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Commentary for Price Waterhouse v. Hopkins

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Commentary on *Price Waterhouse v. Hopkins*

Dale Margolin Cecka

INTRODUCTION

As the first U.S. Supreme Court decision to explore sex stereotyping in depth, *Price Waterhouse v. Hopkins*¹ was a landmark decision, with unforeseen and often progressive results in cases involving LGBTQ rights and sexual harassment. However, on balance, its effect on women plaintiffs in glass ceiling cases has been disappointing to feminists because the opinion failed to define “stereotyping” in a way that gave legal meaning to the concept of implicit bias. The Court did not connect the dots between stereotyping, subconscious behavior, and disparate gender impact in corporate culture. It is no surprise, therefore, that even in 2015, a new generation of women faces a corporate culture startlingly similar to the one Ann Hopkins faced over twenty-five years ago.²

Professor Martha Chamallas, writing as Justice Chamallas, strengthens the original opinion by clarifying that decision makers often stereotype unconsciously. She also makes clear that, especially in cases involving “token” women in male-dominated workplaces, courts should pay close attention to expert testimony. The feminist judgment provides a framework for lower courts to identify implicit gender stereotyping and define actionable violations of Title VII.

¹ 490 U.S. 228, 256 (1989).

² See, e.g., David Streitfeld, *In Ellen Pao's Suit vs. Kleiner Perkins, World of Venture Capital is Under Microscope* (March 5, 2015), www.nytimes.com/2015/03/06/Technology/In-Ellen-Paos-Suit-Vs-Kleiner-Perkins-World-Of-Venture-Capital-Is-Under-Microscope.html (female venture capitalist in Silicon Valley told to “[s]peak up – but don’t talk too much. Light up the room – but don’t overshadow others. Be confident and critical – but not cocky or negative.”).

DOCTRINAL SUMMARY

In *Price Waterhouse*, the Court established the “mixed motive” framework of discrimination cases. The “mixed motive” framework supplemented the *McDonnell-Douglas* test in which a plaintiff can succeed by showing that an employer’s proffered “legitimate” reason for the employment decision was a “pretext” for discrimination.³ By contrast, “mixed motive” cases recognize that employment decisions can be the result of a combination of legitimate and illegitimate reasons. The burden then shifts to the employer to prove it would have made the same decision without the illegitimate factors. Plaintiff Ann Hopkins succeeded because her case involved several “smoking gun” comments by the male partners that showed their decision had relied on explicitly gender-based stereotyping. But the limitations of *Price Waterhouse* stem in part from these “smoking gun” comments, because the Court failed to clarify how, in future cases without such comments, plaintiffs could prove an illegitimate “motive.”⁴

The other weakness of *Price Waterhouse* is that the Court seemed to reaffirm the assumption that bias is always deliberate and conscious. Therefore, subsequent plaintiffs were circumscribed from proffering evidence about subconscious bias or about inherently biased male-dominated work environments with broad-based disparate impacts on women. *Price Waterhouse* was a perfect case for the Court to address the subtlety and complexity of sex-based discrimination, but instead it extended existing doctrinal frameworks that simplistically ignore the reality that an employer’s reasons are not necessarily known or knowable.

Price Waterhouse is primarily known for its addressing of sex stereotyping. The word “stereotype” appears ten times in the various opinions of *Price Waterhouse*, but the Court did not clarify what kind of stereotype-influenced behavior and workplace environment is illegal. The Court had in the record extensive expert testimony from Dr. Susan Fiske about stereotyping, but it dismissed that testimony as mere “icing on the cake”⁵ and it was not integral to the holding. The Court concluded summarily that partners reacted “negatively to [Hopkins’s] personality because she is a woman.”⁶ It alluded to the “possible ways of proving that stereotyping played a motivating role in an

³ 411 U.S. 792 (1973).

⁴ The 1991 Amendments to Title VII established that discriminatory motives could not be a “motivating factor” in employment decisions but otherwise were silent about how plaintiffs could prove those motives. 42 U.S.C. 2000e-5(2)(B).

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989).

⁶ *Id.* at 235.

employment decision.”⁷ But, it expressly declined to decide “which specific facts, ‘standing alone,’ would or would not establish a plaintiff’s case.”⁸

The Court’s failure to provide a framework for evaluating stereotyping led lower courts to become entangled over whether, for example, a statement by an employer is just an innocuous “stray remark” or evidence of illegal bias.⁹ Other courts also have become preoccupied with the status of the speaker of the comment and who, if anyone, heard or paid attention to it.¹⁰ As Chamallas points out, this confusion undercuts the progressive holding of *Price Waterhouse* and makes what could have been a ground-breaking decision on women’s rights a paper tiger. Twenty-six years after *Price Waterhouse*, women still earn less and have a lower status in the workplace, even controlling for factors such as qualifications, personal preferences, job responsibilities, occupation type, and industry.¹¹

GENDER DISPARITIES AND BIAS IN THE AFTERMATH OF PRICE WATERHOUSE

Many feminist scholars agree that discrimination against women has changed: it has become less intentional and overt and more entrenched, repressed, and subconscious.¹² The prevalence of implicit bias has also been the subject of an increasing number of scientific studies and experiments.¹³

The U.S. Supreme Court has never recognized implicit bias against women. Indeed, in 2011, it found that Wal-Mart had not discriminated against

⁷ *Id.* at 251–52.

⁸ *Id.* at 252.

⁹ See, e.g., *Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App’x 45, 47 (1st Cir. 2010); *Montgomery v. J.R. Simplot Co.*, 916 F. Supp. 1033, 1039–40 (D. Or. 1994); *Millan-Feliciano v. Champs Sports*, No. 11–1823, 2012 U.S. Dist. LEXIS 148264, at *16–20 (D.P.R. October 15, 2012).

¹⁰ See Kerri Lynn Stone, *Clarifying Stereotyping*, 59 *U. Kan. L. Rev.* 591, 610 nn. 110–11 (2011).

¹¹ Christi Corbett, *The Simple Truth About the Gender Pay Gap*, aauw 1, 8 (2015), www.aauw.org/files/2015/02/The-Simple-Truth_Spring-2015.pdf.

¹² Stone, *supra* note 10, at 626; See generally Ann McGinley, ¡Viva La Evolucion!: *Recognizing Unconscious Motive in Title VII*, 9 *Cornell J.L. & Pub. Pol’y* 415 (2000); Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 *Cal. L. Rev.* 997 (2006).

¹³ See, e.g., Nicholas D. Kristof, *Our Racist, Sexist Selves*, *N.Y. Times*, April 6, 2008, www.nytimes.com/2008/04/06/opinion/06kristof.html?_r=3&. According to one study, female politicians with more feminine features (“large eyes and rounded features”) tend to win elections, while those with more masculine features (“prominent eyebrows”) tend to lose. These judgments took place “380 milliseconds after the presentation of a female politician’s face” to study participants. Eric Hehman, Colleen M. Carpinella, Kerri L. Johnson, Jordan B. Leitner and Jonathon B. Freeman, *Early Processing of Gendered Facial Cues Predicts the Electoral Success of Female Politicians*, 5 *Soc. Psych. and Personality Sci.* 815, 821 (May 14, 2014).

1.5 million female employees even though better-performing women were paid less and promoted less often than their male peers and despite comments in the record that women should not make as much money as men. In so doing, the Court rejected expert testimony about stereotyping at Wal-Mart, and instead relied on its own armchair psychology.¹⁴

THE FEMINIST JUDGMENT

Chamallas's opinion rectifies the confounding legacy of *Price Waterhouse*. The actual *Price Waterhouse* decision was progressive in admitting psychological theory into evidence, but it did not go far enough. Chamallas's opinion explores and defines what stereotyping is; acknowledges the prevalence, complexity, and danger of implicit bias; and explicitly supports the use of interdisciplinary experts to help courts grapple with these thorny issues.

One crucial difference between the feminist judgment and the original *Price Waterhouse* is that Chamallas rejects the focus on conscious intent as the touchstone of "real" discrimination. Relying on theories developed by Linda Krieger, Susan Fiske, and Chamallas herself,¹⁵ Chamallas exposes the pretext/mixed motive differentiation as a false dichotomy, because it assumes people are self-aware. In Chamallas's view, it is much more likely that seemingly "legitimate" reasons will often be tainted by unconscious, if non-malicious, stereotyping. In contrast to the original opinion, the feminist judgment unequivocally rejects that actionable cases of gender stereotyping are limited "to instances in which the decision maker is aware that he or she is relying on a gender stereotype." Chamallas affirmatively recognizes that subconscious stereotyping is a violation of Title VII.

Chamallas also attempts to prevent the array of restrictive and conflicting "tests" created by the lower courts in the wake of the original decision. The treatment of stereotyping by many of the lower courts did not account for the nuances of bias, and is not in line with the spirit of the decision, which was to prohibit employers from allowing stereotypes to infiltrate their decision making. Chamallas's opinion, in contrast to the original, requires courts to look at the totality of a corporate culture. Chamallas's recognition of implicit bias opens a window on the subtle ways that corporate cultures still limit opportunities for women. According to Chamallas, courts should consider the context of

¹⁴ *Wal-Mart*, 131 S. Ct. at 2545, 2553–554.

¹⁵ See generally Krieger and Fiske, *supra* note 12; Martha Chamallas, Introduction to Feminist Legal Theory (3d ed. 2012); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. Cal. L. Rev. 747–53 (2001).

the workplace, statistical evidence of implicit bias, and whether the employer has done anything to prevent stereotyping behavior, rather than fixating on sexist comments. For example, in male-dominated “token” environments like Price Waterhouse and Silicon Valley, the Chamallas decision would require courts to examine how stereotypes influence the clubby and competitive culture at the partner level. In cases like Wal-Mart, where women’s representation has reached beyond token levels, Chamallas urges courts to heed expert testimony that explains how stereotypes may still be at play when managers are given complete discretion to make pay and promotion decisions. By granting probative value to scientific findings, the feminist judgment strikes a blow against allowing masculine bias in law to pass as “objectivity.”

Twenty- six years after *Price Waterhouse*, the glass ceiling still exists, from big box stores to Silicon Valley.¹⁶ We know that human beings are inherently biased and our culture has ingrained stereotypes.¹⁷ If the law continues to ignore the pervasiveness of implicit bias, discrimination in wages, promotions, and other employment benefits are unlikely to change. Chamallas’s opinion is groundbreaking because it recognizes implicit bias and encourages courts to place expert testimony about bias at the center of Title VII discrimination cases.

The research on bias is shocking, but there is a bright side. It can be used to ferret out bad behavior if, as Chamallas would, we allow it a place in discrimination cases. Spreading this knowledge among the judiciary and in the corporate world can also foster good behavior. But in order to right past wrongs, courts would have to follow Chamallas, and recognize the nexus between stereotyping about women, implicit bias, and the glass ceiling.

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

Justice Martha Chamallas, concurring.

Ann Hopkins’s bid for a partnership at Price Waterhouse, one of the nation’s largest accounting firms, requires us to consider the scope of Title VII’s ban on sex discrimination, 42 U.S.C. § 2000e, at a time when women are increasingly seeking to advance and attain leadership roles in male-dominated institutions and organizations. Just five years ago, we confronted a similar challenge to a denial of a partnership in a law firm and held for the first time that Title VII

¹⁶ Jillian D’Onfro, *Ellen Pao’s Best Piece of Advice for Professional Women Who Feel Like They’re Hitting a Glass Ceiling*, Bus. Insider (April 6, 2015), www.businessinsider.com/ellen-pao-after-kleiner-perkins-trial-2015-4/.

¹⁷ Stone, *supra* note 10, at 613–19, 626 (citing McGinley, *supra* note 12, at 425).

applies to the partnership selection process. *Hishon v. King & Spaulding*, 467 U.S. 69, 77–78 (1984). Today, the Court strengthens its commitment to sex equality in employment by ruling that firms must assure that such partnership decisions are not tainted by stereotypes about gender or women, even when some members of the firm couch their objections in neutral terms.

Although we deal here with a case of individual disparate treatment, we must bear in mind that any fair evaluation of a claim of sex, race, or other form of status-based employment discrimination invariably requires us to take account of the larger context in which the alleged discrimination takes place. In litigating her claim, Hopkins has highlighted her status as a “token” woman in a male-dominated workplace and has produced evidence that she was subjected to the kind of gender bias characteristic of the treatment of token women when they are evaluated by supervisors and peers in such settings.¹⁸ Hopkins employs the term “token” in a straightforward, numerical sense to express the fact that women senior managers and women partners are rare at Price Waterhouse, as indeed they are in the other Big-8 accounting firms.¹⁹ Although Title VII’s mandate of equality has been in effect for nearly twenty-five years, it is still the case that most women are employed in predominantly female occupations and in predominantly female jobs within occupations. Ann Hopkins’s case thus is embedded in the dynamics of tokenism in the workplace and in the conflict that occurs when individuals from groups that were formerly segregated into lower-status positions seek to break into the highest levels of the organization. Her case is what has become known as a “glass ceiling” case, a metaphor used to describe the invisible (glass) barriers facing women employees who can see elite positions but cannot reach them (ceiling).²⁰ When pioneers such as Ann Hopkins seek to surmount such barriers and pursue paths that traditionally were not open to women, this Court must guarantee that they are afforded equal treatment and an equal opportunity to succeed.

¹⁸ The first published use of the term “tokenism” was by Dr. Martin Luther King in an article criticizing the slow pace of racial integration in schools and factories in the South. Martin Luther King, Jr., *The Case Against Tokenism*, N.Y. Times Mag., August 5, 1962, at 11. The term was later used by sociologists to describe the situation of groups that were dramatically under-represented in organizational settings. See Rosabeth Moss Kanter, *Men and Women of the Corporation* 206–24 (1977).

¹⁹ In 1988, the highest percentage of women partners in a Big-8 accounting firm was 5.6 percent. Price Waterhouse had the lowest percentage with 2 percent women. Eric N. Berg, *The Big Eight: Still a Male Bastion*, N.Y. Times, July 12, 1988, www.nytimes.com/1988/07/12/business/the-big-eight-still-a-male-bastion.html.

²⁰ Carol Hymowitz and Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can't Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs*, Wall St. J., March 24, 1986, at 1.

Ann Hopkins was a senior manager at Price Waterhouse when the firm turned down her bid for partnership. As a woman seeking partnership, Hopkins was a rarity in the firm. When Hopkins became a candidate for partner in 1982, only seven of the 662 partners at Price Waterhouse were women. All of the partners in her home office were men. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112 (D.D.C. 1985). Most significantly, Hopkins was the only woman in the group of eighty-eight persons being considered for partnership that year. *Id.* The firm demographics clearly indicate that Hopkins was a token woman in a large, intensively male-dominated organization.

Although Hopkins never complained of sex discrimination before being rejected for partner, she did encounter other sex-linked obstacles on her way towards achieving her goal of becoming a partner, both during her tenure at Price Waterhouse and before joining the firm. Like many professional women, Hopkins found it difficult to navigate the special “dual career” problems that arise when both spouses work in a professional capacity. Thus, Hopkins had previously worked for Touche Ross, another major accounting firm, where her husband was also employed. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461 (D.C. Cir. 1987). Because Touche Ross had a policy against both spouses being considered for partnership, Hopkins left that firm, making it possible for her husband to become a partner shortly thereafter. *Id.* To secure the job at Price Waterhouse, Hopkins had to obtain a waiver of a rule that barred employment of anyone whose spouse was a partner in a competing firm. *Id.* The year before she went up for partner at Price Waterhouse, however, the firm informed Hopkins that she would be ineligible to become a partner because of her husband’s position. *Id.* at 461–62. At that point, Hopkins threatened to resign as senior manager and the controversy was settled only when her husband left Touche Ross to set up his own consulting firm.²¹ *Id.* at 462. Once these barriers were removed, plaintiff was finally nominated for partnership by the partners in her home office. *Id.*

The partners voted on Hopkins’s candidacy through a collegial, collective process, with no pre-set standards for determining how much opposition would be fatal to a given candidacy. Of the thirty-two partners who submitted

²¹ Although Hopkins did not allege that Price Waterhouse’s ban on hiring the spouse of a partner in a competing firm amounted to sex discrimination, such bans on the employment of spouses (including no-spouse rules within the same organization) likely have a disparate impact on women because of the societal pressure on women to place their husbands’ careers ahead of their own. See Anna Giattina, Note, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 Wayne L. Rev. 1111, 1115 (1987) (citing Irving Kovarsky and Vern Hauck, *The No-Spouse Rule, Title VII, and Arbitration*, 32 Lab. L.J. 367 (1981)).

evaluations on her candidacy, thirteen supported her, eight partners opposed her, three recommended that her candidacy be placed on hold, and eight indicated that they lacked sufficient information to make a judgment. 490 U.S. at 233. That degree of opposition was enough to put Hopkins's partnership on hold. *Id.* Some months later, after she lost the support of two partners in her home office, she was advised that it was very unlikely that she would ever be admitted to the partnership. 825 F.2d at 463. Hopkins then decided to quit the firm, following the "up and out" practice at Price Waterhouse in which candidates rejected for partnership routinely resigned. *Id.* She set up her own firm and filed this suit for sex discrimination. *Id.* Ultimately, sixty-two men in the group of eighty-eight candidates received partnership offers. *Id.* at 462.

The record demonstrates that, in many respects, Hopkins was a star performer. She compiled an impressive record on tangible measures that usually matter most in the professional world. In the years before she was considered for partner, she brought in more business and billed more hours than any other person nominated for partner in that year. *Id.* Most notably, she won a \$25 million contract with the Department of State that Price Waterhouse admitted was a "leading credential" for the firm when it competed for other lucrative contracts. 490 U.S. at 233. The partners in her office initially strongly supported her candidacy, and she was highly regarded by her clients. *Id.* at 234.

According to Price Waterhouse, however, Hopkins was deficient with respect to her social or interpersonal skills, particularly what some partners regarded as her overbearing personal style and harsh treatment of staff. *Id.* at 234–35. Several partners faulted her for not acting more like a lady. *Id.* at 235. During the partnership selection process, for example, a number of partners submitted written evaluation comments framed in terms of Hopkins's sex. *Id.* One partner said she needed to take a course in "charm school." 825 F.2d at 463. Others criticized her for being too "macho" and speculated that she "overcompensated for being a woman." *Id.* Some partners objected to her use of "profanity," and one of her supporters stated that he believed that the negative reaction to Hopkins stemmed from the fact that Hopkins "was a lady using foul language." *Id.* In describing Hopkins's career at the firm, one supporter noted that plaintiff "had matured from a tough-talking, somewhat masculine hard-nosed mgr. [manager] to an authoritative, formidable, but more appealing lady ptr. [partner] candidate." *Id.* The tenor of the firm's objection to her candidacy was summed up by the partner in charge of Hopkins's office who was tasked with explaining to Hopkins why she had been put on hold. *Id.* To increase her chances of making partner, he counseled Hopkins to "walk more

femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.*

The record also reveals that sex stereotyping at Price Waterhouse was not confined to Hopkins’s case. In prior years, one woman candidate had been criticized for trying to be too much like “one of the boys,” another, because she reminded a male partner of the legendary bank robber, Ma Barker, and another, because she was typecast as a “woman’s libber.” *Id.* at 467. The starkest example of sexism was a comment made by a partner the year before Hopkins’s evaluation who said that he “could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers.” 490 U.S. at 236. The firm never reprimanded the partner, and his vote was recorded in Hopkins’s case. *Id.*

Overall, the portrait of Ann Hopkins that emerges from the trial record is that of a non-traditional woman who disrupted gender expectations by excelling in objective (one could say, masculine) measures, such as rainmaking and billable hours, but who was regarded as lacking when it came to soft (feminine) social skills. In a very concrete way, this case tests whether the promise of equal access and equal opportunity will be realized for those exceptional and pioneering women who defy gender conventions.

As this Court is well aware, this case is not just about whether to compel one of the leading accounting firms to grant Ann Hopkins a partnership. Instead, our decision is important because the Court endorses a special mixed-motive (or “motivating factor”) framework of proof designed to cover a potentially large percentage of employment discrimination cases in which it can be said that both legitimate and biased reasons caused a negative employment outcome, such as a lost job, promotion, or raise. This special framework of proof is tailored to today’s workplace realities and is far preferable to the abstract, “but-for” causation test imported from tort law that the dissent would have us apply to Title VII cases. Although some judges and commentators have enlisted tort law as a guide to interpreting Title VII, we should take care not to borrow indiscriminately from that body of private law. It is worth reminding ourselves that one reason Congress felt it necessary to enact Title VII outlawing discrimination by private employers was that tort law had proven so inadequate to protect employees against manifestly unfair and discriminatory decisions. *See Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination* 164–74 (1979). Thus, it should come as no surprise that importing tort principles into the realm of Title VII, as the dissent would have us do, is not likely to further Title VII’s twin goals of deterring discrimination and making victims of workplace discrimination whole. Title VII is more than simply a federal tort; it is a distinctive body of public law that

aims to eliminate longstanding patterns of segregation, stratification, and lack of equal opportunity.

The “motivating factor” framework of proof the Court adopts today will undoubtedly be used in a myriad of future cases in which it can be said that the cause of an adverse employment action is overdetermined, in the sense that several causes (legitimate and illegitimate) contributed to the outcome and it is difficult to ascertain whether a single cause alone would have produced the same result. Given employees’ limited access to proof and lack of intimate knowledge of the employers’ practices and procedures, it is enough to require the employee to prove that sex was a motivating factor or played a role in the adverse decision. The employer is in a better position to prove the counterfactual in such cases, namely, to convince the court that the same decision would have been made even absent consideration of plaintiff’s sex.

Equally important, today’s decision makes it clear that sex stereotyping is a form of sex discrimination. For two decades, this Court has condemned sex stereotyping in constitutional cases when states have sought to justify sex-based classifications on the basis of outmoded stereotypes about women and men. See *Orr v. Orr*, 440 U.S. 268, 282–83 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 215–17 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 650–53 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973). In those cases, the Court ruled that government benefit schemes may not be premised on traditional assumptions about the roles of men and women, namely, that the man is (or should be) the “breadwinner” in a household, while the woman is (or should be) the “homemaker” responsible for performing domestic duties. The constitutional cases indicate that such “separate spheres” ideology is incompatible with the mandate of equal protection because it denies individuals the right to participate in society free of pre-conceived and often denigrating beliefs about their gender group. See Nadine Taub and Elizabeth M. Schneider, *Perspectives on Women’s Subordination and the Role of Law*, in *The Politics of Law: A Progressive Critique* 124–30 (David Kairys ed., 1982).

Today we expand anti-stereotyping theory to condemn decisions by private employers motivated by stereotypical assumptions about the differing traits, talents and behaviors of the sexes or normative views about the proper (and different) roles of men and women. I wholeheartedly concur in Justice Brennan’s observation that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” 490 U.S. at 251. Like the plurality, I agree “that an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. By so explicitly tying gender stereotyping to prohibited sex discrimination

under Title VII, we implement Congress's commitment "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

The key role stereotyping plays in producing and perpetuating gender inequality in the workplace was addressed by plaintiff's expert in this case, Dr. Susan Fiske. Although the use of experts has become commonplace in Title VII litigation, this is the first case we have considered in which a social psychologist versed in stereotyping theory has offered her expertise regarding an employer's decision-making process. Unlike the plurality, I do not regard Dr. Fiske's testimony as mere "icing on the cake." 490 U.S. at 256. Nor am I inclined to dismiss her knowledge and insights as illegitimate or self-serving, as does the dissent. Instead, I regard Dr. Fiske's testimony as providing the district court with a psychologically informed concept of sexual stereotyping and bias that may prove valuable as we struggle to define cognate legal concepts. I value Fiske's interdisciplinary insights not for their own sake but because her body of knowledge may deepen our understanding of how actual decisions are made in the contemporary workplace. Such a deep understanding of the specific mechanisms and expressions of bias in the workplace is necessary if this Court is to remain true to its word that Title VII reaches not only blatant but subtle forms of discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Dr. Fiske's analysis starts by recognizing that certain workplace cultures tend either to foster or to inhibit stereotyping. For social psychologists such as Fiske, the key inquiry is whether it is likely that stereotyping has infected decision making in an organization. Fiske's focus is on the organizational level; notably, she and her colleagues do not purport to make judgments about the biased mindset of any particular individual. For Fiske, it was highly significant that Price Waterhouse was a male-dominated organization, with few women at the upper levels. The paucity of women at the firm meant that decisions were most often made by an all-male group who only rarely were called upon to judge the qualifications of a woman. Fiske explained how such skewed demographics in a firm increased the likelihood that stereotyping would occur, particularly if the firm took no overt steps to counteract it. Under such conditions of tokenism, there is a higher risk that a woman will be judged not as an individual but rather as a member of her gender group.

Dr. Fiske's expertise also enabled her to detect signs of stereotyping at Price Waterhouse. Drawing on the psychological literature, as amplified by the amicus brief filed by the American Psychological Association, Br. for American Psychological Association as Amicus Curiae in Support of Resp't

(hereinafter Br. for APA), Fiske's method was to examine the comments of the partners who cast votes on Hopkins's partnership looking for evidence of two types of stereotypes: (1) descriptive stereotypes, which tell a stock or culturally familiar story about how people with certain characteristics behave and where their talents and abilities lie, and (2) prescriptive stereotypes, which tell a story about how people from a certain group should behave. *See* Br. for APA at 13–16. Beyond identifying the two types of stereotypes, the social science research that Fiske drew upon has also documented what scholars call the “double bind,” i.e., the dilemma facing professional women based on an inherent conflict between socially approved views of femininity and professional competence. Br. for APA at 33–37. Thus, well-entrenched gender stereotypes cognitively associate women (and femininity) with “personal warmth, empathy, sensitivity, emotionalism, grace, charm, compliance, dependence, and deference.” Nadine Taub, *Keeping Women in their Place: Stereotyping Per Se As a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 356 (1980). The contrasting gender stereotypes cognitively associate men (and masculinity) with “aggressiveness, egotism, emotional detachment, persistence, ambition and drive.” *Id.* The double bind comes into play when professional women are required to display masculine attributes to be successful in their jobs, yet are penalized for being the wrong “type of woman” because they fail to conform to the feminine script. *See id.* at 356–58.

In Fiske's view, a variety of prescriptive stereotyping was likely operating at Price Waterhouse. Under her theory, the explicitly sex-based comments, detailed above, were a predictable response to Hopkins's status as a token woman who did not conform to the conventional feminine mold. Fiske's testimony thus provided Hopkins with a theory to explain why some partners might have reacted so negatively to her seemingly unfeminine behavior – why deviation from expected sex-linked behavior would be viewed as a personal shortcoming and result in a penalty.

Beyond the explicitly gender-based comments, Fiske discerned evidence of stereotyping and tokenism in the intensely hostile reaction of some partners who knew Hopkins only slightly. Opponents tended to exaggerate the negative and discount the positive. Claims were made, for example, that Hopkins was universally disliked, potentially dangerous, and likely to abuse authority. Tr. Test. of Dr. Susan Fiske, R. at 39, 55 (hereinafter “Tr. Test.”). Fiske noted that the risk of stereotyping and negative reactions to an unconventional token woman was greatly facilitated by the standardless, subjective process by which partners were selected at Price Waterhouse. 618 F. Supp. at 1117–18. Although discretionary decision making is common in professional firms such as Price Waterhouse, we must recognize that exercise of such discretion makes it easier

to mask or hide bias. In this case, for example, if only objective measures were used in the partnership selection process, Price Waterhouse would have had a much more difficult time explaining its decision to reject Hopkins's candidacy.

In many respects, I fully concur with Justice Brennan's thoughtful plurality opinion. I would note, however, that despite his "icing on the cake" characterization of Dr. Fiske's testimony, the plurality opinion goes a long way toward translating and incorporating many of Fiske's insights into Title VII law.

First, I wholeheartedly agree that the *McDonnell Douglas* "pretext" model is not the sole framework of proof permissible in individual disparate treatment cases under Title VII. *McDonnell Douglas Corp.*, 411 U.S. at 802-05. The mixed-motives framework of proof that the Court endorses today is necessary to supplement the pretext model. In the most common type of "pretext" (or single-motive) case, plaintiffs will seek to prove that there is no legitimate basis for their adverse treatment and will urge the factfinder to infer, often through a process of elimination, that the real or true reason for the employer's action was race, color, sex, national origin or religion. The evidence adduced in pretext cases is most often circumstantial evidence. Rarely these days will plaintiffs be able to offer direct evidence of discrimination, i.e., "smoking gun" comments or admissions that reveal the decision maker's biased state of mind. Instead, whenever possible, plaintiffs will generally offer comparative evidence of discrimination, i.e., evidence of similarly situated employees, outside plaintiff's racial or gender group, who were treated better than the plaintiff. In some cases, comparative evidence can serve as living proof of disparate treatment.

However, in many other discrimination cases, plaintiff will be unable to point to a sufficiently similar comparator. This is particularly true in cases involving professional employees where no two employees may perform identical tasks or work at the same level in the same department or division. Additionally, with respect to high-level positions involving a range of skills, talents, and competencies, an employer can nearly always point to a dimension in which a comparator differs from the individual plaintiff.

In this case, for example, the District Court concluded that Hopkins failed to make out a pretext case under the *McDonnell Douglas* framework of proof. The court ruled that Hopkins's comparative evidence was insufficient to prove pretext because the successful male candidates Hopkins offered as comparators were not similar enough to Hopkins. Given that Hopkins's abrasive personality and asserted lack of social graces were at issue, she attempted to demonstrate that Price Waterhouse had selected male partners who were equally deficient in interpersonal skills. She produced comparative evidence of two men who

had been selected as partners, even though the first man had been criticized for acting like a “Marine drill sergeant” and the second man for being “cocky,” “abrasive and overbearing,” and having a “wise guy attitude.” Br. for Resp’t at 13. However, the District Court found the cases distinguishable based on Price Waterhouse’s claim that each of the male comparators possessed special skills needed by the firm. The Court did not mention why Hopkins’s skill in landing a multi-million contract and her reputation for billing the most hours were not “special” enough to warrant a similarly favorable result, despite her abrasiveness. Particularly when it comes to intangible qualities, it is often difficult to persuade a court that another employee is sufficiently similar to the plaintiff. Moreover, there is a risk that gender bias may creep into the very assessment of similarity or comparability. Thus, the candidate likened to a Marine drill sergeant was also praised by a partner for being a “man’s man,” suggesting a willingness to excuse or discount his lack of social graces because he fit the expected masculine stereotype. Br. for Resp’t at 13.

Given the difficulties associated with the availability and interpretation of comparative evidence, it is critically important that today’s ruling clarifies that a plaintiff may prove discrimination through evidence of sexual stereotyping, even in the absence of comparative evidence. Thus, candidates such as Ann Hopkins who are able to show that sexual stereotyping infected the decision-making process need not always adduce living proof of a similarly situated man who was treated better. Allowing proof of discrimination via sexual stereotyping means that women employees in sex-segregated positions (where there are no male comparators), women employees in unique positions (where there are no comparable employees), and women employees in organizational settings such as Price Waterhouse where candidates are evaluated on a number of tangible and intangible factors – making comparison exceedingly difficult – will not be denied the protection of Title VII simply because no one is quite like them.

I write separately, however, to elaborate upon the meaning of the core concept of “stereotyping” and to provide guidance to the lower courts as they evaluate the legal sufficiency of evidence relating to stereotyping. The record in this case demonstrates that sexual stereotypes may operate to infect an employer’s decision-making process, in violation of Title VII, even when the decision makers themselves are unaware of their own biases. Perhaps influenced by the testimony of Dr. Fiske, the trial court acknowledged that “the stereotyping by individual partners may have been unconscious on their part,” but nonetheless held Price Waterhouse liable because “the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole.” 618 F. Supp. at 1119. Thus, in fashioning a claim

of discrimination centered on sexual stereotyping, the district court contemplated that plaintiffs would pursue such claims – and might well prevail on their claims – even if those responsible for making the adverse decision sincerely believed that they were free of bias and did not realize that bias had distorted the decision-making process.

Unfortunately, the plurality's use of the term "stereotyping," is ambiguous, creating uncertainty that could cause confusion and potentially undercut the force of today's ruling. Thus, at one point in the plurality opinion, Justice Brennan states that gender may be said to have played "a motivating part in an employment decision" in those cases where "if we asked the employer at the moment of the decision what its reasons were, and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. at 250. The import of this statement is that gender bias, motivated by gender stereotyping, cannot exist if the employer sincerely believes that gender did not play a role in the adverse action. The plurality's statement could thus be read to limit actionable cases of gender stereotyping to instances in which the decision maker is aware that he or she is relying on a gender stereotype, excluding cases in which a person harbors sex stereotypical attitudes or even utters sex-based generalizations about men and women, but (erroneously) believes that gender did not drive his or her decision in any way.

Although one can argue that Hopkins has proven the kind of conscious gender bias that the Court's statement envisions, many cases of sex-based disparate treatment will involve unconscious (or semi-conscious) gender bias and stereotyping. As Dr. Fiske explained in her testimony, unconscious stereotypes may "motivate" or "cause" a person to reach a negative judgment – in the sense that stereotypes provide a stimulus to action – even when the evaluator sincerely believes he is basing his judgment on neutral grounds. Thus, for example, a decision maker may reject an Asian American candidate with an impressive record of achievement because he cognitively associates Asians with hard work, but lack of creativity, and does not realize that his subjective assessment of the candidate is a product of a widely held descriptive stereotype about Asians rather than the individual candidate's record. In such a case, a white candidate for the position may seem to be more creative to the decision maker simply because he enters the competition without any preconceived notions about his creative abilities. The important point here is that disparate treatment fueled by unconscious stereotypes is no less injurious than disparate treatment prompted by consciously articulated stereotypes. Thus, in the gender discrimination context, it matters little whether the plaintiff is a victim of conscious or implicit bias because, in both situations, the plaintiff has been

treated less favorably because of her sex and has been denied a valuable job benefit that she would have received if she were a man.

Because prescriptive and descriptive stereotypes can operate beneath the surface and may not manifest themselves in explicitly gender-based comments, I object to Justice O'Connor's insistence that discrimination plaintiffs provide "direct" evidence of bias, in the form of gender-based comments by decision makers, before they are entitled to invoke the mixed-motives framework established by the Court today. 490 U.S. at 276. It goes without saying that now that the Court has called attention to and condemned the gender-based stereotypical comments that surfaced in Price Waterhouse's partnership selection process, we can expect employers to take steps to clean up or sanitize their process, making sure they put fewer comments on the record and instructing decision makers not to refer to a plaintiff's gender in direct or indirect ways. Lest our decision today merely provide a recipe for evading Title VII liability, we should make it clear that gender-based unequal treatment – from whatever source, and however proven – violates Title VII.

At a more fundamental level, I write separately to express my view that, while I endorse the development of a new mixed-motive framework of proof under Title VII, I am of the firm belief that we should not attempt to tightly constrain the methods of proof or arguments plaintiffs offer in future cases. In real life, cases cannot be neatly separated into single-motive (or pretext) cases – where the only question is whether the employer was motivated by the employee's sex or by a legitimate, nondiscriminatory reason – and mixed-motive (or motivating factor) cases where the debate centers on the degree of causal influence exerted by the legitimate versus the illegitimate reason. Instead, in many sex discrimination cases, it simply may be impossible to tell whether the asserted nondiscriminatory reason for the employer's action is itself a product of gender bias or gender stereotyping.

Indeed, the case before us provides a good illustration of the false dichotomy between single and mixed-motive cases. For the most part, this case has been approached by the courts and the litigants as a mixed-motive case. On a strategic level, this is understandable because the District Court expressly found that Ann Hopkins's lack of social graces constituted a legitimate, non-fabricated reason for the firm's refusal to offer her a partnership. 618 F. Supp. at 1114. Thus, if Hopkins was to succeed in her Title VII action, she had to persuade the court that sex also played a role in the partnership denial and to convince the court to place the burden on the employer to prove that it would have made the same decision even if she were a man, an evidentiary burden Price Waterhouse was unable to shoulder. Viewed as a mixed-motive case, Hopkins has won, primarily because she was able to offer

explicitly gender-based comments made by decision makers proximate to the time the decision was made.

However, in my view there is another, more instructive way of approaching Hopkins's case. On this record, it is far from clear that the partners' perceptions of Hopkins as lacking in social graces and as having an abrasive personality qualify as legitimate, nondiscriminatory reasons for the partnership denial. Instead, Hopkins has made a convincing case that these perceptions themselves were tainted by sexual stereotyping, thereby undercutting the categorization of this case as a mixed-motive case. Thus, if the purportedly legitimate reasons cannot be said to be free of sex bias, we are then left with only sex-based reasons for the adverse decision.

Central to understanding why these apparently legitimate reasons may be tainted by gender bias is the testimony and approach of Dr. Fiske. Rather than focusing on abstract concepts of motive or causation to determine what happened at Price Waterhouse, Fiske placed paramount importance on the structural features of the workplace at Price Waterhouse, particularly the fact that Hopkins was a token woman in a large organization. Tr. Test. at 26–7. Fiske explained how this condition of rarity can have a significant impact on how a person is viewed within a given organization, describing what psychologists call selective perception. In line with gender stereotypes, many people expect token individuals to fit preconceived views regarding traits of the group (e.g., that women are more caring and nurturing than men) and are apt to scrutinize women more closely on feminine dimensions such as interpersonal skills and personality. *Id.* at 31. It does not take an expert to appreciate that women, in the professions and in other settings, are often noticed and rated on a scale applied to women only, focusing selectively on their style of dress, their appearance, their social graces, and other traits not directly linked to their ability to perform the job. The phenomenon of selective perception described by Fiske can easily translate into disparate treatment, given that men are not as likely to be judged negatively because of their lack of social graces, allowing even a “man's man” to be blunt and assertive and yet still make partner.

This kind of biased attention can be particularly harmful to a woman such as Ann Hopkins who acts counter to the stereotype. When highly visible individuals defy expectations, they often elicit intensely negative reactions from some people in the organization. In this case, for example, several partners had an intensely negative view of Hopkins even though they had had little personal contact with her, suggesting a predisposition against a woman being aggressive or forceful. Most tellingly, the very same traits that elicited a negative reaction by some were viewed by others as acceptable, even laudable. Thus, supporters viewed Hopkins as “outspoken, sells her own ability, independent, [has] the

courage of her convictions,” Tr. Test. at 37, while detractors found her “overbearing, arrogant, abrasive, runs over people, implies she knows more than anyone in the world about anything and is not afraid to let anyone know it.” *Id.* at 64. At the very least, this split image of Hopkins made it very difficult to ascertain the accuracy of differing partners’ evaluation of her personality.

In her testimony, Fiske also explained how token women in male-dominated organizations are liable to be slotted into role traps that mimic patterns associated with women outside the workplace, such as mother, little sister, seductress, or militant. Tr. Test. at 31. Once an individual is so typecast, her behavior is more likely to be perceived as fitting the preconceived role, creating a tendency to view that person through such a distorted lens. Thus, there is a tendency to characterize “mixed” behavior (tough and assertive, yet warm and funny) as being all of one type (tough and assertive), suppressing the interpretation that does not fit the preconceived role. In this respect, the personality of the token individual is very much a social construct, the majority’s distorted image of the individual, with little room for individuality or diversity within the token group. Given her token status, it is possible that Hopkins was typecast as a militant and that the softer side of her personality was obscured by a preconceived view of Hopkins as hard-nosed, abrasive and aggressive. Certainly the advice given to Hopkins – to soften her style by dressing and talking more femininely – suggests that some partners believed that perceptions of Hopkins might change if her appearance changed and that there was nothing inalterable or deep seated about her personality that made her unfit for a partnership at Price Waterhouse.

Given the dynamics of tokenism, the split view of Hopkins by the partners at Price Waterhouse was likely not simply a function of the slice of Hopkins’s behavior that each individual evaluator had witnessed. Nor can we be confident that the collective assessment of Hopkins as competent, but also rude and abrasive, was fair and accurate. Instead, even with all the evidence in, the “real” Ann Hopkins does not clearly emerge simply from putting the pieces together. One lesson we can learn from this case is that when gender stereotyping and unconscious bias color perceptions, it is exceedingly difficult to discover the objective truth about an individual. In the final analysis, it may be impossible to separate Hopkins’s “real” personality from the environment in which she worked.

In this case, however, what we do know is that Price Waterhouse did nothing to decrease the chances that gender bias and gender stereotyping would infect its decision-making process. It did not reprimand the partner who openly voiced his opposition to women joining the ranks of partner. It did not instruct the partners that each candidate should be judged on his or her

performance or merit, rather than on sex-linked traits, such as social graces or personal appearance. It did nothing to limit possible abuse of discretion by partners, for example, by specifying with some precision the criteria to be used in the partnership decision and seeking the partners' assessment of the candidates only on those measures. Perhaps most importantly, it did not take any steps to ensure that the few women who served as senior managers, such as Ann Hopkins, had a clear path for advancement and an opportunity to remedy any perceived shortcomings before they went up for partner.

In my view, this is an easy Title VII case. Simply put, Ann Hopkins deserved to win her suit because she handily met and exceeded the objective, performance-based measures of success – she proved her ability to attract clients, to generate billable hours, and to handle major projects for the firm. As a token woman in the firm, she also presented compelling evidence that she was vulnerable to sex bias and sexual stereotyping, bias that surfaced in the written comments of several partners during the selection process. Because Price Waterhouse did nothing to inhibit or counteract stereotyping in its organization, it cannot now rely on subjective assessments of the personality of a female candidate to justify its adverse decision, particularly given the high risk that such assessments are themselves tainted by sexual bias.

I concur separately today to underscore my view that Title VII plaintiffs should be able to make out a viable claim for sex stereotyping not only in mixed-motive cases where proof of sex stereotyping is used to discharge the plaintiff's initial burden of proving that sex was a "motivating factor" in a decision based on legitimate and discriminatory reasons, but also in other types of discrimination cases in which the employer's asserted "legitimate" reason may itself be tainted by impermissible sex stereotypes. Additionally, I would adopt a psychologically informed definition of stereotyping for use in Title VII cases that encompasses commonly held descriptive and normative generalizations about a group, whether those beliefs are explicitly stated by decision makers, through direct evidence of gender-based or sexist comments, or simply can be inferred from the fact that an exceptional candidate from an underrepresented group has been rejected by an organization which lacks diversity and has done little to minimize the risk of stereotyping in its organization. Our decision today should alert employers that they are responsible for taking steps to assure that neither conscious nor unconscious stereotyping distorts the processes by which they select and make key decisions about their employees, including monitoring and structuring discretionary decisions to focus on job-related criteria, skills and performance.

Undoubtedly, we will be called upon in the future to decide more difficult cases, in which women are denied advancement in gender-integrated

settings or are judged deficient on performance-based, objective measures that tend to favor male candidates. In such cases, plaintiffs will likely be required to point to a different set of organizational features or individual facts to convince the factfinder that they have been subjected to disparate treatment because of their sex. Today, we have the relatively easy task of declaring that Title VII prohibits an employer from denying an exceptional candidate the opportunity to ascend to the highest ranks of her profession simply because some members of her firm judged her not feminine enough for their tastes.