

LISTENING TO DR. FISKE: THE EASY CASE OF *PRICE WATERHOUSE V. HOPKINS*

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INTRODUCTION

It may be blasphemous to complain about *Price Waterhouse v. Hopkins*.¹ The 1989 term of the United States Supreme Court was widely regarded as having been a disastrous term for proponents of civil rights, sexual equality, and progressive causes. In 1989, then, Ann Hopkins' victory was notable. She convinced the Court that employers—not employees—should bear the burden of persuasion in what are known as “mixed motivation” cases.² These are cases in which employment decisions are purportedly made for both sexist and nonsexist reasons. *Hopkins* stands for the proposition that, even in the professional world, there are limits to partners' discretion when they choose who will join their ranks. After *Hopkins*, plaintiffs' attorneys will try hard to characterize their cases as mixed motivation cases to take advantage of the burden shifting, particularly now that the theory of disparate impact has been eroded by *Wards Cove Packing Co. v. Atonio*.³

My critique of *Hopkins* is not that the Court reached the wrong result. Rather, I take issue more generally with the comparative approach used in Title VII sex discrimination cases—an approach by which the courts seek to discover whether discriminatory conduct caused harm to a woman by imagining if the same fate would have happened to a man. Even the plurality and concurring opinions in *Hopkins* continue an unproductive search for illicit motivation and causation. *Hopkins* further complicates the

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1. 109 S. Ct. 1775 (1989).

2. For doctrinal discussions of mixed motivation cases, see Brodin, *The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353 (1984); Zimmer & Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25, 43-51 (1986).

3. 109 S. Ct. 2115 (1989).

law of employment discrimination by refining evidentiary burdens in a special category of cases. In this process the more critical facts and issues surrounding the treatment of women in the workplace are submerged and left unexamined. For instance, there is little in the opinions in the *Hopkins* litigation about the specific barriers women face when they break into and try to advance within male-dominated professions.⁴ There is not much about the mechanisms that are used to contain the rise of women in hierarchies that involve significant sources of wealth and power. If a woman wanted to learn how to make it in one of the "Big 8" accounting firms, I do not think she would gain much useful information from the Court's discussion of discrimination. Instead, the opinions embrace the rhetoric of similar, highly abstract debates over intent and causation that permeate tort law,⁵ constitutional law,⁶ and labor law.⁷

One unusual feature of the *Hopkins* litigation, however, which deserves attention is the role played by Dr. Susan Fiske, an expert witness for the plaintiff. Fiske testified at trial that sexual stereotyping played a major determining role in the firm's decision not to make Hopkins a partner. Fiske's testimony drew on a body of research in social psychology which explains stereotyping as a function of the structural features of an organization and which catalogues the forms of expression such stereotyping often takes. In contrast to the time-worn metaphysical debate about causation that so engaged the Supreme Court Justices, Fiske's analysis of what was going on at Price Waterhouse was concrete and potentially quite useful for reshaping Title VII doctrine. Fiske's orientation was far from radical; her opinions were located squarely within the mainstream of her discipline and endorsed by the American Psychological Association.⁸ I got the impression, however, that not many of the judges who ruled at the various stages of the *Hopkins* litigation were persuaded by what Fiske was saying. Judge Williams of the Circuit Court for the District of Columbia

4. Justice O'Connor did remark, however, that cases like *Hopkins* might not be exceptional. She cited the "growing number" of similar cases in the lower courts and the "mounting evidence" that intentional discrimination was very hard to prove. *Price Waterhouse*, 109 S. Ct. at 1802. By declining to treat Hopkins' claim as exceptional, O'Connor implicitly acknowledged that barriers faced by women in the workplace were pervasive and real.

5. See, e.g., H. HART & T. HONORE, *CAUSATION IN THE LAW* (2d ed. 1985).

6. See, e.g., *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

7. See, e.g., *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

8. Brief for Amicus Curiae American Psychological Association in Support of Respondent at 4-5, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) [hereinafter APA Amicus Brief].

was openly hostile to Fiske's message,⁹ and Supreme Court Justice Kennedy echoed Williams' disparaging remarks.¹⁰ Judge Gesell—the trial judge in the case who ruled for Hopkins—at times seemed very skeptical of Fiske's analysis and conclusions.¹¹ Even Justice Brennan, writing for the plurality in favor of Hopkins,¹² was careful to point out that he was not relying too heavily on Fiske. He was tempted to call her testimony "icing on the cake."¹³

Perhaps part of the resistance to Fiske's testimony stemmed from a judicial reluctance to let a social scientist determine what constitutes discrimination. When I first read the trial court's description of Fiske's testimony, I admit that it did seem somehow inappropriate to allow a nonlegal expert to testify on what appeared to be the ultimate legal issue in the case. Beyond this general distrust for nonlegal knowledge, however, what might have made Fiske's testimony appear inapposite to the courtroom setting was that the research that informed Fiske's opinions had radical potential. Fiske did not fit in well because, in her view, sex discrimination was not a rare occurrence directly traceable to the bad intent of a few individuals. Fiske's starting point was that sex discrimination is the not-so-rare byproduct of an organizational structure which lacks a high percentage of women in powerful positions. Fiske's feminist orientation may have posed too great a challenge for male-dominated Title VII litigation. Her knowledge of stereotyping problematized the legal assumption that intent and cause are objective facts which can be "found" in individual cases. Fiske's testimony explained how gender could shape perceptions of a woman's "personality" and "style" so as to cast doubt on even sincere assessments by those who sit in judgment in male-dominated institutions.

In the course of the litigation, Fiske was disparaged, dismissed as irrelevant, and accused of lacking professional integrity. This intense negative reaction to Fiske indicates that something more than the ordinary distrust of nonlegal experts was operating in this

9. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473-78 (D.C. Cir. 1987) (Williams, J. dissenting), *rev'd and remanded*, 109 S. Ct. 1775 (1989).

10. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1813 n.5 (1989) (Kennedy, J. dissenting).

11. See *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117-18 (D.D.C. 1985), *aff'd in part, rev'd in part, and remanded*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1775 (1989). See *infra* text accompanying notes 110-44.

12. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

13. *Id.* at 1793.

case—much of the criticism of Fiske was itself sexist.

My commentary is directed more at the tone and rhetoric of the arguments and discussion in the lower courts than it is with the holding and legal theory of the Supreme Court's decision. Ann Hopkins deserved to win and she did win. In my opinion, Dr. Susan Fiske presented the best reasons why Ann Hopkins should win. I think the law could benefit from spending more time on the work of Fiske and her colleagues. If we listened to Dr. Fiske, we might reshape the legal notion of sex discrimination in a way that helps women and turns *Price Waterhouse v. Hopkins* into the easy case it should be.

I. THE RECORD ON ANN HOPKINS

One of the reasons why the Ann Hopkins case received so much attention may have been that the facts seemed more clear-cut than many controversies presented to the Supreme Court. From a liberal feminist framework, the case is a textbook example of the dangers of sex-based discrimination faced by professional women. Hopkins was denied access to the highest level of the firm, even though she consistently outperformed men by male-focused standards. She asserted that she was caught in a familiar double bind.¹⁴ Although her job required unfeminine behavior (*e.g.*, generating business, giving orders, and being assertive), Hopkins' opponents criticized her and voted against her because she was unfeminine.

When she was denied partnership at Price Waterhouse, Ann Hopkins was a senior manager in her fourth year with the firm. As to the most important measures, she appeared to be a very good prospect—she brought in more business than any other person nominated for partner that year, and she billed the most hours. She was credited with winning a sizeable contract with the Department of State that Price Waterhouse admitted was a "leading credential" for the firm when it competed for other lucrative govern-

14. In the *Hopkins* litigation, the double bind manifested itself in the gendered expectation that women should not be aggressive even though aggressiveness was one of the desirable job qualifications. See *id.* at 1791. Feminist theorists have identified double binds facing women in a variety of other contexts. See, *e.g.*, Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915-17 (1987) (discussing double bind of commodification versus non-commodification of women's abilities).

ment contracts.¹⁵ The partners in her division initially strongly supported her candidacy. She was well regarded by her clients.¹⁶

This impressive record was made even more visible by the rarity of women at the high levels of Price Waterhouse. When Hopkins became a candidate for partner in 1984, only 7 of the 662 partners at the firm were women. Hopkins was also the only woman in the group of 88 persons being considered for partnership her year.¹⁷

Hopkins was turned down for partnership because several partners objected to her personality. Her deficiency was said to be her lack of "interpersonal skills."¹⁸ Specifically, opponents disapproved of her managerial style and her treatment of staff.¹⁹

The process leading to partnership required partners who had contact with Hopkins to fill out a form—a long form for partners with extensive contact and a short form for those with less exposure to the candidate. Only 32 of the firm's partners submitted written comments. Of these, 8 partners opposed her and 3 recommended that her candidacy be put on hold. That degree of opposition, however, was enough to put Hopkins on hold. The Price Waterhouse system was "collegial" in that there were no pre-set standards for determining what degree of opposition would be fatal to a candidacy. Ultimately, however, 62 of the 88 candidates received partnership offers.²⁰

The crux of Hopkins' case centered on the gender-based nature of the written comments submitted by the partners—both her opponents and her supporters—and on the oral advice given to Hopkins by the head partner in her division. The governing body of the firm (the Policy Board) voted to defer Hopkins' candidacy because she lacked "social grace."²¹ This concept of social grace was given an explicitly gendered dimension in some of the written comments. One partner said that she needed to take a course in

15. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 462 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. at 1775 (1989).

16. *Price Waterhouse*, 109 S. Ct. at 1782.

17. *Hopkins*, 618 F. Supp. at 1112.

18. *Id.* at 1113.

19. *Id.*

20. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 462 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1775 (1989).

21. *Id.* at 463.

charm school.²² Others criticized her for not fitting the traditional feminine image; they claimed that she was "overly aggressive,"²³ "macho,"²⁴ and that she "overcompensated for being a woman."²⁵ Other partners pointed to her use of profanity.²⁶ One of her supporters stated that he believed that the negative reaction to her language stemmed from the fact that Hopkins was "a lady using foul language."²⁷

The conventional wisdom at the firm seemed to be that unless Hopkins softened her style, she would not make partner. The most celebrated comment in the record came from the partner in charge of Hopkins' office who counseled her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."²⁸ Hopkins was advised to undertake a quality control review. But before the results of that review were in, she lost the crucial support of two partners in her home office. She left Price Waterhouse, set up her own firm, and sued.²⁹

Additional evidence of sexual stereotyping at Price Waterhouse was introduced at trial. In prior years, one woman candidate for partner had been criticized for trying to be too much like "one of the boys";³⁰ another, because she reminded a male partner of Ma Barker;³¹ and another, because she was typecast as a "women's lib[b]er."³² The starkest evidence of sexism was a comment made by a partner the year before Hopkins' evaluation who said that he "could not consider any woman seriously as a partner-

22. *Hopkins*, 618 F. Supp. at 1117.

23. *Id.* at 1113.

24. *Id.* at 1117.

25. *Id.* at 1116-17.

26. *Id.* at 1117.

27. *Id.*

28. *Id.*

29. *Id.* at 1113.

30. *Id.* at 1117. The comment was supposedly meant as criticism of the candidate for spending too much time with nonprofessional office staff who were predominantly women. For this reason, Judge Williams regarded the comment as sex-neutral. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 476 (D.C. Cir. 1987) (Williams, J., dissenting). Williams did not appreciate the structural situation of a token professional woman who finds that to socialize with other women, she must often cross class lines—lines that are also gender lines. To be criticized for being too much like one of the girls (the import of the comment made) is thus not sex-neutral because it makes women disproportionately vulnerable for seeking out each other's company.

31. *Hopkins*, 618 F. Supp. at 1117.

32. *Id.*

ship candidate and believed that women were not even capable of functioning as senior managers."³³ The partner was never reprimanded and his vote was recorded.

Some specific incidents in support of Price Waterhouse's assertion that Hopkins' personal style was overbearing also came out during the trial. She once yelled obscenities at a consultant for forty-five minutes.³⁴ She interrupted another woman manager and told her to keep still during a meeting.³⁵

As I read the litigation documents, the most critical facts in the case were not in serious dispute. Ann Hopkins was a "token" in the sense that, at Price Waterhouse, she was one of a tiny proportion of partners or persons in line for partnership who were women. Ann Hopkins' record was superb on all objective performance measures. No one seemed to dispute her professional competency or that she was exceptionally good at generating business. There was no question that her clients were satisfied with her performance. The only roadblock to partnership was the subjective assessment of some partners that Hopkins' personal style was unacceptable. The critical legal issue was whether that judgment was sexually discriminatory.

II. THE EXPERT TESTIMONY OF DR. SUSAN FISKE

Hopkins attempted to prove that the objections to her personality were sexually discriminatory by introducing the expert testimony of Dr. Susan Fiske, a social psychologist. Fiske's specialty is sex stereotyping in organizations.³⁶ She prepared for trial by reading written documents pertaining to the Hopkins candidacy and written comments made in conjunction with several other male

33. *Id.*

34. Brief for the Petitioner at 7-8, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) [hereinafter Brief for the Petitioner].

35. Trial Testimony of Dr. Susan Fiske, Record at 71, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) [hereinafter Trial Testimony].

36. At the time of trial, Fiske was an Associate Professor of Psychology at Carnegie Mellon University. She received her undergraduate degree and her Ph.D from Harvard University. In the field of stereotyping, Fiske had published several articles and was the recipient of a National Science Foundation Grant to study people's evaluative and emotional responses to stereotypes. Trial Testimony, *supra* note 35, at 21-23. Currently, Fiske is Professor of Psychology at the University of Massachusetts at Amherst. She gives an account of *Price Waterhouse* in *Court's Ruling Against Sex Stereotyping in Employment Decisions Will Make It Easier for Professors to Win Discrimination Lawsuits*, CHRONICLE OF HIGHER EDUCATION, May 31, 1989, at B1-B3.

and female candidates for partnership at Price Waterhouse. Her analysis was based on the written record, supplemented by information on the firm's demographics, partnership criteria, and selective data on other partnership candidates.³⁷

Fiske stated that sexual stereotyping "played a major determining role" in the decision to deny Hopkins a partnership.³⁸ Her analysis placed great weight on the structural features and selection process at Price Waterhouse as well as on the nature of the comments about Hopkins. Because Fiske had never interviewed anyone at Price Waterhouse, including Ann Hopkins, she did not testify as to any particular individual's state of mind. Instead she pinpointed those factors (or antecedent conditions) that might have encouraged stereotyping at Price Waterhouse and identified what she regarded as a pattern of comments indicating that stereotyping was present.

Of paramount importance to Fiske was the fact that Hopkins was a token woman at the firm. Fiske explained the social science research on the importance of "rarity" in social organizations.³⁹ The research she relied most heavily upon was that done by Rosabeth Moss Kanter.⁴⁰ Kanter's most well-known book, *Men and Women of the Corporation*, is an ethnography of a large corporation. In it, Kanter articulates many ways in which "discrimination itself emerges as a consequence of organizational pressures as much as individual prejudice."⁴¹ Kanter's work demonstrates that when a group is very rare—constituting approximately 15% or less of the organization—the members of the group are unable to form alliances and have little prospect of influencing the dominant culture.⁴² Citing Kanter and others, Fiske testified that the condition of rarity can have a significant impact on how a person is viewed within the organization.⁴³ Fiske stated that when there is dramatic underrepresentation of a group, the token individuals are much more likely to be thought about in terms of their social category. People expect token individuals to fit preconceived views about the traits of the group, to manifest particular qualities. To-

37. Trial Testimony, *supra* note 35, at 44-45.

38. *Id.* at 28.

39. *Id.* at 26.

40. *Id.* at 25, 31. Fiske also mentioned the work of Professors Madeline Heilman of N.Y.U. and Shelley Taylor of U.C.L.A.

41. R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 9 (1977).

42. *Id.* at 208-09.

43. Trial Testimony, *supra* note 35, at 26-27.

kens are highly visible as people who are different, and they are not often permitted the individuality of their unique, nonstereotypical characteristics. When a token person behaves in a way that is counterstereotypical—for example, when a woman acts in an aggressive, competitive, ambitious, independent, or active way—she is more likely to be regarded as uncaring or lacking in understanding.⁴⁴ This does not mean that women can play safe by conforming to conventional stereotypes. The Catch 22 or double bind of the powerless group is that stereotypes associated with nondominant groups are also traits that are not highly valued in the organization. A woman who acts womanly acts in a way that may cast doubt on her competence and effectiveness; a woman who is thought to be too masculine may be regarded as deviant.⁴⁵

In describing how persons respond to an individual whose behavior is incongruent with prevailing stereotypes, Fiske referred to Kanter's four "role traps."⁴⁶ Under this scheme, the dominant male group perceives token women as mothers, seductresses, iron maidens, or pets.⁴⁷ These perceptions and the roles associated with them constrict the group's image of the woman and allow the men in the group to treat the woman in a "packaged" way.⁴⁸ The role trap most applicable to Hopkins is that of the "iron maiden." Kanter's research describes the iron maiden as the contemporary version of the virgin aunt.⁴⁹ Women who refuse to play roles more congruent with feminine stereotypes (e.g., mother, seductress, or pet) may find themselves viewed as "hard, unemotional, difficult to get along with," and "[n]ot a regular human being."⁵⁰ An iron maiden is considered tougher or more dangerous than she is. As a result, she might be "trapped into a more militant stance than . . . [she] might otherwise take."⁵¹ When a woman is typecast as an iron maiden, there is a tendency to characterize "mixed" behavior (tough and assertive, yet warm and funny) as being only tough and assertive, thus suppressing the interpretation that does not fit the stereotype.⁵²

44. *Id.* at 31.

45. APA Amicus Brief, *supra* note 8, at 16.

46. Trial Testimony, *supra* note 35, at 31.

47. R. KANTER, *supra* note 41, at 233.

48. APA Amicus Brief, *supra* note 8, at 22.

49. R. KANTER, *supra* note 41, at 233.

50. Trial Testimony, *supra* note 35, at 31.

51. R. KANTER, *supra* note 41, at 236.

52. APA Amicus Brief, *supra* note 8, at 24.

Fiske's account of the gendered way token women in an organization are likely to be perceived was used by Hopkins to discredit the "neutrality" of the partners' observations of Hopkins' interpersonal skills. Under Fiske's theory, the explicitly sex-based comments describing Hopkins were a predictable response to her status as a token woman who did not fit the conventional feminine mold. Fiske gave Hopkins a theory to explain why some partners might react so negatively to her unfeminine behavior—why deviation from expected sex-linked behavior would be viewed as a personal shortcoming and result in a penalty. Fiske's analysis opened the possibility that a double standard might be operating at Price Waterhouse in which women accountants were expected to behave in a way suitable for women while still satisfying male performance standards.

More importantly, Fiske's analysis cast doubt on some of the comments critical of Hopkins' personality that were expressed in a more sex-neutral fashion. Fiske noted that, under conditions of rarity, evaluators may give biased attention to stereotypic dimensions.⁵³ This means that women will be scrutinized more closely than men on "feminine" dimensions such as social skills and personality, and that attention will be focused away from "masculine" task or performance measures. This kind of biased attention can be very harmful to a woman who acts counter to the stereotype. Kanter describes how tokens "capture a larger awareness share."⁵⁴ A token woman's "shortcomings" then become highly visible, in addition to being shaped in a gender-coded fashion.

An additional cue Fiske found which indicated that stereotyping was influencing decisionmaking was the intensity of the negative reaction toward Hopkins.⁵⁵ 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.⁵⁶ Fiske contrasted these extremely negative comments with positive comments by others in the organization who seemed to describe the same behavior. Supporters found Hopkins as "outspoken, sells her own ability, independent, [has] courage of her convictions."⁵⁷ Detractors found her

53. Trial Testimony, *supra* note 35, at 37.

54. R. KANTER, *supra* note 41, at 210.

55. Trial Testimony, *supra* note 35, at 39.

56. *Id.* at 39, 55.

57. *Id.* at 37.

"overbearing, arrogant, abrasive, runs over people, implies she knows more than anyone in the world about anything and is not afraid to let anybody know it."⁵⁸ Fiske's testimony on this phenomenon of "selective perception" suggested that the differing reactions to Hopkins were not simply a function of the slice of Hopkins' behavior that each individual evaluator had witnessed. Instead, when all the evidence was in, the "real" Ann Hopkins might still not clearly emerge from putting all the pieces together. For Fiske, the reality of Ann Hopkins was actually shaped by her status as a token and the degree to which the organizational climate encouraged or discouraged reliance on stereotypes. Although Fiske's approach was far from postmodern, it did challenge the notion that the court could easily discover the objective truth about Ann Hopkins' personality. The process of truth-finding was complicated by Fiske's emphasis on the importance of the structural position of the subjects (the evaluating partners) and the object of their judgment (Ann Hopkins). Fiske's use of Kanter's role traps also demonstrated how other people can contribute to the social construction of the personality of an individual. This made it more difficult to separate Hopkins' "real" personality from the environment in which she worked.

In addition to delineating some of the ways stereotyping might find expression when a token person is evaluated, Fiske criticized the specific partnership process at Price Waterhouse.⁵⁹ Stereotyping was encouraged in Fiske's view because Price Waterhouse did not clearly specify the criteria on which partners were to base their judgments of a candidate's personal qualities. Decisive weight was placed on negative assessments of partners who had very limited contact with Hopkins, allowing sex-linked judgments to drive the process.

Fiske used a qualitative, ethnographic methodology to arrive at her conclusion that stereotyping played a major determining role in the firm's decision to deny Hopkins a partnership. Her testimony was unusual in employment discrimination litigation in that she was not analyzing the results of past employment decisions at Price Waterhouse and trying to show a statistical sex bias.⁶⁰ Nor was she reporting on the results of a survey or an inter-

58. *Id.* at 64.

59. *Id.* at 32-33.

60. For a discussion of the Supreme Court's ambivalent attitude toward social psychologists and social science data, see Bersoff, *Psychologists and the Judicial System*, 10 *LAW*

view she had conducted at Price Waterhouse. Instead, her method was to demonstrate those patterns of behavior at Price Waterhouse which strongly resembled behavioral patterns identified in Kanter's research as characteristic ways in which organizations respond to the "problem" of token women. In Fiske's analysis, stereotyping was a byproduct of organizational demographics, not simply the insensitivity of individuals holding stereotyped views. A crucial part of Fiske's analysis is her acceptance of a fundamental correlation between stereotyping and rarity in an organization. If 30% of the partners at Price Waterhouse had been women, Fiske might not have reached the same conclusions. Additionally, Fiske's "deconstruction" of certain facially neutral comments was legally innovative. It gave Hopkins the important opportunity to document her claim of stereotyping beyond recounting only the obviously sexist remarks. It meant that even in cases in which there are no "smoking gun" statements, there might still be persuasive evidence of stereotyping.⁶¹

III. THE COMPARATIVE STANDARD: IF ONLY HOPKINS WERE A MAN

The most conventional way of analyzing the legal issue in *Hopkins* is to apply a comparative standard—compare Ann Hopkins' treatment to that of a similarly situated man. If Hopkins had been a man, would the partners have made the same objections to "his" personal style and would they have objected with the same intensity? Under the comparative standard, women are measured by the rules created with men in mind. Implicit in the comparative standard is that if women follow men's rules, they have a right not be disadvantaged for doing so. The comparative standard is so well entrenched that it is sometimes treated as if it were the only conceivable meaning of discrimination. The comparative standard is also frequently linked to liberal feminism. The primary goal of liberal feminism in this context is identified as affording women the same access to jobs and other benefits as is given to men.⁶²

AND HUMAN BEHAVIOR 151 (1986). Donald Bersoff was the counsel of record for the APA Amicus Brief in *Price Waterhouse*, *supra* note 8.

61. The remainder of Fiske's analysis was less unusual from a legal standpoint. Her objections to the standardless subjective procedure used at Price Waterhouse for selecting partners are familiar. Lawyers as well as social scientists have long argued that such unfettered discretion facilitates discrimination. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 191-205 (2d ed. 1983).

62. Alison Jaggar's often-cited taxonomy describes liberal feminism as one of four major feminist theoretical approaches. A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 27-50

There is an intricate relationship between the comparative standard and the concept of causation in employment discrimination law. A plaintiff proves her case by showing that "but for" her sex, she would have received the job or benefit.⁶³ Sex is considered to be the "cause" of the employer's decision if the same result would not have occurred in the case of a man.

The precise relationship between what qualifies as discriminatory behavior and which behavior "causes" harm, however, is not always clear. Only in certain types of cases—for example, where a person is a target of an indisputably racist or sexist epithet—will there be a sharply delineated focus on whether the discriminatory behavior caused the alleged harm. In these cases, the attention shifts from the quality of the defendant's behavior (the discrimination question) to the role we ascribe to that behavior in the unfolding of events (the causation question). More often, the issues are analyzed in a blended fashion: we decide *whether* conduct is discriminatory by reference to the comparative standard. In these cases, the issue of causation is difficult to separate from the issue of discrimination. What makes the conduct discriminatory is that it would not have had the same impact on a man.

This analysis of the relationship between cause and discriminatory behavior finds its analogue in tort law in the murky doctrine of proximate cause.⁶⁴ Proximate cause becomes most prominent as a separate issue in those instances where the defendant's conduct was clearly negligent. The classic proximate cause case often takes the shape of a long, twisted causal chain of events in which a highly unexpected and catastrophic injury can be traced back to the defendant's negligent conduct. The doctrine of proximate cause serves to limit liability for "freak" accidents, even though there is an undisputed factual connection to the defendant's negligent conduct. In the less clear cases of negligence, however, we often have trouble deciding the negligence question without simultaneously ascertaining whether proximate cause is "present," *i.e.*, whether defendant's duty extended to that particular risk.⁶⁵ When we are less confident about the unacceptability of

(1983). For additional accounts of the ingredients of liberal feminism, see generally J. DONOVAN, *FEMINIST THEORY* 1-30 (1985); R. TONG, *WOMEN, SEX AND THE LAW* (1984).

63. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

64. See W. P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 42-45 (5th ed. 1984).

65. My analysis of proximate cause is informed by the "duty-risk" approach first devel-

the conduct, we reframe the question as a question of causation and end up asking the normative question in a more neutral, quasi-scientific, and disguised fashion.

There is another analogue to tort law in the play between discrimination and causation. In both tort and employment discrimination litigation, causation is often deployed as a linguistic tool for the defendant.⁶⁶ When it is futile to argue that the behavior is acceptable, it helps to shift the focus to causation and argue that the behavior was insignificant. Causation issues often surface in "second generation" cases after some consensus has developed that certain recurring kinds of discriminatory behavior can not be justified.⁶⁷ For example, when it is no longer acceptable for decisionmakers to express stereotyped judgments about how certain groups should act, defendants will try to avoid liability by distancing themselves from the sexist statements and arguing lack of causation. This was the strategy of Price Waterhouse—argue that the sexist statements of the partners were insufficient proof that sexism *caused* the denial of partnership.

For all the purported disagreements among the Supreme Court Justices in *Hopkins*, each Justice embraced the comparative standard, and the various opinions are consistent with the general account of the relationship between discrimination and causation suggested above. The Justices disagreed only on the assignment of the burden of proof, and on the quality and quantum of evidence necessary to make it the defendant's burden, rather than the plaintiff's, to show that the hypothetical man would not have fared better. The Brennan plurality opinion is the most plaintiff oriented: the plaintiff is required only to show that gender is a "motivating" cause of the employment decision.⁶⁸ In their concurring opinions,

oped by legal realist scholars in the 1920's and 1930's and later adopted by the Louisiana Supreme Court. See Green, *The Duty Problem in Negligence Cases* (pt. 1), 28 COLUM. L. REV. 1014 (1928); *id.* (pt. 2), 29 COLUM. L. REV. 255 (1929). See also Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970); Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973). Legal realism sought to demystify proximate cause by uncovering the various policy considerations that lay behind causation determinations.

66. For discussions of the normative nature of many causation arguments, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 106-07 (1987); Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

67. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986) (sexual abuse did not alter working environment for female employees).

68. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1787 (1989).

Justices O'Connor and White characterized the plaintiff's burden more stringently—the plaintiff must prove that gender was a “substantial” factor in the decision.⁶⁹ Once this initial burden was met, however, Justices O'Connor and White would place the burden of persuasion on the defendant to prove that it would have made the same decision regardless of the plaintiff's gender. In contrast, the dissenters would have kept the burden of persuasion on the plaintiff throughout, requiring the employee to show that the same decision would not have been made if plaintiff were a man.⁷⁰

By characterizing all of the opinions as within the same comparative mold, I do not mean to discount the practical significance of burden shifting as a litigation issue, particularly because the causation question is not a matter of pure evidentiary fact. Assignment of the burden of persuasion can determine the outcome of a case. My interest here is to discuss the limitations of the comparative approach, rather than to analyze the details of a doctrine based on the comparative standard.

In *Hopkins*, the comparative standard did not yield a ready answer even though the facts were not hotly disputed. The problem was that the trial judge apparently accepted Price Waterhouse's claim that because successful male candidates were not comparable to Hopkins, their success did not indicate disparate treatment.⁷¹ Because “personality” was at issue, the challenge was to find a male candidate with the same personal style as Hopkins and then to compare his treatment to Hopkins'. Hopkins contended that Price Waterhouse routinely selected male partners who were deficient in interpersonal skills.⁷² However, Price Waterhouse successfully defended this charge by distinguishing the two cases that Hopkins claimed were most comparable. Two men had been selected as partners, even though the first had been criticized for acting like a “Marine drill sergeant”⁷³ and the other had been described as being “abrasive and overbearing,”⁷⁴ having a “wise guy attitude,”⁷⁵ and being “cocky.”⁷⁶ However, Judge Gesell

69. *Id.* at 1795 (White, J., concurring); *id.* at 1798 (O'Connor, J., concurring).

70. *Id.* at 1809-10 (Kennedy, J., dissenting).

71. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1115 (D.D.C. 1985), *aff'd in part, rev'd in part, and remanded*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1775 (1989).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

thought that neither man's case was comparable to Hopkins. Instead, the court found that their cases were distinguishable, based on Price Waterhouse's claim that each man possessed special skills needed by the firm.⁷⁷ Because of this asserted lack of comparable partnership decisions, Judge Gesell did not regard *Hopkins* as an easy case.

Hopkins illustrates that applying the comparative standard requires a great deal of judgment and that exercising this judgment has its political dimension. I regard Hopkins' examples of male candidates as convincing comparative evidence. Gesell's different view makes me wonder whether he had embarked on a search for a case on "all fours" which he was destined not to find. I also wonder why Hopkins "skill" at landing a multimillion dollar government contract was not special enough to make her case comparable to the two men with special skills. Upon reading that the male candidate likened to a Marine drill sergeant was also praised by a member of the Policy Board for being a "man's man,"⁷⁸ my concerns about interpreting comparative evidence were intensified. Despite all her qualifications, Ann Hopkins could never qualify as a man's man.

IV. THE INADEQUACY OF THE COMPARATIVE STANDARD

The difficulty Judge Gesell experienced applying the comparative standard may stem from the limitations of the comparative standard itself. The comparative standard assumes that gender is severable from other traits of the individual. The comparative standard asks us to perform the mental feat of taking away (or changing) the gender of a person and then determining what would have happened. This metamorphosis requires, however, that we ignore or change an important social fact about a person that affects not only a person's self image but also the response of others to that person. This tends to diminish the core notion of comparability as a useful standard. If Ann Hopkins had a twin brother who was considered her clone, their situations might still not be comparable. One salient difference in their situations would be a difference in gender. If any insight has proved to be a central theme in much of critical feminist legal scholarship in the last decade, it is

76. Brief for the Petitioner, *supra* note 34, at 6.

77. *Hopkins*, 618 F. Supp. at 1115.

78. Brief for the Petitioner, *supra* note 34, at 6.

that ignoring a woman's gender does not consistently lead to equality.⁷⁹ A legal doctrine that relies exclusively on the comparative standard is unlikely to account fully for differences that gender makes. In many cases, deciding what is equitable treatment requires some assessment other than imagining that women are men.⁸⁰

One reason why the comparative method seems destined not to detect all forms of sex discrimination is that it is not particularly well-suited to unearthing unconscious sexism. It may be the case that the partners who objected to Hopkins' personal style were sincere when they reported that they found her overbearing and abrasive. We will never know, however, whether a male clone of Hopkins would have been regarded by these same partners as assertive and self-assured. A negative quality in a woman may be experienced as a positive quality in a man. Given the importance of gender in our world, it would be surprising if the personalities of men and women were not experienced in gendered ways. This means that the partners in Price Waterhouse could well believe that Hopkins' lawsuit is unjustified—from their perspective, they may see equal treatment, if they can truthfully assert that they have never voted in favor of a candidate with an "objectionable" personality. The key unaddressed question, however, is whether

79. Patricia Cain has recently historicized this theme in contemporary feminist legal scholarship as "Stage Two (Women Are Different From Men)." Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 199 (1989-1990). See also, Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987-1988). For a discussion of the risks of ignoring difference, see Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1988); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981). Wendy Williams argues that even liberal feminist litigators and scholars who advocated for formal equality were not denying sex differences, but merely emphasizing commonalities among men and women. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 103-05.

80. The mental transposition of a women's gender implicitly treats femaleness as a problem that must be erased before we can assess the situation clearly. This move resembles the conceptual process whereby white, middle class, straight women are held to be standard persons in order to determine whether sex discrimination is present. This focus tends to erase the experiences of women of color, working class women, lesbians and other, comparatively less privileged women because it views their lives as posing problems other than sex. For discussions of the exclusion of race, class, and sexual orientation from feminist theory, see E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Cain, *supra* note 79; Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

this surface equality masks underlying inequities. The underlying inequity could be felt at either an individual or a group level. For the individual woman who acts counter to the stereotype, personal style may present a problem because an "unfeminine" style poses an implicit challenge to the status quo and is likely to be resisted—in a variety of subtle and not so subtle ways—by those who experience change as threatening. As for the disparate impact of subjective personality assessments on women as a group, I suspect that the range of personal styles that are considered acceptable for women are narrower than those for men. I have noticed that some men who have made their mark on the world and are respected for their achievements seem to get away with a lot—they can be rude and unconventional. These deviations from the norm are excused by labeling the man an eccentric, or a character, or even an institution. It seems to be harder for a woman to be a legend in her own time. Several accomplished academic women I know have reputations for being unstable, idiosyncratic, and incapable of leadership. This makes me think that the limits of tolerance probably have a differential gender impact, even if we have not conducted a statistical analysis to measure the degree of the disparity.

A more fundamental challenge to the adequacy of the comparative standard can be constructed from the critique of objectivity made by feminist scholars such as Catharine MacKinnon⁸¹ and Martha Minow.⁸² They have demonstrated in a number of contexts how the prevailing viewpoint is not seen as a viewpoint at all. The partiality of the dominant (*i.e.*, male) perspective is obscured, largely because it is unstated and presumed. The minority view, in contrast, is regarded as a viewpoint, as being partial and particular, rather than objective and universal. Feminists are said to have a perspective, while mainstream writers unselfconsciously purport to make neutral assessments.

An illustration of the power of the hidden viewpoint can be seen in the difficulties religious minorities face when asserting "equal" rights to time off from work to observe their holy days. The dominant group is generally Christian and observes Sunday as the Sabbath. When an Orthodox Jew claims a right to Saturday

81. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

82. Minow, *Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 34-57 (1987).

off, for example, the claim may be thought of as seeking a special privilege, as stemming from a particular religious point of view. The Sunday churchgoers can mask the religious nature of their observance because they are merely taking advantage of the official day off. It is the naturalness of the unstated viewpoint that gives it its epistemological power. Employers will not likely feel put upon by the religious practices of the Sunday worshippers. The Sabbatharians, however, may well be made to feel that they have subordinated their job to accommodate their personal religious beliefs.

In a workplace that is often dominated by men—both numerically and in terms of resources and privilege—the unfelt power of implicit male norms is the backdrop against which women make their claims to equal employment opportunity. The dynamics underlying implementation of sexual harassment illustrate the point. For women workers, it is very important that the workplace be free from sexual harassment. The issue of sexual harassment is less important for men because they are far less likely to be victims. I have seen this asymmetry of positions played out in the following way. When women seek the enforcement of sexual harassment policies, for example, the position is apt to be viewed by many male colleagues or co-workers as the woman's perspective. Even those who agree with the merits of the position may think that the proponent of the policy has a personal axe to grind. When men in the majority make similar self-interested arguments for policy changes, however, they are much more readily viewed as making an argument for the good of the order. These debates can have repercussions beyond the immediate issue. A reputation for lack of impartiality, for example, can hurt a woman's chances for advancement. Often the promotion goes to the person who is viewed as a moderate, a team player, a person who will create consensus. In some abstract world, an individual woman may be comparable to an individual man in her willingness to compromise or to work to find a common ground. Her position as a minority, however, may make it seem as if she is more narrow, self-absorbed, and biased than her male counterpart. The comparative standard tends not to highlight this complexity. In purporting to be a search to discover whether discrimination caused the harm, the legal comparative standard tacitly assumes that the collective position of men and women is the same and, I believe, considerably underestimates the disadvantage of being a woman in a man's world.

In the last analysis, how one resolves the question whether

Hopkins would have made partner if she had been a man probably depends as much on political starting points as it does on the specifics of the decisionmaking process at Price Waterhouse. I suspect that persons who believe that women are treated fairly in the workplace or that women are often given special preferences will resist the claim that gender made the difference in this particular decision. Those who think that discrimination against women is commonplace will be disposed to believe that a man with similar qualifications would have been selected as partner.

A good example of the importance of differing starting points surfaced during the testimony of Dr. Fiske. Judge Gesell actively questioned Fiske and kept interrupting counsel to pose his own questions.⁸³ At one point, Gesell asked Fiske whether a particular partner's assessment of Hopkins and his behavior toward her was a "stereotype."⁸⁴ The partner had been in the meeting with Hopkins when she cut off another woman from speaking. The following exchange between Fiske and Judge Gesell captures the wide distance between them.

THE COURT: He had a group of managers in the company talking about how the job was going, women, men managers, including this plaintiff. He was asking for suggestions on how they ought to proceed. And another woman spoke up and she was told by Miss Hopkins to keep still. It wasn't relevant. So he said, look, we are all trying to work on this. You shouldn't be so assertive. A stereotype?

THE WITNESS [Dr. Fiske]: I would suggest that the same behavior coming from a man would be less likely to be focused on as much as a problem.

THE COURT: Well, he probably would have fired a man. I agree with that. If a man had done it, he probably would fire him but other than that I don't understand what you are talking about.⁸⁵

83. See, e.g., Trial Testimony, *supra* note 35, at 26 (Judge Gesell complains to Fiske about social science terminology: "You are not telling me anything. You have got to talk to a layman, ma'am."); *id.* at 28 (Judge Gesell interrupts Fiske to ask, "Does that lady [Fiske] have an opinion that she is going to offer in this case?"); *id.* at 31 (Judge Gesell interrupts to ask Fiske to describe her research because he finds it hard to believe that men doing business with women expect them to be "tender and suppliant and meek and courteous and sweet.").

84. *Id.* at 71.

85. *Id.*

Dr. Fiske thought that if a man silenced a woman by cutting her off, it might not have been noticed, at least not to the degree that Hopkins' actions had been. Judge Gesell appears to think that Hopkins was lucky to be a woman because he believed that any man who acted that way would have lost his job. There is nothing in the record to indicate how partners at Price Waterhouse typically responded to incidents such as this. The answer to the comparative question boiled down to political starting points: Fiske believed that men were allowed greater leeway in personal interactions, particularly if they acted in a traditionally masculine, aggressive fashion. Gesell's comment indicates that he thinks that women are given special privileges to misbehave in the workplace, perhaps because employers are afraid of sex discrimination lawsuits.

V. BEYOND COMPARISONS: A FEMINIST READING OF *PRICE WATERHOUSE V. HOPKINS*

Posing the comparative question of whether Ann Hopkins would have been chosen to be a partner if she had been a man is likely to result in a stalemate. It frames the issue of discrimination abstractly and uncritically assumes that differences in people exist apart from the social environment in which they work and interact. The comparative question presupposes that a judge can discover whether there are salient differences about the person being judged—besides a difference in gender—that might justify treating her unfavorably. The question is framed simply as a question of fact. The question of difference becomes more complicated, however, if we start from an assumption that differences can be socially constructed and that dominant culture is marked by a profound gender imbalance in power, numbers, and ability to affect the working environment. The question of difference shifts from the factual inquiry about whether a difference exists (Was Hopkins really more outrageous than her male peers?) to an inquiry into the ways in which a perception of difference originates and is maintained.

A feminist reading of *Hopkins*⁸⁶ leads me beyond comparisons

86. Feminist legal scholars have focused attention on the importance of language and the limitations that male-centered legal language imposes on feminist critics. See, e.g., Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989). Feminist legal critiques now often include

and a male-focused legal doctrine centering on objective causation. In my reading of the opinions of Judge Gesell in the district court and Judge Williams in the appellate court, I sense a skepticism and at times a hostility toward claims of professional women such as Ann Hopkins who challenge informal mechanisms used to contain power in large organizations. This ideological resistance was most dramatically expressed through criticism of Susan Fiske.

When I read the transcript of Dr. Fiske's trial testimony, I found myself paying as much attention to the tension I discerned between Judge Gesell and Dr. Fiske as I did to the information on stereotyping that Fiske was conveying. Gesell seemed to have great difficulty understanding what Fiske was saying. He interrupted her frequently and at times he undermined her position by changing the meaning of her statements and then challenging her to explain herself more clearly. Although Gesell ruled in favor of Hopkins and decried the climate at Price Waterhouse that allowed stereotyping to occur, some of his statements during trial and portions of his written opinion suggest that he did not fully appreciate the substance of Fiske's testimony. Gesell's opinion is problematic, even though he found that Price Waterhouse had discriminated and accepted Hopkins' theory of stereotyping as a form of discrimination.

There is no such ambivalence in the views expressed by Judge Williams on the appellate court and cited approvingly by Justice Kennedy.⁸⁷ Williams and Kennedy clearly bought into Price Waterhouse's strategy to discredit Fiske's testimony by relying on sex-biased images and stereotypes. The critique that Fiske leveled at the partners' evaluation of Hopkins' personality could be applied to these judicial assessments of Dr. Fiske. In this respect, the *Hopkins* litigation was itself a demonstration of the influence of sex-biased assumptions and gendered thinking in the decisionmaking processes of male-dominated institutions.⁸⁸

discussions of how judicial language contributes to the marginalization of women. Chamallas & Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Phinney, *Feminism, Epistemology and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151 (1989).

87. See *supra* note 10.

88. Two of the opinions written in the *Hopkins* litigation—by Judge Joyce Hens Green sitting by designation on the D.C. Circuit, and Justice Brennan of the Supreme Court—were progressive in both result and rhetoric. Green's opinion was the only one to mention that Hopkins had faced sex-linked barriers in her career before the denial of partnership at Price Waterhouse. Hopkins and her former husband first worked for Touche Ross. Hopkins left

A. *The Trouble with Judge Gesell*

Although Judge Gesell referred to Dr. Fiske as "well qualified"⁸⁹ and noted that she had done "extensive research and study in the field of stereotyping,"⁹⁰ I am not confident that he understood some of the basic assumptions underlying her research. As I read Fiske, her analysis is predicated on the disparate power of dominant and nondominant groups in a given organizational setting.⁹¹ Fiske believed that, as a token woman, Ann Hopkins was vulnerable to sex stereotyping—a social practice that affects perceptions and knowledge acquisition and has little or nothing to do with biological differences between the sexes. Fiske's investigation was not centered on individuals, nor was it fashioned to assess individual blame. Fiske declined to identify particular partners as being stereotypers, explaining that her objective was to address the question whether stereotyping was occurring at the institutional level within an organization.⁹²

Much of the difficulty Gesell experienced understanding Fiske during her testimony stemmed from his effort to fit her remarks into a narrower legalistic mode which focuses on individual blameworthiness. He may have not fully appreciated her points because he was interested in pinpointing the partner or partners who were

Touche Ross because of its anti-spouse policy that prohibited both a husband and wife from being considered for partnership. When Hopkins was hired at Price Waterhouse, the firm waived its rule against hiring a manager whose spouse was a partner in another firm. Price Waterhouse then took the position that Hopkins could not be considered for partnership because her husband was a partner for a competing firm. Hopkins was nominated for partnership only after she threatened to resign and her husband left Touche Ross. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461-62 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1775 (1989).

89. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part, rev'd in part, and remanded*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1175 (1989).

90. *Id.*

91. For Fiske, this disparity is expressed primarily as a function of numbers. Although she had no occasion to address the question of sexism in predominantly female contexts, the implication is that a workplace will change when there is a greater gender balance among the decisionmakers. In this respect, Fiske's analysis is incomplete. She does not take into account pressures beyond the specific organization that may prompt women decisionmakers to perpetuate male-focused norms. Nor does she analyze the firmly embedded conceptual and linguistic structures that make it difficult for even consciously feminist men and women to break out of gendered patterns. Fiske's emphasis on numbers, however, was not naive. Fiske acknowledged that even large percentages of women workers in low power positions do not affect stereotyping of women in higher level positions nor enhance the power of the low status female jobs. Trial Testimony, *supra* note 35, at 47.

92. *Id.* at 34, 45.

guilty of stereotyping, even if they were unaware of their own bias.

Gesell had trouble, for example, understanding the way Fiske used the key terms "token" and "stereotype." When Fiske explained that solo or token women were likely to be perceived in female stereotypical roles, Gesell initially jumped to the conclusion that Fiske was condemning the partnership for employing Hopkins solely because she was a woman:

THE COURT: Then you are viewing this as a token case, somebody put a women in just because they want a woman, as they put a black or a homosexual or any of these different groups. Just put them in there so you would recognize them.

THE WITNESS (Dr. Fiske): I don't actually mean to imply that when I say token, the terminology in my field is to call somebody who is rare or unusual a token, but obviously that implies that they are there for token reasons.

THE COURT: Well, token has a very bad connotation in the field that I am working in, has an extraordinarily bad connotation.⁹³

This exchange indicates that Gesell initially thought Fiske was making a normative assessment about the motivation of the partners at Price Waterhouse, when in fact Fiske was only trying to make a descriptive point about organizational demographics. This confusion apparently was cleared up after Fiske repeated her definition of "token." However, Gesell then experienced conceptually similar problems understanding what Fiske meant by "stereotype." Gesell repeatedly misused the terminology—he mistakenly thought that "stereotype" referred to the person doing the stereotyping, instead of referring to a conceptual frame that shapes perceptions and knowledge. His focus was on the male partner making the judgment, rather than on the conceptual and linguistic mechanisms that might shape those judgments:

THE COURT: Well, let me put this to you and see if I can understand—I am trying to understand this. I take it a person who is stereo—subject to this stereotype flaw doesn't know it himself. It isn't conscious.

THE WITNESS (Dr. Fiske): You mean the stereotyper?

THE COURT: The person stereotyped, the male.

93. *Id.* at 31-32.

THE WITNESS (Dr. Fiske): Okay, the person who is stereotyping?

THE COURT: I don't know what you call it, but the person you say is the stereotype, he doesn't intentionally know he is, does he?⁹⁴

Gesell's misunderstanding of the "stereotype" concept persisted throughout Fiske's testimony. In Gesell's parlance, individual partners became the "stereotype" and he analogized stereotyping to a kind of disease or malady. He wondered, for example, whether the senior partner in Hopkins' department who offered her the critical advice to act more femininely had suddenly been bitten by the "stereotype bug."⁹⁵ Finding out whether there was something wrong with individual partners was important to Gesell. Gesell appeared not to appreciate the fact that Fiske did not regard stereotyping as a pathology that occurred only in infected workplaces. The radical potential of Fiske's research—its potential to provide a critique of most male-dominated workplaces—was obscured by Gesell's rhetoric of individual blame and contagion.

The best example of Gesell's failure to grasp the significance of Fiske's organizational theory of stereotyping and the implications it carries for legal doctrine occurred when Fiske tried to offer a solution to the "double bind." Fiske had previously testified that women who act according to feminine stereotypes run the risk of being viewed as incompetent.⁹⁶ Fiske also claimed that counter-stereotypic behavior was risky because aggressive women might be said to lack social skills.⁹⁷ As one possible solution to the dilemma of the double bind, Fiske said she would advise women "to work in a department that has a substantial number of women in it."⁹⁸ Judge Gesell objected to such advice, claiming that Fiske's solution would mean "that I would have many more lawsuits because every woman that had that happen to her would say it was sexual bias."⁹⁹ Gesell apparently thought that Fiske was arguing in favor of having employers segregate existing women employees into separate departments. Rather, Fiske was arguing for increased hiring and promotion of women in higher echelon jobs, an argument

94. *Id.* at 33.

95. *Id.* at 42, 46.

96. *Id.* at 46.

97. *Id.*

98. *Id.* at 64.

99. *Id.* at 48.

designed to encourage employers to go beyond token representation. For Fiske, "batch hiring" and "batch promotion" was one way to secure a critical mass of women and simultaneously to decrease the likelihood of stereotyping in an organization.¹⁰⁰ Such a forward-looking structural solution did not fit comfortably into Gesell's framework or the framework of Title VII as he understood it.

This analysis of Gesell's interaction with Fiske as a witness is not meant to suggest that her testimony had no positive influence on Gesell's decision. Indeed, because Gesell concluded that the comparative standard had not been violated,¹⁰¹ his ruling for Hopkins was based on his finding that Price Waterhouse failed to address the problem of stereotyping in the firm.¹⁰² However, even his rather strongly worded opinion faulting the employer for not taking preventive measures displays, I believe, a different and less progressive understanding of the concept of stereotyping than what Fiske embraced. Gesell was caught up in the search for the "stereotype," by which I believe he meant a male chauvinist who objected to women's advancement within the firm. Also, certain passages in the opinion have an apologetic tone that can be read to provide an excuse for individual partners who make unjustified decisions harmful to women's advancement.

Gesell repeatedly stressed that the stereotyping by various partners at Price Waterhouse was "unconscious."¹⁰³ What was involved, according to Gesell, was not "an intentional discriminatory motive or purpose,"¹⁰⁴ but a "far more subtle process [where] one

100. *Id.*

101. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1115-16 (D.D.C. 1985), *aff'd in part, rev'd in part, and remanded*; 825 F.2d 458 (D.C. Cir. 1987), *rev'd and remanded*, 109 S. Ct. 1175 (1989).

102. *Id.* at 1120. Gesell relied on an article by Nadine Taub who, nearly a decade before, had advocated the recognition of stereotyping as a per se violation of Title VII without further proof of discriminatory intent. Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980). Gesell's initial ruling, however, was not particularly financially rewarding to Hopkins. Because he refused to find that Hopkins had been constructively discharged, he awarded no backpay. *Hopkins*, 618 F. Supp. at 1121. On remand from the Supreme Court, Gesell changed his decision and ruled that Hopkins had been constructively discharged, thus making her entitled to back pay, as well as the right to be made partner. Even this victory was not complete, however. Gesell lowered the amount of back pay owed Hopkins, claiming that she had failed to mitigate her damages. "Vindication dominated her thinking and kept her earnings below what she could have earned by reasonable effort in her field." *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1214 (D.D.C. 1990).

103. *Hopkins*, 618 F. Supp. at 1118.

104. *Id.*

who is in a distinct minority may be viewed differently by the majority because the individual deviates from an artificial standardized profile."¹⁰⁵ This lack of "intentional" sexual stereotyping meant that Hopkins could not meet her burden as to discriminatory motive or purpose because such a specific showing of intent was required in this case.¹⁰⁶ It is not entirely clear, however, why Gesell did not regard explicitly gendered comments such as the statement that Hopkins "overcompensated for being a woman"¹⁰⁷ or should act and dress "more femininely"¹⁰⁸ as instances of blatant, intentional stereotyping. His opinion suggests that no matter how clearly the comment matched the familiar stereotype about the targeted group, it would not amount to intentional sex stereotyping unless the commenter consciously desired to inflict harm on the target because she was a woman. Under this narrow view, even statements that embodied explicitly gendered language, relied on confining sex-linked roles and images, and served to put women in their place could be classified as "subtle" discrimination, provided there was no disclosure by the speaker of the hostile motivation underlying his remarks.

Other passages in Gesell's opinion suggest that he did not share Fiske's view that stereotyping is a socially-constructed mechanism by which minorities are marginalized in the workplace. At points, Gesell's rhetoric takes on a biologic cast. Gesell stated that the observation that "deep within males and females there exist sexually based reactions to the personal characteristics of one of the opposite sex surely comes as no surprise."¹⁰⁹ The sexual reaction to which Gesell refers differs from the phenomenon of stereotyping as Fiske described it. For Fiske, stereotyping is a one-way street. The token group is subjected to confining images because they do not possess the power or the numbers to affect the culture of the dominant group. For Gesell, sexual difference, rather than dominance or minority status, causes men and women to view the other group as "the other." Although Gesell does not explicitly state that this sexual difference has its origin in biology, his location of the reaction as "deep within" evokes images of biological, heterosexual responses.

105. *Id.*

106. *Id.*

107. See *supra* text accompanying note 25.

108. See *supra* text accompanying note 28.

109. *Hopkins*, 618 F. Supp. at 1117.

Although Gesell held Price Waterhouse liable for discriminating against Ann Hopkins, parts of his opinion reinforce a conservative view, a view that justifies inequality in the workplace as being consistent with women's biological nature. Gesell noted that "[b]usiness women who earn a place at the highest ranks of their profession by combining ability with a strong persistent effort to succeed frequently sense antagonism from some male colleagues whose contact with the working female as an equal has been limited."¹¹⁰ This statement signals an apologetic attitude: Gesell seems to excuse men because they have not had enough exposure to the monolithic creature he calls the working female. The statement also hints that the problem lies in the minds of women who "sense" the negative reaction toward them. The implication is that if such women were not so sensitive, the problem would decrease or disappear. Finally, Gesell makes it clear that he does not want his ruling to become a catalyst for transforming gender relations in the workplace.

[C]onsidering the infinite variety of work conditions; differences in experience, education and perceptions among individuals in working encounters; as well as the fact that the interactions of personalities of either sex are as complex and inscrutable and as infinite as combinations of genes will produce, it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.¹¹¹

The statement sounds a conservative note on two levels. On the surface, it assures that enforcement of Title VII will not bring radical change. The statement also links sex and sexual difference to "genes" and rhetorically justifies nonintervention by making us think that sex differences are at once "inscrutable" and inalterable.

The trouble with Judge Gesell's opinion is that in borrowing Fiske's theory of stereotyping, he did not accept her structurally-based explanation of difference. Gesell underestimates and detoxifies the harm of sexual domination of women in the workplace by linking sexual stereotyping to inherent biological difference.

110. *Id.* at 1118.

111. *Id.*

B. The Case Against Susan Fiske

At the appellate level, Judge Williams' dissenting opinion deploys sexual difference in an aggressive fashion against both Ann Hopkins and Susan Fiske.¹¹² Although Williams never specifies its origin, the "fact" of sexual difference is critical to the conceptual and linguistic structure of his argument. It is used simultaneously to justify sexual stereotyping at Price Waterhouse and to discredit Fiske's testimony. Williams not only believed that Hopkins was treated fairly and should lose; he feared that listening to Fiske would victimize men and result in an intolerable incursion into their freedom of thought and speech. There is an irony to Williams' intense negative reaction to Fiske. As a token female expert and academic, Fiske was vulnerable to marginalization and stereotyping. In tune with the Price Waterhouse litigation strategy, Williams portrayed Fiske as unscientific, biased, and irrelevant.¹¹³ He also thought her views were dangerous, stating that "[i]f analysis [such as Fiske's] is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes" as being overbearing, arrogant, and abrasive.¹¹⁴

At the outset, Williams framed the issue as one of sexual difference. He quoted from *Ballard v. United States*,¹¹⁵ a case challenging the exclusion of women from jury service, in which Justice Douglas had remarked that "the two sexes are not fungible."¹¹⁶ In *Ballard*, Douglas sought to use sexual difference progressively by making an argument for the sexual integration of juries.¹¹⁷ Williams' use of sexual difference, however, is conservative, implying that some sexual stereotyping is permissible when it reflects differences between men and women.¹¹⁸

To prove that some stereotyping was permissible, Williams of-

112. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473-78 (D.C. Cir. 1987) (Williams, J., dissenting).

113. See *id.* at 477-78. I am reminded of the partners' harsh assessment of Ann Hopkins when I read Williams' critique of Susan Fiske. See *supra* text accompanying notes 21-28.

114. *Id.* at 477.

115. 329 U.S. 187 (1946).

116. *Hopkins*, 825 F.2d at 474 (Williams, J., dissenting) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

117. See *Ballard*, 329 U.S. at 193-96.

118. *Hopkins*, 825 F.2d at 478 (Williams, J., dissenting). "The stereotype theory adopted by the district court should not be allowed to spring to life in a case where its occurrence is not plausibly related to [an employment decision regarding the plaintiff]." *Id.*

ferred the example of a man who appeared for work in skirts and dresses. He claimed that firing the man for failing to conform to the sexual stereotype that prohibits men from wearing women's clothing would not give rise to liability under Title VII.¹¹⁹ Judge Bootle had paraded the same "horrible" in an early case when the issue was whether men could be fired from their jobs for having long hair.¹²⁰ For these judges, allowing a man to wear a dress represents the absurd extreme to which a literal reading of Title VII might lead.

The example of a man in a dress is not just an example of a gender taboo that is strictly enforced. Cross-dressing is commonly misassociated with homosexuality and is regarded as a form of sexual deviance.¹²¹ Williams' use of the cross-dressing image is a signal that sex differences are biological, and that ignoring sex differences is risky and unnatural. The cross-dressing image also serves to underscore the heterosexism of the law that remains virtually untouched by Title VII doctrine.¹²² Williams' dissent artfully draws on the tension between the law's failure to protect against discrimination based on sexual orientation and the promise of Title VII to root out sexual stereotyping. This serves further to sexualize Hopkins' claim, even though Williams says nothing directly about Hopkins' sexuality. Williams' opinion subtly brings the reader into the private realm of heterosexual relations where male dominance is most pronounced and resistant to challenge.

After criticizing the district court for failing to "draw a line between permissible and impermissible"¹²³ stereotyping, Williams set out to deny—comment by comment—that the gendered remarks made by the partners at Price Waterhouse were either harmful or true sex stereotypes after all. He regarded the advice to act "more femininely"¹²⁴ as harmless because it came from a sup-

119. *Id.*

120. See *Willingham v. Macon Tel. Pub. Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972). For a feminist analysis of dress restrictions, see Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 109 (1982).

121. For a discussion of many of the common misperceptions about cross-dressers, see J. WEINRICH, *SEXUAL LANDSCAPES* 24-26 (1987).

122. See *De Santis v. Pacific Tel. & Tel.*, 608 F.2d 327 (9th Cir. 1979) (Title VII does not recognize claim for discrimination based on sexual orientation). See also EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 68-71 (1990).

123. *Hopkins*, 825 F.2d at 474 (Williams, J., dissenting).

124. See *supra* text accompanying note 28.

porter and was not formally endorsed by the Policy Board.¹²⁶ The charm school remark, he admitted, was sex-linked, but Williams discounted its significance by calling it "facetious"¹²⁶ and by joking that "[t]he smoke from this gun seems to me rather wispy."¹²⁷ He sought to de-sex the phrase "one of the boys"¹²⁸ by arguing that some sex-linked phrases lose any genuine link to gender with the passage of time.¹²⁹ The only remark that Williams thought was "plainly beyond the pale"¹³⁰ was the admission by the partner who said he "could not consider any woman seriously as a partnership candidate."¹³¹ Because this remark had not been made in connection with Hopkins' case, Williams found it irrelevant.¹³²

Williams' operational definition of impermissible stereotyping was exceedingly narrow—only a direct confession of discrimination qualified as possibly illegal. His hostility to Hopkins' claim is even more dramatically evidenced by his aggressive, masculinist rhetoric. Williams sounds positively indignant when he describes the partner who would not take women seriously as a "male chauvinist pig"¹³³ and a "troglodyte."¹³⁴ Williams' aggressive stance, however, did not help Hopkins prove her case because Williams also insisted that there was no showing that this misbehaving partner had ever influenced anyone else. He also speculated that the informal atmosphere of the firm made these remarks unacceptable, even though the record was clear that the partner had never been reprimanded.¹³⁵

125. *Hopkins*, 825 F.2d at 475 (Williams, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.* at 476.

129. *Id.* Williams argued that not all sex-based phrases were sexist. He cited as an example the contemporary use of the term "doll" to describe either a man or a woman who is pleasant or generous. *See id.* Williams observed that "doll" originally was slang for a "conventionally pretty and shapely woman, . . . whose function is to elevate the status of the male and to inspire male lust." *Id.* (citing *NEW DICTIONARY OF AMERICAN SLANG* 108 (1986)). There is a double meaning in Williams' text. On the surface he makes a persuasive argument that words must be analyzed in historical and textual context. However, Williams' citation of the original meaning of "doll" reinforces sexist images because the definition objectifies woman and treats women as instruments to be used either for male sexual gratification or for male moral development. By so inserting this view of woman as sex object into his text, Williams indirectly offers a justification for differential treatment based on sex.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Williams' tough talk signals a willingness to use power, particularly because it

Williams' attack of Fiske was similarly aggressive in tone. He not only questioned Fiske's conclusion that stereotyping had infected the decisionmaking process at Price Waterhouse, he also questioned her qualifications, expertise, and objectivity.¹³⁶ The opinion is so laden with sexual stereotypes that it reinforces Fiske's point about the association between intensity of negative reaction and token status. Williams describes Fiske in highly skeptical terms as a witness "purporting to be an expert in the field."¹³⁷ None of the usual bases for challenging Fiske as an expert were present in the case. Price Waterhouse had not questioned her expertise or the legitimacy of her discipline. In its amicus brief to the Supreme Court, the American Psychological Association demonstrated that Fiske's methods and research had become standard fare within the discipline.¹³⁸ Williams also trivialized Fiske's method of detecting sexual stereotyping from explicitly gendered comments by claiming that "anyone could do so."¹³⁹ Relying on his own judgment, with some aid from the *New Dictionary of American Slang*,¹⁴⁰ Williams authoritatively stated that some sex-based phrases "have gradually detached themselves from any genuine link to sex."¹⁴¹

Williams strongly objected to Fiske's willingness to make an assessment of the situation at Price Waterhouse without her personally meeting with the partners or Hopkins and finding out "about the truth of the matters."¹⁴² However, the fact that Hopkins—and others in her field—worked from a written record alone cannot account fully for Williams' objections. Williams also portrayed Fiske as unscientific: he said her "arts"¹⁴³ allowed her to detect the existence of stereotyping and he characterized her pro-

is injudicious (and not very nice) to call a person names. Williams' macho reaction is familiar to me. In numerous task forces, committees, and other administrative settings, I have heard not-so-feminist men self-righteously denounce sexual harassment and sexism with no apparent qualms. Often there are promises to fire or otherwise deal swiftly and harshly with any man who dares to defy the new policy. The problem for women typically occurs when the denouncers are simply not willing in specific cases to find the evidence compelling enough to label it harassment or sexism. Because the aggressive display is not actually used to change the marginal status of women, it serves only to underline male power.

136. *Id.* at 477-78.

137. *Id.* at 477.

138. APA Amicus Brief, *supra* note 8, at 29.

139. *Hopkins*, 825 F.2d at 477 (Williams, J., dissenting).

140. *See supra* note 129.

141. *Hopkins*, 825 F.2d at 476 (Williams, J., dissenting) (emphasis added).

142. *Id.* at 477.

143. *Id.*

fessional judgment as "remarkable intuitions."¹⁴⁴ This critique sought to discredit Fiske by transforming her credentials as a social scientist into a womanly art and by devaluing her methodology by labeling it women's intuition. It is clear that Williams placed little value on female-identified traits in this context. His gendered criticism of Fiske was not unlike a host of similar slams from Price Waterhouse counsel who described Fiske's testimony as "gossamer evidence"¹⁴⁵ and "intuitive hunches."¹⁴⁶ Neither Williams nor Price Waterhouse ever set forth reasons explaining why they thought that Fiske's qualitative research methods were deficient. It was enough to make the rhetorical link between woman/intuition/art—the implicit contrast being man/research/science. The effect was to discredit Fiske by the invocation of gender stereotypes.

In addition to undermining the soundness of Fiske's judgment, Williams also questioned her ability to judge fairly in any case involving a woman. Williams asserted that Fiske would reach the same conclusion whenever a woman's personality was criticized, no matter how justified the criticism might be.

[I]f an observer characterized someone as 'overbearing and arrogant and abrasive and running over people,' an expert such as Dr. Fiske could discern—and would, if the subject were a woman—that they stemmed from unconscious stereotypes. . . . To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes.¹⁴⁷

Justice Kennedy echoed this criticism in his dissent in the Supreme Court.¹⁴⁸ He quoted the above passage and added the unqualified statement that "[t]he plaintiff who engages Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision."¹⁴⁹

On a number of levels, this criticism of Fiske is unfair. Fiske did not rest her conclusion on just one factor—the excessively

144. *Id.* at 478.

145. Brief for Petitioner, *supra* note 34, at 20.

146. *Id.* at 44.

147. *Hopkins*, 825 F.2d at 477 (Williams, J., dissenting).

148. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

149. *Id.* at 1813 n.5 (Kennedy, J., dissenting).

strong objection on the part of some partners to Hopkins' counter-stereotypic behavior. She also placed weight on the rarity of women as partners and partnership candidates, the highly subjective nature of the process, the positive reaction of Hopkins' clients, and Hopkins' clear ability to make money for the firm and work long hours. Given this combination of factors, Fiske might have thought (as I do) that *Hopkins* was an easy case. Her conclusion in *Hopkins* does not tell us how Fiske might come out in a case where the woman was not so clearly a star in the firm. *Hopkins* was the only case in which Fiske had ever appeared as an expert witness.¹⁵⁰

Williams' inclination to doubt Fiske's ability to be impartial is also sex-linked. Part of the gender script that sharply dichotomizes the traits of men and women links femaleness with partiality, while ascribing universality and objectivity to men. This dichotomy fails to account for the partiality of the dominant culture and it masks the hidden male viewpoint. The woman's point of view is seen as a perspective, while the male point of view is so deeply embedded in the structure that it is not regarded as a point of view at all, but simply as the "truth of the matter." Williams did not understand, or was not impressed by, the starting point of Fiske's analysis—that Ann Hopkins was a token woman in an intensively male-dominated firm. By overlooking the fact of women's marginalization in the workplace, Williams missed the point of much of Fiske's structural analysis. As Kanter puts it, in the terms of Gestalt psychology, Williams failed to see that "those who get to be common more easily become 'ground' rather than 'figure.'" ¹⁵¹

Finally, Williams believed that accepting Fiske and her theory of stereotyping posed the danger of turning "Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts."¹⁵² He stated that the case "necessitate[s] a study of just what expressions Congress may have wished to wash from the American tongue"¹⁵³ and claimed that the evidence in *Hopkins* "establishe[d] at most the existence of sexist attitudes."¹⁵⁴ His rhetoric closely tracks Judge Easterbrook's labeling of the anti-pornography ordinance co-authored by Catharine MacKinnon and

150. Trial Testimony, *supra* note 35, at 24.

151. R. KANTER, *supra* note 41, at 210.

152. *Hopkins*, 825 F.2d at 477 (Williams, J., dissenting).

153. *Id.*

154. *Id.* at 478.

Andrea Dworkin¹⁵⁵ as "thought control."¹⁵⁶ This McCarthyesque language conjures up images of witchhunts, social engineers, and threats to individual liberty and free speech. The victim in this conservative narrative is not Ann Hopkins, but the partners who spoke against her. In this way, enforcement of anti-discrimination law was transformed by Williams' rhetoric into an incursion on free speech.¹⁵⁷ The rhetorical shift from discrimination to free speech enabled Williams to project Hopkins as a danger. Hopkins' claim for partnership was cast as posing a threat to the freedom of thought of the partners. Eclipsed by this account are the substantial financial benefits conferred by Hopkins' work for the firm and the other positive aspects of her employment. This accentuation of the negative resembles the process Fiske described by which a woman who fails to conform to familiar feminine roles is often typecast as the iron maiden,¹⁵⁸ as posing a danger in excess of her individual influence and power.

Williams' rejection of Hopkins' claim and his resistance to Fiske's theory of stereotyping was embedded in gendered stereotypes, images, and language. He embraced a notion of sexual difference but not sexual domination. Williams' opinion suggests that he believes that men and women are different, but that such differences are not tied to structural inequities. Moreover, in pronouncing on matters of sexual difference, Williams spoke authoritatively and aggressively. His opinion left no space to listen to "experts" such as Fiske whose starting points tended to question, rather than to reinforce, male domination in the workplace.

CONCLUSION

Justice Brennan cautioned that it was not the Court's job to decide whether Hopkins was "nice" but only whether the partners reacted negatively to her because she was a woman.¹⁵⁹ My reading of *Hopkins* suggests that these two questions are intertwined. Because I accept the proposition that sexual difference is socially con-

155. For a comprehensive draft of the anti-pornography ordinance, see W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, *CONSTITUTIONAL LAW* 760 (6th ed. 1986).

156. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

157. *Cf. Matsuda, Public Response to Racist Speech: Considering the Victim's Story*, 87 *MICH. L. REV.* 2320 (1989).

158. *See supra* text accompanying notes 49-52.

159. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 (1989).

structed, I regard even common judgments about niceness as problematic. For me, Ann Hopkins presented an easy case. It is easy because Hopkins was able so convincingly to document her positive value to the firm and the commitment she made to that organization. It is easy because I share Fiske's assessment that it is not possible to separate criticism of Hopkins' personal style from Hopkins' status as a token woman at Price Waterhouse. It is easy because I doubt whether it is possible to make an objective assessment about Hopkins' personality retrospectively, given the male-focused culture at Price Waterhouse. It is easy because I conclude from my experience as a token woman in the legal academy¹⁶⁰ that if there are no strong legal incentives to encourage employers to retain and advance women in their jobs, then prevailing structural, conceptual, and linguistic frameworks will continue to provide powerful justifications for women's exclusion and unfavorable treatment.

160. Despite a significant rise in the percentage of women law students, women still comprise only approximately 20% of the full-time faculty at ABA accredited schools. Angel, *Women in Legal Education: What It's Like to Be Part of A Perpetual First Wave or the Case of Disappearing Women*, 61 *TEMP. L. REV.* 799, 840 (1988); Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 *U. PA. L. REV.* 537, 538 (1988).