

# THE COGNITIVE FOUNDATIONS OF FORMAL EQUALITY: INCORPORATING GENDER SCHEMA THEORY TO ELIMINATE SEX DISCRIMINATION TOWARDS WOMEN IN THE LEGAL PROFESSION

## I. INTRODUCTION

Despite the progress women have made in the legal profession,<sup>1</sup> sex discrimination remains a substantial impediment to female advancement in this field.<sup>2</sup> Based on the findings of gender schema theory, one of the principal causes of this discrimination is the necessary role of stereotypes in normal cognitive processing.<sup>3</sup> To efficiently process information presented by their environments, people form cognitive knowledge structures called “schemas” that automatically categorize all related groups of information, including different groups of people.<sup>4</sup> The content of schemas is formed entirely from personal observation and experience, and once these structures are developed, all new information is processed according to its relation to schematic content.<sup>5</sup> Consequently, because gender stereotypes are still a prevalent, yet often implicit, component of most social environments, the resulting gender dichotomies become heavily integrated into general cognitive processing and thereby influence personal evaluations and perceptions of both others and ourselves.<sup>6</sup> One of the more predominant forms of these stereotypes is gender role stereotypes, which are also a primary mechanism for reinforcing sex discrimination towards women in

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1. See NAT'L ASS'N OF WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 5 (2007), <http://www.nawl.org/Assets/Documents/2007+Survey+Report.pdf>; A Snapshot of Women in the Law in the Year 2000, <http://www.abanet.org/women/snapshots.pdf> (last visited Aug. 2, 2010); see also Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501 (2004) (reviewing the history and development of legal theories on sex discrimination towards women).

2. See David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1411-14 (2008) (discussing gender role stereotypes and their influence on sex discrimination in the legal profession); Lens, *supra* note 1; COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2008, <http://www.abanet.org/women/CurrentGlanceStatistics2008.pdf> (last visited Aug. 2, 2010).

3. See Sandra Lipsitz Bem, *Gender Schema Theory: A Cognitive Account of Sex Typing*, 88 PSYCHOL. REV. 354 *passim* (1981) (proposing the relationship between schemas and gender stereotypes); see also VICKI S. HELGESON, *THE PSYCHOLOGY OF GENDER* 167-69 (Jeff Marshall et al. eds., 2d ed. 2005).

4. See Ian Andrew James et al., *Schemas Revisited*, 11 CLINICAL PSYCHOL. & PSYCHOTHERAPY 369, 370-75 (2004) (discussing the function of schemas in categorizing information for general cognitive processing).

5. See *id.*

6. See Bem, *supra* note 3, at 354-56, 362.

the legal profession due to their basis in the social roles traditionally occupied by women and men.<sup>7</sup>

This note will examine the reciprocal social and cognitive influences of gender role stereotypes on sex discrimination towards women in the legal profession and propose a solution to eliminate this continuing social problem. This note begins by examining the function of stereotypes in cognitive processing, their role in shaping social structure, and methods for overcoming the reciprocal influences of these processes. The note then narrows its scope to gender role stereotypes, examining both their social and cognitive influences, the resulting biases towards women in the legal profession, and how gender schema theory explains these problems. The following section uses current gender differentials in salary and promotion to illustrate why both cognitive and social aspects of gender role stereotypes must be taken into account in evaluating current sex discrimination towards women in the legal profession. The note then discusses formal equality through its relation to gender schema theory, highlights the benefits of formal equality's focus on individual qualifications, and responds to potential criticisms. Finally, this note proposes that incorporating the cognitive principles of gender schema theory into formal equality and applying the resulting theory to the workplace is a crucial step for actualizing gender equality in the legal profession.

## II. THE COGNITIVE AND SOCIAL FUNCTIONS OF STEREOTYPES

Stereotypes are overly broad generalizations of an individual's qualifications, behaviors, and personality traits based upon the social groups with which that individual is associated.<sup>8</sup> Due to its derogatory impact on minorities and other social groups, stereotyping is considered a practice of the ignorant and corrupt. However, multiple cognitive theories propose that stereotyping is a necessary function of normal cognitive processing.<sup>9</sup> Many of these theories are based on the premise that it is impossible for

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7. See generally Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859 (2005) (discussing the history and continued prevalence of gender stereotypes and sex discrimination in the practice of law). See Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1051-54 (1996) (addressing the general oversight of the impact of gender role stereotypes on men); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 109-12, 115-16 (2009) (discussing the influence of gender role stereotypes on sex discrimination in law school faculties).

8. See DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 16-17, 24 (Kurt W. Fischer et al. eds., 2004) (reviewing common definitions of "stereotype").

9. See *id.* at 12, 120-22; Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 2-3 (2009) (discussing the necessary role of schemas in structuring our views and opinions on sexuality); James et al., *supra* note 4; Christine A. Padesky, *Schema Change Processes in Cognitive Therapy*, 1 CLINICAL PSYCHOL. & PSYCHOTHERAPY 267, 267-68 (1994) (summarizing the function of schemas in categorizing and evaluating information).

individuals to analyze every component (including people) of their constantly changing environments.<sup>10</sup> These theories propose that the formation of cognitive structures called schemas, which store generalizations of the individual traits commonly associated with different categories of information, allows people to intake larger quantities of information than they would normally be able to process.<sup>11</sup> All new information is automatically processed through its relation to these pre-existing categories, which enables people to quickly and efficiently evaluate their surrounding environments.<sup>12</sup> Accordingly, it seems that many forms of discrimination and prejudice could be alleviated by simply raising social awareness that stereotypes function as generalized, cognitive responses to aid in processing information and are often not the result of conscious observation.

#### A. Schemas and Their Roles in Stereotyping

Schemas are categorical units of information stored in long term memory that aid in encoding, storing, and retrieving information.<sup>13</sup> Separate schemas are formed for separate categories of information, functioning essentially as cognitive knowledge structures that categorize related subunits of information and their associations to other schemas. For example, the schema for humans would likely be composed of separate schemas for race, gender, and age, each of which would include its own separate, yet often interrelated, content such as physical traits, associated behaviors, and appropriate behavioral responses to group members. Schemas are formed for all types of information, extending beyond generalizations of people to all identifiable categories such as plants, animals, occupations, and even types of furniture.<sup>14</sup> Activation of different schemas is often linked through overarching themes in content, which can cause activation of one category to strengthen associations between related categories.<sup>15</sup> This form of mental processing is so integral to the analysis of individuals' environments that schematic content includes not only cognitive information, but also behavioral, affective, and physiological components.<sup>16</sup>

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10. See sources cited *supra* note 9. Due to the large volume of information present in our daily lives, our cognitive processing mechanisms do not have the capacity to individually process every detail we face.

11. See Padesky, *supra* note 9, at 267-68 (providing a general description of schemas).

12. See sources cited *supra* note 9.

13. See James et al., *supra* note 4, at 370; see also SCHNEIDER, *supra* note 8, at 120-22; Padesky, *supra* note 9, at 267-68.

14. See Brower, *supra* note 9; James et al., *supra* note 4, at 370-71; Padesky, *supra* note 9, at 267-68.

15. See James et al., *supra* note 4, at 370-72; see also SCHNEIDER, *supra* note 8, at 121-22.

16. See James et al., *supra* note 4, at 375.

All schematic content is developed from personal experience, which makes an individual's physical environment a critical component of cognitive development.<sup>17</sup> Schemas are primarily developed in early childhood, resulting in the integration of the stereotypes learned and observed as children into general cognitive processing.<sup>18</sup> Although it is possible to change schematic content, which creates the potential to replace stereotype-based content with more accurate, individualized content, these schemas can be extremely difficult to alter.<sup>19</sup> The strength and maintenance of schemas is directly related to their functionality and frequency of use,<sup>20</sup> and associated patterns of behavior, such as responses to different groups of people, also tend to be repeated frequently.<sup>21</sup> The automatic nature of schematic processing further reinforces schematic content. Even though content can be activated consciously or unconsciously, often only the products of activation and not the actual processing details are available for conscious analysis.<sup>22</sup> Therefore, schemas formed during childhood that relate to frequently accessed information, such as characteristics of different groups of people, become cognitively augmented through years of repeated activation, making their content extremely difficult to replace.<sup>23</sup>

Schematic content also influences evaluation of environmental information, including views of other people and personal self-constructs.<sup>24</sup> Once schemas are developed, information is automatically processed through its relation to schematic content, which often creates the appearance of accuracy where none may actually exist.<sup>25</sup> Information consistent with schematic content is more likely to be cognitively attended, and ambiguous information is often interpreted to conform to pre-existing categories.<sup>26</sup> Through these processes, the social prevalence of stereotypes is

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17. See HELGESON, *supra* note 3, at 168; James et al., *supra* note 4, at 370-71.

18. See James et al., *supra* note 4, at 371; see also Carol Lynn Martin & Diane Ruble, *Children's Search for Gender Cues: Cognitive Perspectives on Gender Development*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 67, 67 (2004) (comparing cognitive theories on childhood development of gender stereotypes).

19. See James et al., *supra* note 4, at 374-75; Padesky, *supra* note 9 *passim* (discussing counseling methods for altering schemas). The ability to alter schematic content leaves open the question of whether these alterations result from the replacement of old schematic content, the formation of new schemas, or a combination of both processes.

20. See James et al., *supra* note 4, at 371-72.

21. See *id.*

22. See *id.* at 370, 374 (finding that conscious activation results from the voluntary retrieval of content, whereas unconscious activation occurs automatically, allowing little or no ability to control activation).

23. See James et al., *supra* note 4, at 374-75; Padesky, *supra* note 9, at 268.

24. See SCHNEIDER, *supra* note 8, at 124-31; Bem, *supra* note 3, at 355; James et al., *supra* note 4, at 370-71.

25. See SCHNEIDER, *supra* note 8, at 125, 130-31; Brower, *supra* note 9, at 4-5; James et al., *supra* note 4, at 370.

26. See SCHNEIDER, *supra* note 8, at 128-29, 130-31; Brower, *supra* note 9, at 4-5; James et al., *supra* note 4, at 370.

automatically reinforced, often without any direct bias towards stereotyped individuals.<sup>27</sup> People whose personal characteristics coincide with expectations (i.e., personal stereotypes) are evaluated more positively than those persons who demonstrate nonconforming characteristics.<sup>28</sup> In fact, even observing inconsistent behaviors and traits which illustrate the inaccuracy of stereotypes is generally ineffective in altering these perceptions because even when these characteristics are cognitively attended they are often either discounted through rationalization or viewed as an exception not indicative of normal (i.e., stereotypical) behavior.<sup>29</sup> Based on these findings, it seems that a more accurate and socially beneficial view of stereotypes is that they function as cognitive markers, providing foundation for further, conscious analysis of the people encountered in an individual's daily environment.

### B. *The Role of Stereotypes in Social Organizations*

The social functions fulfilled by stereotypes create further disincentives for acknowledging stereotypes as mechanisms of cognitive processing. Stereotypes are a primary means of establishing social groups, and the feelings of community associated with group membership<sup>30</sup> create both direct and implicit motivation for group members to overlook the potential inaccuracies of stereotypes to maintain the group's internal structure.<sup>31</sup> Social ingroups define and distinguish their identity by forming strong stereotypes about the negative attributes of outgroups, thus instilling a strong sense of community through inclusion by exclusion.<sup>32</sup> Consequently, common ingroup characteristics appear unique, while also instituting atmospheres of support and social acceptance through group consensus.<sup>33</sup> Once ingroups are established, maintenance

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27. See SCHNEIDER, *supra* note 8, at 21-22.

28. See *id.* at 128; see also Faigman et al., *supra* note 2, at 1411-14 (discussing the implicit nature of gender role stereotypes).

29. See Padesky, *supra* note 9, at 268 (noting that information inconsistent with schemas is rejected or edited); see also Brower, *supra* note 9, at 4-5; Faigman et al., *supra* note 2, at 1410-13 (describing sociological studies on the memory of gender-typed and cross-typed behavior).

30. See SCHNEIDER, *supra* note 8, at 233, 366, 368; Joshua Correll & Bernadette Park, *A Model of the Ingroup as a Social Resource*, 9 PERSONALITY & SOC. PSYCHOL. REV. 341, 342-43 (2005) (discussing the nature of ingroups and function of stereotypes in defining their structure); see also Jay J. Van Bavel et al., *The Neural Substrates of In-group Bias: A Functional Magnetic Resonance Imaging Investigation*, 19 PSYCHOL. SCI. 1131, 1131-32 (2008) (explaining the motivation roles of social identity).

31. Communities are an essential component of our psychological well-being, providing senses of both personal identity and self-validation through group acceptance. It seems then that people, even without direct awareness of the social functions of stereotypes, would be hesitant to acknowledge the inaccuracy of their structural underpinnings for fear of losing their identity. See SCHNEIDER, *supra* note 8, at 327-28; Correll & Park, *supra* note 30, at 342-46.

32. See SCHNEIDER, *supra* note 8, at 121-22, 327-28.

33. See *id.* at 327-28; Correll & Park, *supra* note 30, at 342-46.

of group identity is so essential to ingroup structure that pressuring group members to adopt conforming attitudes and behaviors is unnecessary to achieve group consensus since conformity will usually occur either unconsciously or out of desire for acceptance.<sup>34</sup> As a result, the unchallenged stereotypes of outgroup members are often assumed to be correct, which again creates the potential for inaccurate perceptions of outgroup members.<sup>35</sup> In fact, ingroup dynamics are so integral to social structure that several studies have found that simply being assigned to an arbitrary group creates strong preferences for other ingroup members over members of outside groups.<sup>36</sup> Therefore, it seems that individual efforts to consciously evaluate people beyond automatic stereotypes must be accompanied by broader social changes that reemphasize the importance of an individual's qualifications and personal characteristics.

### III. THE PSYCHOLOGY OF GENDER ROLE STEREOTYPES

Gender stereotypes are premised on overly broad generalizations of the social, biological, and cognitive differences between women and men.<sup>37</sup> Although stereotypes are associated with almost all social groups, gender, along with race and age, is one of the more common bases for stereotyping. These categories are all immutable, culturally salient, easily observable, and have genetic components, which seems to provide both an opportune marker for quickly accessing related schematic content and the appearance of accuracy through the permanence of genetic traits.<sup>38</sup> Gender stereotypes, however, differ from race and age stereotypes in both application and content. Unlike race and age, gender is such a pervasive form of classification that its use extends beyond describing people to categorizing a wide variety of other subjects such as pets, social activities, abstract concepts, and inanimate objects.<sup>39</sup> Gender stereotypes also carry very influential prescriptive components. These stereotypes, more so than race and age stereotypes, function as a primary indicator of socially acceptable traits and behaviors, which creates strong social pressure, and

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34. See SCHNEIDER, *supra* note 8, at 327-28.

35. See *id.*

36. See Correll & Park, *supra* note 30, at 342-43; Van Bavel et al., *supra* note 30, at 1131. Evolutionary theory provides further support for both the social and cognitive significance of these processes, proposing that, because humans evolved in an environment necessitating survival on the formation of small, cohesive groups, human cognition presupposes and facilitates the maintenance of ingroup membership. See Correll & Park, *supra* note 30, at 342; see also SCHNEIDER, *supra* note 8, at 366 (Past biological mandates resulted in close knit and interdependent groups of individuals.).

37. See SCHNEIDER, *supra* note 8, at 437-52.

38. See *id.* at 96, 437.

39. See *id.* at 439.



therefore cognitive influence, for both men and women to conform to the descriptive characteristics associated with these stereotypes.<sup>40</sup>

Gender role stereotypes are one of the more prejudicial forms of gender stereotyping, especially towards women employed in traditionally masculine occupations.<sup>41</sup> The concept of gender role stereotypes was originally introduced by Alice Eagly,<sup>42</sup> whose work has been influential in understanding the continuance of sex discrimination towards women in the legal profession despite their numerous achievements in the field.<sup>43</sup> Eagly proposes that many of the gender role stereotypes attributed to men and women are not based on biological traits but instead on the characteristics of the social roles generally occupied by each sex.<sup>44</sup> Although biological differences between men and women clearly exist, the exact nature of these differences is highly debated, and there is a general scientific consensus that biological traits function interactively with both social and cognitive factors in creating sex-typed behavior.<sup>45</sup> Gender role stereotypes provide strong support for this interaction because they are founded almost exclusively on social expectations of gender-typed behaviors and characteristics with biological sex ultimately functioning as little more than an immutable marker for attributing these gender-based social constructs.<sup>46</sup>

#### A. *The Social and Cognitive Foundations of Gender Role Stereotypes*

Gender role stereotypes appear to be cognitively based, at least in part, on the social perception that women only embody feminine characteristics and men only embody masculine characteristics.<sup>47</sup> The specific traits and behaviors that define these characteristics are primarily determined by the social roles typically occupied by each sex.<sup>48</sup> Cognitive as-

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40. See *id.* at 443; Faigman et al., *supra* note 2, at 1409-14; see also *supra* text accompanying notes 35-38 (pervasive social pressure to maintain group conformity and acceptance).

41. See VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 104 (1998) (discussing the development of schemas from gender role stereotypes). For examples of the discriminatory impacts of gender role stereotypes, see HELGESON, *supra* note 3, at 76-78; SCHNEIDER, *supra* note 8, at 184-85, 447-48; and Faigman et al., *supra* note 2, at 1407-28.

42. SCHNEIDER, *supra* note 8, at 447-49; see also Faigman et al., *supra* note 2, at 1407-08.

43. See Faigman et al., *supra* note 2, at 1407; Latourette, *supra* note 7 *passim*; Lens, *supra* note 1 *passim*; McGinley, *supra* note 7, at 109-12, 115-16 (influence of gender role stereotypes on sex discrimination in law school faculties).

44. Sex relates to biological traits, whereas gender defines the social constructs associated with biological sex, such as clothing, social activities, or socially acceptable emotions and behaviors. See HELGESON, *supra* note 3, at 3.

45. See Alessandra C. Iervolino et al., *Genetic and Environmental Influences on Sex-Typed Behavior During the Preschool Years*, 76 *CHILD DEV.* 826, 826 (2005).

46. See HELGESON, *supra* note 3, at 75-78; SCHNEIDER, *supra* note 8, at 184-85; Faigman et al., *supra* note 2, at 1407-09.

47. See generally *supra* notes 17, 24 and accompanying text (relationship between environment and schematic content); *supra* notes 44-46 and accompanying text (basis of gender role stereotypes of social constructs).

48. See HELGESON, *supra* note 3.

sociations are then formed between communal traits—warmth, emotional expression, concern for others, and relational interdependence—and femininity because women generally occupy communal roles.<sup>49</sup> Likewise, because men generally occupy agentic roles, agentic traits such as instrumentality, competence, strength, and independence define masculinity.<sup>50</sup> Agentic traits also include the qualities associated with success in traditionally masculine occupations, such as ambition, assertiveness, analytical ability, and self-reliance.<sup>51</sup> The resulting cognitive dissociation between women and agentic qualities often has adverse social consequences for women employed in these occupations since even small, seemingly unnoticeable biases often result in large accumulation disadvantages in salary, promotion, and prestige relative to their male contemporaries.<sup>52</sup>

Gender role stereotypes adversely affect both sexes. Just as women are dissociated from the agentic qualities attributed to traditionally masculine roles, men are likewise—and often more strongly—discouraged from exhibiting communal traits.<sup>53</sup> However, because the legal profession is a traditionally masculine field, women bear a substantial portion of the sex discrimination in this profession.<sup>54</sup> The social biases towards women employed in traditionally masculine professions are illustrated through a meta-analysis conducted by Eagly and colleagues.<sup>55</sup> In comparing women and men employed in leadership positions, the authors found that, despite consistent leadership qualities in both sexes, there was an overall tendency for participants to evaluate female leaders more negatively than male leaders.<sup>56</sup> Notably, this tendency increased considerably when women exhibited agentic traits generally associated with the examined occupations.<sup>57</sup>

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49. Examples of communal occupations include nurses, primary caregivers, teachers, and secretaries. See SCHNEIDER, *supra* note 8, at 184, 447-48; VALIAN, *supra* note 41, at 13; Faigman et al., *supra* note 2, at 1407-09.

50. Examples of agentic occupations include doctors, bankers, soldiers, and business associates. See *supra* note 49 and accompanying text.

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

52. See SCHNEIDER, *supra* note 8, at 130; VALIAN, *supra* note 41, at 3-4, 171; see also Michael Conway & Lenny R. Vartanian, *A Status Account of Gender Stereotypes: Beyond Communitarity and Agency*, 43 SEX ROLES 181, 181-97 (2000) (finding that, because higher-status positions are considered powerful and are more likely to be occupied by men, women are perceived as less powerful than men even though they also occupy, albeit in smaller numbers, these same positions).

53. See SCHNEIDER, *supra* note 8, at 443-44; Faigman et al., *supra* note 2, at 1413-14, 1426; Levit, *supra* note 7 *passim*.

54. See Shu-chin Grace Kuo, *Rethinking the Masculine Character of the Legal Profession: A Case Study of Female Legal Professionals and Their Gendered Life in Taiwan*, 13 AM. U. J. GENDER SOC. POL'Y & L. 25, 26-35 (2005) (discussing sex discrimination towards women in the United States that results from the perception of the legal profession as a masculine field).

55. Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 7-19 (1992) (demonstrating the negative effects of gender role stereotypes on evaluations of female leaders); see also SCHNEIDER, *supra* note 8, at 442; Faigman et al., *supra* note 2, at 1413-22.

56. See Eagly et al., *supra* note 55, at 13.

57. *Id.* at 16.



Adverse evaluations were even stronger when women used traditionally masculine leadership styles, particularly those emphasizing assertive or confrontational methods, and devaluation was highest when women occupying male-dominated roles were evaluated by men.<sup>58</sup> Based on these results and the findings of multiple cognitive theories on stereotyping and gender development, there appears to be a reciprocal relationship between social observation, cognitive processing, and the social influence of gender role stereotypes.<sup>59</sup>

*B. The Developmental Influence of Gender Role Stereotypes on Children*

Gender role stereotypes play a predominant part in the social and cognitive development of children.<sup>60</sup> Cognitive perspectives of gender development propose that sex and gender differentiations are two of the primary means by which children organize their environment.<sup>61</sup> By age five, children develop rigid gender stereotypes which they use to guide personal behavior, direct cognitive attention, organize memories, and form impressions of others.<sup>62</sup> While these stereotypes become more flexible with increased cognitive development,<sup>63</sup> the gender dichotomies developed in early childhood form the basis of adolescent and adulthood cognitive processing.<sup>64</sup> Several studies that have examined the developmental influences of gender role stereotypes provide strong support for these theories, finding that children in families that espouse egalitarian gender roles develop more flexible gender role constructs.<sup>65</sup> Additional support is provided by a longitudinal study which found that the gender role attitudes mothers demonstrate to their children is a predictor of what their children's gender role attitudes will be by age eighteen.<sup>66</sup> The study also found

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58. *Id.* at 12-13.

59. *See generally supra* text accompanying notes 9-11 (theories of stereotyping); *supra* text accompanying notes 14-27 (nature of schemas).

60. *See* VALIAN, *supra* note 41, at 48-50; Bem, *supra* note 3, at 354-56; Martin & Ruble, *supra* note 18, at 67-68.

61. *See* VALIAN, *supra* note 41, at 48-50; Bem, *supra* note 3, at 354-56; Martin & Ruble, *supra* note 18, at 67-68.

62. *See* Martin & Ruble, *supra* note 18, at 68; *see also* HELGESON, *supra* note 3, at 167-69 (discussing stages of gender development proposed by different cognitive developmental theories).

63. There is considerable evidence that most children develop constructs of gender and gender role stereotypes over similar developmental patterns that consist of three main stages. It has also been proposed that primary levels of cognition (which are involved in gender recognition) developmentally orient children to the social importance of gender, whereas higher, more flexible concepts possibly serve to develop socially acceptable responses to gender-typed behaviors. *See* Martin & Ruble, *supra* note 18, at 69.

64. *See* Bem, *supra* note 3, at 354-56, 362-63; Martin & Ruble, *supra* note 18, at 67-69.

65. *See* Iervolino et al., *supra* note 45, at 827.

66. *See* Mick Cunningham, *The Influence of Parental Attitudes and Behaviors on Children's Attitudes Toward Gender and Household Labor in Early Adulthood*, 63 J. MARRIAGE & FAM. 111, 116-20 (2001) (examining the impacts of parental gender-typed behavior on their children's gender development).

that behavioral modeling, such as parental division of labor, became more important to the children's development as they grew older.<sup>67</sup> These findings illustrate that as long as gender role stereotypes remain an integral component of our social structure, they will likewise constitute a primary structural component of many people's cognitive processing and thereby further reinforce their current social prevalence.

### C. Gender Schema Theory

The premises behind gender schema theory provide strong evidence of the reciprocal influences of social, environmental, and cognitive factors on the development and maintenance of gender role stereotypes.<sup>68</sup> Due to the necessary role of schemas in processing information, gender differentiations will inevitably play a role in normal cognitive processing.<sup>69</sup> However, as with all schemas, the content and influence of gender schemas are determined by experience and environment.<sup>70</sup> According to gender schema theory, only basic knowledge of gender roles and their related traits is needed to influence learning patterns and motivate conforming behavior in children.<sup>71</sup> As children observe both sex and gender-typed differentiations, gender schemas are developed for acceptable masculine and feminine characteristics.<sup>72</sup> Consequently, because gender role stereotypes play such a prevalent role in defining general social structure,<sup>73</sup> these perceptions often function as a primary basis of gender schematic processing.<sup>74</sup> Through this process, gender role stereotypes influence both self-perception and evaluation of others, which cognitively reinforces their present social foundation.<sup>75</sup>

Gender schema theory also provides insight as to why sex discrimination continues to remain such a pervasive, although often implicit, obstacle for women in the legal profession. Sandra Bem, a prominent researcher in this field,<sup>76</sup> proposes that sex discrimination is directly related to the pres-

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67. See *id.* at 120.

68. See *supra* text accompanying note 59.

69. See *supra* text accompanying notes 13-16; see also Bem, *supra* note 3, at 355.

70. See *supra* text accompanying note 59.

71. See Bem, *supra* note 3, at 355.

72. See VALIAN, *supra* note 41, at 48-50; Bem, *supra* note 3, at 354-56; Martin & Ruble, *supra* note 18, at 67.

73. See *supra* notes 44-46 and accompanying text.

74. See VALIAN, *supra* note 41, at 104; Bem, *supra* note 3, at 355-56.

75. See VALIAN, *supra* note 41, at 48-50; Bem, *supra* note 3, at 354-56, 362; see also *supra* text accompanying notes 24-29 (influence of schemas on evaluation of both our environment and self-constructs).

76. See HELGESON, *supra* note 3, at 170-73.

ence of gender dichotomies within current social structure.<sup>77</sup> Social constructs of masculine and feminine characteristics serve as a “basic organizing principle” of many social interactions and experiences, which often results in the development of very restricted schematic content about the potential qualifications of both sexes.<sup>78</sup> Because the legal profession is considered a traditionally masculine field, female employment in this profession directly contradicts gender schematic content.<sup>79</sup> As a result, women in the legal profession are automatically perceived as inherently unqualified for complete success, often without any intentional bias,<sup>80</sup> and they also face the implicit devaluation of their qualifications and professional achievements because they are inconsistent with general cognitive schematic processing.<sup>81</sup>

#### IV. CURRENT DISCRIMINATION TOWARDS WOMEN IN THE LEGAL PROFESSION

Although women have made significant progress in the legal profession since the enactment of Title VII of the Civil Rights Act of 1964<sup>82</sup> (Title VII) and the Supreme Court’s decision in *Reed v. Reed*, which established the principle that discrimination “solely on the basis of sex” is unconstitutional,<sup>83</sup> sex discrimination towards women continues to be a pervasive problem not only this field, but in other fields as well.<sup>84</sup> The 2007 case of *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>85</sup> illustrates how this problem remains a pressing legal issue and also shows both the continuing and multifaceted nature of sex discrimination toward women in traditionally masculine occupations. The facts of the case suggested a continuing pattern of discrimination that spanned decades. Lilly Ledbetter had

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77. Sandra Lipsitz Bem, *Dismantling Gender Polarization and Compulsory Heterosexuality: Should We Turn the Volume Down or Up?*, 32 J. SEX RES. 329 *passim* (1995); see also Bem, *supra* note 3, at 354-55.

78. See Bem, *supra* note 3, at 354. However, because the content of schemas is determined by environment, gender schemas are not innately defined and consequently can vary in flexibility as a result of the inevitable variations among individuals’ environments.

79. See *supra* notes 47-52 and accompanying text.

80. See *supra* notes 54-57 and accompanying text.

81. See *supra* note 78 and accompanying text; *infra* notes 111-16 and accompanying text.

82. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2006).

83. *Reed v. Reed*, 404 U.S. 71, 77 (1971). The Court held that an Idaho statute which awarded mandatory preference to men over women in appointing estate administrators violated the Equal Protection Clause because the criteria of sex bore no rational relationship to any justifiable state objectives. The Court also established that administrative convenience is not a justifiable ground for discrimination based on sex. See *id.* at 76-77. For progress towards gender equality in the legal profession, see sources cited *supra* note 1.

84. See sources cited *supra* note 2.

85. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 42 U.S.C. and 29 U.S.C.).

worked for Goodyear as a plant supervisor for over twenty years, yet she was paid a substantially lower salary than any of her male coworkers throughout the entirety of her employment.<sup>86</sup> Towards the end of her career, she filed a formal charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination. After taking early retirement, she filed suit against Goodyear, asserting violations under Title VII and the Equal Pay Act of 1963. Evidence revealed that during her employment she had been given several negative evaluations based on her sex which resulted in her receiving a lower salary than she would have received but for the discriminatory evaluations.<sup>87</sup> Ledbetter maintained that each negative evaluation compounded the wage disparity, causing her to suffer financially throughout employment.<sup>88</sup> Despite being confronted with a compelling case of sex discrimination, the Court held that claims based on the cumulative adverse effects stemming from prior discriminatory actions which occurred more than 180 days before the filing of a complaint with the EEOC are barred by the statute of limitations because they neither establish the requisite current discriminatory intent nor create a hostile work environment necessary to constitute sex discrimination under Title VII. Therefore, since her claim was not filed with the EEOC within 180 days of a discrete discriminatory act, her claim was barred.<sup>89</sup> In reaction to the Supreme Court's failure to address the "reality of wage discrimination," Congress passed the Lilly Ledbetter Fair Pay Act of 2009 which restarts the EEOC filing period for prior discriminatory acts each time an employee is paid pursuant to these past actions.<sup>90</sup> Employees can now remedy the current effects of past discrimination anytime they receive a paycheck reflecting wage discrimination, regardless of when the initial discriminatory act occurred.

Recent statistics on salaries and promotion rates of women and men in the legal profession reveal the continuing presence of sex discrimination in this field. Women in the legal profession earn on average only 77.5% of the salaries earned by their male colleagues.<sup>91</sup> As with most prestigious or high-paying occupations,<sup>92</sup> female employment is concentrated at the bottom of the promotion hierarchy and grossly underrepresented at the top.<sup>93</sup> For example, in most firms women are employed at relatively equal ratios

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86. *Id.* at 621-22.

87. *Id.*

88. *Id.*

89. *See id.* at 642.

90. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 42 U.S.C. and 29 U.S.C.).

91. COMM'N ON WOMEN IN THE PROFESSION, *supra* note 2; *see also* NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 1, at 8-9, 13.

92. *See* VALIAN, *supra* note 41, at 14.

93. *See* NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 1, at 4-7 (employment rates in the legal profession).

to men at the associate level.<sup>94</sup> However, women comprise only 26% of non-equity partners,<sup>95</sup> earning an average of \$27,000 less than male non-equity partners,<sup>96</sup> and 16% of equity partners,<sup>97</sup> earning an astounding average of \$88,000 less than male equity partners.<sup>98</sup> Academic occupations also follow similar hiring and promotion patterns. Though salary discrepancies are much smaller, female professors generally begin tenure tracks as assistant professors, whereas men are more likely to begin their tenure tracks as associate or full professors.<sup>99</sup> Most notably, in law school administrative positions, women account for 66.5% of assistant deans and 46.2% of associate or vice deans; however, despite adequate representation at these levels, only a paltry 19.8% of dean positions are held by women.<sup>100</sup>

This striking disparity among women and men reflected in legal compensation and promotion statistics, though manifestly unacceptable, should not be surprising given the premises underlying gender schema theory. However, evaluating the actual role of sex discrimination in these salary and promotion differentials is far more complex than engaging in bare statistical analysis. For example, one study found that nearly half of all female associates express a lack of interest in making partner.<sup>101</sup> Women are also more likely than men to work reduced hours and to pursue less prestigious or demanding positions, often due to family and childcare responsibilities.<sup>102</sup> Though substantial evidence suggests that these statistics are influenced partly by the implicit biases of gender role stereotypes and actual discrimination,<sup>103</sup> if women are frequently choosing not to pursue these positions, evaluation of sex discrimination must extend beyond salary and promotion differentials to address the underlying reasons for these choices. Considering the premises behind gender schema theory, it appears that a primary reason for these choices is the general presumption

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94. See *id.* at 4. Women account for 47% of first-year associates and 43% of seventh-year associates. *Id.*

95. *Id.*

96. *Id.* at 9.

97. *Id.* at 4.

98. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 1, at 8.

99. See McGinley, *supra* note 7, at 104-05, 112-15, 117 (finding that sex discrimination towards women in hiring, promotion, and evaluation is related to tenure tracks).

100. COMM'N ON WOMEN IN THE PROFESSION, *supra* note 2, at 3.

101. See Amanda J. Albert, *The Use of MacKinnon's Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291, 297 (2006); see also THE NALP FOUND., KEEPING THE KEEPERS II: MOBILITY & MANAGEMENT OF ASSOCIATES 63 (2003).

102. See Albert, *supra* note 101, at 297; Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 270-71 (1994) (illustrating the likelihood of women to choose family over careers); McGinley, *supra* note 7, at 119-20; NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 1, at 13-14.

103. See *supra* Part III.A.; *infra* notes 111-116 and accompanying text.

that the legal profession is a masculine field not suitable for complete integration by women.<sup>104</sup>

#### V. THE INTEGRATION OF FORMAL EQUALITY IN THE WORKPLACE

Formal equality is founded on the premise that equally qualified individuals should be treated equally based upon their qualifications.<sup>105</sup> Modeled after racial equality, formal equality values autonomy and has provided the foundation for many Supreme Court cases that established gender equality as a fundamental component of basic liberty.<sup>106</sup> Although this view has been criticized for creating unequal results by focusing on equality so much that the basic differences between women and men are overlooked,<sup>107</sup> formal equality, when applied rationally, does not deny the differences between women and men, but instead advocates individual assessment of both sexes based on personal capability.<sup>108</sup> These principles also provide a solid basis for incorporating the premises of gender schema theory into current legal theory. The resulting premises will enable formal equality to begin adequately addressing both the social and cognitive foundations of sex discrimination in the legal profession and is therefore a necessary step towards fully remedying sex discrimination toward women in this field.<sup>109</sup>

##### A. Application to Legal Theory and Practice

Many of the legal theories that criticize formal equality as a means of eliminating or reducing sex discrimination are based on variations of the argument that it is discriminatory for employers not to accommodate the common gender differences disadvantaging women—namely choosing different career paths and having less agentic qualities—in their business practices and policies.<sup>110</sup> However, as Bem explains, “[t]he irony is that even though our society has become sensitized to negative sex stereotypes and has begun to expunge them . . . it remains blind to its gratuitous em-

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104. See *supra* Part III.C. Two of the primary factors underlying this presumption are that the legal profession values agentic qualities over communal qualities and the overrepresentation of men in higher-status positions. See *supra* Part III.B. and text accompanying notes 98-101.

105. See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 2 (1994); Lens, *supra* note 1, at 520.

106. See Bartlett, *supra* note 105, at 2-3; see also Lens, *supra* note 1, at 520.

107. See Bartlett, *supra* note 105; Lens, *supra* note 1, at 521-23.

108. See Bartlett, *supra* note 105, at 2; Lens, *supra* note 1, at 520.

109. Many of the cognitive and social biases resulting from the use of gender role stereotypes can be either eliminated or reduced by consciously evaluating people based on their individual qualifications and promoting the equal treatment of qualified individuals.

110. See Bartlett, *supra* note 105, at 4-17 (discussing the theories of substantive equality, nonsubordination, different voice or connection of difference theory, and postmodern feminism); Lens, *supra* note 1, at 521-23 (discussing the separate spheres frame theory).



phasis on the gender dichotomy itself.”<sup>111</sup> Accordingly, as both sexes are equally capable of occupying either traditionally masculine or traditionally feminine gender roles, viewing career paths and requisite career traits in terms of gender is fundamentally inaccurate.<sup>112</sup> Even though policies designed to accommodate common gender differences do often provide initial benefits, they implicitly reinforce gender role stereotypes by devaluing the individual qualifications of both sexes, thereby inadvertently reinforcing the discrimination they were implemented to remedy.<sup>113</sup>

Evaluating men and women in the legal profession according to their individual qualifications would help remedy many of the biases facing women employed in leadership positions. Since men have traditionally occupied these positions, women in leadership roles are often caught in a cognitive “double bind.”<sup>114</sup> Female leaders are commonly viewed by their peers and superiors as less competent than their male colleagues and are often held to higher standards in both performance and promotion criteria.<sup>115</sup> Moreover, when female leaders exhibit agentic traits traditionally associated with these positions, they are often confronted by a “hostile, backlash reaction” for displaying cross-gendered behavior.<sup>116</sup> These biases further frustrate the progression of women in leadership positions since their achievements are often viewed with more skepticism than the achievements of their male counterparts.<sup>117</sup> When men are successful in traditionally masculine occupations, their success conforms to gender schematic content, so it is attributed to natural ability and viewed as a continuing history of success in similar circumstances.<sup>118</sup> The achievements of women, however, directly contradict gender schematic content and are therefore often discounted by attribution to effort, the relative ease of the task, or luck rather than actual ability.<sup>119</sup> Because these characteristics are attainable by almost anyone, women’s achievements become cognitively neutralized, which devalues both their professional integrity and success.<sup>120</sup>

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111. Bem, *supra* note 3, at 363.

112. See generally *supra* Part III.A. See Levit, *supra* note 7 (addressing the general oversight of the impact of gender role stereotypes on men).

113. See *supra* Part III.C.

114. See SCHNEIDER, *supra* note 8, at 442; see also VALIAN, *supra* note 41, at 14-15; Faigman et al., *supra* note 2, at 1417-20.

115. Faigman et al., *supra* note 2, at 1417-20; see also SCHNEIDER, *supra* note 8, at 442; VALIAN, *supra* note 41, at 14-15.

116. Faigman et al., *supra* note 2, at 1419.

117. See VALIAN, *supra* note 41, at 167-72; see also SCHNEIDER, *supra* note 8, at 131.

118. See VALIAN, *supra* note 41, at 169.

119. See *id.* at 169-70.

120. See *id.* at 170.

*B. Responses to Criticism*

One of the more cogent criticisms of formal equality is that it disregards the reproductive differences between women and men, namely pregnancy and breastfeeding.<sup>121</sup> Formal equality proposes that special accommodations should not be arranged for women who seek leave due to pregnancy because all forms of medical leave should receive the same treatment.<sup>122</sup> While this position may initially seem to be unsympathetic to the reproductive needs of women, the findings of gender schema theory strongly support this approach.<sup>123</sup> The current leave system focuses its remedial measures on the reproductive differences between women and men. In turn, the need for legislative protection becomes implicitly associated with pregnancy, breastfeeding, and therefore women.<sup>124</sup> As a result, these policies unnecessarily facilitate the sex discrimination they were originally created to prevent by reinforcing the gender role stereotype that women should be primary caregivers and indirectly portraying women as needing special legislative protections from adverse social standards and business practices.<sup>125</sup> Formal equality, however, would reduce sex discrimination by focusing reform efforts on the actual *leave policies* for all forms of medical leave rather than just those related to pregnancy.

Another criticism of formal equality raised by prominent legal theorists is that it does not take into account the childcare responsibilities that are inevitably placed on working mothers.<sup>126</sup> Critics assert that it is discriminatory towards women for employers to fail to provide them with parenting tracks for promotion because “family obligations and childbearing . . . responsibilities inevitably affect women more than men.”<sup>127</sup>

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121. See Bartlett, *supra* note 105, at 3.

122. See *id.* The premises of gender schema theory indicate that policies which focus on accommodating women rather than ensuring that all employees, regardless of sex or type of leave taken, are not discriminated against reinforce the gender role stereotypes that associate women and childbirth with the need for special protection because they focus on sex rather than the resulting discrimination. For example, conditions specific to men, such as prostate cancer, do not afford special protections for men despite their similar potential to require the benefits of pregnancy leave such as substantial spans of time away from work and use of policy benefits. It appears then that the primary basis for separating pregnancy-related leave from other forms of leave is the discrimination that is unique to women who either take pregnancy-related leave or already have children. However, by attaching protections to pregnancy-related leave itself, these policies assume discrimination will occur, thereby implying that pregnant women need special protection in the workplace instead of addressing sex discrimination when it occurs under any form of medical leave.

123. See generally *supra* Part III.C.

124. One solution that may accommodate the reproductive needs of women through gender-neutral mechanisms while also providing benefits to all employees is to require businesses to provide all forms of medical leave with the same protections given to pregnancy-related leave.

125. See generally *supra* Part III.C.

126. For examples of the types of theories advocated by theorists, see *supra* note 110 and sources cited therein.

127. Albert, *supra* note 101, at 304 (internal punctuation marks omitted); see also Levit, *supra* note 7, at 1073; McGinley, *supra* note 7, at 118-23.

However, as with most social roles, both men and women can fulfill primary childcare responsibilities which eliminates the need for gender-based protections.<sup>128</sup> Furthermore, these views are not only premised on gender role stereotypes, assuming that men do not consider working long hours away from their families (and in general) a sacrifice,<sup>129</sup> but they also overlook and consequently reinforce the “robust fatherhood penalty” associated with paternity leave.<sup>130</sup> Men who take paternity leave are often evaluated more harshly than both their male colleagues and women who take maternity leave.<sup>131</sup> Even when employers do formally offer paternity leave, men are generally discouraged from utilizing these accommodations. In a study of corporations offering paternity leave, two-thirds found it “unreasonable” for men to take any form of leave, and 41% of the institutions offering unpaid leave did not actually sanction the use of these policies.<sup>132</sup> Therefore, offering parenting track policies for women prejudices both sexes by socially reinforcing long-standing gender role stereotypes: women are primary caregivers who need special accommodations to secure promotions and men are breadwinners who have limited roles in raising their children. Adopting leave policies based on formal equality, however, would minimize these stereotypes by eliminating formal distinctions between paternity and maternity leave and ensuring that parenting tracks, when offered, accommodate both sexes.

## VI. CONCLUSION

Sex discrimination towards women in the legal profession remains a pervasive social problem despite the improvements for women in the legal workplace over the past few decades. One of the main reasons this problem continues to persist is the largely unaddressed cognitive components of sex discrimination by many prominent legal theories in this area. Gender schema theory strongly shows that the reciprocal functions of gender role stereotypes in both cognitive processing and the structuring of the legal profession reinforce sex discrimination. Formal equality supports this position and also provides a sound basis for incorporating gender schema theory into current legal theory through the principle that both women and men should be evaluated solely on their individual qualifications. Accordingly, by incorporating the premises of gender schema theory into formal equality, formal equality will provide a legal theory that

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128. See Faigman et al., *supra* note 2, at 1425-26; Levit, *supra* note 7, at 1073-79.

129. See Albert, *supra* note 100, at 304 (discussing dissatisfaction by both men and women with required hours).

130. See Faigman et al., *supra* note 2, at 1425-26; see also Levit, *supra* note 7, at 1073-79.

131. See Faigman et al., *supra* note 2, at 1426.

132. Levit, *supra* note 7, at 1073-74.

is capable of more comprehensively addressing the cognitive and social foundations of sex discrimination in the legal profession.

The adoption of policies rooted in formal equality is a positive step towards ending sex discrimination in the legal profession. These policies directly address sex discrimination in the workplace by requiring hiring, promotion, and compensation processes to be based solely on individual qualifications, and they also help implicitly alter gender schematic content and erode commonly held gender role stereotypes about women. Changing cognitive associations between men and success in the legal profession to more gender-neutral conceptions of professional achievement will gradually remove the role of gender role stereotypes in this field and also change the overall nature of these stereotypes while creating more inclusive standards and beliefs. Because these policies alter both the social and cognitive foundations of sex discrimination in the legal workplace, policies rooted in formal equality are a crucial step towards establishing complete gender equality in the legal profession.

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<sup>Ψ</sup> To Katie Kirkpatrick.

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