-based narrative, these premises do not necessarily lead to the conclusion that the status quo is natural and does not need to be remedied. If proponents of the nature-based narrative claim that men and women are neurologically different, which causes them to exhibit divergent behavioral traits and skills, the current gender gap in both position and pay is not the necessary result. A proponent of the modern nature-based narrative, who believes that men and women are different-but-equal, can simultaneously believe that the gender gap can be remedied by valuing feminine traits in the workplace. Indeed, even if we accept that men and women differ in terms of strengths and weaknesses along gender lines, why should the conclusion be that only masculine traits are those fit for the highest-paying and most prestigious occupations?<sup>141</sup> If the natural traits traditionally attributed to men and women are equal in value, then why does the marketplace literally place less value on feminine traits by paying women a fraction of what men are paid across nearly all occupations?<sup>142</sup> The nature-based narrative ignores the alternative conclusion that can also flow from its own premises—that sex discrimination continues to play a role in maintaining workplace inequalities despite the supposed existence of inherent biological differences. Society can remedy the gender gap by valuing feminine traits in employees across occupations and by de-masculinizing employers' conception of the "ideal worker." This is a good place for activists and courts alike to begin breaking down the harmful effects of the nature-based narrative. Through showing that the gender gap is

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<sup>139</sup> In 1869, Myra Colby Bradwell was denied admission to the Illinois bar because she was a woman. Gwenn Hoerr Jordan, "*Horror of a Woman*": Myra Bradwell, the 14<sup>th</sup> Amendment, and the Gendered Origins of Sociological Jurisprudence, 42 AKRON L. REV. 1201, 1201 (2009). The Supreme Court of the United States affirmed the denial of her bar application. See *Bradwell v. State*, 83 U.S. 130, 139 (1872). Justice Bradley, in his concurring opinion, wrote: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

<sup>140</sup> Women were largely excluded from most military positions, besides nominal roles as nurses and administrators, until the advent of a handful of policy and legislative changes in the 1970s. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 96–97 (2008). However, it was not until the early 1990s that "Congress repealed the last statutory prohibition on women holding combat positions in 1993, and the military has opened a wide range of combat roles to women." *Id.* at 97. The prohibition was based largely on the belief that women were naturally unfit for military service: "Underlying this regime of separate status was a pervasive belief that women's true responsibilities were domestic and precluded full participation in public life, including military service." *Id.* at 96.

<sup>141</sup> See *supra* Part I.

<sup>142</sup> See *supra* Part I.

capable of remedy while remaining within the premises of the nature-based narrative, society is not required to immediately throw aside their closely held belief in the inherent difference between men and women. Thus, people are more likely to be receptive to this gradual change.

Even researchers like Simon Baron-Cohen, who are deeply ingrained in the nature-based narrative discourse, agree that masculine and feminine traits exist on a continuum.<sup>143</sup> Each person is uniquely structured with a variety of traits: “[N]ot all men have the male brain, and not all women have the female brain. In fact, some women have the male brain, and some men have the female brain.”<sup>144</sup> However, Baron-Cohen argues that on average, women inherently retain a greater number of feminine traits whereas men inherently retain a greater number of masculine traits.<sup>145</sup> This Note seeks to disprove this assertion by maintaining that even if a correlation between a person’s biological sex and gender-based traits exists, the two are not causally linked. Rather, the existence of one set of traits or the other is more likely explained by our highly gendered society. However, in order to remedy the gender gap within a society that adheres strictly to the tenets of the nature-based narrative, it may be beneficial to argue that, for now, society can maintain a tight link between biological sex and corresponding gender traits while also challenging existent inequalities.

In order to challenge workplace inequalities and begin exacting change from within our gendered culture, employers need to commit to a revaluation of masculine and feminine traits in the workplace. Currently, feminine traits are valued solely in the lower paying and less prestigious occupations traditionally delegated to women. Across most occupations and industries, employers have effectively masculinized their conception of the “ideal worker.”<sup>146</sup>

The *Sears*<sup>147</sup> case provides an example of an employer that masculinized the “ideal worker.” Men overwhelmingly dominated the departments that paid on a commission basis, and consequently men far out-earned their female coworkers. The selection criteria for the commission jobs was obviously written with a mind towards hiring men: “Illustrative questions asked if the applicant spoke in a low-pitched voice and participated in hunting, football, boxing, or wrestling.”<sup>148</sup> Furthermore, the departments that paid on commission were those geared toward traditionally male interests (e.g. the hard lines of merchandise, including “hardware, automotive, sporting goods”).<sup>149</sup> This division

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<sup>143</sup> See BARON-COHEN, *supra* note 16, at 2–3.

<sup>144</sup> *Id.* at 8.

<sup>145</sup> *Id.*

<sup>146</sup> See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001) (coining the term “ideal worker”).

<sup>147</sup> EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988). See *supra* Part II for a full analysis.

<sup>148</sup> WILLIAMS, *supra* note 146, at 14.

<sup>149</sup> *Sears*, 628 F. Supp. at 1306.

deterred women from choosing to work in these departments. Sears could have included more traditionally feminine traits that are still associated with successful salespeople—such as being communicative, helpful, and understanding of the customer’s needs—in their hiring criteria for commission employees. Additionally, Sears could have offered a commissioned salary to employees in a wider variety of its departments.<sup>150</sup> Each of these actions would have diminished the statistical disparities between male and female employees at Sears, while also maintaining a link between women and femininity and men and masculinity. Thus, both proponents and opponents of the nature-based narrative could get on board with a similar restructuring of all workplaces.

Another example of masculinization of the “ideal worker” is found in the merits of the *Dukes v. Wal-Mart* case, in which a group of female employees filed a class action employment discrimination lawsuit against Wal-Mart in 2003.<sup>151</sup> In the plaintiffs’ motion for class certification, the plaintiffs alleged that “[f]emale employees receive far fewer promotions to management than do male employees.”<sup>152</sup> Furthermore, they alleged that Wal-Mart’s lax policies afford unreasonably broad discretion to managers who are charged with making decisions on whom to promote. The “tap on the shoulder” promotion policy allows management’s implicit biases to effectively masculinize the “ideal worker.” For example, evidence shows that women employees were denied promotions due to the fact that they were not “masculine” enough. In one employee’s deposition, she testified that a store manager gave a sporting good department manager position to a male because he “needed a man in the job.”<sup>153</sup> Another employee testified in her deposition that she was denied a position as an Electronics Department Manager and was told that “it was a man’s job that carried a lot of responsibility.”<sup>154</sup> A second example is that the few women who held Wal-Mart management positions felt that the environment was “inhospitable” and “very closed” to female managers. Regularly scheduled management social events were hyper-masculinized; they included activities such as quail hunting and going to strip clubs.<sup>155</sup> The last example is that Wal-Mart employees had to be willing to relocate in order to be considered for a promotion into a management position.<sup>156</sup> The ability to relocate is a “masculine”

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<sup>150</sup> For example, it did not make sense for Sears to offer commission to sales employees working in the men’s apparel and sporting goods departments, but not those working in the women’s apparel and cosmetics departments. See *id.* (describing commission sales as including men’s clothing and sporting goods but not including fashion, cosmetics, linens, women’s clothing, or children’s clothing).

<sup>151</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff’d en banc*, 603 F.3d 571 (9th Cir. 2010), *rev’d*, 131 S. Ct. 2541 (2011).

<sup>152</sup> Plaintiffs’ Motion for Class Certification and Memorandum of Points and Authorities at 1, *Dukes*, 222 F.R.D. 137 (No. C 01-02252 MJJ).

<sup>153</sup> *Id.* at 7 n.5 (internal quotations omitted).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 13–14.

<sup>156</sup> *Id.* at 22.



trait. This requirement impacts a disproportionate number of women, who are more likely to be tied to the domestic sphere than are men.<sup>157</sup> The male-dominated management team systematically undervalued feminine traits by finding that overall women employees were unfit for management positions either because they had family obligations or because they did not need the job as much as men who were expected to support their families.<sup>158</sup>

A small tweak to a job description is sufficient to enhance the value of feminine traits and thereby de-masculinize the conception of the “ideal worker.” Socially determined “feminine” traits are not exclusively useful in traditional domestic roles, such as mother, caretaker, or volunteer. Such “left-brain” behavioral skills attributed to women by the nature-based narrative include: empathy, communication, creativity, attention to detail, and command of language. These traits are extremely valuable across industries. In fact, Baron-Cohen wrote that one of the traits attributed to the female brain is the uncanny ability to read people’s facial expressions.<sup>159</sup> Such a skill, if it exists, would be enormously valuable at any corporate negotiating table. Society can continue to view women as feminine and men as masculine, while also appreciating that an employer can extract great value from a workforce with a diverse set of skills.<sup>160</sup> Usually, a job will require a mixture of socially constructed masculine and feminine traits. For example, construction workers might be described as team-oriented and communicative (traditionally feminine traits), or they might be described as being physically strong (a traditionally masculine trait). However, the problem is that, many times, employers cast jobs in either purely masculine or feminine terms depending on which gender is supposed to fill the particular position. A more expansive definition of the ideal worker for a particular job, taking into account all of the necessary and valuable skills for that role, will lead to a narrowing of the occupational gender gap.

If employers continue to only value traits that are disproportionately associated with men, the result will be higher pay and an increased number of promotions for male workers to the detriment of female workers. In order for a revaluation of feminine traits in the workplace to actually occur, employers need to be deterred from masculinizing the ideal worker via the threat of Title VII liability.

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<sup>157</sup> See Reply Brief of Appellees and Cross-Appellants in Support of Cross-Appeal at 19, *Dukes*, 222 F.R.D. 137 (Nos. 04-16688, 1416720) (“The company’s practice of requiring relocation across stores for salaried managers . . . creates a greater burden for women”) (internal quotations omitted); see also WILLIAMS, *supra* note 146, at 20 (explaining that employers demand “an ideal worker with immunity from family work”).

<sup>158</sup> Plaintiffs’ Motion for Class Certification and Memorandum of Points and Authorities, *supra* note 152, at 16 n.9.

<sup>159</sup> See BARON-COHEN, *supra* note 16, at 32.

<sup>160</sup> See Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998) (arguing that a diverse workforce will “enhance creative problem solving, the invention of enterprising innovations, and the leveraging of different viewpoints and employee backgrounds”).

Accordingly, the courts must be willing to find employers who engage in such conduct liable for unlawful employment discrimination under the auspices of Title VII's disparate impact theory. Because employers are unlikely to view women workers as exhibiting the requisite masculine traits of the ideal worker, a disproportionate number of women will likely be barred from entering certain fields and will fail to be promoted into management positions. In cases with similar fact patterns to those found in both *Sears* and *Dukes*, the courts can and should find employers liable for policies and practices that serve to masculinize the ideal worker because they have a disparate detrimental impact on women. Once employers and society are effectively told by the courts that these practices are "wrong," the socially determined value of masculine and feminine traits will begin to shift away from the prejudicial and discriminatory confines of the nature-based narrative.

## VII. CONCLUSION

The nature-based narrative is a collection of cultural fictions whose pages have accumulated stories since the beginning of the human race. It is human nature to tell stories that create dichotomies and assign values to their parts—good or evil, superior or inferior. This is the method by which one group maintains and justifies dominance over another. This Note suggests a way to break down the nature-based narrative by exposing its stories for what they are: not grounded in nature, but rather grounded in socially constructed fictions. Thus, the current occupational gender gap is not fixed, but can be narrowed within a new paradigm.

I envision a future society free from the cyclical confines of the nature-based narrative—one in which the socially determined qualities of masculinity and femininity have become entirely unhinged from their corresponding biological sex. It is a society in which it is normal for women to rule the upper echelons of the corporate ladder, for fathers to stay at home with their children, and for parents to encourage their sons to go to ballet class and their daughters to play little league baseball. To reach this ideal state, we must strive to discard the strict masculine and feminine dichotomy and set the traits free that have been so neatly divided and compartmentalized within these social constructs.