SUMMERS' PERSONAL AS POLITICAL: REASONING WITHOUT EFFORT FROM STEREOTYPES

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Before I read Harvard President Lawrence Summers' remarks in full, I had already seen a number of commentators' views. Despite the uproar (apparently missed by the editors of last month's Harvard alumni magazine), I expected to be somewhat sympathetic to the point of view ascribed to President Summers—that differences in men's and women's preferences and abilities had an effect on the applicant pool for physics professors. The theory seemed plausible to me. After all, when I left Harvard and started work at the type of large law firm Summers mentioned in his talk, I advocated for part-time work and partnership, on the premise I share with President Summers that many young women (and I would add young men) "don't want to have a job that they think about eighty hours a week."[1] Furthermore, I am not bothered by suggestions that differences between men and women extend beyond reproductive parts. Researchers discovered just last month that low-dose aspirin, a new must-have on the heart-attack-avoidance list, does not have the cardio-protective effect for women that had been proved in studies of men.[2] And was not this the point of convincing researchers, at long last, to take the trouble to study women anyway—that women may not simply be little men? As a law professor who taught a course called Genetics & the Law, I am not only comfortable with, but optimistic about, the potential for biology to provide understanding and guide decisions.

In light of this broad potential for our views to coincide, I was surprised at how painful it was for me to read President Summers' complete remarks. Here was one of the youngest men ever to become a Harvard professor, now a stand-up-for-standards sort of President, speaking on a topic about which he claimed to have "made an effort to think in a very serious way."[3] Yet remark after remark evinced

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[1] Lawrence H. Summers, *Remarks at NBER Conference on Diversifying the Science & Engineering Workforce*, January 14, 2005, *available at* http://www.president.harvard.edu/speeches/2005/nber.html (last visited Apr. 18, 2005).

[2] *See* Mary Duenwald, *Aspirin is Found to Protect Women from Strokes, not Heart Attacks*, N.Y. TIMES, March 8, 2005, at F1.

[3] Summers, *supra* note 1.

anything but serious inquiry—an anecdote from a trip, another about his children, some conversations with like-minded colleagues, a near-total disregard of existing scholarship and rival hypotheses. Although I have been away from the place a few years, I am certain this is not what they regard as serious inquiry at Harvard these days.[4]

Summers' talk might appropriately have been titled *The Chasm Between Policy and Belief at Harvard.* Summers put to one side "the many things we're doing to promote the crucial objective of diversity at Harvard" to explain his view that the task is basically unworkable in light of the fundamental inadequacy of female try-outs for the team.[5]

Much can and has been written about the problems inherent in Summers' argument. As early as the question-and-answer period after his talk, his errors began to be catalogued and named. The problems stem from Summers' unfounded assumption that women inevitably lack aptitude in science, from his failure to see that job structure and interest are a function of social variables, and from the reinforcing effect that Summers' women-can't-do discourse will have toward deepening the already strong rivers of bias against women in science.[6]

Beginning with Summers' own reasoning, one might wish that he had studied enough behavioral economics, postmodern thought, or feminist theory, to question his own convictions.[7] The President of Harvard, leader of the academic elite, had some of the best research and researchers at his disposal to examine the role of socialization and discrimination in women's employment in the sciences. He did not look for guidance to the soft-core sciences—sociology, psychology, law,

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[4] After Summers' vote of no confidence in women, the Harvard Faculty of Arts and Sciences voted no confidence in Summers. 3/15/2005 Motion submitted and approved by Harvard University Faculty of Arts and Sciences ("The Faculty lacks confidence in the leadership of Lawrence H. Summers") (on file with author) [hereinafter Harvard Faculty Motion].

[5] Summers, *supra* note 1.

[6] *See, e.g.*, Carey Goldberg, *M.I.T. Admits Discrimination Against Female Professors*, N.Y. TIMES, March 23, 1999, at A1 (noting M.I.T. President Charles M. Vest's response to a document detailing discrimination against women in science at that institution: "I have always believed that contemporary gender discrimination within universities is part reality and part perception. True, but I now understand that reality is by far the greater part of the balance."); Natalie Angier & Kenneth Chang, *Gray Matter and the Sexes: Still A Scientific Gray Area*, N.Y. TIMES, Jan. 24, 2005, at A1 (citing a study in which men rated mathematics paper a full point higher on a five-point scale if the author was listed as "John T. McKay" rather than "Joan T. McKay" and a study in which students were less likely to favor a well-educated candidate over an experienced candidate for an engineering job if the well-educated candidate was designated as a woman).

[7] *See, e.g.*, Cass R. Sunstein, *Hazardous Heuristics* 70 U. CHI. L. REV. 751 (2003) (discussing a number of heuristic principles that reduce complex tasks but cause systemic errors, including the availability heuristic, in which people who lack statistical knowledge answer questions of probabilities by thinking of easily recalled illustrations); Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L. J. 587, 598 (2002) (defining postmodernism as "incredulity toward metanarratives" and discussing the importance of "remaining open to insights from others whose values are differently situated"); Martha Minow, *Feminist Reasoning: Getting It and Losing It*, 38 J. LEG. ED. 47, 48 (1988) (noting "the common tendency to treat differences as essential, rather than socially constructed, and to treat one's own perspective as truth, rather than as one of many possible points of view"). *Cf.* Richard A. Posner, *Brandeis and Holmes, Business and Economics, Then and Now*, 1 REV. L. & ECON. 1, 4 (2005) (noting that Justice Brandeis' view of economics "was intuitive, which is generally a bad sign").

history or cultural studies (Could they have something to say? Do they still have professors in cultural studies after the last Summers fiasco?).[8] Instead, Summers went straight to the most available information—his unschooled experience.

It is difficult to respond to much of Summers' position that the impact of innate gender difference is strong, while the impact of socialization and discrimination is modest at best, if only because Summers did not rely on systemic data. What follows from his proposition (even if true) that Israeli kibbutzim started out with a commitment to have men and women perform the same jobs but ultimately reverted to a more gender-differentiated division of labor? Can a woman fail to receive her Ph.D. in physics and become a star in her field because Summers' two-year-old daughters once played with trucks in a way that made them seem like dolls—a nurturing role? If women in their twenties drop out of math and science courses, does it prove that they could not have made it had they further pursued these courses?

Beginning with a different set of life experiences as a reference point, Summers' examples had a different resonance for me. Take Summers' kibbutz example. As a Jewish woman who has traveled to Israel, I see religious sex-segregation norms that continue to influence the Jewish religion and the state of Israel.[9] Were I to travel to Israel today, I would not be permitted to stand and pray at the Temple wall because of my gender.[10] To suggest, as Summers does, that Israeli kibbutz members arrived at the door of their collective experience with good faith and genetic predispositions but no religion, culture, or history to influence their actions strikes me as uninformed.

Nor do his daughters' coddled trucks tell me the same "something" that Summers felt they told him. In my house it was the trains that came to life as dolls, and stuffed dogs that were escorted through the house in strollers, but my *sons* were the ones animating those creatures. Was it *their* inherent gender-based destiny to nurture that was at work?

I even relate to Summers' empirical "problem" of "girls who are persisting longer and longer" in math and science—but quitting these subjects in their twenties.[11] After thinking of math as my favorite and best subject from grade school on, I earned a school-wide math award in middle school, advanced placement credit in math in high school, and enrolled in a college math course as my only elective outside a special first-year program. In my second semester of

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[8] *See* Karen W. Arenson, *Harvard Scholar to Visit Princeton Institute*, N.Y. TIMES, May 8, 2003, at A3 (reporting that Henry Louis Gates Jr., the chairman of Harvard's Afro-American studies department, would spend a sabbatical year at Princeton); Jacques Steinberg, *A Harvard Star in Black Studies Joins Princeton*, N.Y. TIMES, Jan. 26, 2002, at A2 (reporting that both Cornel West and K. Anthony Appiah resigned from Harvard to accept offers at Princeton after a "rift between Mr. Summers and the Afro-American studies department").

[9] *Cf.* Ran Hirschl, *Constitutional Rights vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1842-1844 (2004) (outlining several contexts in which religious norms would exclude women from leadership positions and conflict with Israeli secular norms of equality).

[10] *See id.* (chronicling legal disputes over whether women can pray at the Wall).

[11] Summers, *supra* note 1.

college, I walked into a math class with many students. One other was a woman. From a brief set of introductions I learned that these classmates were all majors in math, science, and engineering. Before the second class meeting, I had dropped the course. No doubt my decision can be criticized as a lack of conviction, confidence, or courage (though in hindsight, I cannot say I have regretted the choice). Had I stayed for the duration, I do not know whether I would have succeeded (although my sister, who worked through an organic chemistry course as an international relations major, now bears the title MD). However, I take issue with Summers' contention that the decision to drop the course itself suggests innate inferiority. The drop-out data might be read to suggest any number of possibilities, among them, that parents and high schools are doing a decent job keeping women in the mix, while colleges are responsible for shrinking their own applicant pools—either by failing to make the case for the importance of these subjects, or failing to make women feel that they belong in these classes.[12] In the last fields to integrate, it may be more difficult to convince women to come to the party. The very fact that a workforce is still male-dominated, at a time when so many fields have integrated, may send women an accurate signal about the climate they should expect. [13]

I do not offer these anecdotes as proof of any strong theory of gender socialization, but simply to show that stories like Summers' can be understood in many ways. Personal experience can illuminate statistics and analysis, but should

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[12] *See* Claudia H. Deutsch, *If at First You Don't Succeed, Believe Harder*, N.Y. TIMES, Sept. 19, 2004, § 3, at 7 (interviewing Harvard Business School professor Rosabeth Moss Kanter, who argues that "the expectation of a positive outcome" is the most important factor in achievement and that this expectation can be nurtured by others including coaches, parents and schools).

[13] *See* Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Distrubing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOM. L. J. 1 (2004) (arguing that "women rationally use level of diversity as a proxy for discrimination since the latter is harder to observe"). Some studies suggest that women in male-dominated work environments are likely to encounter more harassing behavior. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 227 (2004) (noting that in the job context there are two elements of gender—the gendered ratio of the workers and the gendered nature of the work—and citing evidence that increases in male-dominated work environment and male-defined jobs are both associated with greater levels of harassment). Physics at Harvard has been argued, at least at times, to have been one of these difficult environments. *See* Cornelia Dean, *Theorist Drawn Into Debate "That Will Not Go Away,"* N. Y. TIMES, Apr. 12, 2005, at D2 (interviewing M.I.T. professor Evelyn Fox Keller who describes her time as a physics graduate student at Harvard in the late '50s and early '60s as a time of "almost unmitigated provocation, insult, and denial."). High rates of harassment have been reported in other fields of science, including medicine. *See* Miriam Komaromy et al., *Sexual Harassment in Medical Training*, 328 NEW. ENGLAND J. MED. 322, 322-326 (1993) (reporting that 73% of women who responded to the survey reported that they had been sexually harassed at least once during their training, and that 79% of those who had been harassed thought the experience created a hostile environment or interfered with their work). *Cf.* John Solomon, *Officials Cite Harassment, Lax Safety at NIH*, ARIZ. DAILY STAR Apr. 11, 2005, at A3 (describing testimony by senior officers suggesting sexual harassment against women at the NIH). Of course, even if sexual harassment is foreseeable in male-dominated workplaces, sexual harassment is still illegal in all workplaces. *See* Carr v. Allison Gas Turbine Division, 32 F.3d 1007, 1012 (7th Cir. 1994) (entering judgment for a sexual harassment plaintiff in an all-male workplace and stating "[t]he U.S. Navy is able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop").

not replace them.[14] If President Summers wants to move from a handful of disparate anecdotes to the conclusion that all manner of sex-based behavioral differentials (in play, course schedules, and work arrangements) are linked to innate differences in ability rather than socialization and discrimination, he has got a lot more research to fund over at Harvard.

Surely, the single set of data on which Summers relied was unequal to the task. In support of his thesis, Summers cited data from sociologists Yu Xie and Kimberlee Shauman, which showed that 12th-grade boys were twice as likely to score in the top 5% on certain tests than 12th-grade girls. However, Xie and Shauman themselves dispute the conclusion Summers drew from their data: Innate differences between boys and girls account for under-representation of women in the sciences.[15] Shauman, a University of California-Davis sociologist, noted that societal factors might be at work in producing the disparities before eighth grade.[16] Moreover, she noted that there is an imperfect fit between success on a high school standardized test and pursuit of and success in science careers. According to Shauman, "we have very high-achieving women who choose not to go into science. We also have very low-achieving men who choose to go into and succeed in science."[17] Extrapolating women's future performance from their performance on the SAT test is particularly problematic because that test "underpredicts academic performance of females in their freshman year of college, and overpredicts such academic performance for males."[18] Because of this disparate impact on females, at least one court held that exclusive use of SAT data, used in that case to award scholarships, could be found to discriminate against women in violation of Title IX—a federal statute that prohibits gender discrimination in federally funded educational programs.[19]

Back to heuristics, one can see how the argument that high-school boys are more heavily represented in the high end of math and science tests can transmogrify into the proposition that Harvard can not find top women to fill its roles. However, even if the set of high-achieving high school students included more boys than girls, it would be committing the fallacy of division to assume that

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[14] *Cf.* Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2114 (1989) (arguing that stories can serve a useful function in illustrating why a rule is hurtful or mean-spirited, but that this hurtful character must be evaluated in the context of principles).

[15] Daniel Himer, *Sociologist Cited by Summers Calls His Talk "Uninformed,"* HARV. CRIMSON, Jan. 19, 2005 (online edition).

[16] *See* Angier, *supra* note 6, at A1 (citing data from Harvard psychology professor Elizabeth Spelke who studies spatial, quantitative, and numerical abilities in children under age 7 and does not find differences in aptitude among those age groups).

[17] Himer, *supra* note 15.

[18] Sharif v. N.Y. State Ed. Dept., 709 F. Supp. 345 (S.D.N.Y. 1989). *See also* Angier, *supra* note 7, at A1 ("women with somewhat lower SAT scores often do better than men with higher scores" as SAT scores tend to underpredict female performance).

[18] *Id.* (noting that Japanese girls and boys scored higher on standardized tests than did the boys of many nations including the U.S.).

[19] *See id.*

what is true of that group as a whole would necessarily be true of its parts. Even if only 1% of high school women had the aptitude to become outstanding scientists, there still would be thousands of potential candidates and no reason why Harvard couldn't have hired the tens which would have made up a full department (or no reason, after Summers' speech, that Princeton or M.I.T. cannot do this).[20]

The focus on intrinsic aptitude, which pervaded Summers' comments, itself may put the women and men of the United States at a disadvantage in math and science as compared to our international counterparts.[21] "There is good survey data showing that this disbelief [in a gift, knack, or gene for math ability] and the conviction that math achievement can be improved through practice . . . is a tremendous cultural asset in Asian society and among Asian-Americans."[22] The founder of the most successful method of music education for young children, Shinichi Suzuki, based his educational philosophy on the principle that "talent is not inborn but nurtured."[23] In a book describing that philosophy, Suzuki related a story of a girl who had little initial skill in math but through constant practice acquired ability and was accepted into a fine school.[24] To him, "'[s]aying my child has no talent' is actually the same as saying 'I did not educate my child to develop the sprout of his talent'"—a failure of the person responsible for the child's education.[25]

Not only is a primary focus on aptitude problematic, but group-based stereotypes about aptitude are particularly problematic. Summers' impressionistic evidence about gender differences would not pass muster in a courtroom were it used to justify gender-based disparities.[26] As the United States Supreme Court has now ruled on many occasions, the State "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[27] One recent case in which the Court refused to pay heed to such generalizations was a case filed by a woman who sought admittance to the all-male Virginia Military Institute (VMI). In opposition to the claim, VMI argued that its "adversative method" of education, which features physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior,

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[20] *See* Shirley M. Tilghman, *Changing the Demographics: Recruiting, Retaining and Advancing Women Scientists in Academia*, March 24, 2005, *available at* www.princeton.edu/main/news/archive/S11/21/06G40/index.xml (last visited May 5, 2005) (President of Princeton adeptly addresses why universities should care about increasing the numbers of women in the sciences and how universities can do so.).

[21] *Id.* (noting that Japanese girls and boys scored higher on standardized tests than did the boys of many nations including the U.S.).

[22] Angier, *supra* note 6, at A1 (quoting sociologist Yu Xie).

[23] Shinichi Suzuki, ABILITY DEVELOPMENT FROM AGE ZERO 8 (1981).

[24] *Id.* at 20.

[25] *Id.* at 8.

[26] *See* Mary Ann Case, *"The Very Stereotype the Law Condemns": Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (noting that the "bulk of the work" in the Supreme Court's sex discrimination decisions is "the proposition that there are constitutional objections to 'gross stereotyped distinctions between the sexes'").

[27] U.S. v. Virginia, 518 U.S. 515, 533 (1996).

and indoctrination in desirable values,[28] was a method of education poorly suited to women. In support of its contention, VMI introduced expert testimony about typical male or female tendencies. For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere."[29] Although the Court did not challenge this evidence, it nevertheless refused to allow "generalizations about 'the way women are,'" or "estimates of what is appropriate for most women," to justify "denying opportunity to women whose talent and capacity place them outside the average description."[30] It refused to use an "inherent differences" argument to constrain individual opportunity by excluding women from VMI's citizen-soldier training.[31]

The Supreme Court has not only recognized that gender-based stereotypes are a problem, it has also recognized that specific stereotypes are endemic to discrimination against women. One of these stereotypes highlighted by the Court is the same one pressed by President Summers: "[T]he pervasive presumption that women are mothers first and workers second."[32] The Court saw this presumption, and its companion—the presumption that men lack domestic responsibilities—as "precisely where sex-based discrimination has been and remains strongest."[33] Given the vitality of this mother-as-exclusive-caretaker stereotype as a point through which women are denied opportunity by state as well as private enterprises, the Court held that Congress could enforce against the states the Family and Medical Leave Act, which guaranteed leave in a gender-neutral way.[34]

The problem with viewing women as mothers first and workers second is that it stereotypes them right out of significant jobs.[35] "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first and workers second."[36] Summers used the stereotype precisely in this way, to answer the question "Who

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[28] *Id.* at 522. For a discussion regarding how women have not been permitted to fully integrate into military culture as a result of their relegation to subordinate positions, *see generally* Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMEN'S L.J. 177 (2005).

[29] *Id.* at 541.

[30] *Virginia*, 518 U.S. at 550. *See also* Mary Ann Case, *"The Very Stereotype the Law Condemns": Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1467-68, 1471 (2000) (highlighting similarities between sex discrimination cases and cases holding that irrebuttable presumptions are unconstitutional, and noting that the "modern constiutional and statutory law of sex discrimination makes a place for exceptional women").

[31] *Id.* at 520, 533 (holding that neither "goal of producing citizen-soldiers nor VMI's implementing methodology [which employs an 'adversative method'] is inherently unsuitable to women").

[32] Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721,736 (2003).

[33] *Id.* at 738.

[34] *Id.* at 735.

[35] *See* Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 3-6 (2003). In employment law, employers who make frank and open statements reflecting the view that mothers do not belong in the workplace, have lost a number of cases brought by mothers who faced adverse employment action based on these hostile prescriptive stereotypes. *See, e.g., Moore v. Alabama*, 980 F. Supp. 426 (M.D. Ala. 1997) (holding that statement by Vice President of Academic Affairs to pregnant employee that "I was going to make you head of the office, but look at you now," constituted direct evidence of unlawful employment discrimination).

[36] *Hibbs*, 538 U.S. at 736 (citing Congressional determination).

wants to do high-powered work?," with the answer—not moms.[37] But Summers' response assumes both that high-powered work requires 80-hour weeks, and that women, especially mothers, lack interest in this schedule. The possibility that work structure could be altered to accommodate family responsibilities (for both men and women),[38] or that work interest is itself a function of social factors[39] was not seriously considered.

To say that stereotypes about men and women are problematic, is not to say that male-female differences do not exist. This is a study of scholarly interest at many levels, and conclusions are still being drawn in many different contexts. The problem is the use of evidence of differences in the ordinary way—to limit women's opportunities and justify inequality. The bridge between difference and dominance, I sometimes forget, is a short one that is easily crossed.[40]

The harm threatened by remarks like Summers', which discuss difference to justify disparities, is that the discussion will perpetuate inequality.[41] After telling women that math and science are generally contrary to their essential natures (not so different from many historical texts), and that the mostly male decision-makers who hire them should carefully evaluate whether these marginal hires (but not their male counterparts) are up to snuff,[42] does Summers feel he will have a greater chance of enticing women to seek 24/7 employment opportunities at his school?

Signals are important.[43] And the damage to Harvard's reputation, despite damage control, will be enduring.[44] The collateral damage to women from Summers' further entrenchment of bias has the potential to be enduring as well.[45]

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[37] Summers, *supra* note 1. Perhaps not coincidentally, "[t]he number of women offered tenure in Harvard's Faculty of Arts and Sciences has declined every year since Summers became President in 2001, and last year women received just four of 32 tenure offers." *Evelyn Hammonds of Harvard Named to Lead Its Female Faculty Task Force*, Mar. 7, 2005, JET, at 7.

[38] *Cf.* Lisa Belkin, *Goodbye Doesn't Mean Forever*, Mar. 13, 2005, N.Y. Times, § 10, at 1 (noting that nearly 40% of women with a graduate, professional degree or a high-honors undergraduate degree have left the workforce voluntarily as have 24% of men, but then discussing the many companies that are experimenting with work-schedule accommodations for women); *see also* Deborah Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 Mich. L. Rev. 2212, 2317 (1998) (discussing the merits of work-spreading for even upper-level workers).

[39] *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990) (noting sociological literature that tends to show that "adults' work attitudes and behavior are shaped by the positions they occupy within larger structures of opportunity, rewards, and social relations in the workplace").

[40] *See* CATHERINE MACKINNON, *On Difference and Dominance*, *in* FEMINISM UNMODIFIED 34-47 (1987) (opposing the suggestion that male-female difference equals female inferiority); MARTHA MINOW, MAKING ALL THE DIFFERENCE 49 (1990) ("Buried in the questions about difference are assumptions that difference is linked to stigma or deviance and that sameness is a prerequisite for equality.").

[41] *See* J.E.B. v. Alabama, 511 U.S. 127 (1994) (precluding prosecutors from striking jurors from a venire in a paternity case on the basis of gender and noting that "a shred of truth may be contained in some stereotypes" but nevertheless state actors must "look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination").

[42] Summers, *supra* note 1.

[43] David B. Wilkins, G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 Cal. L. Rev. 493, 549-554 (1996).

In the end, there may well be relevant biological differences between men and women in the way that they process and respond to information.[46] But it will likely be years before we fully identify such group-based differences, and many more years before we understand the implications of those differences for groups or individuals. Until we have made more progress toward eliminating social barriers to women's entry into these fields, we can have no idea how much, if any, of the gap biology explains.[47] The reason to want women in science is not simply benevolence toward an excluded group. Rather, expanding the talent pool more broadly to include people of every race, class, national origin, and gender increases the chance of finding useful and productive scientific advances from which all social groups will gain. Women were once considered unfit for law.[48] And today their contributions as leaders in that profession are immense. (The Harvard-educated mother of three who ran the large law firm at which I worked is but one example. The brilliant deans of both my law school and President Summers' law school are two others).[49] Women were considered unfit for medicine.[50] But many

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[44] *See* Harvard Faculty Motion, *supra* note 4 ("The Faculty regrets the President's mid-January statements about women in science and the adverse consequences of those statements for individuals and for Harvard.").

[45] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (discussing implicit biases, their real-world consequences, and the way in which biases are sustained); Anthony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 206 (2005) (citing numerous studies related to unconscious gender stereotypes including research showing that "self-fulfilling prophecies can maintain stereotypes about both race and gender").

[46] *See* Maureen Dowd, *X-Celling Over Men*, N.Y. TIMES, Mar. 20, 2005, § 4, at 13 (commenting on a study that shows women have "a significant increase in gene expression over men" and that "[w]omen are not only more different from men than we knew. Women are more different from each other than we knew."); John O'Neil, *Women's Brains on Nicotine*, N.Y. TIMES, Feb. 22, 2005, at F1 (reporting that "[n]icotine acts on male and female brains differently" but that "one of the drug's major effects was to make women's brains work more like men's").

[47] *See* Stephanie Riger, *Rethinking the Distinction Between Sex and Gender*, *in* POWER, PRIVILEGE & LAW: A CIVIL RIGHTS READER (Leslie Bender & Daan Braveman eds., 1995) (discussing problems with 19th century psychology research designed to identify the "true" differences between men and women, one of which was the impossibility of "creating a non-sexist environment in which the essential natures of males and females could emerge untainted," and noting the "shrinking or disappearing of group differences purported to be explained by biology"). *See also Virginia*, 518 U.S. at 538 (noting that coeducation at the University of Virginia, the most prestigious institution of higher education in that state, began less than 40 years ago). The same is true for many fine institutions.

[48] *See* Bradwell v. State, 83 U.S. 130 (1873) (denying law license to Myra Bradwell on the ground that "[i]n the nature of things, it is not every citizen of every age, sex and condition that is qualified for every calling and position," and stating that "the natural and proper delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

[49] *See* Naureen S. Malik, *Advice From the Top: Climbing the Ladder in U.S. Law Firms*, April 15, 2004, *at* www.mayerbrownrowe.com/news/index.asp?nid=20 (last visited May 5, 2005) (interviewing Deborah de Hoyos, managing partner of Mayer, Brown, Rowe and Maw); *see also* Lori Rohlk Pfeiffer, *Deans of Distinction*, 37 ARIZ. ATT'Y 30 (2001) (discussing University of Arizona Law School Dean Toni Massaro); Mary Elizabeth Basile, *False Starts: Harvard Law School's Efforts Toward Integrating Women Into the Faculty, 1928-1981*, 28 HARV. J.L. & GENDER 143, 143 & 186 (2005) (noting the appointment of Harvard Law School Dean Elena Kagan in 2003 and calculating that 17% of law school deans are female).

[50] *See Virginia*, 518 U.S. at 536, 544 (citing among others, Dr. Edward H. Clarke of the Harvard Medical School, who maintained that "the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs" and noting evidence that "[m]edical faculties similarly resisted men and women as partners in the study of medicine").

standards of care for disease would be unknown without their research.[51] Even in physics, where women's participation is still relatively small, the world would be less in the absence of their contributions.[52] It is unfortunate that the President of Harvard has not used his position to nurture their potential. But perhaps after the firestorm surrounding his speech, Harvard's serious inquiry will begin in earnest.

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[51] *See, e.g.*, Marla Dubinsky et al., *Pharmacogenics and Metabolite Measurement for 6-mercaptopurine Therapy in Inflammatory Bowel Disease*, 118(4) GASTROENTEROLOGY 705-13 (2000); Barbara Kirschner, *Safety of Azathioprine and 6-mercatopurine in Pediatric Patients with Inflammatory Bowel Disease*, 115(4) GASTROENTEROLOGY 813-21 (1998).

[52] *See, e.g.*, K.C. Cole, *Fun With Physics*, *in* THE BEST AMERICAN SCIENCE WRITING 30-41 (Dava Sobel ed. 2004) (discussing the work of Janet Conrad of the Columbia physics department and her contributions to the understanding of neutrino physics); *see generally* ALLISON LASSIEUR, MARIE CURIE: A SCIENTIFIC PIONEER (2003) (describing obstacles Marie Curie faced in trying to obtain a university education because of her gender, the Nobel Prize winning discoveries she made in spite of these obstacles, and the gender discrimination she faced even after them, for example, in trying to obtain a chair at the Sorbonne).