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ON THE USE OF GENDER STEREOTYPING RESEARCH IN SEX DISCRIMINATION LITIGATION

*Eugene Borgida, Ph.D., Corrie Hunt, and Anita Kim**

INTRODUCTION

In cases in which expert scientific testimony may be helpful to a jury, a witness who is qualified as an expert may “testify in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”¹ In cases involving claims of gender stereotyping, several courts have permitted testimony by experts who are qualified to explain the practice of stereotyping and the conditions under which it is more or less likely to occur.²

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¹ FED. R. EVID. 702; *see also* *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 593-94 (1993).

² *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262-63 (N.D. Cal. 1997); *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191-92 (N.D. Cal. 2004); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 882 (D. Minn. 1993); *Beck v. Boeing Company*, 203 F.R.D. 459, 461 (D. Wash. 2001); *Price Waterhouse v.*

However, expert testimony on gender stereotyping has not been without its critics. In *Price Waterhouse v. Hopkins*, for example, the majority rejected the notion of expertise in gender stereotyping in evaluating the testimony of the expert psychologist presented by the plaintiff, Dr. Susan Fiske:

[W]e are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female as requiring "a course in charm school." Nor . . . does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.³

Similarly, in overturning the admission of expert testimony on gender stereotyping, the Minnesota Court of Appeals, in *Ray v. Miller Meester Advertising, Inc.*, offered the following rationale:

Information about and commentary on gender issues is so abundant in our society that it has become a common stereotype that women receive disparate and often unfairly discriminatory treatment in the workplace. . . . Gender stereotypes are the stuff of countless television situation comedies and are the focus of numerous media treatments on a nearly daily basis. It is unarguable that virtually all adults in our society know about gender stereotypes.⁴

In addressing such criticism, Faigman, Kaye, Saks, and Sanders⁵ have offered an astute perspective on the differences of opinion regarding the validity of gender stereotyping testimony and the value of social science evidence in the litigation context.

Hopkins, 490 U.S. 228, 255-56 (1989); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (D. Fla. 1991); *E.E.O.C. v. Morgan Stanley & Co.*, 324 F.Supp.2d 451 (S.D.N.Y. 2004).

³ 490 U.S. at 256.

⁴ *Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d 355, 366 (Minn. Ct. App. 2003).

⁵ David L. Faigman et al., *Legal Issues, in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* 374 (David L. Faigman et al. eds., 2002).

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“One significant value of much social science research is that it makes clearer what we only dimly perceive, if we perceive it at all.”⁶ The researchers noted that individuals often respond to reports of psychological findings by nonchalantly remarking, “of course we knew this all along.”⁷ However, individuals’ beliefs about what they have always known often prove “not quite correct or, more importantly, not quite correct in substantial detail.”⁸ While Faigman and colleagues suggest that research on eyewitness identification is the paradigmatic example of this phenomenon, they assert that research on gender stereotyping also fits this model and “offers insights about gender relations . . . beyond what experience alone can provide.”⁹

Overall, research in gender stereotyping has yielded a body of knowledge that illustrates the complex nature of gender relations. Although some of the findings may at first seem intuitive, the effects of gender stereotyping are incredibly complicated and nuanced. As will be discussed, the research demonstrates that judgments of women are strongly influenced by stereotypes and that this is especially true when women behave in counterstereotypic ways.

I. OVERVIEW OF RESEARCH ON GENDER STEREOTYPING

Several reviews of the scientific literature on gender stereotyping suggest that this body of knowledge reflects a scientifically established and mature area of psychological science with areas of scientific agreement and disagreement that provide evidence-based insights into the nature of gender relations.¹⁰ Hunt

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *E.g.*, 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 (1999); Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOL. 1049 (1991); Jennifer S. Hunt et al., *Gender Stereotyping: Scientific Status*, in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 374 (D. L. Faigman et al. eds., 2002).

et al. suggest several areas of scientific agreement with regard to gender stereotyping research.¹¹ First, researchers have studied the traits and attributes generally associated with women and men, and the traits that are associated with subtypes of women and men (e.g., businesswomen, feminists, and housewives, or construction workers, businessmen, and jocks). With respect to the *content* of stereotypes, Hunt et al. argue that the research has consistently shown that men are seen as agentic and achievement oriented, and women are seen as communal, nurturing, and passive. It is noteworthy that stereotypically male traits are associated with success in the business world and that stereotypically female traits are not. Further, people not only associate individual traits with men and women, but they also believe prescriptively that men and women *should* behave in gender-consistent ways.

Second, Hunt et al. show that research has continually found that gender stereotypes have a small but definite effect on social judgments of women and men (e.g., evaluations, attributions, and employment decisions), especially when women and men act in ways that are inconsistent with existing stereotypes. Research has shown that when forming initial impressions of women, people frequently rely more on their stereotypes about women than on information about the specific woman (individuating information). Thus, preconceived stereotypes of businesswomen more strongly influence a perceiver's impressions of a specific businesswoman than do that woman's own attributes.

Research also has shown that the effects of using these stereotypes are predictable and especially strong in contexts in which individuals behave in gender-inconsistent ways. In one meta-analysis, for example, Swim, Borgida, Maruyama, and Myers found that, overall, there was only a slight tendency to evaluate women more negatively than men.¹² However, when only stereotypically masculine and gender-neutral roles were examined, this effect size increased substantially. The effect disappeared when women were evaluated in stereotypically feminine roles,

¹¹ Hunt et al., *supra* note 10, at 423-24.

¹² Janet Swim et al., McKay vs. McKay: *Is There a Case for Gender Biased Evaluations?*, 105 PSYCHOL. BULL. 409 (1989).

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supporting the idea that women are penalized when they behave in gender-inconsistent ways.¹³

A third area in which there is sufficient scientific agreement involves research showing that stereotypes are more likely to exert an influence in gender-salient situations, ambiguous situations, or situations in which the perceiver is not motivated to make accurate judgments.¹⁴ Finally, as noted by Hunt et al.,¹⁵ researchers also have studied the psychological processes by which individuals use stereotypes in their perceptions and evaluations of others. Gender is a fundamental dimension of categorization. Once an individual is categorized as belonging to a gender, the stereotypes of that gender may quickly come to the perceiver's mind, a process known as stereotype activation. Once stereotypes are activated, they are then available for the perceiver to apply in her thinking about and evaluation of the target person. It is important to note that categorization, stereotype activation, and stereotype application can all occur outside of the perceiver's awareness.

Moreover, some people are more likely to use stereotypes to guide their judgment than others, and different motives seem to affect the use of stereotypes differently. Right Wing Authoritarian (RWA) personalities, for example, are characterized by endorsement of traditional norms and values, submission to authority, and aggression against those who defy traditional norms and values. Research supports the idea that individuals with RWA personalities endorse traditional gender roles and disapprove of women who behave non-traditionally. One study reviewed by Hunt et al., for example, found that men with RWA personalities rated feminists significantly less favorably than housewives, did not believe feminists promoted equality for women, and perceived feminists as holding different values than their own.¹⁶

As discussed in the next section, the activation and application of gender stereotypes can be nuanced and pose double-bind impression management dilemmas for women in organizational

¹³ *Id.* at 423-24.

¹⁴ Hunt et al., *supra* note 10, at 408.

¹⁵ *Id.* at 412-19.

¹⁶ *Id.* at 420.

contexts.

II. A CASE STUDY IN GENDER STEREOTYPING: WOMEN WHO SELF-PROMOTE

A relatively recent and important area of research in the field of gender stereotyping illustrates how gendered prescriptions for personality interact with what women may (and do) experience as they attempt to climb the occupational hierarchy. Emphasizing the conflicts women face in their dual gender and leadership roles, this growing body of research demonstrates that in order to be perceived as competent when compared to their male counterparts in leadership roles, women must self-promote and explicitly emphasize their prior successes. However, this self-promotion involves an impression management dilemma for women: self-promotion may increase perceptions of their qualifications, but self-promotion also appears to increase the likelihood of social rejection or what Rudman refers to as the “backlash effect.”¹⁷ Various experimental studies have been conducted¹⁸ to examine the impact of this “backlash” effect on hiring decisions, perceptions of likeability, social skills, and competence. This approach relies on the presumption of communal conceptions of women as friendly, unselfish, and other-focused, and as expressively clashing with the masculine and agentic expectations

¹⁷ Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. OF PERSONALITY AND SOC. PSYCHOL. 629, 629 (1998) [hereinafter Rudman, *Self-Promotion As a Risk Factor for Women*].

¹⁸ See, e.g., *id.*; Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. OF PERSONALITY AND SOC. PSYCHOL. 157 (2004); Laurie A. Rudman & P. Glick, *Feminized Management and Backlash toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. OF PERSONALITY AND SOC. PSYCHOL. 1004 (1999) [hereinafter Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*]; Laurie A. Rudman & P. Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, 57 J. OF SOC. ISSUES 743 (2001) [hereinafter Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*].

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associated with managerial leadership.¹⁹ The experimental evidence generally suggests that because self-promotion is incongruent with prescriptions for leadership traits, agentic women are at a greater risk of experiencing a “backlash.”

A. Perceptions of Competence

The prediction that women are less likely to be perceived as agentic has primarily been investigated in terms of competence ratings for hypothetical female job applicants.²⁰ In one experiment, for example, undergraduate participants interviewed and evaluated a female or male applicant (target) for a potential partner in a Jeopardy-like game.²¹ Results indicated that when participants interviewed a self-effacing applicant, they rated the man as more competent than the woman. In contrast, participants rated both self-promoting men and women equally in terms of task aptitude.

Insofar as modesty is considered to be a part of the feminine stereotype and self-promotion is not,²² the previous experiment provides some support for the idea that conformity to the stereotype of a feminine personality may result in diminished perceptions of a woman’s competence. Heilman, Wallen, Fuchs, and Tamkins further examined how gender stereotypes affect perceptions of competence of female job applicants by experimentally manipulating the presence of specific and objective information about the candidate’s competence for a managerial (or

¹⁹ Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice toward Female Leaders*, 109 PSYCHOL. REV. 573, 574-75 (2002).

²⁰ Rudman, *Self-Promotion as a Risk Factor for Women*, *supra* note 17, at 629-30; Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1004-06; Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 746-49; M. E. Heilman et. al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Stereotyped Tasks*, 89 J. OF APPLIED PSYCHOL. 416, 417-18 (2004) [hereinafter Heilman et al., *Penalties for Success*].

²¹ Rudman, *Self-Promotion as a Risk Factor for Women*, *supra* note 17, at 639-40.

²² Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 PSYCH. OF WOMEN Q. 65, 68-70 (2001).

leadership) position.²³ In this study, participants read a job description and background of three employees holding the same position in a large organization. What is particularly interesting in this study is that when participants did not read an evaluation of the candidate's prior job performance, they made the trait inference that the male candidate was more competent than the female candidate.²⁴ Only when participants read that upper-level management had evaluated the female candidate as extremely competent did participants actually rate the two candidates equally on the dimension of task aptitude.²⁵

While the studies detailed here focused specifically on self-promotion and on whether or not the applicant's prior successes were known, other studies have found that agentic applicants are perceived as more competent for managerial positions than communal²⁶ and androgynous candidates.²⁷ The finding that in ambiguous situations people will infer that women are less capable than men is consistent with the argument that descriptive stereotypes of "how women are" decrease a woman's chances of being perceived as having the agentic qualities and attributes required of successful managers and leaders. On this basis, it might seem that in order to avoid these inferences, women should simply make sure they self-promote and provide solid, credible evidence of their job qualifications.

B. Perceptions of Likeability

Unfortunately, enhanced perceptions of competence for women who self-promote seem to come at a social cost. Women who speak strongly about their strengths and clearly delineate prior successes are viewed as more qualified, but also as less socially

²³ Heilman et al., *Penalties for Success*, *supra* note 20, at 418.

²⁴ *Id.* at 419-20.

²⁵ *Id.*

²⁶ Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1008.

²⁷ Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 752.

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attractive.²⁸ For example, Rudman and Glick's research explored how women who present themselves as directive and assertive—or as successful agentic leaders—are viewed as stepping outside of their feminine gender roles and, thus, as no longer in possession of stereotypically feminine interpersonal skills.²⁹ In one experiment, participants who viewed a videotaped interview or read an application essay rated agentic males as more socially skilled than agentic females.³⁰ Supporting the hypothesis that this discrepancy is due to perceived inconsistencies between agentic expectations and feminine roles, ratings for the social skills of female communal applicants were statistically indistinguishable from those for male communal applicants.³¹ These applicants spoke or wrote more modestly about their previous accomplishments and, as a result, were viewed as more interpersonally skilled.³² However, participants rated the women as less competent overall.³³ Moreover, participants who automatically associated women with communality and men with agency were more likely to view agentic females as interpersonally deficient.³⁴

In this light, the evidence rather clearly demonstrates that gendered personality constructs can influence people's perceptions of job applicants and that this effect places women at a disadvantage. Heilman et al., in the study described in the previous section, found that when prior successes were clear, participants

²⁸ Rudman, *Self-Promotion as a Risk Factor for Women*, *supra* note 17, at 635-36; Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1007-08; Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 752-53.

²⁹ Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1008-09; Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 757-59.

³⁰ Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 749-53.

³¹ *Id.* at 753.

³² *Id.*

³³ *Id.* at 752.

³⁴ Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 758.

actually liked the female applicant less than the male applicant.³⁵ More specifically, participants in the study assumed women who demonstrated success in a masculine domain to be more hostile than men and, in turn, less likeable.³⁶ Interestingly, this effect was attenuated in the female or neutral job condition.³⁷ What is particularly noteworthy, however, is that participants inferred that the successful woman was interpersonally hostile, while they did not infer that an equally qualified man was hostile toward others.³⁸

This research demonstrates how descriptive and injunctive stereotypes about women's communality affect people's perceptions of female job applicants in the dimensions of competence and likeability. Based on this evidence, the question becomes whether these perceptions result in systematic discrimination against women in terms of hirability and promotions. In this regard, research has shown that unlikable people are viewed as less worthy of salary increases and promotions.³⁹ Although this effect was found for both men and women, it certainly has implications for agentic women who are viewed as less likeable.

Gender differences for hiring recommendations indicate that women should moderate their presentation according to the gender of their evaluators. While female participants consistently preferred a self-effacing female partner, male participants preferred a self-promoting woman when told that they had a vested self-interest in the performance of the applicant.⁴⁰ In contrast, self-promoting male applicants were consistently rated as very hireable, regardless of the gender and motivation of the evaluators.

Extending these findings to gendered leadership positions, in an experiment with a group of undergraduate students, Rudman and Glick found patterns of discrimination against women

³⁵ Heilman et al., *Penalties for Success*, *supra* note 20, at 419.

³⁶ *Id.* at 423.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 425-26.

⁴⁰ Rudman, *Self-Promotion as a Risk Factor for Women*, *supra* note 17, at 633-34.

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competing for a masculine manager position.⁴¹ Specifically, undergraduate participants recommended that communal female applicants be hired for the position significantly less frequently than they recommended the hiring of communal male applicants. Moreover, participants with implicit gender stereotypes (of which they were unaware) were more likely to prefer a male authority figure.⁴²

Although this research suggests that women will be discriminated against as they try to enter male-dominated professions, discrimination patterns have also been documented for women applying to stereotypically feminine positions. Research has demonstrated that people recommend agentic females significantly *less* frequently than agentic males for a feminized managerial job.⁴³ This is consistent with the finding that success in female-dominated occupations is associated with being gentle, nurturing, and supportive.⁴⁴ When women presented themselves as possessing the agentic qualities deemed necessary for leadership positions, they were viewed as lacking in the feminine “niceness” presumably required for more feminine manager positions.

Notably, while communal females and males were rated equivalently for hiring in a feminized job description, agentic males were recommended for the job most often.⁴⁵ Likewise, no significant differences were found between agentic male and female applicants in the masculine job condition. In combination with the findings on the role of likeability in hiring decisions, this

⁴¹ Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1008; Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 753.

⁴² Laurie A. Rudman & S. E. Kilianski, *Implicit and Explicit Attitudes toward Female Authority*. 26 PERSONALITY AND SOC. PSYCHOL. BULL. 1315, 1325 (2000).

⁴³ Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1008; Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 753.

⁴⁴ Mary Ann Cejka & Alice H. Eagly, *Gender-Stereotypic Images of Occupations Correspond to the Sex Segregation of Employment*, 25 PERSONALITY AND SOC. PSYCHOL. BULL. 413, 418-19 (1999).

⁴⁵ Rudman & Glick, *Feminized Management and Backlash toward Agentic Women*, *supra* note 18, at 1008.

research suggests that women indeed face an impression management dilemma when applying for jobs; they must choose between being successful and being liked. Only when women self-promote *and* behave in an overtly friendly and sociable manner do the gender discrimination patterns seem to disappear.⁴⁶ But because men need only self-promote to be considered good job candidates in all circumstances, the bar seems to be placed higher for women.

III. EXAMINING THE EXTENSION OF THE SELF-PROMOTION DILEMMA BEYOND THE LABORATORY

The question of whether the findings discussed in the previous sections are generalizable to non-laboratory settings merits consideration. This question of “overreaching” based on experimental science is by no means limited to this social scientific domain.⁴⁷ But this is an especially important question in light of organizational trends emphasizing the communal qualities of managerial jobs (which, in turn, may work against self-promoting, agentic women who will be perceived as violating prescriptive expectations). Most of the evidence on the “backlash” phenomenon has involved laboratory experiments conducted with undergraduate participants.

There is some reason to believe, however, that women’s being held to a higher standard for leadership positions is not limited to laboratory or experimental settings. In their quantitative meta-analysis of forty-five studies of actual leaders drawn from business, educational, and government organizations, Eagly, Johannesen-Schmidt, and van Engen examined gender differences

⁴⁶ Rudman & Glick, *Prescriptive Gender Stereotypes and Backlash toward Agentic Women*, *supra* note 18, at 753.

⁴⁷ D. L. Faigman & J. Monahan, *Psychological Evidence at the Dawn of the Law’s Scientific Age*, 56 ANN. REV. OF PSYCHOL. 631, 640 (2005) [hereinafter Faigman & Monahan, *Psychological Evidence at the Dawn of the Law’s Scientific Age*]; Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein Et Al.’s Punitive Damages*, 53 EMORY L.J. 1359, 1373 (2004).

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in leadership styles.⁴⁸ The study divided leadership styles into three categories: *transformational*, *transactional*, and *laissez faire*. *Transformational* leaders are distinguished by a more encouraging, nurturing, and supportive interaction style with subordinates. Notably, this style has been independently established as one of the most effective, that is, other meta-analyses have shown positive correlations between leaders' effectiveness and all components of transformational leadership.⁴⁹ The less effective but more conventional style of delegating responsibility and rewarding satisfactory performance is defined as *transactional*.⁵⁰ The third and least effective style, *laissez faire*, is characterized by a lack of involvement in and general failure to take responsibility for managing.⁵¹ Investigating gender differences in the use of these three styles, the researchers found that as compared to male leaders, female leaders were significantly more transformational. Additionally, men exhibited significantly higher scores for less effective methods of leadership, namely passive management by exception and laissez-faire.

In summary, this research suggests that, without any information about the prior successes of an applicant, people tend to automatically assume that male candidates are more qualified and competent than female candidates. In order to counteract these perceptions and their consequences, some women may self-promote and make explicitly clear that they are exceptionally qualified candidates and top performers in their field. However, because agentic behaviors are viewed as contraindicative of feminine "communal" prescriptions for behavior, these self-promoting women are viewed as lacking in social skills and "niceness." Because agency does not have the same influence on perceptions of male likeability, this may lead to discrimination in more feminized managerial jobs that emphasize the role of interpersonal skills. In addition, the finding that likeability is

⁴⁸ Alice H. Eagly et al., *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCHOL. BULL. 569 (2003).

⁴⁹ *Id.* at 571.

⁵⁰ *Id.*

⁵¹ *Id.*

associated with recommendations for salary increases and promotions may have some interesting implications for understanding demonstrable salary disparities between men and women. If women want to be successful, then they must both self-promote and emphasize their “niceness.” Unfortunately, this suggests that female managers and executives are being held to a different standard than their male counterparts.

Thus, the Eagly et al. meta-analysis, consistent with the findings of this area of research, suggests that female managers who are more likely to enact a transformational leadership style in actual organizational settings perhaps do so *because* this repertoire of effective leadership behaviors may allow them to lessen role incongruity dilemmas in their daily organizational lives.⁵²

CONCLUSION

To date, the courts that have accepted expert testimony on gender stereotyping have admitted this testimony in the form of a *social framework* analysis. Such an approach is established and grounded in legal and social science scholarship,⁵³ and its use is not confined to employment discrimination law.⁵⁴ Social frameworks are offered to the trier of fact through expert testimony to provide a scientifically informed context for thinking about the matters in dispute. As Gutek and Stockdale have suggested, “[i]t is

⁵² *Id.* at 584.

⁵³ *E.g.*, Faigman & Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, *supra* note 47; John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 L. AND HUM. BEHAV. 571 (1991); John Monahan & Laurence Walker, *Judicial Use of Social Science Research After Daubert*, 2 SHEPARD'S EXPERT & SCI. EVIDENCE Q. 327 (1994); JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (4th ed. Foundation Press 1998); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

⁵⁴ Susan T. Fiske & Eugene Borgida, *Social Framework Analysis As Expert Testimony in Sexual Harassment Suits*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR* 575 (Samuel Estreicher ed., 1999).

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important to point out that a social framework analysis does not demonstrate that discrimination or harassment either does or does not occur but provides information to help the jury determine whether or not discrimination or harassment occurred.⁵⁵ Thus, the focus, at least with respect to expert testimony on gender stereotypes, is on general causation and not on establishing specific causation.⁵⁶

In pattern and practice class action sex discrimination cases, general, but not specific, causation is the test; however, this issue is far from resolved.⁵⁷ Some of the legal opinions in cases involving sex discrimination have referred to social framework testimony as providing a “sound, credible theoretical framework” for thinking about the role of gender stereotyping in a given case.⁵⁸ For example, in *Beck v. Boeing Company*, the federal district court judge ruled against a motion to exclude such testimony on the grounds that the testimony was based on sufficient facts and data, that the testimony was the product of reliable principles and methods, that the principles applied reliably to the facts of the case (and that not all factors affecting gender stereotyping had to apply to a specific case), and that general and not specific causation was the relevant test.⁵⁹ Finally, while some members of the defense bar view expert testimony on gender stereotyping as “junk science,” others have referred to it as “a potentially powerful theory of sex discrimination which has particular significance for merit-based compensation systems.”⁶⁰

⁵⁵ Barbara A. Gutek & Peggy Stockdale, *Social Framework Analysis*, in EMPLOYMENT DISCRIMINATION LITIGATION 245 (Frank J. Landy ed., 2005).

⁵⁶ Eugene Borgida, *Social Framework Analysis and Employment Discrimination* (2004) (paper presented at the American Psychological Society annual meeting, Chicago, Ill.) (on file with author).

⁵⁷ E.g., Faigman & Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, *supra* note 47, at 652.

⁵⁸ E.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 882 (D. Minn. 1993).

⁵⁹ *Beck v. Boeing Company*, No.C00-0301P (D. Wash. May 14, 2004) (order denying defendant's motion to exclude expert report, opinions, and testimony of plaintiffs' expert Eugene Borgida, Ph.D.).

⁶⁰ Lyndsay E. Harris & James E. Boddy, *Sex Discrimination Class Actions and Merit-Based Compensation: Is Your System at Risk?*, 16 EMP. L. COMMENT.

Importantly, a body of scientific knowledge, even one from the social sciences, should not be held to a standard that requires a complete consensus within the field of scientific inquiry for it to play a role in educating factfinders; in fact, we would argue that such a criterion is unrealistic and scientifically naïve in *any* scientific field. Social and psychological science, like the biological and physical sciences, are cumulative. There will always be some inconsistencies and disagreements in a field and these typically are empirically resolved over time and with peer review. As discussed in this article, however, it is possible to identify areas of comparative consensus among researchers of gender stereotyping. Disagreements about such assessments should not lead to the dismissal of the entire body of knowledge as inapplicable or “junk science.” Indeed, the U.S. Supreme Court in *Daubert* was correct in cautioning against the “wholesale exclusion” of expert testimony.⁶¹ As with other areas of psychological science, we would endorse the Court’s approach in *Daubert*, which advises that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means” of challenging admissible evidence.⁶²

1, 1 (2004), available at <http://www.mofo.com/docs/PDF/ELC0204.pdf>.

⁶¹ 509 U.S. 579, 596 (1993).

⁶² *Id.*