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What's Wrong with Stereotyping?

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WHAT'S WRONG WITH STEREOTYPING?

Anita Bernstein*

With neither statutory proscriptions to uphold nor a clear statement of what they were trying to do, federal judges in the United States have deemed stereotyping actionable at law. The judges who built this cause of action moved fast, as "stereotype" in its modern sense is relatively new. What explains stereotyping as a legal wrong? Exploring the concept of a stereotype as presented by its coiner, the public intellectual Walter Lippmann, this Article argues that what's wrong with stereotyping is unjustifiable constraint.

An answer to the question of what's wrong delivers other answers as well. This Article shows how current American law and legal institutions exacerbate the problem of stereotyping as well as lessen it. It says which stereotypes fall outside the ken of legal remediation. It distinguishes stereotyping from discrimination. It locates the constitutional law of stereotyping. In its last Part, using examples, it tells how law and legal institutions repair this wrong.

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INTRODUCTION

Reductive generalizations about groups of persons flourish so robustly in the contemporary United States that they can spring weedlike into case law even when no party brought them up. Consider *American Freedom Defense Initiative v. Metropolitan Transportation Authority*,[1] a decision applying the First Amendment to a policy about the content of advertisements on city buses. The ads at issue asserted, under a caption of "✡Support Israel✡/Defeat Jihad," that "the savage" threatens "the civilized man."[2] In his opinion, Judge Paul Engelmayer chose to roam far afield. He remarked that "Upper West Siders are elitist snobs," using quotation marks to show he didn't mean what he said. His opinion went on to muse, also inside quotation marks, that fat people might be slobs, blondes bimbos, lawyers sleazebags, and clerks at a New York supermarket chain "rude and lazy."[3]

The court did not stop there,[4] and we too can play. Librarians shush. Jocks are dumb. Engineers lack social skills. Politicians are corrupt, car salesmen dishonest, professors absentminded, ballerinas bulimic, publicists and actors and lobbyists insincere, drill sergeants domineering. Firefighters are handsome, dim-witted hunks. Whenever regional divergences in the United States challenge mellow Californians, hurried New Yorkers, flinty New Englanders, and bland Midwesterners to get along, they can unite laughing about another cohort. Blood-relative spouses in Appalachia, perhaps.

American stereotypes—they thrive alongside prohibitions of discrimination in civil rights statutes,[5] increased ethnic diversity in the population,[6] and the phenomenon known for decades as political correctness[7]—might be gathered indefinitely, but I will pause. Stereotypes are a social fact. They pervade life in the United States. If anything is wrong with stereotyping, then the breadth of the wrong must be wide.

A metaphoric rather than a literal definition of the word starts the inquiry. "Stereotype" melds a Greek adjective meaning solid, στερεός (in the Roman alphabet "stereos"), with a noun for type in the sense of an impression or mold, τύπος ("typos"). In combination, the word means a hard, plate-like cast, something

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1. 880 F. Supp. 2d 456 (S.D.N.Y. 2012).

2. *See* http://3.bp.blogspot.com/-9JdgVU6XE34/UFn96YfXZEI/AAAAAAAAKoE/hASiZECRc6Y/s1600/DefeatJihad.jpg for an image (last visited Feb. 12, 2013).

3. *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 475.

4. *Id.* (generalizing in quotation marks about Democrats, Republicans, "Tea Party adherents," and other groups).

5. *See infra* Part III.

6. *See* U.S. CENSUS BUREAU, *Population*, *in* STATISTICAL ABSTRACT OF THE UNITED STATES: 10 (2012), *available at* http://www.census.gov/compendia/statab/2012edition.html (reporting shifts counted in the 2010 census).

7. *See* Richard Bernstein, *The Rising Hegemony of the Politically Correct*, N.Y. TIMES, Oct. 28, 1990, at E1; Cathy Young, *Political Correctness on Campus Goes Too Far Chills Debate*, NEWSDAY, Nov. 26, 2012, at A32.

that can leave a mark.[8] Before this term migrated to social psychology and public discourse in the twentieth century, it had its first English-language home in printing.[9]

The American journalist and public intellectual Walter Lippmann gave this word its contemporary meaning in 1922. Lippmann used the rigidity of printing technology as a metaphor for how we human beings bring "the world outside" into "the pictures in our heads."[10] Stereotypes, he observed, are the "subtlest and most pervasive of all influences."[11]

These influences vary in their effects. Current definitions of the word stereotype build on Lippmann's modern construct and admit multiple possibilities. First, a stereotype can "have a positive or negative valence, or indeed neither, depending on whether the attribute is derogatory or complimentary or indifferent, good or bad or neutral."[12] Slobs, bimbos, sleazebags, and other pejoratives thus do not exhaust the category:[13] A stereotype will occasionally praise a group of persons.[14] The Oxford English Dictionary definition of stereotype—"a preconceived and oversimplified idea of the characteristics which typify a person"[15]—allows for neutral and positive constructs, as does the even broader definition proffered by the philosopher Miranda Fricker, who writes that "stereotypes are [only] *widely held associations between a given social group and*

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8. *See* REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 9 (2010); *see also* DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING 8 (2004).

9. "Stereotyping" in Supreme Court decisional law once referred only to printing technology. *See* Callaghan v. Myers, 128 U.S. 617, 623 (1888) (marking the Court's first use of the word); *see also* Mountain Timber Co. v. Washington, 243 U.S. 219, 229 (1917) ("printing, electrotyping, photoengraving and stereotyping").

10. WALTER LIPPMANN, PUBLIC OPINION 3 (1922).

11. *Id.* at 89–90.

12. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 31 (2007).

13. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 475 (S.D.N.Y. 2012).

14. Stereotypes in the United States, for example, ascribe intelligence to some Asian Americans and Jews, athletic prowess to subgroups of African-American men and boys, and a flair for aesthetics to "the queer eye." *See* Charles Stangor, *The Study of Stereotyping, Prejudice, and Discrimination Within Social Psychology: A Quick History of Theory and Research*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 1, 4 (Todd D. Nelson ed., 2009). "Every positive element" of the model minority stereotype, writes one scholar, "is matched to a negative counterpart. To be intelligent is to lack personality. To be hard-working is to be unfairly competitive. To be family-oriented is to be clannish, 'too ethnic,' and unwilling to assimilate. To be law-abiding is to be rigidly rule-bound, tied to traditions in the homeland . . . ." Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 240–41 (1995).

15. 16 OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989). My conjugation of the verb "to stereotype" is unknown to the OED. *See id.* at 652 (including only three definitions of "stereotyping": "[t]he action or process of making stereotype plates for printing," "[t]he action of fixing or perpetuating in an unchanging form," or, in zoology, "[t]he frequent repetition by an animal of an action that has no purpose").

one or more attributes."[16] Second, these definitions of stereotypes are agnostic on the question of whether the associations asserted or implied are true or false or somewhere in between.

Anyone who asks what's wrong with stereotyping,[17] accordingly, has to stipulate that not all stereotypes are wrong in the sense of doing harm that is severe enough to warrant sanction from the law, a costly response. Some stereotypes might be false or unreliable but do not offend the groups of people they reference.[18] Some might offend but have the virtue of being reliable, or true enough.

Exclusions noted, many—probably most—messages in stereotypes are reductive and demeaning.[19] The negative consequences they install can cause social losses.[20] Thus they injure: and so stereotyping, like every other source of detriment attributable to the actions of human beings, warrants attention from the law. The law leaves countless detriments unremedied, undeterred, and unaddressed, to be sure; but harm is the law's *raison d'être*.[21] Stereotyping invites work from institutions empowered to effect legal change.

What *is* wrong, as far as the law should care, with stereotyping?[22] The answer explored in this Article is that stereotyping is wrong to the extent that it functions to deprive individuals of their freedom without good cause. Wrongful stereotyping constrains some groups of people more and others less. Like environmental pollution, redlining by mortgage lenders, disregard for occupational safety, misbranding of consumer products, nondisclosure of information pertinent to the sale of securities, and other ills, it is a behavior that has adverse consequences for the public. It therefore lies within reach of new regulation—broadly understood: I will not in this Article propose the codification of particular legal rules, nor suggest paths to redress in court for the wrongs of stereotyping.

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16. FRICKER, *supra* note 12, at 30.

17. Because this Article addresses an action that may be amenable to regulation by the law, rather than "a stereotype" or "stereotypes" simpliciter, the gerund form suits its content.

18. An example of a benign stereotype that might be false or unreliable: "[U]pon hearing that someone went to a certain excellent law school and served as a local bar association president, a prospective employer might conjure up a stereotype of how intelligent or professional the person is before meeting him or her." Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 624 (2011). The stereotype here seems vague, but it may exist.

19. *See* OXFORD ENGLISH DICTIONARY, *supra* note 15.

20. *See infra* Part IV.

21. *See* Avani Mehra Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CAL. L. REV. 1313, 1317 (2012) (noting this precept in the work of John Stuart Mill); *see also* John C.P. Goldberg & Robert H. Sitcoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 366 (2013) (expounding on the common law maxim that where there is a right, there is a remedy).

22. *Cf.* Lawrence Blum, *Stereotypes and Stereotyping: A Moral Analysis*, 33 PHIL. PAPERS 251 (2004) (offering an answer grounded in philosophy).

Instead, I argue that the law now buttresses this source of unjustified constraint and ought to stop doing so.[23]

Constraint emerges from what Walter Lippmann, creator of the modern meaning of this word, identified as "the perfect stereotype":[24] In his classic study of political community, Aristotle wrote that some people are slaves by nature.[25] Not all enslaved persons, Aristotle said, fit that description:[26] But slaves by nature must not, indeed cannot, become free citizens. If "by nature a slave"[27] is indeed the perfect stereotype—a contention I embrace and elaborate on in this Article—then this status category helps explain what is wrong with stereotyping today, a century and a half after Abraham Lincoln issued his famed Emancipation Proclamation.[28]

Stereotypes now doing mischief, I argue in Part I, keep alive the Aristotelian slaves-by-nature construct by characterizing particular groups of persons as unruly and in need of authoritative constraint. The constraint message that stereotyping relays and reifies brings particular harm to women of all races and African-American men. Cast respectively as crazy[29] (consider "psycho bitch," a locution that has won ten elaborate definitions on the crowdsourced Urban Dictionary[30]) and violent ("the angry black man"[31]), these two groups bear an extraordinarily severe brunt of contemporary American stereotyping.

An early task for rectifiers interested in easing this brunt is to form a clearer understanding of stereotyping. Psychologists spent decades building an enormous descriptive literature on point.[32] Several of these pioneers, testifying as expert witnesses, have explained patterns and consequences to judges.[33] Though

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23. *Cf.* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 78 (1994) ("I make the modest claim that" . . . a particular practice "should stop"). *See also infra* note 337 and accompanying text (describing Professor Chamallas's proposal).

24. LIPPMANN, *supra* note 10, at 98.

25. ARISTOTLE, THE POLITICS, at 6–7 (Benjamin Jowett trans. 2009). Lippmann, having started *Public Opinion* with a passage that mused on the shadows of Plato's cave, remained in ancient Greece to find this emblematic stereotype. LIPPMANN, supra note 10, at passage preceding Table of Contents.

26. ARISTOTLE, *supra* note 25, at 7–9.

27. *Id.* at 6.

28. *See* Eric Foner, Op-Ed., *The Emancipation of Abe Lincoln*, N.Y. TIMES, Jan. 1, 2013, at A19 (noting, on the sesquicentennial anniversary of the proclamation, that "Lincoln did not live to provide an answer" to problems of justice left unresolved by his decree).

29. A problematic word, but the best available for this purpose.

30. *Psycho Bitch*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=psycho%20bitch (last visited Jul. 16, 2013).

31. *See* Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC, Sept. 2012, at 76; Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1169 (2008).

32. Blum, *supra* note 22, at 251–52. The other discipline that has investigated stereotyping, cultural and media studies, has had less influence on the law. *See id.*

33. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes. 131 S. Ct. 2541, 2553 (2011) (reporting the testimony of sociologist William Bielby); Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36 (1989) (reporting the testimony of psychologist Susan Fiske); Tuli v.

influential to the outcomes of key cases, their insights have not aligned to create a juridical account of stereotyping that can guide conduct *ex ante*. Nor do they predict whether courts will condemn any particular instance of the phenomenon. And only a small share of this research has focused on what is central to law: harm.[34]

Part II notes three conditions present in the subset of stereotypes that the law ought to recognize as wrongful. Each of these conditions distinguishes stereotyping from something else. The first distinction that Part II proposes is between what is and is not harmful to individuals. Stereotyping has to hurt people in order to warrant intervention from the law. The second distinction builds on work by Frederick Schauer to distinguish generalizing (which the law cannot avoid and which delivers important benefits) from stereotyping, which unlike generalizing can be categorically wrongful. The third condition divides wrongful stereotyping from invidious discrimination. Unlike the other two distinctions, this one does not purport to sort malign from benign. Wrongful stereotyping and invidious discrimination are both bad, almost tautologically so. To avoid redundancy and be useful as a legal category, however, stereotyping must contain content distinct from discrimination or prejudice. Part II portrays its contribution in a Venn diagram.

Having described the phenomenon, this Article moves to consider rectification as a job for the law. Judges, legislators, litigators, and laypersons in the United States live in a social world that stereotyping has helped to inform, explain, and create. Steeped in "the subtlest and most pervasive of all influences,"[35] American law has, perhaps understandably enough, recognized as actionable injury only a small fraction of what is wrong. Courts and legislatures identify stereotyping as a manifestation of employment discrimination and almost nothing else. Part III focuses on the most influential judicial condemnation of the phenomenon, *Price Waterhouse v. Hopkins*.[36]

The plurality in *Price Waterhouse*, a late work in the career of an influential liberal, continues to vex and fascinate judges and commentators. I read it as grounded in the intuition and vote counting behind "getting to five,"[37] and speculate that Justice Brennan understood that opposition to stereotyping would be

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Brigham & Women's Hosp., 592 F. Supp. 2d 208, 214 (D. Mass. 2009) (reporting the testimony of psychologist Peter Glick); Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1264–65 (N.D. Cal. 1997) (reporting the testimony of Fiske and Bielby); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502–03 (M.D. Fla. 1991) (reporting the testimony of Fiske).

34. One approach to stereotyping does focus on harm. Matt L. Huffman, *Introduction: Gender, Race, and Management*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 9 (2012) (noting that the stereotype "content model" focuses on "sexism, heterosexism, racism, anti-immigrant biases, ageism, and classism").

35. LIPPMANN, *supra* note 10, at 89.

36. 490 U.S. 228 (1989).

37. Dahlia Lithwick, *Getting to Five*, N.Y. TIMES, Oct. 10, 2010, at BR 20 (reviewing SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010)).

attractive to prospective allies. He chose a characterization of what Price Waterhouse did to Ann Hopkins that both succeeded and failed: Brennan drew three co-signers and two concurrences, a solid majority, but sowed confusion about what exactly Title VII forbids. Part III examines this precedent along with a precursor and more recent case law. I note the questions it left open and broach provisional answers.

Courts that equate stereotyping with employment discrimination perform commendable reparative work that has a long way to go. The precedents that deemed stereotyping actionable rested on expert evidence that found the phenomenon endemic in the United States, not just in the workplace.[38] Part IV canvasses domains other than employment where particular groups of persons suffer law-related detriments that depend on, and reinforce, pernicious and perdurable stereotypes. The examples of Part IV do not amount to a full catalogue. They suffice, however, to present American law and legal institutions not only as proscribers and adjudicators in the *Price Waterhouse* mode, but also complicit in what's wrong.

Legal institutions that undertake repair have both a constitutional base to work from and a set of sector-specific tasks to achieve. Part V explores the constitutional base. If stereotyping relates to enslavement, as Part I argued, then any focus on ameliorating its harms necessarily points to a foundational text on emancipation, the Thirteenth Amendment to the Constitution. This Article joins literature that reads the Thirteenth Amendment as not just an artifact of settled history but central to current problems of law and politics. Part V heeds good counsel offered in this corpus—Jamal Greene's argument that the contemporary function of the Thirteenth Amendment is to inform and inspire political change rather than resolve disputes in court—by postponing its recommendations of what legal institutions ought to do.[39] Fixing what's wrong with stereotyping falls within a larger constitutional project that demands more new engagement than new doctrine.

The next amendment to the Constitution prohibits discriminatory state action. Courts and legislatures have manifested more comfort with the Fourteenth Amendment than the Thirteenth, whose contemporary applications remain elusive, and would likely find in it a stronger mandate for them to act.[40] Consistent with the tack taken earlier in this Part and throughout the Article, my discussion of the

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38. *See* Brief of Amici Curiae, National Employment Lawyers Association et al. in Support of Respondents at 12, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277) (gender); *see also* Expert Report of Willliam T. Bielby, Ph.D. at 40–46, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (N. D. Ill. 2008) (No. 05CV06583), 2008 WL 6587777 (race).

39. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012).

40. *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1464 (2012) (accounting for the relative strength of the Fourteenth Amendment by noting its utility for business corporations, which the Thirteenth Amendment lacks).

Fourteenth Amendment does not purport to write new rules or urge particular results for disputes that come to court. Rather, I argue that legal institutions that buttress the wrongs of stereotyping contribute to harm at what might be called the border of state action. The Fourteenth Amendment provides a reason for them to stop doing so.

With a constitutional foundation for the project laid, opportunities emerge. Part VI gives examples of how American law has already installed changes that help to ameliorate some harms of wrongful stereotyping. The end of this Part identifies discrete functions for three sectors, with attention to the ways these institutional actors perceive and can help rectify the problem. The sectors are lawyers and their clients, judges, and legislators. An enhanced understanding of stereotyping—one that distinguishes between harmful and nonharmful variations of the problem, provides law-based deterrence and recourse for the harmful kind, and leaves alone those instances of stereotyping that do not constrain anyone—will increase freedom.

I. "THE PERFECT STEREOTYPE"–"BY NATURE A SLAVE"

A. Two Political Theorists Weigh In

A handful of Athenians had started to doubt their practice of slavery by the fourth century B.C.[41] They did not propose abolition of the status, but wondered about its justice.[42] What made slavery look dubious in ancient Athens was not the mistreatment of enslaved individuals, but benevolence. Male slaves shared some privileges of free men, and they appeared freer the higher they stood on the disenfranchisement ladder.[43] Allowances from a master cohort blurred the line between these persons and full citizens.[44]

In response, the institution won its greatest defender when Aristotle in *Politics* declared that a person can be "a slave by nature."[45] One can tell who these people are, Aristotle continued.[46] Some individuals and not others perform servile work, know how to do it, have the muscles for it.[47]

That nature (rather than politics or society) has decreed some persons to be slaves makes for "the perfect stereotype," wrote Walter Lippmann in his classic *Public Opinion*.[48] The defining "hallmark" of a stereotype is that it "precedes the use of reason; is a form of perception, imposes a certain character on the data of our senses before the data reach the intelligence."[49] Human beings, as Lippmann

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41. LIPPMANN, *supra* note 10, at 96.
42. *See* YVES GARLAN, SLAVERY IN ANCIENT GREECE 119 (Janet Lloyd trans., Cornell Univ. Press, expanded and rev. ed. 1988).
43. *Id.* at 64–65.
44. LIPPMANN, *supra* note 10.
45. ARISTOTLE, *supra* note 25, at 6.
46. *See id.* at 8.
47. *See id.*
48. LIPPMANN, *supra* note 10, at 19.
49. *Id.* at 21.

was the first scholar to explain, use stereotypes to understand their world. Stereotyping fits unfamiliar experiences into grooves that confirm and reassure.

Sweeping, reductive, negative, culturally contingent, and unlinked to logic or factual support, Aristotle's "by nature formed a slave" generalization exemplifies the phenomenon of a stereotype, but calling it perfect—that is, extraordinary among stereotypes—calls for more explanation. Many stereotypes frame new encounters and experiences by preceding reason, providing a form of perception, and imposing character on the data of human senses. What is "perfect" about the slave-by-nature construct? Lippmann did not say. The rest of this Part sets out to support his contention.

B. The Benign Category Contrasted

Many stereotypes impose little constraint. "The French," for example, as Marilyn Monroe sang in *Gentlemen Prefer Blondes*, have been cast as "glad to die for love. They delight in fighting duels."[50] Across the French frontiers a traveler might find humorless Germans, bad soldiers in Italy, Spaniards who loll at siesta, or Monégasques with more money than regard for the rule of law. Crossing the borders of France also leads to cliché-commodities like beer and fries in one country, cuckoo clocks, pocket army knives, and shady bank accounts in another.

Stereotypes like these evoke a wanderer free to disengage, roam in and out, or reevaluate the national-origin generalization that has framed a newcomer. Funny or not, they do come across as jocular. They invite give-and-take parity, a lateral playing field. While countries vary in size and power, every national is a foreigner somewhere, and most people have an equally long list of countries that are not theirs. Point the finger of national-origin stereotyping if you like, but another can point back with equal force at you, or you (along with your target) can walk away.

Thus *American Freedom Defense Initiative v. Metropolitan Transportation Authority*, noted above,[51] may have interpreted the First Amendment correctly, but as an aggregator of stereotypes it missed a crucial distinction. The court invalidated the defendant's policy of rejecting advertisements that "demean an individual or group on account of 'race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation.'"[52] Hypothetical ads that called blondes bimbos, lawyers sleazebags, fat people slobs and so on were, to Judge Engelmayer, fatal to the defendant's position: The MTA would allow them, the court noted, and so the state of New York "discriminates based on [the] content" of opinions expressed in advertisements.[53] As a rationale for free speech, fair enough. But if one is willing to overlook for a moment the problem of state censorship, what the court called "MTA's no-demeaning

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50. GENTLEMEN PREFER BLONDES (20th Century Fox 1953).

51. *See supra* note 1 and accompanying text.

52. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 461 (S.D.N.Y. 2012).

53. *Id.* at 476.

standard"[54] had a valiant goal. By making reference to classifications protected in statutory law, it avoided arbitrariness, and through its verb "demean" it adverted to a history of constraint that has long burdened members of particular groups.

Constraint as a metric suggests that some of the stereotypes assembled for argument's sake in *American Freedom Defense Initiative* are less benign than others. Calling lawyers sleazebags, blonde women bimbos, and fat people slobs is relatively worrisome because these assertions approach the boundaries of protected classifications: Writers have argued they demean on the bases of gender, disability, age, and religion.[55] If these contentions are correct, then the three stereotypes support hierarchies that a state legislature tried democratically to undermine via civil rights statutes. By contrast, "Democrats," "Republicans," "Tea Party adherents," "Upper West Siders," and "store clerks at Gristedes"[56] can return slurs lobbed at them in hypothetical advertisements relatively easily or ignore them with about the same ease in a belief that they are trivial. Stereotypes about these persons correspond approximately to the one about the amorous Frenchman: not much truth-value, not much constraint.

C. Constraint-Worthy Traits That Stereotyping Ascribes to Subgroups

At the other end of the stereotyping spectrum are the stereotypes that pursue subordination through constraint. They keep in force the Aristotelian slaves-by-nature construct by characterizing particular subgroups of persons as unruly. Authoritative control is indispensable; it ensures order and safety.

Different characteristics make people unruly, and so unruliness takes different manifestations in stereotyping. Here are five illustrative traits.[57]

Stupid. In this stereotype, members of groups are cast as inherently devoid of the intellectual strength needed to guide their behavior. Variations on the theme include claims that the cohort is naïve, superstitious, childlike, hard to educate, timorous, devoid of creativity or artistic inspiration, incapable of understanding science or quantitative material, or ill-suited to master new technology. The stereotype burdens disadvantaged groups in particular, but will

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54. *Id.* at 459.

55. *See, e.g.*, MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE *passim* (2005) (observing that many contemporary lawyer jokes recycle old Jewish jokes); Bruce Blaine & Jennifer McElroy, *Selling Stereotypes: Weight Loss Infomercials, Sexism, and Weightism*, 46 SEX ROLES 351, 355 (2002); Lauren E. Jones, Note, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996 (2013); Alleen Pace Nilsen, *Old Blondes Just Dye Away: Relationships Between Sexism and Ageism*, 55 LANGUAGE ARTS 175 (1978).

56. *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 475.

57. By "illustrative" I mean supported in decisional law and scholarship. Litigants, courts, and academic writers have reported law-buttressed constraints that manifest acceptance of these five ascribed characteristics. *See infra* Part IV. The list does not purport to be complete. My thanks to Kathleen Clark for her thoughts on this point and to Susan Appleton for a pertinent suggestion that space constraints have forced me to omit: The adjective "domestic," Professor Appleton noted, references a host of stereotypes manifest in the law.

occasionally slur privileged persons, such as absentminded professors and college students in particular fields of study.

Crazy. This one resembles stupid in that it generalizes about the mind of the stereotyped person, but differs in what it ascribes. The crazy stereotype lands with particular force on women.[58] Hormone-addled, delusional, weepy, emotional rather than rational, and perverse are among its variations.

Violent. The angry black man exemplifies this stereotype. His anger is perceived as indefensible and dangerous rather than righteous.[59] Like the stereotype of crazy, the violent stereotype predicts that the group member will engage in destructive behavior. He is too committed to expressing anger through physical assault to be reached by reason or incentives.[60]

Predatory, Seductive, Manipulative. This stereotype assigns blame or responsibility for a voluntary act to a member of the stereotyped group even though this person did not commit it. Reminiscent of exegeses on a Bible story that held Eve responsible for the action of her adult partner Adam even though Adam outranked her,[61] it finds sly power below a surface of apparent weakness or softness. Beware the group, goes the message, because its maneuvers are more malevolent than they look. Its stories will be plausible on the surface, perhaps even beguiling, but they are wrong. Women and gay men bear the brunt of this stereotype.

Brutish. This stereotype reduces a group of persons to a subhuman animal cohort, often (but not always) hulking and strong. Like the crazy stereotype, the brutish one overlaps with cognitive deficiency while emphasizing a different threat. Stereotypes about cognitive deficiency, which assert that subgroups are not smart enough for privileges and power, hold particular sway in government, private-sector employment, and elite higher education. By contrast, groups stereotyped as brutish are not perceived as competitors for white-collar or high-

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58. *See* Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123, 134 (1997) (identifying "five forms of the female liar," most of which ascribe mental instability); *supra* note 30 and accompanying text.

59. DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 10–14 (4th ed. 2001) (identifying "the brutal black buck" hell-bent on rape and other violence as central to *The Birth of a Nation*, a landmark of Hollywood racism); DENNIS ROME, BLACK DEMONS: THE MEDIA'S DEPICTION OF THE AFRICAN AMERICAN MALE CRIMINAL STEREOTYPE 21–22 (2004); Mark Peffley & Jon Hurwitz, *The Racial Components of "Race-Neutral" Crime Policy Attitudes*, 23 POL. PSYCHOL. 59 (2002); *see also* Devon W. Carbado & Mitu Gulali, *Conversations at Work*, 79 OR. L. REV. 103, 111 n.19 (2000) (arguing that bargaining by African-American male customers comes across in car dealerships as angry).

60. Erin Aubry Kaplan, *It's a Mad, Mad, Mad, Mad World*, L.A. TIMES, Mar. 19, 2008, at A17 ("Black anger is never seen as intellectual in nature, merely primal . . .").

61. Sally Frank, *Eve Was Right to Eat the "Apple": The Importance of Narrative in the Art of Lawyering*, 8 YALE J. L. & FEMINISM 79, 79–81 (1996) (offering both this familiar exegesis and a revisionist alternative).

wage privilege. The anxiety they provoke is less articulate. They appear dangerous as bodies housing minds and temperaments that are blank, thick, and opaque.

Emphasizing constraint puts to one side a stereotype that has received particular attention from social psychologists: "lacking warmth."[62] This one has burdened Germans, Jews, Asian Americans, and "nontraditional women."[63] Conceding that the stereotyped group is competent,[64] the constraint here takes the form of diminutions in opportunity, or a policy of returning perceived coldness with coldness. That a group lacks warmth becomes more of a reason to shun it than to curb its behaviors. College admission practices that appeared to disfavor Jewish applicants in the past and appear to disfavor Asian-American applicants at present suggest that this stereotype may work to exclude competitors who score high on meritocratic criteria.[65] Exclusion also constrains, but it imposes less constraint than what stereotypes about unruliness render.

Here an interlocutor might ask: What if one of these generalizations happens to be correct about a particular group, or correct enough? I take up that possibility below.[66] For now I note only the implicit call to constraint. Persons so stereotyped are not only inferior but also potentially dangerous. The traits ascribed to them support hampering their freedom.

D. Constraint Manifested

Constraints emerge from stereotypes both externally and internally. The external kind of constraint falls on the stereotyped group when other people perceive the group member as in need of authoritative control. As Walter Lippmann wrote, stereotyping "imposes a certain character on the data of our senses before the data reach the intelligence,"[67] and this conclusion perceives freedom for the group member as unruliness. Ascribing stupidity, craziness, violence, predation, or brutishness to other people becomes a reason to limit their freedom.[68]

The stereotype of lacking warmth, a less direct source of constraint for group members, fosters distrust and suspicion: *What do they want? They have an agenda and they're cold and smart enough to achieve it ruthlessly*. Among the available responses, direct confrontation might favor the person who lacks warmth,

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62. *See* Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCH. 878, 879 (2002) (reviewing the literature).

63. *Id.*

64. *Id.* at 880.

65. Carolyn Chen, *Asians: Too Smart for Their Own Good?*, INT'L HERALD TRIB., Dec. 21, 2012, at 8.

66. *See infra* Part II.B.

67. LIPPMANN, *supra* note 10, at 21.

68. Anke Passenier, "*Women on the Loose*": *Stereotypes of Women in the Story of the Medieval Beguines*, *in* FEMALE STEREOTYPES IN RELIGIOUS TRADITIONS 61, 64 (Rita Kloppenborg & Wouter J. Hanegraaff eds., 1995) (arguing that a "woman on the loose" stereotype posits "that women should be controlled and enclosed, lest disaster will ensue").

and so shunning appears prudent. Shunning takes the form of rejection in social, educational, and vocational settings.

Other stereotypes generate consequences that impose constraint more overtly. Notions that groups are stupid, crazy, or predatory make it harder for members to obtain positions that require trust. A person so stereotyped at work can expect to receive fewer chances to exercise judgment, plan strategies, join powerful teams or subgroups, or deal with valued customers and clients. Stereotyping also jeopardizes job security when it makes the work performance of group members look worse than it is.

Outside the workplace, constraint grows cruder. Stereotypes that explain disruptive or puzzling behaviors by nonstereotyped persons by blaming the predations or delusions of someone in a stereotyped group restore order on the surface at the price of suppressing freedom for an individual who does not deserve that penalty. Violence presumed to lurk in a population motivates more aggressive law enforcement against it. Privileges to harm another person when one has good reason—which are found not only in defenses to crimes but also rules of procedure and professional responsibility that may or may not penalize accusers and their counsel when they fail to persuade or prevail[69]—can, with the help of stereotyping, be interpreted less generously when the initiator comes from a group classed as unruly.

Constraint also emerges when a group member applies the stereotype to herself or himself.[70] Consider fair-haired women. "I'm hyper-sensitive to being a young blond woman in financial services," one Melbourne-based financial planner told a reporter, "so I deliberately set out to gain all the qualifications I could in order to be taken seriously."[71] A Harvard undergraduate began "Having a Blonde Moment," an article she published in the *Crimson*, with the unlikely sentence "I am not dumb."[72]

The phenomenon relayed in these anecdotes has been researched under the rubric of social identity threat, also known as stereotype threat.[73] This

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69. *See infra* Part IV (discussing criminal law defenses and complaints brought in court by women). Courts in the United States differ from their counterparts in other countries by refusing, in typical cases, to shift fees and costs in favor of prevailing parties. Procedural sanctions for frivolous or bad faith pleadings are imposed relatively rarely, and tort actions for abuse of process or malicious prosecution are hard to win.

70. Geoffrey L. Cohen & Julio Garcia, *"I am Us": Negative Stereotypes as Collective Threats*, 89 J. PERSONALITY & SOC. PSYCH. 566, 567 (2005) (reporting on studies of African-American and Latino students).

71. Leng Yeow, *Perfect Niche: In Practice*, FIN. REV. ASSET, Dec. 7, 2012, at 10.

72. Kristi L. Jobson, *Having a Blonde Moment*, HARVARD CRIMSON (Dec. 2, 2004), http://www.thecrimson.com/article/2004/12/2/having-a-blonde-moment-i-am/.

73. The pioneer was Claude Steele, whose experiments found that African-American students performed better on the Graduate Record Exam when they were not told that the test measured intellectual strength. Claude M. Steele & Joshua Aronson, *Stereotype*

condition of psychological discomfort delivers "an extra mental burden not experienced by people with a different social identity."[74] One study supported this proposition by supplying Asian-American women with selected reminders before they took a math test.[75] Mentioning the subjects' ethnicity resulted in stronger performances than what the control group achieved; subjects who were reminded of their gender performed worse.[76] Other studies locate social identity threat effects on exam performance among Latinos and poor whites, among other groups.[77] Real-world consequences of internalized stereotypes may include public health. Yale University researchers, for example, found an association between the stereotypes that elderly persons held about old age and how well or poorly they recovered from disabling conditions.[78] Not all searches for social identity threat find it,[79] but the finding has been replicated in dozens of studies.[80]

The U.S. presidential election of 2008 presented the first African-American candidate who had a good chance of winning first the nomination and then the election. He kept calm when provoked. One contemporary magazine story observed that white pundits "imploring Obama to get angry, to shed his above-the-fray cool and fight back" had proposed a risky strategy.[81] In one television debate, Barack Obama, squeezing into expectations that deliver freedom to unstereotyped persons while constraining the stereotyped, appeared resolved to give "no hint of being an 'angry black man'—like those who supposedly torch their own ghettos, then rape and pillage the white burbs."[82] His opponent, John McCain, apparently

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Threat and the Intellectual Test Performance of African Americans, 69 J. PERSONALITY & SOC. PSYCH. 797, 799 (1995).

74. Joshua Aronson & Matthew S. McGlone, *Stereotype and Social Identity Threat*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 153, 154 (Todd D. Nelson ed., 2009).

75. Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 98 n.139 (2012).

76. *Id.*

77. Aronson & McGlone, *supra* note 73, at 156–57. *See also Bibliography of Empirical Studies*, REDUCINGSTEREOTYPETHREAT.ORG (last visited Jul. 17, 2013), http://www.reducingstereotypethreat.org/bibliography.html (providing a lengthy bibliography of published studies).

78. Becca R. Levy et al., *Association Between Positive Age Stereotypes and Recovery from Disability in Older Persons*, 308 JAMA 1972, 1973 (2012) (considering both positive and negative stereotypes and concluding that effects were associated with both kinds).

79. *See, e.g.*, Lawrence J. Stricker, *Inquiring About Examinees' Ethnicity and Sex: Effects on AP Calculus AB Examination Performance*, COLLEGEBOARD (Jan. 1, 1998), *available at* http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1998-1-inquiring-ethnicity-sex-effects-ap-calculus-ab-exam.pdf (finding no effect on an examination given to high-schoolers).

80. Annie Murphy Paul, *It's Not Me, It's You*, N.Y. TIMES, Oct. 7, 2012, at SR9.

81. Michael Grunwald, *For Obama, Race Remains Elephant in the Room*, TIME (Sept. 15, 2008), http://time.com/time/nation/article/0,8599,1841109,00.html.

82. Rick Salutin, *The Strength It Takes to Just Sit There*, GLOBE & MAIL, Oct. 17, 2008, at A19; *see also* Grunwald *supra* note 80, at 1 ("White America has shown an

"felt free to fume and eye roll,"[83] while Obama, according to one observer in 2008, "can't afford to do what white candidates can do—express anger."[84]

Taking time to second-guess one's responses, guard against triggering thoughts about an angry black man in voters, and add another layer of inhibition and preparation means that something else has to give—a campaign work day has little spare time. President Obama's election demonstrated that this stereotype is not fatal to high political ambitions, but he paid a price in constraint. Sitting presidents remain political actors, and so winning a second term did not set Obama as free as his hypothetical white counterpart.

The primary opponent Obama faced in 2008, and later brought into his cabinet, experienced both less and more constraint. On one hand, Hillary Rodham Clinton was freer than Barack Obama during the primary to announce with indignation that "if HIV-AIDS were the leading cause of death of white women between the ages of 25 and 34, there would be an outraged outcry in this country."[85] "Outraged" and "outcry" were likely among the words foreclosed to Obama. On the other hand, Clinton encountered a constraining stereotype dubbed the Iron Lady. This persona, associated with British prime minister Margaret Thatcher, pressures a female candidate to eschew "stereotypical feminine traits."[86] Voters want ladies who aspire to run a country to be iron: According to one review of the stereotyping Hillary Clinton faced in 2008, "most successful women politicians" in modern electoral history won office by presenting themselves as extra tough.[87]

Clinton, who first ran for office as the wife of an outgoing president, balanced her record on behalf of women and children with hawkishness. She went out of her way to adopt several pro-military positions,[88] and as a senator she voted to give advance invasion authorization to a president she opposed.[89] Whether

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abundant willingness to support no-demands blacks like Tiger Woods, Oprah Winfrey, Colin Powell and Will Smith, but a race man like Malcolm X would be another story.").

83. Salutin, *supra* note 82, at A19.

84. Lynda Hurst, *Will Soft Bigotry Skew the Vote?*, TORONTO STAR, Oct. 25, 2008, at 1.

85. Gregory Scott Parks & Jeffrey J. Rachlinski, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race* 24 (Cornell Legal Studies Research Paper, Working Paper No. 08-007, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102704&download=yes.

86. *Id.* at 33–34.

87. *Id.*

88. Doyle McManus, *Letting Others Lead*, L.A. TIMES, Mar. 20, 2011, at A28 (describing Clinton as one of the Obama administration's "hawks" with respect to intervention in Libya); Susannah Meadows, *Hillary's Military Offensive: Clinton's Hawkish Stance is a Two-Edged Political Sword*, NEWSWEEK (Dec. 12, 2005), http://newsmine.org/content.php?ol=cabal-elite/families/clintons/hillary/clinton-hawkish-stance-plays-to-military.txt (noting Clinton's support for military bases and reservist health care).

89. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Cong. (2002). When the AUMF vote proved unpopular with Democratic primary voters, Clinton had to choose between two paths that both appeared

Clinton authentically desired war is impossible to know, given the stereotype of female weakness that pressed her to embrace military aggression.[90] If this leader had to promote bloodshed that she did not want to happen at pain of forfeiting her future in government, then the constraint of stereotyping in U.S. history has taken at least one deadly turn.

II. TOWARD A DEFINITION OF STEREOTYPING FOR LEGAL REMEDIATION

Lexicons, etymology (combine στερεός with τύπος), and scholarly works offer definitions of the word stereotype that pertain to the project of remedying what is wrong,[91] but are too broad to set a work agenda for courts, legislatures, lawyers, and litigants. Stereotyping has no agreed-on unitary definition.[92] It does, however, have three aspects that give these institutional actors a preliminary sense of what the law can repair.

A. Harm to Individuals as an Element of the Wrong

This first point emerged in the previous Part under the rubric of constraint and needs only brief attention here. Having shrugged off an assemblage of stereotypes related to national origin, political party affiliation, and occupation on the ground that they do not constrain individuals (enough to matter), we move now to harm as the *raison d'être* of the law. In thinking about harm in this context, the law ought to begin by taking the vantage point of the target of stereotyping—using an objective approach, making reference to a reasonable member of the classified group[93]—rather than that of stereotypers themselves, who have little incentive to consider the possibility that they are inflicting injury. Ostensibly neutral outsiders, whose incentive to think about harm is not much greater, are in a better position to evaluate whether the law ought to provide recourse, but they too may lack awareness of harm. Making reference to the perspective of the stereotyped group is the most informative starting point.

It functions to posit out rather than posit in. Not every stereotype that a target finds harmful will necessarily deserve law-based condemnation, but a stereotype that cannot be reasonably understood to cause harm is one that the law can decline to redress. Accordingly, some instances of stereotyping—the ones that persons so classified experience as trivial, bland, flattering, or neutralized by an

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weak: she could repudiate her vote and thus depict herself as buffeted by a stronger male politician, President Bush, or affirm it and allow Obama, her rival, to present himself as uncompromised and independent.

90. In the Senate, Clinton tried to find Iron-Lady middle ground, pushing for an increase in formal congressional power in warmaking. Her efforts failed. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 468 (2011).

91. *See supra* notes 9–19 and accompanying text.

92. *Id.*

93. *See* Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 493 (C.P.D.) (inaugurating the objective standard for the common law).

equivalent or reciprocal generalization—lie outside the bounds of legal remediation.

B. Unreliable Enough

The possibility that a stereotype contains enough truth to be useful—the unit of sufficiency sometimes noted metaphorically as the size of a grain or a kernel[94]—necessarily complicates the question of what's wrong with stereotyping. Researchers have long taken an interest in the problem of stereotypes that are reductive but true enough.[95] An accurate negative stereotype offers unambiguous benefits to stereotypers, who save time and gain reassurance: rejection of another person protects them. Loss to stereotypers arises only when acceptance of the stereotyped person, the path they did not take, would have made them better off.

In his study of stereotyping in American law, Frederick Schauer makes a case for the use of negative, reductive generalizations about classes of people.[96] Undertaking to defend "decision by categories and by generalizations, even with the consequent apparent disregard for the fact that decision-making by generalization often seems to produce an unjust result in particular cases,"[97] Schauer concludes that human beings cannot live without generalizing[98] and that the contrary imperative, particularization—that is, refraining from grouping things or people together in an effort to uphold the precept that like cases must be treated alike[99]—in a strong form is impossible to honor. Generalization is more than just an unavoidable ill, however. Schauer deems it morally correct, not just convenient and cheap, because, *inter alia*, it functions to lessen the harms occasioned by "creativity, initiative, and discretion."[100]

His *Profiles, Probabilities, and Stereotypes*, written shortly after the 2001 terrorist attacks, has in mind the problem of state actors who generalize about individuals—in particular, men who are or appear to be of Middle Eastern origin—and then foist baneful consequences on them in the name of security.[101] Whether or not one agrees with Schauer that the harms profiling cause are justified, it is undoubtedly correct to say that the law cannot avoid detrimental classifications that lead to unjust results at the margins. The under-eighteen citizen who would

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94. RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 70 (2d ed. 2010) ("grain of truth"); Blum, *supra* note 22, at 257 ("kernel of truth").

95. *See* BROWN, *supra* note 94, at 70–74; *see* Lee Jussim et al., *The Unbearable Accuracy of Stereotypes*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 199, 199 (Todd D. Nelson ed., 2009); *see* Lee. J. Jussim et al., *Why Study Stereotype Accuracy and Inaccuracy?*, *in* STEREOTYPE ACCURACY: TOWARD APPRECIATING GROUP DIFFERENCES 3, 3–4 (Yueh-Ting Lee et al. eds., 1995).

96. FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES (2003).

97. *Id.* at ix.

98. *Id.* at 75.

99. *Id.* at 219.

100. *Id.* at 276.

101. *Id.* at 183–90.

make a thoughtful and prudent voter,[102] the criminal defendant whose conviction puts him just barely in the range of more time in prison, the pristine oral contract invalidated because a statute said it had to be reduced to writing, and other persons and things treated severely by formal applications of legal rules might help support reconsideration of whatever generalization proves frustrating, but they have no place in identifying what the law ought to deem wrong with stereotyping. Whatever is wrong must be narrower than a rationale wide enough to condemn every generalization that the law imposes.[103]

Accordingly, just as a harmless stereotype falls outside what's wrong with stereotyping as a legal category,[104] an accurate enough negative generalization is not, without more, something that the law ought to stop condoning. Dividing wrongful from nonwrongful generalization calls for care about the quality of decision-making. The effort is at least as procedural or methodological as substantive. For example, the upper age limit for airplane pilots who work in passenger aviation, codified in federal law, generalizes negatively about persons older than the statutory maximum,[105] but this detrimental consequence will exemplify wrongful stereotyping only if lawmakers failed to consider the accuracy of their generalization.[106] The question of how much consideration is enough will, of course, recur. Hard cases fall near the border. The best standard that can be posited here is "untrue enough," whereby generalization may be deemed equivalent to a wrongful stereotype if power holders imposed its detriments with insufficient consideration of whether it is true or inadequate weighing of its harms in relation to the degree of truth present.

C. Stereotyping Distinguished from Discrimination

If "to stereotype" meant exactly the same thing as "to discriminate," then it would add no descriptive value to an account of discrimination as misconduct. American law can live with redundancies in its labels (like the exact overlap of

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102. Throughout the world, children experience extraordinarily oppressive generalization at the hands of the law. BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE book jacket (2010) (noting a lack of "dignity, equality, privacy, protection, and voice").

103. In this view, one prominent working definition of stereotype—"a term of art by which is simply meant any imperfect proxy, any overbroad generalization," Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000)—leaves an issue unresolved. Proxies about individuals are imperfect almost by their nature and yet the law aggregates individuals into groups. Professor Case's construct informs what is wrong with law-based aggregation by gender but does not take on the question of what is wrong with law-based aggregation of persons simpliciter.

104. *See supra* Part II.A.

105. Schauer, *supra* note 96, at 108.

106. The decision to raise the maximum that was in place when Schauer wrote, from 1960 to 1965, might be evidence of reflection in Congress. *See* Fair Treatment of Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007) (codified at 49 U.S.C. § 44729).

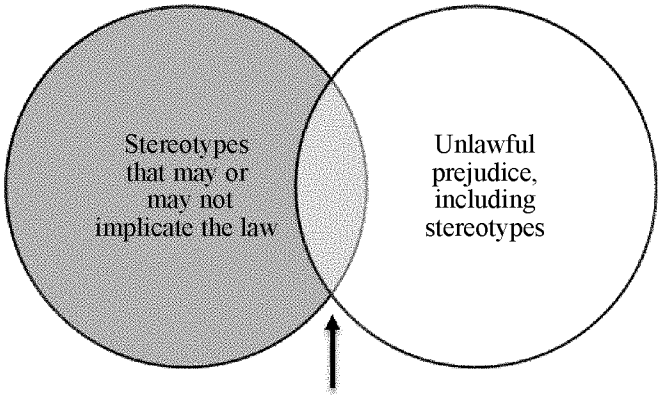
"issue preclusion" with "collateral estoppel"[107]) but needs no more of them, and also should not overlook differences that really exist. To best warrant its place in the firmament of legal categories, stereotyping ought to have an identity distinct from the related ill that might be called bigotry or prejudice as well as discrimination.

Inattention to the possibility of a separate meaning for stereotyping has generated a superficially simple answer to this Article's question: What's wrong with stereotyping is what is wrong with unlawful discrimination. Though attractively terse, this simple answer is more than incorrect: It has confounded courts and made case law hard to synthesize. Vexations postponed,[108] I explore its incorrectness here.

Recall the meaning of stereotype as a rigid and platelike cast.[109] What courts and commentators have described as stereotyping or stereotypes can instead be instances of discrimination or prejudice misconceived and mislabeled. To be useful to the law—to provide substantive content independent of discrimination—stereotyping must retain the morpheme of "type."

1. The Center of a Venn Diagram

Stereotyping that is of interest to the law occupies the point of overlap between two aggregations, here labeled Left Circle and Right Circle. We have considered Left Circle in connection with stereotypes that do little or no harm: amorous Frenchmen, rude and lazy store clerks, and the like.[110] Stereotypes that do not harm do not implicate the law.[111] Right Circle contains unlawful prejudice in all its forms, including discrimination and stereotyping.



107. ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 11–12 (2001).

108. *See infra* Part III.

109. *See supra* note 9.

110. *See supra* note 50 and accompanying text.

111. *See supra* Part II.A.

Should a Venn diagram seem needlessly elaborate to describe a simple partial overlap, consider the Right Circle confusion present in Supreme Court cases on alleged age discrimination in retirement plans. In *Hazen Paper Company v. Biggins*,[112] the Court held that firing a 62-year-old employee a few weeks before the employee's pension was to have vested did not violate the Age Discrimination in Employment Act ("ADEA"). Age is a category distinct and severable from years of service, wrote Justice O'Connor.[113] This holding is cogent enough. The Court went on to suggest, however, that every successful claim under the ADEA involves a stereotype about older workers:[114] Because a "prohibited stereotype ('Older employees are likely to be—')would not have figured in this decision . . . stigma would not ensue,"[115] wrote the Court, and so Mr. Biggins had to lose. The Court returned to this erroneous conflation of stereotyping with discrimination in *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*,[116] concluding that a state retirement plan that treated older retirees worse than disabled retirees did not violate the ADEA because the distinction did not rest on a stereotype about older workers.[117]

The Venn diagram error in *Hazen Paper Co.* and *Kentucky Retirement Systems* was mistaking the small category of actionable (or "prohibited"[118]) stereotyping for the large category of prejudice, as illustrated in Right Circle. Without more, the fragment "[o]lder employees are likely to be—" expresses nothing but prejudgment, presumably negative, about this group. Yet to qualify for membership in the category of stereotype, a generalization about persons must say something specific. Solid type, again. Justice O'Connor needed to fill in the clause at the end of the dash.

Options to finish her sentence are familiar. An employer guilty of stereotyping might perceive older workers as "doddering but dear,"[119] prone to senile dementia,[120] or incapable of mastering advances in office technology.[121] Alternatively, an employer might feel simple aversion for these workers. When it lacks descriptive detail, however, aversion is not a stereotype. It can amount to prejudice, which when acted upon in the form of workplace detriment can fulfill the central elements of an employment discrimination claim with no need to reference stereotyping. But the ADEA—a statute that does not include any form of

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112. 507 U.S. 604 (1993).
113. *Id.* at 611.
114. *Id.* at 610–11.
115. *Id.* at 612.
116. 554 U.S. 135, 138 (2008).
117. *Id.* at 146.
118. *Hazen Paper Co.*, 507 U.S. at 612.
119. Amy J.C. Cuddy & Susan T. Fiske, *Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 3, 4 (Todd D. Nelson ed., 2002).
120. *See* Robert McCann & Howard Giles, *Ageism in the Workplace: A Communication Perspective*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 163, 188 (Todd D. Nelson ed., 2002).
121. *See id.* at 171.

the word stereotyping in its text—did not require Walter Biggins to find a stereotype about older workers that his employer used against him, and the Kentucky retirement plan could have discriminated against older workers without stereotyping them.

A retrospective on the Women's Rights Project launched by the American Civil Liberties Union in 1972 also elides discrimination with stereotyping. Titled "Fighting Sex Stereotypes in the Law,"[122] it summarized litigation successes achieved by the young Ruth Bader Ginsburg and her ACLU colleagues, some but not all of which challenged stereotypes held and enforced by law. Ginsburg stated her working definition of sex stereotyping in an amicus brief: "[A] legislature may not place all males in one pigeonhole, all females in another, based on assumed or documented notions about 'the way women or men are.'"[123] This phrasing does not define stereotyping, although it is broad enough to include it. Like Justice O'Connor's "[o]lder employees are likely to be—," it stops before reaching specifics. ACLU briefs of the 1970s did approach specificity sometimes—"[b]readwinner was synonymous with father, child tenderer with mother,"[124] for example—but more often they equated sex stereotyping with sex discrimination, omitting any description of the stereotype they deemed at issue.[125] Other writings on sex discrimination also object to stereotyping when they mean to denounce the subordination of women.[126]

This word choice probably achieves strategic advantage at the expense of descriptive accuracy. Nonliberal justices of the Supreme Court have written decisional law that objects to gender stereotyping.[127] Sex-discrimination victories

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122. AM. CIVIL LIBERTIES UNION, FIGHTING SEX STEREOTYPES IN THE LAW (Dec. 2012).

123. *Id.* at 3 (describing this position as "Ginsburg's views on gender stereotyping that animated the ACLU's litigation" and citing its amicus brief in *Craig v. Boren*).

124. *Id.* at 4 (quoting brief filed in *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975)). *Frontiero v. Richardson*, 411 U.S. 677 (1973) also included a bit of specifics. In *Frontiero*, the ACLU persuaded the Supreme Court that a policy codified by Congress of allowing servicemen to claim their wives as dependents regardless of financial circumstances, but not allowing servicewomen to do the same when they were in fact supporting their husband, was unconstitutional. *Id.* at 678–79. The stereotype adverted to is that husbands are economically dominant in marriage and wives stay out of the labor force. AM. CIVIL LIBERTIES UNION, *supra* note 122, at 3–4 (noting "[c]hallenges to laws perpetuating the stereotype of men as breadwinners and women as caretakers").

125. *See id.* at 8–9 (claiming that sex segregation in grade schools is wrong because it "perpetuates sexual stereotypes"); *see id.* at 11–12 (describing mistreatment of pregnant police officers as stereotyping).

126. *See, e.g.*, COOK & CUSACK, *supra* note 8, at 12–13 (adverting to "a customary stereotype of women as men's property" in Vanuatu); Suzanne Sangree, *Title IX and the Contact Sport Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 440 (2000) (claiming that treating contact sports differently from noncontact sports perpetuates a stereotype that women are inferior).

127. The winners were men. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (Rehnquist, J.) (adverting to "the pervasive sex-role stereotype that caring for family members is women's work"); Miss. Univ. for Women v. Hogan, 458 U.S. 718,

for plaintiffs in the Supreme Court have tended to reference stereotypes, a phenomenon that may honor "gender as a category of classification"—in other words, an individual has been put in the wrong box—instead of a system of subordination.[128] While public opinion on the wrongness of discrimination may have fallen into retreat,[129] "in modern Western societies stereotyping is frowned upon."[130] At least when gender is concerned, denouncing stereotyping may fare better in court than denouncing prejudice or discrimination. I have no quarrel with the tactic. For the sake of clarity, however, it would have been useful to identify the stereotypes in question.

2. Quick, Stealthy, Unspoken, Plausibly Deniable

Like the distinction between stereotyping on the one hand and discrimination or prejudice on the other, this second aspect also rests on the printing-technology metaphor that gave the word stereotype its modern meaning. What made the "type" morpheme of "stereotype" revolutionary back when Johannes Gutenberg invented the printing press was an extraordinary new power to disseminate ideas quickly, with little variation inserted by the disseminator.[131] Printing technology replicates a text and sends a message with no need for a human scrivener who might be distracted, careless, or ill intentioned.

The message that stereotyping communicates is prejudice. Stereotyping is one of the slickest ways that prejudice can spread and thrive. If this message had to compete for attention without a technology of dissemination and replication, it would move more slowly and have less impact. Social psychologists report a double whammy: Stereotypes gain storage extra easily in the human mind and are extra easy to retrieve without effort.[132] In its modern, post-Lippmann incarnation, stereotyping makes ready use of a fast generalization.

This phenomenon has appeared more neutral to observers than harmful. The English anthropologist Robin Fox, for example, praises stereotyping by likening it to the unreasoned human beliefs about causation that David Hume

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729 (1982) (O'Connor, J.) ("MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.").

128. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 307 (2005).

129. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCH. SCI. 215, 215 (2011); Jennifer Agiesta & Sonya Ross, *Poll: Majority Prejudiced Against Blacks*, ASSOCIATED PRESS, (Oct. 27, 2012) *available at* http://news.yahoo.com/ap-poll-majority-harbor-prejudice-against-blacks-073551680--election.html.

130. Blum, *supra* note 22, at 266.

131. *See generally* ELIZABETH L. EISENSTEIN, THE PRINTING REVOLUTION IN EARLY MODERN EUROPE (2d ed. 2005).

132. Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERS. & SOC. PSYCHOL. BULL. 1139, 1146–1148 (1995).

identified in the eighteenth century.[133] "If we believe that fire warms or water refreshes," Hume concluded, "it is only because it costs us too much pains [sic] to think otherwise."[134] Only "custom" or "Nature" or "blind habit" can explain what people believe about the causation of events by antecedents.[135] In the early *Star Trek*, Fox recalls, First Officer Spock, half Vulcan and half human, hewed faithfully to logic. Scriptwriters juxtaposed Vulcan rationality against the jumble of human intuition and emotion that motivated Spock's colleague Captain Kirk. Persons who strive to live by Spock-like reason, claims Fox, "can't keep it up for long and in the end quickly ditch it for prejudice and stereotype."[136] On vintage *Star Trek*, the not-so-logical Kirk usually bested Spock; off television and on earth, humanity cherishes and clings to "stereotypical thinking and the attribution of blame."[137] Fox concludes by endorsing "the idea that prejudice is not a form of thinking but thinking is a form of prejudice."[138] To live in the world is to stereotype.

Walter Lippmann had said as much back in 1922, and many who study stereotyping agree: The world "is altogether too big, too complex, and too fleeting for direct acquaintance,"[139] and so individuals need stereotypes to manage the complexity that other people manifest and impose. A textbook on cross-cultural communication repeats "too big, too complex" in its account of why people stereotype: "Hence," it concludes, "you want to classify and pigeonhole."[140] Nimble swiftness, so central to stereotyping, emerges even more dramatically when one looks for alternative means of expressing a negative generalization.

The mid-twentieth century scholar of prejudice Gordon Allport elaborated on this point. One "can distinguish between a valid generalization and a stereotype," wrote Allport, only with "solid data" about "true group differences."[141] Let us explore one of Allport's specimens of stereotypes, "the

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133. Robin Fox, *Prejudice and the Unfinished Mind: A New Look at an Old Failing*, 3 PSYCHOL. INQUIRY 137, 142 (1992).

134. *Id.* at 141.

135. *Id.*

136. *Id.* at 145.

137. *Id.* at 148.

138. *Id.* at 151.

139. LIPPMANN, *supra* note 10, at 10.

140. LARRY A. SAMOVAR, RICHARD E. PORTER, & EDWIN R. MCDANIEL, COMMUNICATION BETWEEN CULTURES 170 (7th ed. 2011). Consider, for example, stereotyping of the elderly, a common practice in the United States. Two authors who disapprove of what they call "ageism" concede that identifying characteristics shared by a population like this one provides "useful information." Cuddy & Fiske, *supra* note 118, at 5. Visitors to a retirement home sort the people they encounter into three cohorts—residents, staff, and their fellow visitors—with the help of generalizations that amount to stereotypes. If they could not do so, they would "quickly become confused and overloaded by the complexities," and prefer to stay away. *Id.*

141. GORDON ALLPORT, THE NATURE OF PREJUDICE 192 (1954).

Irish" as "whiskey-soaked."[142] Our challenge is to apply "solid data" to this generalization.

Tedious labor ensues. What does our stereotyper mean to say about "the Irish"? Is she calling them all alcoholics, heavy drinkers who fall short of that label, or just over-fond of gathering in pubs? Or is she generalizing about most or many of the cohort rather than all? Who is Irish enough to count?[143] Individuals in the United States whose ancestors came from both Ireland and other nations might or might not be covered.

Next comes the question of whether the stereotype is "veridical,"[144] or true enough.[145] Perhaps "the Irish," assuming they can be identified, qualify as whiskey-soaked. The national charity Alcohol Action Ireland reports high rates of per capita consumption of alcohol and binge drinking, as well as a 145% increase in the average quantity of alcohol drunk in 2010 compared to 1960.[146] No references to whiskey in particular, no transnational comparisons. When an Irish newspaper ran a story about the stereotype and asked readers to comment, results were inconclusive.[147] The World Health Organization ranks Ireland high in per capita alcohol consumption but only slightly above nearby Britain,[148] and its data say that if the Irish are whiskey-soaked, then denizens of most nations in Eastern Europe are more so.[149]

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142. *Id.*

143. U.S. Representative Joseph Crowley, for example, born in New York to an Irish-American father and a mother who immigrated from Northern Ireland, aligned himself with the slur when he wrote on congressional letterhead to complain about the drunk stereotype as propounded by a retailer of apparel. Cian Traynor, *Ditch the Drink and Find Some Pride*, IRISH TIMES, Nov. 6, 2012, at 13.

144. BROWN, *supra* note 94, at 70.

145. It might be possible to investigate drunkenness with reference to ethnic groups. Research published in the 1980s, for example, concluded that American Jews (even very assimilated ones with little connection to religious institutions or practices) are extraordinarily unlikely to be alcoholics. Barry Glassner & Bruce Berg, *How Jews Avoid Alcohol Problems*, 45 AM. SOC. REV. 647 (1980); Barry Glassner & Bruce Berg, *Social Locations and Interpretations: How Jews Define Alcoholism*, 45 J. STUD. ALCOHOL & DRUGS 16, 16 (1984).

146. ALCOHOL ACTION IRELAND, *How Much Do We Drink?*, http://alcoholireland.ie/alcohol-facts/how-much-do-we-drink/ (last visited Aug. 24, 2013).

147. Michael Freeman, *Poll: Are 'Drunken' Stereotypes About Irish People a Problem?*, THEJOURNAL.IE (2012) http://www.thejournal.ie/poll-are-stereotypes-about-irish-people-a-problem-374773-Mar2012/ (last visited Aug. 24, 2013). Pertinent to this Article's thesis was one reference to constraint: "I lived in Oz for a year and some Australian landlords refused to rent their properties out to Irish people for that very stereotype sorry mate but the stereotype is sabotaging the Irish reputation abroad," wrote a reader. Marie Egan, Comment to *Poll: Are 'Drunken' Stereotypes About Irish People a Problem?*, THEJOURNAL.IE (June 3, 2012).

148. WORLD HEALTH ORG., GLOBAL STATUS REPORT ON ALCOHOL AND HEALTH 273–77 (2011).

149. *Id.*

In contrast to a stereotype, the slow, ponderous mode of negative generalization keeps the generalizer and the generalized-about on a more level playing field. Persons who assert a negative generalization cannot leverage the strength of familiarity without a stereotype. When they have to drone that "X people are more likely to . . ." and add qualifiers, rather than whip out a phrase associated positively with humor, popular culture, and social acceptance, they must toil to press their point. Forced to speak literally with no help from a glib cliché, defenders of a negative generalization like "whiskey-soaked" open themselves up to an equally literal and leaden challenge, generating debate instead of a quip. They drive away all but the most earnest listeners. They have no sound bite. Without stereotyping as an accelerant, they slow down.

Another utility of stereotyping as a technology of prejudice is its ability to deny—and also lessen—individual human agency as a source of harm. "Stereotyping" in gerund form builds on a verb, here a transitive verb that implies a subject and object. For example, one might claim that "Norwegians stereotype Finns." If they really do so, however, what is attributable to an individual (here, one of the "Norwegians") is occluded by the collective nature of the action.

No individual can invent and disseminate a new stereotype on her own. The most anyone can do by way of stereotyping is to articulate the stereotype in clear terms—no hinting, no equivocation, no irony—and make a detrimental decision about someone else that the stereotyper ascribes to the explanatory force of the generalization. This maximal version of stereotyping will rarely occur. Foremost, stereotypes can flourish with their infirmities (and even the fact that they are stereotypes) undetected by individuals who harbor, express, and rely on them. "Finns are X" may be less veridical than "heifers are female cattle," "peanuts contain allergens," or "metal containers don't belong in microwave ovens," but in structure the sentences look and sound alike. When a stereotype is trusted and spoken, odds are that the truster–speaker has little consciousness that stereotyping is what she just did.[150]

Moreover, the truism that prejudice is bad encourages individuals to think of themselves as impelled by motives other than bigotry.[151] Stereotyping as understood in this Article—harmful, negative, reductive—manifests as prejudice when it is detected. But individuals do not think of themselves as prejudiced,[152] and so they do not perceive themselves as lending strength to a bigoted stereotype.

Plausible deniability, the old Cold War notion of making blame harder to ascribe by intentionally withholding information from political leaders before they

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150. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 209 (2005).

151. MICHAEL BILLIG, IDEOLOGY AND OPINION: STUDIES IN RHETORICAL PSYCHOLOGY 20 (1991).

152. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1277–78 (1992) (noting that "racism of other times and places does stand out, does strike us as glaringly and appallingly wrong").

commit controversial acts,[153] characterizes the relation between stereotyping and bigotry. Stereotyping muffles the consciousness of invidious discrimination that individuals need in order to feel responsible for having classified others unjustly. It interprets complicated, neutral, or ambiguous behavior from the stereotyped cohort as easy to understand and worthy of quick condemnation. It answers the question of how to evaluate another person while suppressing, in its swift and sometimes merry way, the formation of a judgment that could have come out differently. Stereotyping offers not only a shortcut to a prejudiced conclusion but the erasure of its tracks to this destination. A stereotyper might, if asked, testify truthfully to her unbigoted intentions. She would have to second-guess herself to challenge what she decided.

Stereotyping is a winged messenger: It flies fast. By its nature it escapes accountability. The next Part turns to the exception to this generalization.

III. THE FRACTION OF AMERICAN STEREOTYPING THAT IS ACTIONABLE

A tiny percentage of individuals harmed by stereotyping have found relief in American courts. Most of these victories occurred in the field of employment discrimination. Even though the United States Code contains not one black letter prohibition of stereotyping,[154] courts have construed a (limited) cause of action for this wrong.

A. Price Waterhouse*, a Predecessor, and Its Progeny*

That stereotyping might violate Title VII of the Civil Rights Act is a notion first accepted by a court in 1971. The Seventh Circuit Court of Appeals approved a claim of wrongful termination and added a reference to stereotyping. In "forbidding employers to discriminate against individuals because of their sex," declared the court, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[155]

Sprogis v. United Air Lines, Inc. did not name or describe the stereotype that had fostered disparate treatment for the plaintiff, but a contemporary magazine story may have spotted it. Ascribed by another airline to "a lovely smiling stewardess,"[156] the slogan "Fly Me" suggests that Mary Burke Sprogis, a United

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153. EVAN THOMAS, ROBERT KENNEDY: HIS LIFE 123 (2000) (describing the concept as empowering the Central Intelligence Agency in the Kennedy administration).

154. A search of the Westlaw database USC found that the only references to stereotypes or stereotyping in federal statutes either reference printing technology, 44 U.S.C. § 505 (2012), or authorize government agencies to study the phenomenon of stereotyping based on race or sex. 20 U.S.C. § 2501(3) (2012).

155. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

156. *The Nation: Fly Me*, TIME (Nov. 15, 1971), *available at* http://www.time.com/time/magazine/article/0,9171,903213,00.html. The National Organization for Women promptly picketed: "GO FLY YOURSELF NATIONAL," said one placard, naming the airline. Gilligan Newton-John, *The Groovy Age of Travel #3: A*

flight attendant fired immediately after getting married, had veered from a persona. If "Fly Me" breathes an intelligible hint about licentious, accessible single-girl stewardesses, then becoming the wife of one man meant that Sprogis forfeited her job when she tacitly declared herself unavailable for sexual fantasy-consumption by the flying public.

Eighteen years later, a clearer instance of the phenomenon reached the Supreme Court. This case, *Price Waterhouse v. Hopkins*,[157] remains the landmark in decisional law about stereotyping as an actionable wrong. Ann Branigar Hopkins had built an extraordinarily strong employment record as a senior manager in Price Waterhouse, a large accounting firm.[158] In 1982 she sought promotion to partnership. After Price Waterhouse stonewalled for two years, neither granting nor denying her application, Hopkins brought an action alleging sex discrimination in violation of Title VII.

At a bench trial, Judge Gerhard Gesell examined personnel records that were replete with gender-based condemnations of Ann Hopkins. Supervisors described her as "macho," "somewhat masculine," "a lady using foul language" who "overcompensated for being a woman," as well as someone in need of "a course at charm school."[159] One evaluator suggested that Hopkins could improve her partnership chances if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[160]

The Supreme Court determined that these criticisms, accompanied by an adverse employment action, supported a claim under Title VII. Justice Brennan used *Sprogis* to support his conclusion that sex stereotyping in the workplace has "legal relevance" because it generates disparate treatment.[161] The lower court decision in *Price Waterhouse* offered more support for that hypothesis: Judge Gesell had written that "at least two other women candidates" who had applied for partnership had been rejected for trying "to be 'one of the boys'" or putting their supervisors in mind of the oft-caricatured gangster Ma Barker.[162] Supervisors at this firm disapproved of women who appeared to them "curt, brusque and abrasive," without considering whether gender bias influenced their assessment,[163] and Price Waterhouse took no steps to keep this bias out of personnel evaluations.

Time Before the Turbulence, RETROSPACE (Nov. 16, 2009), http://my-retrospace.blogspot.com/2009/11/mini-skirt-monday-27-time-before.html.

157. 490 U.S. 228 (1989).

158. *Id.* at 233–34. Today the successor entity known as PricewaterhouseCoopers is even bigger, ranked seventh on a list of the ten largest private companies in the United States. *See* Forbes, *10 Largest Private Companies in America*, FORBES.COM (Nov. 3, 2010), http://www.forbes.com/2010/11/01/top-10-private-cargill-business-private-companies-10-largest_slide_8.html.

159. *Price Waterhouse*, 490 U.S. at 235.

160. *Id.*

161. *Id.* at 250.

162. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985).

163. *Id.*

The plurality appeared to have in mind, although it did not describe, a collision of stereotypes that became the undoing of Ann Hopkins at Price Waterhouse. "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not," Brennan wrote.[164] "Title VII lifts women out of this bind."[165] Justice Stevens, who as a judge on the Seventh Circuit Court of Appeals had dissented in *Sprogis*, signed this plurality opinion.[166]

Price Waterhouse generated extensive doctrinal progeny.[167] Part of its impact took form in new successes for plaintiffs. These wins in court do not tell the full story of this precedent, which has disappointed workers and academic observers over the years, but they are central to its record.

The first doctrinal innovation that *Price Waterhouse* begat was an application of its condemnation of stereotyping to the context of sexual harassment. Three years earlier, the Supreme Court had ruled that sexual harassment constituted sex discrimination under Title VII.[168] Lower courts merged the holding of *Meritor Savings Bank v. Vinson* with *Price Waterhouse* to rule that harassment of an employee based on the employee's noncompliance with gender stereotypes is actionable under the statute.[169] Student plaintiffs have prevailed in Title IX actions as well when they alleged harassment at school based on their noncompliance with stereotypes.[170]

The second judicial innovation, which overlaps with the first, was to deem actionable the harassment of a man or boy based on his perceived effeminacy.[171] Courts describe what these plaintiffs experience as stereotyping. In *Doe v. City of Belleville*, the Seventh Circuit Court of Appeals ruled in favor of

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164. *Price Waterhouse*, 490 U.S. at 251.

165. *Id.*

166. *Id.* at 231.

167. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1316 (2012); *see also* Stone, *supra* note 18, at 634 (calling the decision "overcited"); Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 760 (2013) (using the progeny metaphor).

168. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

169. Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1222–24 (D. Or. 2002) (involving a female plaintiff); *see* Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a female plaintiff); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (involving a male plaintiff); Jones v. Pac. Rail Servs., 85 Fair Empl. Prac. Cas. (BNA) 90 (N.D. Ill. 2001) (male plaintiff).

170. Theno v. Tonganoxie Unified Sch. Dist. No. 364, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (applying this reasoning to a Title IX claim); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1092–93 (D. Minn. 2000).

171. A leading early work in this literature presciently noted the importance of effeminate male plaintiffs to gender stereotyping in court. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2–3 (1995).

two boys who were harassed at school, citing *Price Waterhouse*'s condemnation of stereotyping.[172] This form of harassment, where both victims and perpetrators are male, combines *Price Waterhouse*-style stereotyping with conduct condemned in another Supreme Court case, *Oncale v. Sundowner Services, Inc.*,[173] which found same-sex harassment actionable under Title VII. Whether the Supreme Court agreed with the *City of Belleville* holding is obscure, but the Court did note it.[174] Another leading decision, *Nichols v. Azteca Restaurant Enterprises, Inc.*,[175] held that same-sex harassment based on gender stereotypes is actionable under Title VII.

The boldest judicial application of *Price Waterhouse* has extended protection to transgender employees who lost or risked their jobs when they presented themselves as newly female. Several transgender litigants had sought redress for employment discrimination before *Price Waterhouse* and failed; the Court's condemnation of stereotyping helped a small number of them to prevail.[176] The earliest victory for a plaintiff, *Smith v. City of Salem, Ohio*,[177] interpreted the threat to Jimmy Smith's job as a firefighter, which arose after Smith told his supervisors about having gender identity disorder and intending to transition from a man to a woman, as an instance of "[s]ex stereotyping based on a person's gender non-conforming behavior."[178] *Schroer v. Billington* granted defendant Library of Congress's motion to dismiss on all claims except the one based on sex stereotyping, which the court found well supported in the record.[179] Smith and Schroer brought their stereotyping claims under Title VII. Another court found stereotyping actionable for a transgender plaintiff who sought relief under the Equal Protection Clause.[180]

B. Open Questions, Tentatively Answered

Hard cases make bad law, goes the aphorism;[181] easy cases like *Price Waterhouse* make difficulties of their own.[182] *Price Waterhouse* was an easy case in that although its thirteen judges had their differences about the interpretation of

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172. 119 F.3d 563, 580 (7th Cir. 1997).

173. 523 U.S. 75, 81–82 (1998).

174. The Court vacated *City of Belleville* a few days after deciding *Oncale* and ordered reconsideration in light of its new decision but said no more. *See* Moore v. USG Corp., 94 Empl. Prac. Dec. (CCH) P44,316 (N.D. Miss. 2011); the City of Belleville settled with the Doe plaintiffs before a new decision could issue on remand. Yuracko, *supra* note 163, at 764 n.22.

175. 256 F.3d 875 (9th Cir. 2001).

176. Mary Kristen Kelly, Note, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219, 227 (2010).

177. 378 F.3d 566, 572 (6th Cir. 2004).

178. *Id.* at 575.

179. 525 F. Supp. 2d 58, 63 (D.D.C. 2007).

180. Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011).

181. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 406 (Exch.).

182. Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89, 89–90 (1990).

precedent, the application of federal procedural rules, who had various burdens of proof, and who ought to have prevailed in the end, all but one agreed that Price Waterhouse had discriminated against Ann Hopkins on the basis of sex.[183] Years of business-getting at Price Waterhouse gave Hopkins a full dossier. The numbers of what she achieved were unambiguous. Her supervisors had written equally unambiguous expressions of their gender bias into the file. Personnel recordkeeping this open—candor to the point of recklessness—was rare even in the 1980s. It cannot be expected to recur, and so even though *Price Waterhouse* came out favorably for a plaintiff, its facts necessarily set the bar high for successor-litigants who bring more ambiguous experiences to court.[184]

A dissent in *Price Waterhouse* said that "it is important to review the actual holding of today's decision,"[185] and this position, in hindsight, appears wise. Congress went on to "review the actual holding" before passing pertinent amendments to the Civil Rights Act in 1991.[186] Hundreds of judicial decisions and dozens of law review articles have parsed *Price Waterhouse*. Many of these writings focus on stereotyping as unlawful, harmful conduct. These efforts have not been fully availing: Lower courts who read *Price Waterhouse* "have come up short," one observer concluded after reviewing more than two decades of case law.[187] Readers of the decision still wonder what the Court intended to hold.[188]

Price Waterhouse-related questions continue to fill case law and scholarship. These questions include but are not limited to "what it means to 'stereotype,' how stereotyping translates into impermissible action, and why stereotyping is considered nefarious and capable of fomenting discrimination."[189] Below are some of mine with provisional answers linked to the thesis of this Article.

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183. The dissent found that "Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process;" what was missing, to three Justices, was proof that "sex discrimination caused the adverse decision." In other words, Hopkins had failed to eliminate the possibility that Price Waterhouse had nondiscriminatory reasons to deny her partnership. Price Waterhouse v. Hopkins, 490 U.S. 228, 295 (Kennedy, J., dissenting).

184. *See* NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 213 (1998).

185. *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting).

186. The 1991 Amendments touched on stereotyping only indirectly. They provided that mixed-motive employment discrimination, where factors other than "race, color, religion, sex, or national origin" also motivated the adverse action, suffices to establish a violation of Title VII. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat 1071 (Nov. 21, 1991) (codified in scattered sections of 2 U.S.C.).

187. Stone, *supra* note 18, at 593.

188. For a more constructive expression of this point, see Martha Chamallas, *Of Glass Ceilings, Sex Stereotypes, and Mixed Motives: The Story of Price Waterhouse v. Hopkins*, in WOMEN AND THE LAW STORIES 307, 307 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (observing that the decision "has had many lives").

189. Stone, *supra* note 18, at 593.

1. Is the condemnation of stereotyping in Price Waterhouse *(and its progenitor* Sprogis*) a holding or dicta?*

In both *Price Waterhouse* and *Sprogis*, litigants complained in federal court about adverse employment actions. Price Waterhouse had responded unfavorably to the applications Ann Hopkins had made for partnership. United Air Lines fired Mary Burke Sprogis consistent with its written policy, held in place from the mid-1930s to 1968, that female flight attendants had to begin their employment unmarried and remain unmarried while working in this position.[190] Both women claimed that their employers discriminated against them on the basis of their sex. Their claims fit easily into the center of Title VII without stereotyping. Failure to be promoted and termination occupy the heart of adverse employment action as stated in section 703 of the statute, which lists at the top of its Unlawful Employment Practices both "discharge," which happened to Sprogis, and discrimination with respect to "compensation, terms, conditions, or privileges of employment," which includes partnership rejection that Hopkins experienced.[191]

In both decisions, the courts concluded that stereotyping had inflicted harm but left open the question of how much this conclusion mattered to the outcome. Unlike Mary Burke Sprogis, Ann Hopkins had pressed a point about stereotyping. She engaged a prominent social psychologist to testify at trial that this phenomenon "played a major determining role" in the Price Waterhouse partnership decision,[192] and what Hopkins said about stereotyping proved central to her victory in the district court.[193] Yet even for this famous litigant, stereotyping was the means to an end rather than an end in itself. "The plaintiff must show that the employer actually relied on her gender in making its decision," Justice Brennan wrote. "In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part."[194]

From here, the condemnations of stereotyping in both cases appear to rest outside the holding. The portion of the plurality opinion that begins "We hold . . ."[195] recited a rule about the burden of proof in mixed-motive discrimination claims.[196] The decision also held that Judge Gesell's decision to admit testimony about stereotyping was not clearly erroneous.[197] But unlike the

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190. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1196 (7th Cir. 1971). In 1968, following negotiations with a union, United agreed to drop the no-marriage rule for female flight attendants but insisted that "any Stewardess who shall hereafter become pregnant shall have her services with the Company permanently severed as a Stewardess." *Id.* at n.2.

191. 42 U.S.C. § 2000e–2(a) (2012).

192. Hopkins v. Price Waterhouse, 825 F.2d 458, 467 (D.C. Cir. 1987).

193. *Id.* at 463–64 (noting the trial court's identification of several weaknesses in Hopkins's claim).

194. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

195. *Id.* at 258.

196. *Id.* Congress mooted that part of the decision by codifying a pro-plaintiff rule in 1991.

197. *See* Philip McGough, *Same-Sex Harassment: Do Either* Price Waterhouse *or* Oncale *Support the Ninth Circuit's Holding in* Nichols v. Azteca Restaurant Enterprises,

other big Title VII decision of its decade, the unanimously decided *Meritor Savings Bank*, Brennan's *Price Waterhouse* opinion lacked the votes to make any conduct newly actionable. Jurisprudential sources have described plurality opinions like *Price Waterhouse*—signed by four judges and accompanied by concurrences in the result only—as comparable to concurrences or dissents: "their voices do not carry the authority of the Supreme Court as an institution."[198]

Tentative answer: Dicta, though important and generative.

2. How do stereotyping and actionable discrimination interrelate?

The *Price Waterhouse* plurality's lack of clarity on whether its condemnation of stereotyping was holding or dicta extends into this next question left open by the Court. As noted, Brennan characterized an employer's "stereotyped remarks" as evidence of sex discrimination.[199] Consistent with the framework presented in Part II, this judicial construct considers stereotyping in functional terms.

Tentative answer: Stereotyping is a technology of actionable discrimination, a mode by which injustice gains effect.[200]

3. What does it mean to stereotype?[201]

Justice Brennan did not define this word.[202] More strikingly, neither did *Sprogis*, which even attributed an anti-stereotyping agenda to Congress.[203] The first two Parts of this Article have given my answer to the question. For law, I argued in Part I, the "perfect stereotype"[204] is that a group is by nature born a slave. When members of the group do what they please they are not free persons, just unruly. Variations on the theme of constraint-worthiness pervade American stereotyping, as I outlined above and will develop below.[205] Part II, recognizing that no formal definition is likely ever to be codified, identified three elements that bear on whether legal institutions ought to condemn particular instances of stereotyping.

4. "When should courts apply Price Waterhouse*?"*[206]

This question makes reference to employment discrimination, a domain that this Article built on in this Part but will soon leave behind. It also pertains to

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Inc. *That Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes is Actionable*?, 22 HOFSTRA LAB. & EMP. L.J. 206, 207 (2004).

198. *Id.* at 216–17 (citations omitted).

199. *Price Waterhouse*, 490 U.S. at 251.

200. *See supra* Part II.C.2.

201. Kerry Lynn Stone asked this question. *See* Stone, *supra* note 18, at 593.

202. *Id.*

203. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971); *supra* note 154 and accompanying text.

204. *See supra* Part I.

205. *See supra* Part I; *infra* Part IV.

206. Stone asked this question too. Stone, *supra* note 18, at 634.

any legal treatment of stereotyping. Implicitly paraphrasing her question as "When plaintiffs seek to benefit from the *Price Waterhouse* plurality opinion on stereotyping, should courts accept these uses of the precedent?" Kerry Lynn Stone proposes that courts ask first whether a stereotype is in play and then, if the answer to that question is yes, whether a nexus links the stereotype to an adverse action.[207] My tentative answer here is to commend this framework.

The deeper question is how to distinguish stereotyping's winners and losers in the courts. Since the issuance of *Price Waterhouse*, numerous plaintiffs have obtained the benefit of its holding—that is, a judicial conclusion that the defendant's conduct constituted stereotyping in violation of Title VII. Others sought this benefit and failed to gain it. The challenge of explaining why some employers' gender-presentation demands are cast as unlawful stereotyping, while others encounter tolerance and indulgence to the detriment of plaintiffs in court, has proved formidable.

Rather than answer the question as paraphrased, I note the stakes. Even Stone's seemingly straightforward query about whether a stereotype is in play will not yield definitive answers, in part because stereotypes in the workplace require context to be intelligible. Take "charm school," for instance, where one of Ann Hopkins's supervisors said she needed to go.[208] A reference to charm can be gender neutral. Some men have it.[209] "Charm school," however, refers unambiguously to feminine artifice.[210] Only girls and women get told they ought to enroll there. All thirteen *Price Waterhouse* judges understood the gender subtext present—even Stephen Williams of the D.C. Circuit, who thought Ann Hopkins should have lost.[211] But is charm school, or needing to enroll in charm school, a stereotype? Whether this message matters to the outcome depends on whether one thinks Ann Hopkins had suffered unlawful discrimination at work in the first place.

5. Why did Justice Brennan choose to focus on stereotyping?

This question builds on the holding-or-dicta question above, but does not require acceptance of my "dicta" answer. Even if *Price Waterhouse* holds that stereotyping by an employer without more violates Title VII, Justice Brennan could have upheld the trial judgment in favor of Ann Hopkins without any reference to stereotyping. My tentative answer is that a condemnation of

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207. *Id.* at 635–55.

208. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

209. *See, e.g.*, MADAME D'AULNOY, THE BLUE BIRD (1697) (featuring as hero *Le Roi Charmant*, the Charming King); OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1890) (referencing Prince Charming).

210. *See* Melissa M. Beck, Note, *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 CARDOZO ARTS & ENT. L.J. 241, 248–49 (1994) (observing that charm school was imposed on female professional baseball players in the 1940s).

211. Hopkins v. Price Waterhouse, 825 F.2d 458, 475–76 (D.C. Cir. 1987) (Williams, J., dissenting).

stereotyping is appealing. William Brennan, a good vote counter,[212] probably knew it.[213]

Evidence that judges like the concept of stereotyping is copious. Consider the emergence of a judicial demand that age-discrimination plaintiffs identify a stereotype that harmed them, even though the statute imposes no such burden;[214] the acceptance of stereotyping as sufficient to fulfill the near-requirement, also judge made, that Title VII plaintiffs prove intentional discrimination;[215] and the rise of stereotyping as a strong legal claim post-*Price Waterhouse*, in an era when plaintiffs fared worse elsewhere in employment law.[216] As Valorie Vodjik has argued, a complaint that one has suffered from the application of a stereotype implicitly eschews radicalism. It says, in effect, "I was put in a wrong category," a much more conservative protest than a claim alleging subordination.[217] If the virtues of stereotyping as a technology of prejudice include plausible deniability and independence from human agency, as I have argued, then stereotyping offers a gentle label for misconduct. A factfinder can deem stereotyping actionable without applying blame to a person.

So understood, stereotyping in the workplace is not even evidence of wrongdoing in the sense of pointing factfinders toward one conclusion or another, but instead is a post hoc reinforcement of a position already taken. In contemporary case law it has become the pro-plaintiff counterpart of the pro-defendant "isolated incident," a term that does not refer to the number one, nor even legal insufficiency, but rather to a degree too small to impress the factfinder.[218] Courts and scholars denounce stereotyping when they mean to denounce unlawful discrimination or prejudice.[219] Their embracing of the word attests to its force. Observers who approve of a claim will focus on whatever stereotype is present in the story. Observers who believe a claimant suffered no actionable discrimination will ignore whatever stereotyping the plaintiff relates. Such an allegation would to them be idle and trivial, like saying the French are

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212. *See* Lithwick, *supra* note 37.

213. *See supra* note 126 (recalling decisional law about stereotyping by Justices O'Connor and Rehnquist). Brennan did not win Rehnquist's vote in *Price Waterhouse*, but near the end of his career Rehnquist published a firm condemnation of stereotyping. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (ascribing a policy as "not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work").

214. *See supra* notes 112–20 and accompanying text.

215. *See* Ann C. McGinley, *¡Viva La Evolucion! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 417 (2000).

216. *See supra* notes 167–76 and accompanying text.

217. *See* Vodjik, *supra* note 128; *see also* Case, *supra* note 103, at 1467–68 (reviewing Supreme Court decisional law invalidating "irrebuttable presumptions" about groups of individuals that was received as uncontroversial, perhaps even apolitical).

218. I elaborate on this point in Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 449 (1997) and Anita Bernstein, *Civil Rights Violations = Broken Windows:* De Minimis Curet Lex, 62 FLA. L. REV. 895, 922–25 (2010) [hereinafter Bernstein, *Civil Rights Violations*].

219. *See supra* Part II.C.

glad to die for love and delight in fighting duels.[220] Stereotyping has little bearing on a claim of discrimination unless one is inclined to accept the claim. For a factfinder so inclined, this label as conclusion can achieve a smooth repair.

IV. HOW LAW AND LEGAL INSTITUTIONS BUTTRESS WHAT IS WRONG: EXAMPLES

"The perfect stereotype" of "by nature formed a slave" generates an array of constraints, whereby stereotypes help to curb the unruliness ascribed to groups. Here I continue to press a distinction between prejudice on one hand and stereotyping on the other. Prejudice is the theory: It declaims the categorical inferiority of a group. Stereotyping is the technology. It enforces prejudice against groups by curbing the freedom of group members. Stereotyping fends off threats of disruption; it uses constraint to defend established distributions of power.

In this perspective, the legal remediation of stereotyping available through employment discrimination actions, discussed in the last Part, becomes an outlier. More often, the law will abet and strengthen stereotyping. Five examples in this Part illustrate the phenomenon of constraining stereotypes as they are supported, rather than resisted or redressed, by American law and legal institutions.

A. State-Enforced Impulse Control, Mainly But Not Only of African-American Men

Criminal law understands, sorts, and sanctions violent conduct under the influence of two familiar stereotypes. If black men are angry and women of all racial groups crazy, then the violence these persons initiate will be senseless, erratic, and unreasonable. Crediting stereotypes helps to condemn physically harmful behaviors by a woman or an African-American man, and condone the same behaviors when a white man engages in them.

Impulse control brings desirable consequences, of course. One might note what is right, so to speak, with stereotyping a potentially violent person as crazy or angry. Whenever this stereotype discourages individuals from resorting to bodily attack, people at risk of getting hurt become safer, costs of injuries to the larger society go down, and vulnerable observers like children gain instructive demonstrations of how to express anger without inflicting physical pain on another person. The problem is unequal treatment that follows from a counterpart to the stereotype. If femaleness or blackness makes a person crazy or angry, then the absence of these traits makes him rational, or his behaviors reasonable and comprehensible.

The notion that violent conduct might be reasonable and comprehensible underlies self-defense, the classic justification of Anglo-American criminal law. Self-defense posits that inflicting harm on another person can, under the right conditions, constitute admirable behavior. Whereas an excuse like intoxication or duress merely tolerates injurious conduct, a justification like self-defense extols

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220. *See supra* note 50 and accompanying text.

it.[221] Unstereotyped white men who commit violent acts and claim this privilege enjoy an apparent benefit of the doubt.

The much-reported death of an African-American teenager in 2012 offers a fraught illustration.[222] George Zimmerman killed Trayvon Martin inside a gated community and told Florida police that he had shot Martin to protect himself. Responding to protests about the lack of an arrest, the local chief of police spoke at a press conference. "Mr. Zimmerman has made the statement of self-defense," he said. "Until we can establish probable cause to dispute that, we don't have the grounds to arrest him."[223] Based on a 911 tape recording, however, the officers who had declined to make an arrest knew that Zimmerman, armed with a semi-automatic Kel-Tec pistol as he walked through the gated community, had initiated an encounter with Martin on hostile terms.[224]

The violence that emerged suggested self-defense as a justification less for the assailant than for the dead youth, who had been walking unarmed back from a convenience store when a stranger concluded he looked suspicious and questioned him aggressively. Case law holds that provokers of confrontations cannot claim self-defense unless they can establish that they had attempted to leave the fight before it escalated.[225] The retreat exception could have been present when Trayvon Martin died. George Zimmerman might have tried to disengage. If not, other circumstances might support the acquittal he won.[226] What matters for present purposes is the benefit of the doubt on justification that a person who was not African American received after he killed an African-American teenager.[227] This outcome at least aligns with, although one cannot say with certainty that it was caused by, a stereotype of black men and boys as violent and dangerous.

At around the same time as the death of Trayvon Martin, a Florida judge sentenced an African-American defendant named Marissa Alexander, who had

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221. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 242–43 (1982).

222. "If I had a son, he'd look like Trayvon," said President Obama when the news broke, making a rare public reference to race. Coates, *supra* note 31.

223. Paul Koring, *Killing of Black Florida Teen Puts 'Stand Your Ground' Law on Trial*, GLOBE & MAIL (Mar. 20, 2012), http://www.theglobeandmail.com/news/world/worldview/killing-of-black-florida-teen-puts-stand-your-ground-law-on-trial/article536252/.

224. A 911 dispatcher had asked Zimmerman if he was following Martin; when Zimmerman said yes, the dispatcher replied, "We don't need you to do that." Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 12, 2012, at A1.

225. Commonwealth v. Philistin, 53 A.3d 1, 12 (Pa. 2012); Hart v. State, 637 So. 2d 1329, 1336–38 (Miss. 1994); Blanchette v. State, No. 40A05-0806-CR-341, 2008 WL 4927056 at *1, *2 (Ind. App. Nov. 19, 2008) (unpublished table decision).

226. *See* Jackie Gingrich Cushman, *Why Are We So Divided on Zimmerman Verdict?*, DAYTON DAILY NEWS, Jul. 26, 2013, at A9 (exploring responses to this acquittal).

227. Zimmerman, though of multiracial origin, was the whiter of the two. *See generally* Manuel Roig-Franzia et al., *Who is George Zimmerman?*, WASH. POST, Mar. 23, 2012, at A1 (discussing Zimmerman's background).

fired what she described as a warning shot in self-defense into a wall in her home. Alexander was reacting to a battering husband who had just threatened to kill her. Nobody was hit; Alexander had no criminal record; the Florida "stand your ground" version of self-defense that protected George Zimmerman, enacted in 2005 and permitting deadly force with no duty to retreat, applied to her actions. After a jury found Alexander guilty she received a twenty-year prison sentence, a mandatory minimum.[228] In an interview the state attorney shrugged: Alexander "didn't show much of her being remorseful," nor of "being a peaceful person;" Alexander had fired a gun with two children in the house, a dangerous act[229]—as if the house, terrorized by a man who admitted in a deposition that he had beaten Alexander and abused "all five of his babies' mamas except one,"[230] had been safe before she undertook to defend herself.

Because self-defense claims stand or fall based on particulars, it is hard to draw an inference about groups from the divergent experiences of two individuals like George Zimmerman and Marissa Alexander. Unruliness as ascribed by stereotyping does, however, predict two consequences for self-defense claims—one for killers and one for persons killed. Killers are more likely to prevail when they are white or male rather than African American or female, because the actions of white persons and men are more likely to be perceived as orderly. As for persons killed, African-American men combine the unruliness of the angry-crazy stereotype with perceived or real physical strength not attributed to women, and so killing them in self-defense is especially likely to look reasonable.[231] Evidence supports both predictions,[232] and a 2012 review of Florida case results found that "stand your ground" stances exonerated killers especially effectively when the person killed was black.[233]

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228. Trymaine Lee, *Marissa Alexander Sentenced: Florida Mom Who Shot at Abusive Husband Gets 20 Years in Prison* (May 11, 2012, 10:29 AM), http://www.huffingtonpost.com/2012/05/11/marissa-alexander-sentenced_n_1510113.html.

229. *Id.*

230. *Id.*

231. *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

232. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 206 (1988) (noting successful references to race in a notorious claim of self-defense by a white male shooter); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 207 (1989) (noting that black women fare worse than white women when claiming self-defense in homicide prosecutions); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J. L. & GENDER 237, 249–65 (2008) (describing gender bias in judicial interpretations of the doctrine).

233. Kris Hundley et al., *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law is Applied*, TAMPA BAY TIMES, June 1, 2012, 1A (finding that when the killed person was black, 73% of the killers received no penalty, but when the killed person was white, this success rate went down to 59%). "Stand your ground" played an ambiguous role in the trial of George Zimmerman for the killing of Trayvon Martin. Randy Schultz, *Stand Your Ground?*, RECORD-J., Aug. 4, 2013, at D2 (noting that this phrase "was not invoked at trial but influenced the jury instructions").

As the federal appellate judge Nathaniel Jones has argued in an essay about this privilege, self-defense in the nineteenth century functioned to safeguard the prerogative of white men to control unruly men of color. Prior to the emancipation of enslaved persons in the United States, Jones notes, "[t]he usual pretext for killing a slave [by a slave holder was] that the slave has offered resistance."[234] Provocation, another doctrinal support for the choice to kill a person, "began as a common law doctrine about men defending their honor" against disruptors.[235] Violence when condoned this way appears necessary to repair "breaches of honour" and thus restores, rather than threatens, order.[236]

There is no reason to suppose that men in contrast to women, or white persons in contrast to black persons, should enjoy an enlarged privilege to deploy violence at their discretion. Neither men nor white persons have shown any propensity for inflicting harm in uncommonly prudent or defensible ways. White men are massively overrepresented in the grisly roster of mass shooters.[237] According to the FBI, men also dominate the ranks of serial killers, and a large proportion of these men are white.[238]

When a white man kills, he is more likely than his African-American or female counterpart to receive sympathy from observers who say, in effect, that they can relate. He'd been spurned; he'd suffered trauma;[239] he deserves the

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234. Nathaniel R. Jones, *For Black Males and American Society—the Unbalanced Scales of Justice: A Costly Disconnect*, 23 CAP. U. L. REV. 1, 4 (1994) (quoting FREDERICK DOUGLASS, NARRATIVE OF AN AMERICAN SLAVE 205 (1973)).

235. Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 31 (2006) (citing Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 312–13 (1963)).

236. *Id.* at 31 n.17.

237. Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 27, 2013, 7:32 PM), http://www.motherjones.com/politics/2012/07/mass-shootings-map (examining 61 mass murders that were carried out with firearms in the last 30 years).

238. U.S. DEP'T OF JUSTICE, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS (2008), *available at* http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf. Unlike a mass shooting, a serial killing can escape detection, especially if victims are elderly or ill, and so women might be committing countless homicides that never manifest as crimes. Accordingly I do not claim that women are less deadly than men, only that men have not manifested any greater competence than women to deploy violence in socially useful ways. Nor have white persons as compared with African-American persons manifested such competence. On the race of serial killers, see *id.* at 4 ("The racial diversification of serial killers generally mirrors that of the overall U.S. population.").

239. A mass shooting in 1999 brought out sympathetic rationales in droves:

> The main one was that [the two white male perpetrators] were the victims of brutal high school bullies. They were social outcasts, persecuted by the jocks and the popular kids. But there were other theories afloat: they'd fallen in with a sick Goth subculture; they were neglected by their families; they were influenced by violent video games; they were misfits who could find no place in a conformist town.

benefit of the doubt.[240] Women and African-American men who kill do not win this much warmth: The kindest response they attain laments what observers suppose is their neglected mental illness.[241] Angry-crazy stereotypes applied indirectly to a white man imply that this killer, by virtue of not being a member of an angry-crazy cohort, must have had his reasons for killing.

The inverted stereotype that regards white men as rational creatures whose choices to engage in violence are understandable helps to generate and strengthen social and legal consequences. Take the regulation of firearms, for example. Whereas rights accepted in the United States are generally stated in negative terms—freedom from encroachments rather than any freedom to have something (such as education, housing, or a guaranteed minimum income)—the prerogative to control a rifle powerful enough to eliminate delay in reloading while shooting is an exception, understood as a right rather than a high-risk privilege.[242] Opponents of what is known as gun control, rather than the more neutral-sounding gun regulation, interpret interference with the opportunity to acquire a firearm as a judgment from the state that putative gun-keepers cannot be trusted to manage a dangerous instrument with care and ought to be constrained.

Contemporary gun-control measures do not exempt white people or men from their constraints, and so do not honor the inverted stereotype that valorizes white men as uncommonly rational. Thus they withhold a long-established and familiar privilege. It becomes unsurprising that white men in the United States favor gun rights and resist gun control initiatives more than their black and female counterparts.[243] They have more to lose.[244] Gun control takes away a distinction

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David Brooks, *The Columbine Killers*, N.Y. TIMES, Apr. 24, 2004, at A17 (reporting the refutation of these responsibility-shifting speculations). *See also* Sean D. Hamill, *Gunman Drew Dark Portrait of Loneliness Before Shooting Women*, N.Y. TIMES, Aug. 6, 2009, at A18 (attributing a mass shooting by a white man to rejection from Pittsburgh women).

240. For example, when the South African athlete Oscar Pistorius killed his girlfriend, one reporter promptly gave credence to the possibility that Pistorius had mistaken his victim for an intruder "in an apprehensive, armored country," even though the police had scoffed at that possibility. Jeré Longman, *Pistorius Has Inspired and Divided*, N.Y. TIMES, Feb. 15, 2013, at B11.

241. I reviewed mainstream media sources. One exception to the racial generalization was Jovan Belcher, an African-American football player who killed his girlfriend and then himself; he too won some empathy. One journalist suggested that the victim's having stayed out the night before without approval from Belcher amounted to something like provocation. Glenn Rice, *Chiefs Linebacker Jovan Belcher Kills Girlfriend, Then Himself*, KAN. CITY STAR, Dec. 1, 2012, http://www.kansascity.com/2012/12/01/3943246/chiefs-player-kills-girlfriend.html (noting that a quarrel "likely continued later Saturday morning, resulting in Belcher shooting Perkins").

242. Here I refer to automatic weapons on the assumption that individuals who have "the right to bear arms," U.S. CONST. amend. II, do not necessarily have a right to own every possible type of armament. *See* Jennifer Steinhauer, *Pro-Gun Voices in Congress Are Open to Bullet Capacity Limits*, N.Y. TIMES, Feb. 19, 2013, at A1 (reporting willingness to regulate high-capacity magazines among members of Congress who favor gun rights).

243. *Wide Partisan Gap Exists over Gun Control*, PEW RESEARCH CTR. (Dec. 31, 2012), http://www.pewresearch.org/daily-number/wide-partisan-gap-exists-over-gun-

from white men that it cannot take from people who have already been labeled unruly by stereotyping.

Drug policy is another state constraint that presumes black men to be violent and unruly. The gap between recommended prison sentences for possession of crack cocaine as compared to the powder kind has received extensive attention in law reviews.[245] Heavier penalties for crack are commonly attributed to the much-publicized death of African-American college basketball star Len Bias in 1982.[246] That the aptly named Bias actually overdosed on powder cocaine supports an inference of racial prejudice behind the statutory sentencing disparity,[247] as does the lack of any specific findings about crack when Congress and the Sentencing Commission first acted.

The race scholar David J. Leonard has freshened this familiar critique, noting that while drug law enforcement chases African-American offenders and locks them up, their white peers consume illegal drugs more.[248] Young white users also enjoy their own subset of drug decriminalization: Two of their favorite substances, marijuana and unprescribed attention-deficit medication, are unlawful de jure but condoned de facto.[249] No stereotype of a marauding abuser interferes with their freedom to pursue the pleasure, release, and advantages they want.

B. "Undue Influence and the Homosexual Testator": Gay Means Predatory

Decades ago the trusts and estates scholar Jeffrey Sherman, reviewing case law, speculated that "courts might be more inclined to strike down a will that bequeaths an estate to a testator's homosexual lover than one that leaves the estate to a testator's spouse or heterosexual lover."[250] Sherman worked with an admittedly small data set: four published decisions, one of which upheld the will in question. He nevertheless concluded that "the lover-legatee of a homosexual

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244. *See generally* Rachel Kalish & Michael Kimmel, *Suicide by Mass Murder: Masculinity, Aggrieved Entitlement, and Rampage School Shootings*, 19 HEALTH SOC. REV. 451 (2010) (arguing that mass shooters who kill themselves believe that their final action is justified and necessary for themselves as men).

245. The most prominent article is David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287–91 (1995). *See also* Kyle Graham, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765 (2011); Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 507–13 (2012).

246. Ryan E. Brungard, Note, *Finally, Crack Sentencing Reform: Why It Should Be Retroactive*, 47 TULSA L. REV. 745, 745–46 (2012).

247. *Id.* at 745.

248. David J. Leonard, *Preventing the Rise of Pothead U.*, CHRON. HIGHER EDUC. (Jan.2, 2013, 3:29 PM), http://chronicle.com/blogs/conversation/2013/01/02/preventing-the-rise-of-pothead-u/ (citing federal government statistics).

249. *Id.*

250. Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227 (1981).

testator faces a more difficult task at probate than does his heterosexual counterpart."[251]

Undue influence is a bold accusation—hard to prove, at least in principle, because of a premise that it does not commonly occur. It demands a showing of more than mere pressure. As explained in the current *Restatement of Property*, those who object to a donative transfer like a will must persuade the court that "a wrongdoer" exerted influence that "overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[252] If speaking truthfully, the unduly influenced testator would acknowledge that the action taken in the challenged disposition was "not my wish, but I must do it."[253] Not because all human beings lack free will, but because of extraordinary intervention from another person. The intentional substitution of one mind for another (assuming it happens at all) has to be rare. And yet the doctrine flourishes, invalidating testamentary instruments. It functions to keep inheritances "within relationships fitting preconceived social norms."

Seeking "the dominant paradigm" of undue influence doctrine, another trusts and estates scholar, Ray Madoff, finds this quintessence in *In re Will of Kaufmann*,[254] one of Sherman's four cases.[255] Robert Kaufmann prepared wills and took out life insurance favoring his lover, Walter Weiss, at the expense of his brother and two nephews. Three courts in New York agreed the will resulted from undue influence even though Kaufmann had written eloquently for years about his deep affection for Weiss.

The Appellate Division appeared offended—rather than persuaded that authentic testamentary intent must have been present—by a letter wherein Kaufmann expressed gratitude to Weiss who, "after so many wasted, dark, groping, fumbling immature years," had helped Kaufmann to attain "a balanced, healthy sex life which before had been spotty, furtive and destructive" and caused him, as Kaufmann concluded, "to be reborn and become adult!"[256] This paean, sniffed the court, conveyed not testamentary intent but "gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."[257] Back in New York's pre-Stonewall 1964, a man's open ardor for a man sounded unnatural. From there, influence becomes undue.[258]

The stereotype here, I suggest, associates homosexuality with predation. Persons of this sexual orientation—women as well as men[259]—appear dangerous:

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251. *Id.* at 246

252. RESTATEMENT (THIRD) OF PROP.: WILLS DON. TRANS. § 8.3 (2003).

253. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 579 (1997).

254. *In re* Will of Kaufman, 247 N.Y.S.2d 664 (App. Div. 1964).

255. Madoff, *supra* note 253, at 592.

256. *In re* Will of Kaufman, 247 N.Y.S. 2d at 671.

257. *Id.* at 674.

258. Madoff, *supra* note 253, at 592.

259. *See* JAYE ZIMET, STRANGE SISTERS: THE ART OF LESBIAN PULP FICTION 1949–1969 (1999).

What they do is judged as vulpine, seductive, manipulative, or rapacious. Although applications of this stereotype abound outside the law, we focus here on legal consequences beyond "undue influence and the homosexual testator," the earliest discussion of this stereotype published in the law reviews. Judges have agreed that the predatory stereotype has resulted in detriments that warrant relief in the courts. Scholars have gathered other under-remedied consequences, supporting them with evidence.

A sampling: Cliff Rosky has argued that the predatory stereotype causes judges to discriminate against gay fathers in custody disputes.[260] To Dennis Golden, the federal policy refusing to recognize same-sex couples as entitled to immigration benefits that are available for natal family members and opposite-sex spouses rests in part on "the 'pied piper' stereotype" of homosexual persons as recruiting the innocent into their ranks.[261] Diane Mazur, reviewing the legislative history behind Don't Ask, Don't Tell, enacted by Congress in 1993, concluded that fear of predatory gay servicemen was central to the stance.[262] "The gay panic defense" has been "relatively success[ful]" in bolstering claims of insanity, diminished capacity, provocation, and self-defense by individuals who responded violently to homosexual advances; according to Cynthia Lee, this defense rests on "negative stereotypes about gay men as sexual deviants and sexual predators."[263]

The predatory stereotype constrains heterosexually oriented women as well as gay men. Asian-American women in the United States face a "dragon lady" construct that attributes deceit, manipulation, and erotic power to them along with predation.[264] One of two stereotypes that undermine the credibility of rape complaints, the seductress who invited the assault that she experienced "through [her] provocative clothing or behavior,"[265] brings us to our next example of law-buttressed constraint.

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260. *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 286–94 (2009).

261. Dennis A. Golden, *The Policy Considerations Surrounding the United States' Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting Families Act*, 18 KAN. J.L. & PUB. POL'Y 301, 306–07 (2009).

262. Diane H. Mazur, *Re-making Decisions on the Basis of Sex: Must Gay Women be Admitted to the Military Even if Gay Men Are Not?*, 58 OHIO ST. L.J. 953, 989 (1997).

263. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475–76 (2008).

264. Renee E. Tajima, *Lotus Blossoms Don't Bleed: Images of Asian Women*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 309 (Asian Women United of California eds., 1989). The television drama Ally McBeal featured the dragon lady stereotype via a character named Ling Woo, a sexually predatory lawyer played by Lucy Liu. Tracey Owens Patton, *Ally McBeal and Her Homies: The Reification of White Stereotypes of the Other*, 32 J. BLACK STUD. 229, 250–52 (2001).

265. Juliana Breines, *She Asked For It: The Impact of Rape Myths*, PSYCHOLOGYTODAY.COM (Nov. 5, 2012), http://www.psychologytoday.com/blog/in-love-and-war/201211/she-asked-it-the-impact-rape-myths.

C. Disbelieving Women

Women's complaints about sex-related injuries—rape and sexual harassment in particular—encounter hostile disbelief with the help of stereotyping. Once again the Old Testament has a stereotype tale to tell.[266] Late in the book of Genesis, the unnamed wife of one Potiphar propositioned Joseph, hero of the chapter. When Joseph declined this offer, the spurned Mrs. Potiphar took revenge by falsely accusing Joseph of attempting to rape her.[267]

An ancient and unverified anecdote, of course, but the trope of this particular false accusation continues to occupy American law. For rape, and no other crime, the Model Penal Code demands a prompt complaint, in effect a very short statute of limitations.[268] Like much of the Model Penal Code, this provision does not appear in the law books of most states, but a few jurisdictions impose a prompt complaint rule for marital rape.[269]

The crazy-female accuser stereotype emerges with particular clarity in venerable writing about rape and juries. "No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician," wrote the dean of American evidence, John Henry Wigmore.[270] The Model Penal Code is meeker, saying only that "the jury [in a rape case] shall be instructed to evaluate the testimony of a victim or complaining witness with special care," because the witness brings "emotional involvement" to the trial, and it is hard to know "the truth with respect to alleged sexual activities carried out in private."[271]

Women in sexual assault cases, according to this application of the crazy stereotype, lie "for all sorts of reasons . . . and sometimes for no reason at all."[272] Michelle Anderson, seeking explanations, finds influence on the law from Sigmund Freud and his acolytes. The path has tangles: Freud did claim that women are masochistic, but never wrote that they purposefully lie about being raped. It took a follower, Helene Deutsch, to propose that masochism causes women to fantasize longingly about a violent attack.[273] For Wigmore, women who accuse

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266. *See* Frank, *supra* note 61 (noting exegesis on Genesis that blames Eve for the Fall).

267. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 945–46 (2004) (quoting Genesis 39:1–20).

268. *Id.* at 947–48.

269. Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 283–84 (2007). The period is especially short in South Carolina, thirty days. *Id.* at 283.

270. 3 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW 924a (3d ed. 1940).

271. Anderson, *supra* note 267, at 949 (quoting MODEL PENAL CODE § 213.6(5)).

272. COOK & CUSACK, *supra* note 8, at 16–17 (discussing the English case of R. v. Henry and Manning).

273. Anderson, *supra* note 267, at 983 n.224 (quoting HELEN [sic] DEUTSCH, THE PSYCHOLOGY OF WOMEN 274 (1944)).

men of rape are just plain sick in the head: "Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions."[274]

In December 1983, the Federal Bureau of Investigation asked the Philadelphia police department why it had dismissed fifty-two percent of rape claims—an extraordinarily high percentage—as unfounded in the first half of the calendar year. The department replied with several variations on a theme of crazy. Women accuse men falsely of rape, it said, for revenge and to make men feel guilty. Girls lie about rape for reasons known only to themselves. In a semi-rational category were lies by young women to cover up misbehaviors like truancy, while adult women, according to the report, lie about rape to cover up misbehaviors like adultery. The department also said that some lies stem from the liars' eccentric belief that claiming rape entitles a victim to an abortion or the morning-after pill free of charge.[275]

Preoccupation with the dangers of false accusation, at the expense of concern with the wrongs that accusers allege, pervades other legal responses to sex-related harms. One study of hostile-environment sexual harassment reported a perception that complaints harm the careers of complainants more than the individuals they denounce.[276] Stereotyping a sexual harassment accuser as either crazy—that is, hypersensitive, delusional, overreacting—or predatorily determined to destroy an innocent person offers a quick route to disbelieving her. The extensive literature that deems recovered memories of sexual assault unreliable[277] might rest on good science, but it too comports with the crazy/predatory woman stereotype. Similarly, a study of reports of sexual abuse by children and adolescents—another setting in which the majority of accusers are female—concludes that these claims are received with more skepticism than they warrant.[278]

D. Domestic Violence Stereotypes

Domestic violence is a locus of stereotypes that, with the cooperation of law, constrain individuals. Here are three examples subdivided with reference to the constraints they impose.

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274. *Id.* at 983.

275. Stephanie Hallett, *Do Women Lie About Rape?*, MS.BLOG (Apr. 7, 2011), http://msmagazine.com/blog/2011/04/07/do-women-lie-about-rape/ (last visited Aug. 24, 2013).

276. Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177 (2000).

277. *See* TRUE AND FALSE RECOVERED MEMORIES: TOWARD A RECONCILIATION OF THE DEBATE 1 (Robert F. Belli ed., 2012) (adverting to "the so-called memory wars").

278. Mark D. Everson & Barbara W. Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 230, 230 (1989).

1. Exclusion from Legal Benefits

It may sound perverse to speak of the benefits of domestic violence, but this legal label grants extra protections to some of its victims. The federal Violence Against Women Act funds a national hotline and interstate enforcement of protection orders.[279] State legislation singles out this type of violence for extra attention by providing for "mandatory arrest, primary aggressor language in mandatory arrest statute[s], warrantless arrest, mandatory arrest for restraining order violation, requirement[s] that spousal abuse be considered in custody determinations, mandatory police training, and mandatory statewide data collection."[280]

Stereotyping enters this picture when state laws determine who does and does not qualify for the benefits of warrantless arrest, civil protection orders, and enhanced criminal penalties. These statutory schemes often exclude victims who do not cohabit with the people who battered them (even though one subset of this noncohabitant group, pregnant women, face a high risk of violence at the hands of their partners), persons in same-sex relationships, and poor women who lack the means to form bourgeois households and live instead in dwellings for transients.[281] Stereotypes about domesticity welcome some victims into the privileges of legally recognized family violence and close others out.

2. Racial Exclusion from the Battered Woman Syndrome

Another "benefit" related to domestic violence is the battered woman syndrome, which can provide a basis for acquittal after a woman kills a person who has been beating her. The battered woman syndrome posits a cycle of violence and coercive control permeating a relationship such that, contrary to standard self-defense doctrine, a woman might believe it necessary to kill even when her batterer is unconscious.[282] In addition to offering a defense at trial, this syndrome can support post-conviction relief.[283]

Critics have observed that racial stereotyping lessens the value of battered woman syndrome for African-American defendants. As the leading theorist of this condition, Lenore Walker, has noted, black women are more likely than their white peers to be convicted of killing their abusers. Walker speculates that a woman claiming this syndrome must present herself as motivated by fear rather than anger, a challenge for black people who live under the stereotype that they are more angry than fearful.[284]

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279. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 188 (2000).

280. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1854–55 (2006).

281. *Id.* at 1857–79.

282. *See generally* WALKER, *supra* note 232 (describing the syndrome).

283. Erin Liotta, Commentary, *Double Victims: Ending the Incarceration of California's Battered Women*, 26 BERKELEY J. GENDER L. & JUST. 253, 253 (2011).

284. WALKER, *supra* note 232, at 201–06.

A key element of the syndrome, "learned helplessness," explains why victims respond passively to abuse.[285] Stereotyped as "domineering, assertive, hostile, and immoral" rather than passive, African-American women may to a jury look like the very antonym of helpless even if they were emotionally frail when they killed.[286] Claiming battered woman syndrome is extra costly and difficult for a black defendant who may, for instance, need an additional expert "to testify as to how the mythology concerning African-American women operates;" this burden does not disappear when black people are among the jurors.[287] One commentator concludes that "African American women stand before the court without the same defense readily available to white women."[288]

3. Constraint for Crazy Liars Redux

"Open a loophole for one woman to kill an abusive spouse and pretty soon you've got dozens of dead husbands," an Iowa journalist wrote after the trial of a battered woman for whom the "loophole" did not ward off a fifty-year prison sentence.[289] "You'll open the door to allow any woman to kill a man she doesn't like, and get away with it!" cried a prosecutor when Lenore Walker proposed to testify about battered woman syndrome.[290] Criminal law scholars have joined this chorus doubting women's veracity.[291]

Any justification for homicide can be abused, and self-defense lives with the reality that dead people cannot refute what living people say about them. This concern does not occupy writing about the defense generally:[292] Observers appear confident that individuals not identified as female will use their privilege prudently enough. Unlike battered women, these other killers are presumed not unruly. As

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285. *See generally* Martin E.P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407 (1972) (describing laboratory findings).

286. Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 204 (1991).

287. Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1072–73 (1995).

288. Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 336 (1995).

289. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 302 (2007).

290. WALKER, *supra* note 232, at 33.

291. "Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband." FLETCHER, *supra* note 232, at 21. Allowing a battered woman to kill her sleeping abuser, writes Joshua Dressler, risks "coarsening . . . our moral values about human life" and even condones "homicidal vengeance." Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 458 (2006).

292. Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 557 (2007).

defense lawyer Michael Dowd has observed, however, it is men rather than women who behave as if they enjoy a license to kill their partners for no good reason.[293]

Similarly, the perennial "Why didn't she leave [rather than kill her batterer]?" implicitly accuses a battered woman of at best irrational conduct, if not premeditated murder. It is yet another expression of the crazy-predatory stereotype. Researchers have known for decades that attempting to leave an abusive partner greatly increases the risk of violence at his hands,[294] making the decision to stay rational. Other good reasons for staying also exist.[295] The rhetorical question nevertheless lingers. Its effect on outcomes in court cannot be measured, but it likely accounts for part of the high odds that a battered woman who kills her batterer will be convicted.[296]

E. Brutes

In the first two-thirds of the twentieth century, the infamous reserve clause of baseball stereotyped players as not fully human. Owners of professional teams, immune from antitrust laws, could conspire to "buy, trade, or sell a player as if he were a surplus box of bats."[297] Invoking the reserve clause in a routine trade, the Cardinals in 1969 ordered outfielder Curt Flood to leave his home and report for work in a distant city.[298] Flood had started two businesses in St. Louis and put down roots there. "After 12 years in the major leagues," he wrote to

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293. When the 1970s and 80s marked a 26 percent drop in the number of men killed by their intimate partners, researchers credited the increased availability of shelters, pro-arrest policies, and crisis hotlines. Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 5 (1993). During this period, women experienced no such reduction in their rates of deadly intimate violence. *Id.* at 5. Dowd concludes that a significant percentage of women, but not men, will refrain from killing their same-sex partners if they feel they have a reasonable route out of the relationship. *Id.*

294. *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 107 (1992).

295. Laurie S. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 2 (2001) (listing six possible reasons).

296. *See* Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 52 (1994) (suggesting that because they think a rational person would have left, jurors disbelieve the testimony of battered women). On the odds of a loss at trial, see ELIZABETH ANN DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 29 (2002) (noting that 72–80 percent of women accused of killing abusive partners are convicted or accept a plea, "and many receive long, harsh sentences").

297. David Mandell, Book Review, FLA. BAR J., Oct. 1, 2007, at 68–69 (reviewing BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS).

298. Management did not even give Flood the order directly; Flood heard the news when a sportswriter phoned him. BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 1 (2006).

baseball commissioner Bowie Kuhn, "I do not feel that I am a piece of property to be bought and sold irrespective of my wishes."[299]

A journalist asked Flood how the then-large salary of $90,000 a year could feel like "slave wages," and challenged him, "What's your retort to that?" Curt Flood spoke the word at the center of this Article. "A well-paid slave is nonetheless a slave." Flood's characterization of the reserve clause went over badly, offending the public.[300] He lost in the courts and died in 1997, never having profited from what tellingly became known as free agency.[301]

Since then, professional athletes negotiate lucrative contracts and yet the brute stereotype endures. Baseball rules, for example, still control what individual players can receive: "Free agency" does not cover all participants and does not permit the range of agreements that unfettered bargaining would yield.[302] One book about baseball salaries devotes a chapter to "those ballplayer characteristics that most bother the fans—ingratitude, lack of courtesy, and disloyalty,"[303] a recitation that recalls the old race-tinged adjective "uppity." Why participants in a labor market may not push for high returns—and to whom ballplayers have failed to render the gratitude, courtesy, and loyalty they owe—is not answered. Union leader Marvin Miller, ranked alongside Jackie Robinson and Babe Ruth as among the three most important persons in baseball history, strengthened pensions and collective bargaining in American football, basketball, and hockey as well as baseball.[304] Team owners, unwilling to forgive these victories against the constraint of ascribed brutishness, continue to exclude Miller from their Hall of Fame, a monument that houses countless undistinguished owners, managers, and commissioners.[305]

Most notoriously at its professional level but also in the versions that younger people play, football enforces the brute stereotype with spectacular disregard for the brains of participants. The average tenure in the National Football League is four years—a brief span replete with battery, head trauma, playing while injured, and fighting to keep one's place on a team.[306] A study of 3,439 retired football players found them "three or four times more likely" than nonplayers to

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299. David Margolick, *Fielder's Choice*, N.Y. TIMES, Oct. 8, 2006, at BR17.

300. *Id.*

301. SNYDER, *supra* note 298, at 346.

302. Players are not eligible for free-agent status until they have worked in the major leagues for six years, and rules limit dealings between teams and free agents. James Lincoln Ray, *Baseball Free Agency Rules*, SUITE101 (Feb. 23, 2008), http://suite101.com/article/baseball-free-agency-rules-a45604.

303. ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION xviii (2000)

304. Peter Dreier & Kelly Candaele, *Marvin Miller, Led Baseball Players to Free Agency*, THE JEWISH DAILY FORWARD (Dec. 4, 2012), http://forward.com/articles/167146/marvin-miller-led-baseball-players-to-free-agency/?p=all.

305. *Id.*

306. GAY CULVERHOUSE, THROWAWAY PLAYERS: THE CONCUSSION CRISIS FROM PEE WEE FOOTBALL TO THE NFL 4–7 (2012).

die of brain diseases.[307] Chronic traumatic encephalopathy is just one of the game's many ravages, but it is a particularly telling one for how it holds an athlete's mind and personality in such low regard. Without the brute stereotype that casts the bodies of football players as "throwaway,"[308] simple suggestions for increasing safety on the field would have been investigated long ago,[309] and players would enjoy a level of freedom and prerogative comparable to that of other workers.[310]

The stereotype also flourishes in undergraduate athletics. Similar to the notorious reserve clause that used to prevent baseball players from asserting their interests, a National Collegiate Athletic Association ("NCAA") bylaw forbids student athletes from working with an agent.[311] They apparently must take what their acquirers give them: they are objects, not subjects. They may not sell trinkets like championship rings and trophies.[312] Another NCAA rule forces athletes to do all their eating thrice daily at the table—no snacks, no carrying anything away—even though a single basketball practice can burn 2500 calories and the famed swimmer Michael Phelps found it impossible to maintain his weight when training if he did not eat seven meals a day.[313] Student athletes may not receive a salary for the labors they render: what schools describe as full scholarships force many of them to live at the poverty line, while the coffers of their athletic programs

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307. Kevin Cook, *Dying to Play*, N.Y. TIMES, Sept. 12, 2012, at A31. *See also NFL, Players Agree to Settle Concussion Lawsuit*, CHI. TRIB., AUG. 29, 2013 (reporting $765 million settlement to redress players' brain injuries).

308. *See* CULVERHOUSE, *supra* note 306; *see also* Malcolm Gladwell, *Offensive Play*, NEW YORKER (Oct. 19, 2009), *available at* http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell?currentPage=all (analogizing professional football to dogfighting).

309. One football blog, for example, proposes making helmets and padding much lighter, arguing that football might achieve the safety level of rugby. *See Want to Make Football Safer? . . . Eliminate Helmets*, SB NATION (Feb. 16, 2013, 11:45 AM) http://www.hogshaven.com/2013/2/16/3995210/want-to-make-football-safer-eliminate-helmets. *See also* Tim Stevens, *Rule Changes That Might Make Football Safer* NEWS OBSERVER (Feb. 12, 2012), http://www.newsobserver.com/2012/02/12/1848304/rule-changes-that-might-make-football.html (listing several ideas).

310. [F]ootball's labor history is the most shameful in professional sports. The contracts still aren't real. They're not guaranteed. They are team options and nothing more. There is no such thing as free agency. Star players rarely get to choose the team that they play for; teams can 'franchise' them and use other measures to prevent players from ever becoming free agents.

E-mail from Brad Snyder, Assistant Professor of Law, University of Wisconsin Law School, to Anita Bernstein, Jul. 28, 2013 (on file with Author).

311. NAT'L COLLEGIATE ATHLETIC ASSOC. BYLAW 12.3 (1996).

312. Luke McConnell, *NCAA Places Unfair Restrictions on Student Athletes*, THE OKLAHOMA DAILY (Aug. 23, 2011), http://www.oudaily.com/news/2011/aug/23/column-ncaa-places-unfair-restrictions-student-ath/.

313. *Hungry Athletes: NCAA Rules Limit Players' Food Intake*, SPORTINGNEWS NCAABB (Dec. 25, 2012, 5:12 PM), http://aol.sportingnews.com/ncaa-basketball/story/2012-12-25/hungry-athletes-ncaa-rules-limit-players-food-intake.

overflow.[314] Resistance in court, according to a newspaper columnist, is futile: "Athletes almost never win lawsuits against the N.C.A.A."[315]

How much brutality can accompany the brute stereotype is a question explored by the historian Claire Potter on the death of the celebrated University of Texas football coach Darrell Royal. According to the record Potter reviews, in the 1960s Royal would get rid of unwanted players by forcing them to pummel one another in protracted drills until they either quit in severe pain, forfeiting their scholarships, or could no longer play.[316] One of his players, who had published a book exposing Royal's practices, died schizophrenic on the streets of Dallas.[317]

Darrell Royal's objection to racial integration points up a connection between the stereotyping of athletes and of African-American nonathletes as well:[318] The brute stereotype has been applied to both groups. One of the earliest attempts to gain judicial condemnation of stereotyping away from Title VII, *United States v. Hendry County School District*,[319] featured an argument by plaintiffs that the defendant school district had rearranged its programs so as to cluster "what blacks do best"—vocational training, special education and pre-school acculturation classes—at a historically all-black grade school [320] All three programs lie outside mainstream education; they regard the student as a young brute who needs constraint to become a docile, tractable, and moderately productive low-level worker. Siding with the school district,[321] the court may have sided with stereotyping.

V. THE CONSTITUTIONAL LAW OF STEREOTYPING

Two amendments to the U.S. Constitution speak to the problem of stereotyping, although they probably do not prohibit it. When stereotyping constrains, it lessens human freedom and thus falls within the ambit of what the

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314. RAMOGI HUMA & ELLEN STAUROWSKY, NATIONAL COLLEGE PLAYERS ASS'N., THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4 (2011); *see also* Dave D'Alessandro, *Lawsuit Filed by Former Nets Forward Ed O'Bannon Threatens NCAA's Economic Model*, NEWARK STAR-LEDGER (Mar. 28, 2013), http://www.nj.com/ledger-dalessandro/index.ssf/2013/03/lawsuit_filed_by_former_nets_forward_ed_obannon_threatens_ncaas_economic_model.html (noting that a former NCAA executive director wrote that the NCAA has "a plantation mentality").

315. Joe Nocera, *Academic Counseling Racket*, N.Y. TIMES, Feb. 5, 2013, at A23. An antitrust class action brought against the NCAA by student athletes was faring well, however, when this Article went to press. *See The College Athletics Business: Basket Cases*, ECONOMIST, Jul. 27, 2013, at 75 (reporting a successful motion to expand a putative class to include current athletes).

316. Claire Potter, *The Tributes to Darrell Royal Avoid an Uglier History*, TENURED RADICAL (Nov. 11, 2012, 10:23 AM), http://chronicle.com/blognetwork/tenuredradical/2012/11/4104/.

317. *Id.*

318. *Id.* (stating that Royal used racial epithets against opposing teams and kept a black letterman off the Longhorns until 1970).

319. 504 F.2d 550 (5th Cir. 1974).

320. *Id.* at 553–54.

321. *Id.*

Thirteenth Amendment set out to repair. Another mandate for change comes from the role of state action in the harms catalogued in the last Part. Arguments from the Thirteenth and Fourteenth Amendments must be applied to stereotyping with care, of course. This Part considers them not as imperatives for judges to apply, but as constitutional supports for rectification work ahead.

A. The Constraint of Stereotyping in Modern Thirteenth Amendment Perspective

Like their precursors in ancient Athens, slaveholders in the United States once craved the comfort of Aristotle's "by nature formed" to explain and justify their status as masters. Because they needed to know why slaves were slaves, "the image of the thrall as nasty, ugly, foul, stupid, cowardly, and inferior" duly arose.[322] Eighteenth- and nineteenth-century rationales for slavery included other elements (notably references to Scripture), but at their core was the inferiority of persons enslaved. Proslavery thought of the era flourished particularly in the South. It also took root away from this region.[323]

One infamous rationale, articulated by U.S. Senator James Henry Hammond in 1858, found a metaphor for slavery in architecture. A mudsill rests at the low level of a foundation, holding up a building. For Hammond, slavery was the mudsill. Though inferior to white persons, he explained, the slave race of the South was nevertheless "eminently qualified in temper, in vigor, in docility, in capacity to stand the climate" to do the work of holding up civilization.[324] Nature helped: Slaves were too "happy, content, unaspiring, and utterly incapable, from intellectual weakness, ever to give us any trouble by their aspirations."[325] Of course, American slave masters did not put full trust in this "unaspiring" state. They installed shackles, both literal and legal, to tighten their constraint on their slaves, and they waged an extraordinarily bloody war trying to preserve the institution.

Something more urgent than a threat to property must have been at stake for the Confederate side in the Civil War. Most of its warriors who volunteered for the cause came from families that did not own slaves.[326] They signed up for a high risk of dying: Hundreds of thousands of Confederate soldiers did not return alive. Holders of mere chattel walk away from what they possess when the price of defending it grows this high. The Civil War revealed a desire to maintain constraint of the unruly at an extraordinarily high price. The persistence of

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322. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 249 (1982).

323. *See* PAUL FINKELMAN, DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH (2003); DREW GILPIN FAUST, THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860 (1981).

324. SELECTIONS FROM THE LETTERS AND SPEECHES OF THE HON. JAMES H. HAMMOND, OF SOUTH CAROLINA 318 (John F. Trow & Co., 1866).

325. *Id.* at 320.

326. JOSEPH T. GLATTHAAR, GENERAL LEE'S ARMY: FROM VICTORY TO COLLAPSE 30 (2008).

unruliness as a theme in contemporary stereotyping suggests that this desire remains in place.

Just as the Civil War must have been about more than property, the Thirteenth Amendment, made part of the United States Constitution soon after the war, must have been about more than invalidating a single legal category of ownership. If invalidation were all this amendment did, then its first section—an assertion that slavery and involuntary servitude no longer exist in the United States—would have sufficed. Yet a second section went on to grant enforcement power to Congress. Enforcement power implies ongoing work to do, and the inclusion of a second section implies that "domination and enforced social dependency"—what this Article has called constraint—"do not disappear in modern societies," even long after these societies codify formal emancipation.[327]

Making reference to Section two, the Supreme Court in 1968 brought a famed Reconstruction-era phrase into the modern era when it described resistances that strive to stave off what the Thirteenth Amendment provides. Some persons who could no longer buy and sell slaves, supported by a legal and political culture ambivalent about full abolition, hoped to enjoy de facto what they had lost de jure. From this social setting emerged what the Court called the "badges and incidents of slavery."[328] Lawmaking powers of Congress, wrote Justice Stewart more than a hundred years after enactment of the Thirteenth Amendment, include the authority to prohibit private actions that amount to such badges and incidents.

The phrase may be indeterminate—"badges" is a metaphor of uncertain meaning and "incidents," implying something related to an antecedent, here slavery, asserts the connection it seeks to find—but the "incidents" half of it constitutionalizes a class of post-abolition ills. From here, it becomes plausible to put stereotyping in that class. When the United States ratified the Thirteenth Amendment, the two groups that today suffer the most comprehensively from stereotyping lived under a jackboot of extraordinary, status-based constraint that the law enforced and abetted. Stereotyping that identifies groups of persons as uncontrolled, destabilizing, and dangerous imposes badges and incidents of an oppression that was once written into doctrine and that current law ought to repudiate.

That contemporary stereotyping constrains groups of persons other than African Americans (and women, if coverture is perceived as comparable to chattel slavery) does not preclude reading the Thirteenth Amendment to cover the breadth of its mischief. Antebellum slavery in the United States trammeled on more than enslaved persons themselves. Freed slaves, white abolitionists, and even members of the House of Representatives suffered legal constraint. These interferences, as Chip Carter observes, had to happen: Slavery as an institution "depended not only upon the coercive power to deny freedom and equality to blacks but also . . . upon

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327. Balkin & Levinson, *supra* note 40, at 1475.

328. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

the expressive power of law and custom to deny the validity of the idea of black freedom and equality."[329]

At the founding of the Constitution, write Jack Balkin and Sanford Levinson, the word slavery meant not a form of property but "the opposite of republican government. American revolutionaries argued that British tyranny and the unrepresentativeness of British institutions had reduced them to slaves."[330] To Balkin and Levinson, crabbed readings of the Thirteenth Amendment that both Congress and the courts have imposed since *The Civil Rights Cases* are predictable and make sense. The alternative—reading the text broadly enough to stand against unjust subordination—threatens hierarchies and the power holders who enjoy them. Especially because the Thirteenth Amendment demands no state action and thus enables Congress to confront private actors, it appears unbounded.

What next? Analyzing what he calls "Thirteenth Amendment optimism"—the serious contention that this text "prohibits in its own terms, or should be read by Congress to permit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as these terms are ordinarily understood"—Jamal Greene reviews academic arguments that have found novel constitutional rights in the Thirteenth Amendment. Greene praises these works guardedly, noting that they did not persuade judges. He deems *Jones v. Alfred H. Mayer Co.*, the 1968 reviver of "badges and incidents of slavery," an arguable "mistake" and a precedent that has had "virtually no significant doctrinal progeny."[331] Thirteenth Amendment vitality can best emerge, Greene concludes, not so much from courts as from Congress using its Section two power to "root out pervasive and demeaning inequality and subjugation."[332]

Implications follow for the rectification of what's wrong with stereotyping. Section two of the Thirteenth Amendment gives options to Congress; it does not compel enabling legislation. In the chief Thirteenth Amendment success story that Greene retells, Congress, persuaded by advocates who called their stance "constitutionally inspired," expanded labor rights in the early years of the twentieth century. Yet one Thirteenth Amendment victory that Greene mentions, successful efforts by the Department of Justice Civil Rights Division to combat peonage through aggressive litigation during the 1940s, scarcely engaged Congress at all. Southern congressmen rebuffed the section chief when he lobbied for change in federal involuntary servitude statutes. What succeeded, according to Risa Goluboff, was a "feedback loop [that] developed between federal enforcement and rights consciousness."[333] Awareness of Civil Rights Division litigation success generated support from the public, from there the relaying of

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329. William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1859 (2012).

330. Balkin & Levinson, *supra* note 40, at 1470.

331. Greene, *supra* note 39, at 1762.

332. *Id* at 1763.

333. *Id.* at 1753 (citing Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1646 (2001)).

winnable complaints to the Department of Justice, and from there more public support.

The peonage precedent and its feedback loop allows stereotyping and the Thirteenth Amendment to meet and engage the other sources of change that Greene identifies. Consistent with Greene's prioritization of Section two, reformers can propose statutory change to remedy the harms of stereotyping. I will do so presently. Objections to stereotyping have made (limited) gains in court: The litigation strategy can generate feedback-loop enhancement resembling what Goluboff found in peonage cases. Greene's skepticism about Thirteenth Amendment optimism, and Section one in particular, is well taken.[334] Courts will not rule that stereotyping violates the constitutional prohibition of slavery. They can, however, join with other institutional actors in the larger project of ameliorating its ills.

B. Stereotyping Near the Border of State Action

The Thirteenth Amendment, as was noted, contains no requirement of state action. Yet the issue of governmental responsibility deserves attention in any recommendation that governmental actors change what they are doing. The state action doctrine derives from the text of the Fourteenth Amendment, which prohibits state governments from abridging the privileges and immunities of citizens; depriving persons of life, liberty, or property without due process; and denying persons equal protection of the laws. Here I broach the geographic metaphor of a border and site this wrong near the border of state action. *Heart of Atlanta Motel, Inc. v. United States*, a famous civil-rights era decision, explored possibilities on point.[335]

Managers of the Heart of Atlanta Motel, wishing to continue excluding African-American guests from the premises, objected to the newly enacted Civil Rights Act of 1964 as a barrier to its policy. The Supreme Court upheld the statute as constitutional under the Commerce Clause. Justice Douglas wrote a concurrence that focused on how the motel counted on support from the state of Georgia.[336] Codified statutory law, he said, recognized Heart of Atlanta's property interest in its motel and enabled it to call the police when it deemed a visitor a trespasser. To Douglas, the governmental role looked enough like that in *Shelley v. Kraemer*, the Court's boldest state action decision, which had invalidated under the Fourteenth Amendment a racial covenant between private parties.[337] The contract generated state action, said the Court in *Shelley*, because the state adds imprimatur and

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334. The litigation experience of baseball player Curt Flood, who had referred to himself as "a well-paid slave," see *supra* notes 298–97 and accompanying text, supports this skepticism. *See* SNYDER, *supra* note 298, at 207 (noting that although Flood's complaint had claimed that the reserve clause of major league baseball violated federal statutes against peonage and slavery, his lawyers demoted this contention to a footnote when Flood's challenge moved to the appellate level).

335. 379 U.S. 241 (1964).

336. *Id.* at 283–84.

337. 334 U.S. 1 (1948).

enforcement to race discrimination whenever it upholds a discriminatory agreement.[338]

Jurors who disbelieve a female complainant because they think she is crazy, legislators who vote to prohibit LGBT persons from enlisting in the armed forces because they deem this cohort predatory, administrators who write rules that limit the options and prerogatives of college athletes in the belief that these athletes are brutes, judges who interpret self-defense generously for Caucasian male killers and stingily for African-American and female killers, and other actors who make decisions under color of law may look different from the Atlanta police referenced by Justice Douglas, who would remove or arrest African-American visitors at the racist behest of a land possessor, or the Missouri courts that might if permitted have enforced the covenant in *Shelley v. Kraemer*. The prejudice in these older cases is more blatant, the hand of the state easier to discern. By describing the legal consequences of stereotyping as near the border of state action—they are not state action itself—I draw on literature.

Scholars have identified instances of race and sex discrimination that the law does not prohibit and can be carried on with impunity. In separate law review articles, Richard Banks and Solangel Maldonado have sought to interfere with the preference against African-American infants that white adoptive parents manifest.[339] Professor Banks proposed to proscribe what he called "facilitative accommodation," where an adoption agency (either a private one that receives government funding or a unit of state government, working with child welfare departments) classifies children by race and accedes to adoptive parents' desires for a child of that classification.[340] Federal legislation prohibits "race matching," insisting thereby that agencies make their placements on a colorblind basis rather than prefer black parents for black children, but does nothing to impose colorblindness on adoptive parents. Banks wonders about under-perceived state action: "[R]ules of prohibition are understood as involving the state, but rules of permission are not."[341]

Aware of this preconception about state action, Banks invited the state to draft a rule of permission: "Adoption agencies that receive any government funding should not accommodate adoptive parents' racial preferences."[342] Eight years later Professor Maldonado identified another racial preference of adoptive parents: Asian and Latin American children, obtainable by international adoption, over African-American children—many of them the "healthy infants" favored in this realm—who take longer to gain homes.[343] Maldonado proposed that Congress

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338. *Id.* at 19–20.

339. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415 (2006).

340. Banks, *supra* note 339, at 880.

341. *Id.* at 919.

342. *Id.* at 943.

343. Maldonado, *supra* note 339, at 1415.

compel adoptive parents who want to adopt internationally to wait a year, unless they can show that they tried to adopt a U.S.-born child without regard to race but were unsuccessful.[344]

What is the connection, one might query, between stereotyping as a legal category and the bias by adoptive parents against African-American children that Banks and Maldonado identify and try to ameliorate? They share characteristics found at the border of state action. At this border, the state lends ambiguous, contestable support to discriminatory conduct by non-state actors who may have not considered the possibility that what they are doing discriminates against any group. Human beings are suffering and might have a claim for legal relief, but their route to recovery is not apparent.

Another characteristic found at the border of state action is how difficult it is to install a remedy for the problem. Maldonado and Banks have proposed federal legislation that Congress will almost certainly never enact. Another border-of-state-action scholarly work also illustrates the remedial difficulty: Martha Chamallas argues that the use of race- and sex-based statistical data to estimate a plaintiff's lost future earnings, long condoned by judges in tort litigation, is unconstitutional.[345]

Advocating race- and gender-neutral actuarial data in court, Chamallas revisits familiar themes. State action is obscured by custom, Chamallas observes: "the lives of women and racial minorities are devalued" by a mechanism that falsely appears neutral.[346] Unlike the proposals of Banks and Maldonado, this suggestion has been given legal effect;[347] but whereas Banks and Maldonado spell out exactly what they want to happen, Chamallas titles her article "Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation" and, true to her word, she questions; she does not prescribe much. Rules of evidence (or perhaps procedure) could be rewritten to keep out gender- and race-specific data, but Chamallas does not take that path. She focuses instead on the education of litigants and judges—another overlap with the goals of this Article, explored in the next and final Part.

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344. *Id.* at 1472–73.

345. Chamallas, *supra* note 23, at 106. Race- and gender-specific earnings data admitted at tort trials differs from stereotyping in a crucial respect: it is state action, as Chamallas argues persuasively, whereas stereotyping lies outside this border. "If such a standard were explicitly embodied in a statute (e.g., 'In determining the future earning capacity of a plaintiff who has no established record of earnings, damages may be based on projections that take into account the plaintiff's race and gender')," Chamallas notes, "the legislation would clearly constitute state action. The outcome should not be different simply because the governing legal standard is a common law or nonstatutory standard."

346. *Id.*

347. McMillan v. City of N.Y., 253 F.R.D. 247, 251 (E.D.N.Y. 2008); United States v. Bedonie, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004), *rev'd on other grounds*, 410 F.3d 656 (10th Cir. 2005).

VI. REPAIRING THE WRONG

Understood as constraint that the law remedies but also buttresses,[348] stereotyping invites reformers to consider reparative measures. This next section surveys the record. It starts by examining changes to the law that ameliorated the harms of stereotyping, and then identifies cohorts and institutional actors who, going forward, can make particular types of contributions.

A. Rectification Precedents

Notable law reforms have taken on stereotyping in efforts to lessen its constraints. Although advocates of these measures typically do not use the term stereotyping to describe what they resist or seek to prohibit, stereotyping is central to the wrong they address. So, for example, when the Seventh Circuit in 1971 declared that, in enacting the Civil Rights Act of 1964, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"[349] many members of Congress who had assembled to vote on this bill were alive and could testify about what they intended. Presumably they would have found this reference to stereotyping unfamiliar. And yet the assertion is plausible: The Supreme Court cited it with approval and, as we have seen, the condemnation of discrimination does indeed entail the condemnation of some stereotyping.

In this perspective, codified civil rights—which the noted lexicographer William Safire defined as "positive legal prerogatives" that include "the right to equal treatment before the law, the right to vote, the right to share equally with other citizens in such benefits as jobs, housing, education, and public accommodations"[350]—necessarily take a stand against stereotyping, even if they eschew this word in their text and legislative history and even while they do other work. A stereotype that constrains some group of persons while leaving other groups unconstrained functions to deprive individuals of equal treatment; the "positive legal prerogatives" of civil rights legislation provide redress for unjust constraint.

Federal legislation takes a stand against stereotyping in the Americans with Disabilities Act ("ADA"). The third prong of this statute extends ADA protection to individuals who are not in fact disabled, but appear that way.[351] Congress included this regarded-as-disabled classification to combat "myths, fears and stereotypes associated with disabilities."[352] As the Sixth Circuit once noted, this recognition is not found in other civil rights legislation like Title VII or the Age Discrimination in Employment Act.[353] Widening the class of protected

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348. *See supra* Part I.

349. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

350. Bernstein, *Civil Rights Violations*, *supra* note 214, at 898–99 (quoting WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 127 (5th ed. 2008)).

351. 42 U.S.C. § 12102(1)(C) (2012).

352. H.R. REP. No. 101-485(III) at 30 (1990).

353. Ross v. Campbell Soup Co., 237 F.3d 701, 706 (6th Cir. 2001).

persons in a civil rights statute to include nonmembers makes no sense unless a stereotype exists pernicious of itself, doing harm to people who do not share the condition at issue. The ADA shows that Congress judged stereotyping of the disabled important enough to fall in that category.

For another enactment that resists what is wrong with stereotyping, consider rape shield laws, which deem evidence about the past sexual behavior of an alleged victim inadmissible at trial. Now codified in the statutory law of almost every U.S. state,[354] as well as the Federal Rules of Evidence[355] and the Military Rules of Evidence,[356] these provisions originated in feminist law reform.[357] Questions about rape shield provisions as policy—how well they work, how much judicial discretion they ought to allow at trial, which exceptions to inadmissibility ought to be recognized—fill a rich literature: I note them here only for what they say about stereotyping.

As the Advisory Committee Notes observed in 1994, federal rape shield laws limit the deployment of stereotyping during cross-examination.[358] The stereotypes that a cross-examining lawyer invokes cast female complainants as untrustworthy, addled, probably vengeful, and befouled by having had sex. As an instance of legal resistance to what is wrong with stereotyping, rape shield laws resist constraints that burden women. Before this reform, writes Michelle Anderson, "[w]omen heard the rules: If you want the criminal law to vindicate you if you are raped, you better have led an unsullied sexual life."[359]

The stereotype that women are crazy has suffered a happy setback in the judicial acceptance of battered woman syndrome, which interprets violent or anti-social behaviors as an understandable response to extraordinary conditions. Lenore Walker, who as an expert witness helped persuade numerous American judges that this syndrome ought to be conveyed to juries in homicide prosecutions, has written that in the early years of her efforts, prosecutors misunderstood battered woman syndrome as a variation on insanity offered as an excuse.[360] Courts and legislatures continue to disagree on whether battered woman syndrome is an excuse, which is consistent with the stereotype about craziness, or instead a condition that supports self-defense, a justification that rejects the stereotype.[361]

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354. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 81 n.150 (2002) ("Only Arizona has not passed a rape shield law of any kind.").

355. FED. R. EVID. 412.

356. MIL. R. EVID. 412.

357. Anderson, *supra* note 354, at 80 (citing Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764–66 (1986)).

358. FED. R. EVID. 412 advisory committee's note.

359. Anderson, *supra* note 354, at 54.

360. WALKER, *supra* note 232, at 45, 303.

361. *See Developments in the Law: Legal Responses to Domestic Violence, Battered Women Who Kill Their Abusers*. 106 HARV. L. REV. 1574, 1586 (1993) (discussing battered woman syndrome in terms of self-defense).

As with rape shield laws, observers need not take a position on a controversy to note the erosion of a stereotype. Even when courts accept battered woman syndrome as only an excuse and thereby deem an individual mentally disturbed—rather than honor her for doing something praiseworthy by defending herself[362]—they acknowledge that a battered woman does not bear sole responsibility for the violent act she committed. She had an abuser, a source of unjust mistreatment that left her desperate. If when she acted she was out of her mind, in the vernacular, she was driven there by the malevolent acts of another. This victim was not always broken: The expert testimony required to establish battered woman syndrome, whether as excuse or justification, implies that the default for a woman is to be not-crazy. Courts and commentators who question battered woman syndrome as a defense emphasize the status of women as rational creatures.[363] Every respectable stance on this question, in short, advances the erosion of a pernicious stereotype.

A final illustration of law reform achievements against stereotyping is the rise of same-sex marriage, or what increasing numbers of observers tellingly call marriage equality. We have seen that references to equality as a legal concept frequently implicate stereotyping, whose chief characteristic in the law is the unjust constraint of some groups and not others.[364] Whether "marriage equality" is an accurate synonym for, or perhaps an improvement on, "same-sex marriage" need not be resolved here. For present purposes, this discursive shift relates to the stereotyping inherent in the opposite-sex criterion for entry into marriage.

Treating women the same as men and husbands the same as wives for purposes of regulating entry into this legal status takes a stand against gender stereotyping in that only ascribed generalizations, rather than anything biological or physical, can explain why a woman may not marry a woman and a man may not marry a man.[365] The marital conjunction of a vagina and a penis concerns the law only when one member of a couple makes an issue of it in court: Sexual intercourse is an option for couples who marry rather than a requirement, and it does not consummate a legal status.[366] Procreation cannot explain the opposite-sex demand either,[367] because a man and a woman may form a lawful marriage even when they intend to generate no children, are unable to generate children without assistance, or will share no activities related to parenthood. Gender dimorphism as a criterion for entry into marriage fits a description of stereotyping's effects that

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362. *See supra* note 225 and accompanying text.

363. *See* DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1996); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997).

364. *See supra* notes 122–29 and accompanying text.

365. Limiting the number of persons in a marriage to two, by contrast, can be justified without constraining generalizations. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1975–76 (2010) (reviewing the arguments).

366. Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage,"* 2011 MICH. ST. L. REV. 83, 106–07.

367. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

Ruth Bader Ginsburg offered decades ago: The demand puts "all males in one pigeonhole, all females in another, based on assumed or documented notions about 'the way women or men are.'"[368] Abandoning this criterion helps to lessen the effects of an under-justified constraint.

B. Going Forward

Three categories of law reformers have roles to play in repairing the legal wrong of stereotyping. All have already done some of this work.

1. For Litigators and Litigants: Protect, Enlarge, Refute

Both plaintiffs and defendants can foster the development of stereotyping as a legal wrong by telling courts about the constraints they experience. Employment discrimination case law has started this work, but both sides of the caption have more to say. Defendants have, so far, appeared oddly helpless in response to accusations of stereotyping. Their most winning posture seems to be denial. Once stereotyping as a legal wrong is understood as constraint, however, another avenue opens for them: They can concede stereotyping arguendo, but deny that it constrained. This stance would serve them particularly well at summary judgment.

As for employment discrimination plaintiffs, they have only begun to tell what stereotyping does to them. Clarifying the relation between stereotyping and constraint would expand case law by inviting more description; publishing these accounts would help to reduce the injustice of constraint by expanding on a familiar yet ill-understood wrong.

Now that transgender discrimination has been recognized as a type of unlawful stereotyping, the unfinished business for stereotyping in employment law concerns dress and grooming rules.[369] When the Ninth Circuit held in *Jespersen v. Harrah's Operating Co.* that a casino could force its female employees to wear face powder, blush, mascara, and "lip color . . . at all times,"[370] it upheld a policy that forced women, and not men, to show up for work with their faces adorned and mediated. Lip color and mascara are products that a wearer feels on her skin. They have texture and weight. They consume time: Lip color demands continual reapplication to be on "at all times," and mascara does not come off easily without liquids engineered and purchased for the task. Darlene Jespersen said at her deposition that the makeup rule her employer, Harrah's, installed after she had been bartending for many years interfered with her ability to do her job.[371] Despite this reference to constraint, the court rejected her claim of stereotyping, concluding

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368. *See supra* note 123 and accompanying text (noting difficulties with this definition).

369. My thanks to Peggie Smith for an illuminating discussion of this issue.

370. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107, 1112 (9th Cir. 2006).

371. *Id.* at 1108.

that Harrah's makeup rule did not force wearers to appear sexually provocative and thus did not "stereotype women as sex objects."[372]

A successor litigant could enlarge the number and nature of stereotypes at issue, relating their constraint to sex discrimination. This litigant could contend that by banning makeup for men and mandating it for women,[373] Harrah's enforced a familiar conceit that one of two genders faces the world unadorned and ingenuous while the other puts on a face.[374] The makeup rule comports with the stereotype of women as lying, predatory seducers.[375] Time and money that makeup demands add up to another constraint.

Employment discrimination plaintiffs tend to lose dress-and-grooming cases;[376] the litigation stance I endorse might not reverse this pattern for them. It would, however, advance the state of knowledge about gender stereotyping in the workplace. It also expands understanding of the coercion that accompanies employment at will.[377]

Litigants—again, both defendants and plaintiffs—can also enlarge the catalogue of unlawful stereotyping by extending the subject beyond employment. The success of a transgender-stereotyping claim brought under the Equal Protection Clause can help to lift actionable stereotyping past Title VII.[378] Even though constitutional claims exclude private-sector defendants, this path to court would help to publicize the legal wrong. Regarded-as-disabled litigants can also shed light on pernicious stereotyping by bringing ADA claims. As with Title VII, defendants enhance understanding of stereotyping by showing, when they can, that plaintiffs experienced no constraint. They can also demonstrate the constraint on them of making stereotyping actionable.

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372. *Id.* at 1112.

373. *Id.* at 1107.

374. The Italian verb for "to put on makeup" is *truccarsi*, literally "to make a (dissembling) trick of oneself." The same reflexive verb is used for "to disguise."

375. *See supra* Part IV.C.

376. Yuracko, *supra* note 167.

377. One study of the *Jespersen* litigation explores how managerial decisions to homogenize the appearance of workers to tighten their corporate "brand" generate coercion of employees. Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 49 (2007) (describing one of the decisions in this case as "the essence of employment at will: The employee must take it (the job on the employer's terms) or leave it."); *id.* at 73 (associating "branding" as policy at Harrah's with the 1998 arrival of a new CEO who insisted on a homogenous workplace). On the coercion of Darlene Jespersen, *see id.* at 46 (noting that at her deposition Jespersen described her short-lived attempt to tend bar while wearing makeup as destructive to her "credibility as an individual and as a person"). Jespersen felt so strongly about makeup (and, apparently, was a valuable enough employee) that Harrah's granted her informal dispensation from the rule for many years, firing her only after an image consultant recommended strict enforcement in 2000. *Id.* at 46–47.

378. *See* Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007).

2. For Judges: Describe

Judges have been writing the decisional law of stereotyping for decades. They work with what litigants give them—most noteworthily, perhaps, in 1985 when Gerhard Gesell decided to let the social psychologist Susan T. Fiske talk in court about how stereotyping harmed Ann Hopkins.[379] Courts should expect plaintiffs to furnish this basic point of information. When stereotyping is their cause of action, as is the case for some employment discrimination claims,[380] persons who do not bother to describe the stereotype that they believe hurt them deserve a swift Rule 12(b)(6) dismissal.

What judges add to plaintiffs' narratives is their assessment of whether an unlawful stereotype was present and caused actionable injury. When they answer that question in the affirmative, judges ought to identify the stereotype they deem present, rather than use stereotyping as shorthand for Plaintiff Wins. This descriptive effort would clarify the distinction between stereotyping and prejudice or discrimination. Recurring negative generalizations that harm individuals—both the kind that courts rule unlawful and the kind they tend to condone—would build in decisional law, and plaintiffs and defendants would gain a better understanding of where they stand before they dispute a claim of stereotyping before a judge.[381]

3. For Legislatures: Codify, Clarify

State legislatures and Congress hold powers to ameliorate the harms of stereotypes that the law now buttresses. They might well wish to do so. Although expansive new civil rights legislation has not filled state or federal codes in the United States for a couple of decades, statutory protections continue to emerge and gain ground. Recognition of sexual orientation and transgender status as civil rights categories has been especially vital of late, and the idea that stereotyping wrongfully inflicts injury that ought to be remedied appears to enjoy support. That litigants and litigators choose to frame their complaints as being about stereotyping suggests that voters would approve writing the word into more legislation.

The Thirteenth Amendment authorizes Congress to deter and punish invidious discrimination that relegates individuals into what Alexander Tsesis, writing about women as well as African-American men, has called "a state of unfreedom."[382] As exemplified by the Civil Rights Act of 1866, this remedial power can reach every setting where oppression might thrive, including cartels,

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379. *See generally* Chamallas, *supra* note 182, at 90–91 (reviewing the controversial nature of this ruling).

380. Cases where courts have accepted sex stereotyping as a cause of action include McBride v. Peak Wellness Center, Inc., 688 F.3d 698, 711 (10th Cir. 2012); Gilbert v. Country Music Ass'n, 432 Fed. Appx. 516, 519 (6th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011); Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007).

381. A West headnote category called Stereotypes already exists, under Labor and Employment Law > Discrimination. It could be expanded.

382. Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1653 (2012).

individuals acting alone or in groups, businesses too small for the Commerce Clause or other civil rights statutes, and state governments.[383] Few constitutional limits obstruct reparative efforts against stereotyping brought under the Thirteenth Amendment.

In addition to writing new prohibitions of harms that emerge from stereotyping, Congress could clarify that "sex stereotyping" is indeed a cause of action under the federal civil rights laws, as several courts have said.[384] This clarification could readily include racial stereotyping. Such new legislation would resemble the Civil Rights Act of 1991, codified in response to decisional law and focused more on procedure and remedies than expanded classifications. Whereas the 1991 act originated in strife between the legislature and the judiciary, however,[385] future laws about stereotyping from Congress would advance and harmonize progressive work that courts pioneered.

CONCLUSION

Unaware of what Justice William Brennan had in store for it, the defendant of the great American stereotyping decision put "sex stereotyping" in quotation marks throughout its Supreme Court brief, as if the phrase were a bit of a joke.[386] Not too funny, but not serious either; nothing with "legal relevance."[387] For Price Waterhouse as it defended a sex discrimination claim, stereotyping must have evoked something trivial like dumb jocks, amorous Frenchmen, humorless Germans, and other risible creatures who fill "the pictures in our heads."[388]

Sex stereotyping for the adversary of Price Waterhouse, by contrast, had imposed shackles. It left Ann Hopkins little room to earn the record she needed to gain promotion: She was squeezed between, on one side, the "charm school"[389] matriculant, easy enough on male colleagues' eyes and ears but looking like just the opposite of Big Accounting partnership material and, on the other, the threatening, "macho,"[390] gender-defiant office warrior who made her bosses uneasy. Stereotyping curbed Ann Hopkins' movements, consumed her time, limited what she could say, reduced her opportunities to get credit for what she achieved, and locked her out of the Price Waterhouse partnership.

"Title VII lifts women out of this bind," wrote Justice Brennan.[391] So it did for Hopkins, who after her victory joined the defendant firm as a partner.[392]

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383. *Id.* at 1653–54.

384. *See supra* note 167.

385. Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1097–98 (1993).

386. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

387. *Id.*

388. LIPPMANN, *supra* note 10.

389. *Price Waterhouse*, 490 U.S. at 234–35.

390. *Id.* at 235.

391. *Id.* at 251.

392. ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).

Title VII imposes responsibility for harmful conduct: Luckily for Hopkins, the wrong she suffered had a remedy. More of what's wrong with stereotyping can be righted by the law.

The law of stereotyping, still young, has experienced only its earliest achievements. *Price Waterhouse* shows the strength of the concept. Cited in well over four thousand judicial opinions—more than *Roe v. Wade*, which had a sixteen-year head start, and more than any other decision of the 1988 Term, a year that included noteworthy output from the Court[393]—this precedent has won fame less for its holding, which described the burden of proof in mixed-motives cases (a judgment that Congress undid a couple of years later),[394] than for its bold declaration that stereotyping is a legal wrong. Most of the Justices declined to sign that declaration. It may have been dicta.[395] Yet when employees picked up the idea and ran with it, they won successes that grow ever larger. Calling what happened at work "stereotyping" now offers plaintiffs an especially good route to victory in court,[396] and case law on stereotyping has helped build the only federal civil rights available to date for employees who do not hew to a gender binary.

Employment discrimination litigants, litigators, and courts have taken on a reparative task that no other area of law has reckoned with, even though the violation that Ann Hopkins presented so carefully at her trial has manifestations throughout American society. I have argued in this Article that the wrong of stereotyping is constraint. This constraint does not live only in the workplace, and it dates back before ancient Greece.[397]

It also has constitutional dimensions.[398] This Article paid particular heed to two crucial amendments,[399] but stereotyping implicates the original text of the U.S. Constitution as well. Hierarchies and oppressions entrenched by stereotyping offend republicanism as promised by the Guarantee Clause.[400] Law-supported marginalization of individuals based on their membership in subordinated groups undermines representative democracy, a concern that has constitutionalized state actions like obstructions of the right to vote.[401] When it impedes political

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393. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Michael H. v. Gerald D., 491 U.S. 110 (1989); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

394. *See supra* note 186.

395. *See supra* Part II.B.

396. Vodjik, *supra* note 128.

397. *See supra* Part I.A.

398 I thank Brad Snyder for the thoughts he shared that inform this paragraph.

399 *See supra* Part V.

400 "The United States shall guarantee to every state in this union a republican form of government." U.S. CONST., art. IV, sec. 4. Republicanism as propounded by a leading eighteenth-century political theorist emphasized the anti-constraint thesis that pervades this Article. MORTIMER N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 165 (1994) (describing the view of Montesquieu that republicanism differs from the other two forms of government, monarchy and despotism, in that it recognizes "more than one sovereign").

401 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980).

participation, stereotyping thwarts a design for national government: The Constitution, as Akhil Reed Amar has observed, put "some form of democracy into each of its seven main Articles."[402] Fixing the problem of stereotyping joins a larger project of making American democracy and civic life stronger.

Fixing this problem, I have contended, calls foremost for understanding it. A definition of stereotyping as a legal wrong does not yet exist, but elements have emerged. To warrant attention from the law, I have argued, stereotyping must amount to a wrong. Wrongness takes two distinct facets: first, harm to stereotyped individuals, and second, enough falsity or unreliability to outweigh the utility of a ready shortcut. Stereotyping is among other things a heuristic. Individuals will fight to keep tools that help them understand their environments and make decisions. This Article has been mindful that the work of easing the constraints of stereotyping, like any other push for emancipation, has to pick its battles.

Toward this end, I note that liability for stereotyping simpliciter would be difficult to enlarge. Stereotyping of itself does not hew closely enough to paradigms of responsibility for harm that govern civil rights, tort, criminal, and regulatory law.[403] Before a person can be held liable, American law demands that she hold a modicum of consciousness, which stereotyping functions to obscure.[404] People who regard others through the lens of a stereotype did not invent the generalization they invoke, cannot control it, might be unaware that they are making a socially harmful construct proliferate, and experience its reductive message (*X* group has *Y* trait) moderated by doubts, qualifiers, and refutations that assemble ad hoc and unpredictably.[405] Thus I have not advocated new causes of action for stereotyping. The repairs recommended in this Article, working with established rights and wrongs, have enough to do.

A last caveat: Social psychology aids the project urged in this Article, but policy makers ought to use it with care. Voluminous writing about the ubiquity of stereotyping in human societies, for example, could unnecessarily dampen reform efforts. Just because antisocial impulses and conduct are always with us does not mean that changing the law cannot ameliorate this wrong. Another strand in this

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402 AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 15 (2005).

403. *See* Washington v. Davis, 426 U.S. 229, 245 (1976) (distinguishing between discriminatory intent and disparate impact, treating the former category more stringently in the context of race discrimination); Pers. Adm'r v. Feeney, 442 U.S. 256, 260 (1979) (same; sex discrimination); Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616) (explaining that liability for "trespass of assault and battery" is not available "if a man by force take my hand and strike you"); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002) (describing responsibility as criminal law understands it); Barak Orbach, *What is Regulation?*, 30 YALE J. ON REG. 1, 6 (2012) (observing that although there is no settled definition of regulation, the concept manifests in "a binding legal norm created by a state organ that intends to shape the conduct of individuals and firms").

404. Denno, *supra* note 403, at 271.

405. *See supra* Part II.C.

literature, positing a contrast between descriptive and prescriptive stereotyping,[406] emphasizes a distinction that distracts from the necessary and fundamental attention to harm central to the law. Description prescribes and prescriptions describe. Any stereotype that functions to limit human freedom, even when put in the form of "X [group] is" rather than "X cannot" or "X must never," expresses coercion.

Legal-institutional actors have started the reform work that I advocate. Rectification precedents include changes to evidentiary law that fight stereotypes about female sexual consent and ascribed female irrationality; the statutory civil rights category of "regarded as disabled" which, aware that a person need not be a member of an oppressed group to suffer from the stereotyping of its members, widens a progressive remedy; congressional amelioration of the powder cocaine/crack cocaine sentencing disparity, a gap that rests on a racial stereotype about violence; and successful challenges to laws that demand gender dimorphism as a criterion for entry into marriage. These reforms enlist judges, legislators, and laypersons. The same cohorts identify, describe, clarify, and repair what's wrong with stereotyping.

406. *See* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 665–66 (1999).