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Articles

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by

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Christine Craft, Elizabeth Hishon, Ann Hopkins. What do a newscaster, an attorney, and an accountant have in common? All three are well-educated in their chosen professional fields. All three practiced their professions in mainstream, prestigious arenas. All three were paid high salaries and were on the road to top levels of leadership and management in their professions, but came to abrupt halts in their rise to

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1. For example, Craft graduated from the University of California at Santa Barbara in 1968, where she received a liberal arts degree in English and anthropology. Craft v. Metromedia, Inc., 572 F. Supp. 868, 870-71 (W.D. Mo. 1983), aff'd in part, rev'd in part, 766 F.2d 1205 (8th Cir. 1985), cert. denied, 475 U.S. 1058 (1986). Hishon received her B.A. degree from Wellesley College in 1966. She received her J.D. degree from Columbia University School of Law where she was a Harlan Fiske Stone scholar. MARTINDALE-HUBBELL LAW DIRECTORY 3087B (128th ed. 1988).


3. Craft, for example, contracted to receive $35,000 for her first year’s work at the KMBC station and $38,500 for her second year. Craft, 572 F. Supp. at 872.
success when they attempted to break through to levels of power that had heretofore been occupied almost exclusively by men. All three are women.

The cases of *Craft v. Metromedia*, *Hishon v. King & Spalding*, and *Price Waterhouse v. Hopkins* were argued and decided on a variety of legal grounds. The *Craft* case involved allegations of sex discrimination in violation of Title VII of the Civil Rights Act of 1964, violations of the Equal Pay Act of 1963, and fraud. The Supreme Court in *Hishon* limited the decision to the issues of whether a partnership constituted an “employer” for purposes of Title VII and whether promotion to partnership was a “privilege or condition of employment” so as to prohibit an adverse decision based solely on “race, color, religion, sex, or national origin.” In *Hopkins*, the Supreme Court determined that Price Waterhouse had the burden of proving that the denial of Hopkins’ promotion was due to a lack of interpersonal skills and was not based on

4. Craft was removed from her position as anchor chair of the KMBC News when viewer research results on her proved negative. *Id.* at 873-74. Hishon was denied partnership after eight years of work at King & Spalding, one of the most prestigious law firms in the Southeast. *Hishon v. King & Spaulding*, 467 U.S. 69, 72 (1984). Hopkins was denied partnership at Price Waterhouse, one of the nation’s “Big Eight” accounting firms. The term “glass ceiling” has been coined to describe the obstacle women reach as they attempt to break through to upper level management positions. Felice Schwartz has described the phenomenon more accurately as a cross-sectional diagram. The barriers to women’s leadership occur when potentially counterproductive layers of influence on women—maternity, tradition, socialization—meet management strata pervaded by the largely unconscious preconceptions, stereotypes, and expectations of men. Such interfaces do not exist for men and tend to be impermeable for women. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. 65, 68 (Jan./Feb. 1989). It is important to note at the outset that the careers of Craft, Hishon, and Hopkins were not affected in any manner (leave time, shortened working hours) by the one factor most commonly facing working women—child-bearing. *See* note 21 *infra*.


8. Craft claimed that the personal appearance standards imposed upon her by the station were “based on stereotyped characterizations of the sexes and were applied to women more constantly and vigorously than they were applied to men.” *Craft*, 766 F.2d at 1210.


11. Craft claimed that Metromedia was satisfied with her appearance when she was first hired and that she had made clear before her acceptance of the contract that she absolutely was opposed to any “makeover” or other substantial alteration of her appearance. *Craft*, 766 F.2d at 1217-18.

impermissible bias, reflected by stereotypical thinking about female partnership candidates.\textsuperscript{13}

Despite the variety of legal theories and divergent outcomes of these cases,\textsuperscript{14} the legal battles of these women reflect an overriding theme:

\begin{itemize}
\item \textsuperscript{13} Hopkins, 109 S. Ct at 1793-95. “[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.” \textit{Id.} at 1795.

\item \textsuperscript{14} Craft’s complaint alleged not only that Metromedia discriminated against her because of her sex, but also that she was paid less than similarly situated males. She also alleged that Metromedia had made fraudulent misrepresentations to induce her to accept employment. \textit{Craft}, 572 F. Supp. at 869-70. The jury returned a verdict for Metromedia on the Equal Pay claim, but voted in favor of Craft on the sex discrimination and fraud claims, recommending actual damages of $375,000 and punitive damages of $125,000. \textit{Id.} at 868. The district court, however, entered judgment in favor of Metromedia on the sex discrimination claim (the jury’s decision being an advisory one only) and ordered a new trial on the fraud count due to the excessive verdict. \textit{Id.} On retrial the jury once again decided in favor of Craft, this time recommending $225,000 in actual damages and $100,000 in punitive damages. \textit{Craft}, 766 F.2d at 1210. The Eighth Circuit Court of Appeals, however, affirmed the district court’s ruling that Craft had not been subjected to sex discrimination. \textit{Id.} at 1217. The Court of Appeals also affirmed that there was insufficient evidence for a jury to have determined that Metromedia had intentionally made false statements to Craft in an effort to induce her to accept employment at KMBC. \textit{Id.} at 1220-21. Craft appealed to the United States Supreme Court, but her petition for grant of certiorari was denied. 475 U.S. 1058 (1986).

\item Hishon filed her three-count complaint in the United States District Court for the Northern District of Georgia, alleging sex discrimination in the partnership decision, violation of the Equal Pay Act, and breach of contract. The district court dismissed the case on the grounds that Title VII of the Civil Rights Act of 1964 did not apply to a law firm’s partnership decisions. \textit{Hishon}, 678 F.2d at 1025-26. The Eleventh Circuit Court of Appeals affirmed the ruling below. \textit{Id.} at 1030. The United States Supreme Court held that Hishon’s complaint did state a claim under Title VII. \textit{Hishon}, 467 U.S. at 78-79. Although the case was remanded for trial on the merits, no trial occurred. A settlement was reached between Hishon and the law firm, the terms of which remain confidential. N.Y. Times, Feb. 25, 1985, at B5, col. 2.

\item Hopkins filed her Title VII action in the District Court of the District of Columbia, alleging that criticisms of her interpersonal skills were fabricated and that Price Waterhouse routinely elevated males whose interpersonal skills were deficient but who were highly qualified in other areas. Hopkins also claimed that the criticisms of her interpersonal skills stemmed from discriminatory stereotyping by male partners and that the partnership evaluation process was discriminatory in nature. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1113-14 (D.D.C. 1985). The district court determined that the accounting firm’s decision not to elevate Hopkins was indeed tainted with discriminatory evaluations. \textit{Id.} at 1120. The court, however, rejected Hopkins’ claim that she was constructively discharged by the firm. \textit{Id.} at 1121. On appeal, the Court of Appeals for the District of Columbia ruled in Hopkins’ favor on all counts, including the constructive discharge. Hopkins v. Price Waterhouse, 825 F.2d 458, 465-67 (D.C. Cir. 1987). The United States Supreme Court remanded the case for further consideration. The majority agreed that Price Waterhouse had allowed discriminatory attitudes to affect its promotion process and thus had the burden of proving that the same decision would have been made about Hopkins absent the consideration of gender. The Supreme Court required that Price Waterhouse carry this burden only by a preponderance of the evidence rather than by the “clear and convincing” standard required by the lower courts. \textit{Hopkins}, 109 S. Ct. at 1792.
\end{itemize}
three trained, competent professional women were denied admission to the highest levels of their professions due not to any failings in their abilities to perform capably, but rather to the fact that they were perceived to lack the personal qualifications that the decisionmakers deemed necessary for success. Craft was removed as anchor due to her personal appearance and choice of attire.\textsuperscript{15} Hishon was not promoted because, although “very nice and pleasant . . . she just didn’t fit in” at a law firm that received national notoriety for its bathing suit competition among summer associates.\textsuperscript{16} Hopkins was turned down for partnership due to her lack of “social graces”—articulated by one critic as her need to “take a course at charm school.”\textsuperscript{17}

Few would deny that American business practices are structured such that personal qualifications are an important factor in the advancement of persons of either gender. The question arising from the \textit{Craft-Hishon-Hopkins} trilogy is not whether personal qualifications are a valid measure of potential success, but rather whether females suffer disproportionately from this evaluative device, which, although neutral on its face, is affected profoundly by preconceived notions of the “appropriate” roles and traits of women and men.

In somewhat narrow Title VII terms, the question is whether the evaluation of personal characteristics is based on stereotypical notions so


\textsuperscript{16} Stewart, \textit{supra} note 2, at 17, col. 2. \textit{See also} Panel Discussion, \textit{Plaintiffs, Lawyers and the Courts} (Sarah Weddington, Ann Hopkins, Elizabeth Hishon), delivered at \textit{Women and the Constitution: A Bicentennial Perspective}, Atlanta, Georgia (February, 1988) (audiotape on file with author). Because the \textit{Hishon} case was settled confidentially, the facts of the case are available in few sources other than newspaper and magazine articles published at the time of the Supreme Court decision.

\textsuperscript{17} A supporter of Hopkins sought to excuse her behavior as overcompensating for being a woman. Her personnel file contained comments concerning her use of profanity, and a member of the firm’s Admissions Committee referred to her language choice as “one of the negatives.” Another supporter defended this conclusion by stating that the concern was only addressed because “she is a lady using foul language” and many males were “worse” than Hopkins. One supporter described her as “macho,” but found her otherwise to be “at the top of the list or way above average.” Finally, a supporter referred to her as having matured from a “tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable but much more appealing lady partner candidate.” Among the complaints about her personality was one from a partner opposing her candidacy who stated that she should take a “course at charm school.” The Board who made the partnership decision found that she needed “social grace.” This conclusion was conveyed to her by her supervisor (also an ardent supporter of her candidacy) who relayed to Hopkins that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.” \textit{Hopkins}, 825 F.2d at 463.
as to constitute impermissible discrimination on the basis of sex. But the issue takes on a much broader dimension when examined in light of the growing body of jurisprudence relating to the concept of women in power. Craft, Hishon, and Hopkins sought "power" in their professions and each met a roadblock of such an opaque nature as to render her temporarily powerless. An argument can be made that these roadblocks were internal as well as external. Viewed in a light most favorable to the defendants in both *Craft* and *Hopkins*, it may be asserted that the plaintiffs refused to take steps necessary to attain the power they sought. At the same time, these women appeared to have been judged against standards that a male would not have been forced to satisfy, or that would not have been an issue due to his very gender.

This Article will examine the internal and external stereotyping prevalent in today's workplace and the degree to which that stereotyping seems to be holding back women, both as individuals and as a group, from achieving positions of "equality" and "power" in our society.

18. The news director of KMBC initially informed Craft that consultants were hired by the station to work with on-air personnel regarding their clothing and make-up. Craft agreed to work with the consultant. The management of the station, however, continually disapproved of Craft's on-air appearance as "inappropriate." She was told to dress more conservatively and to wear make-up properly. Another consultant was brought in to work with Craft's wardrobe and make-up. Additionally, Craft was assisted by a clothing consultant from a nearby department store. Craft was not ordered to wear the clothes selected by the consultants and in fact refused to wear several of the outfits. She also apparently refused to comply with suggestions from the management and the clothing consultants that she purchase clothes with more "feminine touches" as her current wardrobe was "too masculine." *Craft*, 766 F.2d at 1213-14. Hopkins' difficulties were in the area of personality and interactions with colleagues, supervisors, and staff. She was described in her initial evaluation for partnership as "overly aggressive, unduly harsh, impatient with staff and very demanding." *Hopkins*, 825 F.2d at 463. These problems apparently worsened after she was denied partnership the first time, as two of her former promoters came to oppose strongly her candidacy the next year. *Id.* The court did not speculate that perhaps the unfairness of the original denial caused Hopkins to become bitter and have less patience with the males who had allowed this situation to continue.

19. In the cases of both Craft and Hopkins, issues such as hair-styles and make-up seemed to affect strongly their male superiors' views of their competence. KMBC had a set of standards for both male and female anchors. For male anchors, the stress was on "professional image" while for females "professional elegance" was important. Women anchors were prohibited from wearing the same outfit more than once in every three or four week period while male anchors were allowed to wear the same suit once or even twice a week. Craft was told by one of the consultants that "viewers—particularly women viewers—criticize women more severely than men." *Craft*, 766 F.2d at 1214.

20. It is rare that men are viewed as "too macho" or as over-compensating for being a man.

21. Perhaps the most prevalent stereotype affecting women in the workforce today is the image of women as the primary childrearers in a "normal" family situation. As a result of this image, as well as the very real needs of those women who do choose to combine working and child-care, a new concept for working women has entered the workplace, referred to alterna-
Part I of the Article is a survey of current feminist approaches to the philosophical issues brought to bear in gender discrimination employment cases. This Part analyzes the interplay between the concepts of sex discrimination as an issue of "power" and sex discrimination as an issue of "equality." Part II examines psychological and sociological studies that illustrate the prevalence of sex stereotyping in the workplace. Part III discusses the manner in which a victim of sex stereotyping must prove sex discrimination in Title VII suits, with particular emphasis on the recent Supreme Court decision in *Hopkins*. Part IV proposes an alternative approach for courts in dealing with such cases. This approach is designed to hold employers accountable for allowing deeply embedded stereotypes to taint their decisionmaking processes, without necessarily producing a windfall for an employee who would not have been promoted absent the stereotyping. The former aspect of this approach is based on the theory that sex stereotyping constitutes a harmful ingredient in any employment situation, one that may adversely affect a variety of employees even though it may not be demonstrable as the legal "cause" of negative employment decisions. This aspect treats sex discrimination as a "power" struggle and is designed to counterbalance the use of sex stereotyping as a device to exclude women from positions of power. The latter aspect of the approach is based on the view that the ultimate goal of all studies of the gender problem is to effect a truly androgynous work environment in which men and women are treated

22. This term is used guardedly, as the studies in Part II indicate that an "androgynous" person may still be a person who is measured in accordance with "male" traits. This author's vision of an "androgynous workplace" encompasses both a workplace in which the inherent worth of the traditionally devalued "female" roles and traits is recognized and validated and a workplace in which persons of either gender may exhibit a combination of the traits traditionally associated with either gender without risk of being characterized as "deviant." This ideal workplace is flexible and open to strengths and weaknesses of both genders and encourages participation in outside responsibilities, particularly family life, by both sexes. The "androgynous" workplace does not strive to set a "middle ground" between "male" and "female," which few workers of either gender could meet. See criticism of "androgyny" theories in Lit-
“equally,” and the terms “promotion” and “sex” have neither a blatant nor a subliminal connection.

I. Current Feminist Theories Relevant to Women Seeking Positions of Power

Observers of the expanding field of feminist thought have commented on the proportions of the debate as to the goals, methodology, and proper stance of women in today's society. This debate is both an “internal” debate among feminists and an external one involving nonfeminists who dispute the need for and validity of feminist thought. Much of this debate revolves around the question of whether gender is an issue of equality or an issue of power. If women's experiences in the world are put on a spectrum, however, it is evident that the gender struggle involves elements both of a struggle for equality and of a struggle for power.

tleton, Reconstructing Sexual Equality, 75 CALIF. L. REV. 1279, 1292-93 (1987). Rather, this ideal workplace rests on the theory that individuals, regardless of gender, are able to work and compete equally in an arena in which the “deck” is not already “stacked” in favor of one gender. This author agrees basically with the theory of Professor Catharine MacKinnon and other radical feminists that “equality” cannot be achieved by women until men alone are no longer allowed to define the parameters of that term. See A. Dworkin & C. MacKinnon, Pornography and Civil Rights: A New Day for Women's Equality 22-23 (1988). This Article represents a modest attempt to combine both that interim step (dismantling the current power hierarchy by attacking the underlying stereotypes of the male-dominated decisionmakers) with the goal of promoting only the best qualified persons to positions of power. Although she rejects the “androgyny” concept, Professor Robin West accurately describes this author’s vision of the role of jurisprudential thought in structuring the ideal workplace as follows:

  Feminism must envision a post-patriarchal world, for without such a vision we have little direction. . . . That vision is not necessarily androgynous; surely in a utopian world the presence of differences between people will be cause only for celebration. In a utopian world, all forms of life will be recognized, respected and honored. A perfect legal system will protect against harms sustained by all forms of life, will recognize life affirming values generated by all forms of being.


23. See Marcus, Spiegelman (Moderators), Feminist Discourse, Moral Values and the Law—A Conversation, reprinted in 34 BUFFALO L. REV. 11, 12, 19-20, 64-68 (1985) (panel discussion held as part of the James McCormick Mitchell Lecture Series at State University of New York in Buffalo) [hereinafter Feminist Discourse]; Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 BERKELEY WOMEN'S L.J. 1, 4-9 (1988) (offering an overview and critique of feminist legal thought).


Even before Justice Bradley wrote his famous commentary on the divinely mandated role of women,26 women in American society were engaged in an open struggle for equal footing with men. This fight for "equality" manifested itself in everything from the right to serve as the personal representative in an estate administration27 to the ability to attain and maintain jobs in fields historically open only to men.28

"Equality" theory began as a comparison of the treatment of women with the treatment of men.29 The focus initially was on laws and policies that treated women less favorably than men.30 It soon was evident that laws that ostensibly favored women could have the harmful result of those that discriminated against women in the workplace.31 These laws became the target of proponents of the "equal treatment" theory, which viewed as unacceptable any rule based either directly or indirectly on gender-based generalization.32 The equal treatment theory, however,

26. In his concurring opinion in Bradwell v. Illinois, 83 U.S. 130, 142 (1872), Justice Bradley noted that "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things. . . ."

27. See Reed v. Reed, 404 U.S. 71 (1971) (holding statutory preference of men to women as administrators of wills violates equal protection clause of the fourteenth amendment).


29. As Professor Christine Littleton has noted, "The richness and diversity of feminist legal theory that has developed over the last two decades is hard to reduce to a simple schema." Littleton, Equality and Feminist Legal Theory, 48 U. PITT. L. REV. 1043, 1045 (1987). The description that follows is intended only as brief overview of the theoretical framework within which has evolved this author’s suggested alternative approach for courts dealing with situations such as those which arose in the Craft, Hishon, and Hopkins cases. This author also recognizes the underlying weakness in attempting to promulgate theories for "all women" that ignore the differences between the obstacles encountered by women seeking positions of prestige and power and those encountered by most women in their jobs as clerks, cleaners, sales personnel, and secretaries. See McCloud, Feminism’s Idealist Error, 14 N.Y.U. REV. L. & SOC. CHANGE 277, 283-84 (1986). The theories set forth in this Article are limited to the judicial difficulties in dealing with women denied promotions or fired from top-level positions due to stereotyped notions of women in such positions.


32. One of the most articulate proponents of the equal treatment theory, Professor Wendy Williams, described the two propositions of this theory as follows: 1) “sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the
was attacked vigorously in the context of pregnancy and child-rearing issues by "special treatment" proponents, who argued that certain "real" differences between men and women, particularly as they related to child-bearing, could not be ignored if women were to achieve an equal position in the workplace. An important offshoot of this debate was the conclusion by both sides that the framework of the working world in which women vie for equality is male-structured and male-dominated. From this examination has emerged the more recent theory that women are physically, sociologically, and psychologically doomed from the outset if they attempt to achieve equality in a world in which the norm is male. Sex stereotyping in the workplace clearly reflects this theory; "female" or "feminine" roles and traits are usually the antithesis of the traits thought related to success and effectiveness. Consequently, feminists have extended the discourse on equality to encompass the notion that true equality is not currently available for women because male-defined reality renders women unequal.
Professor Christine Littleton has extrapolated from the body of feminist legal theory "three interrelated theories to explain and resist women's inequality." These theories are sex discrimination, gender oppression, and sexual subordination. Sex discrimination is evident when, without justification, one gender is preferred over another. This discrimination often arises from unjustified stereotypes relating to each of the genders. Gender oppression is manifested in situations in which women or men are restricted to certain social roles. Sexual subordination occurs in those situations in which anything associated with one gender is devalued or disaffirmed or when the gender is identified with anything that is disaffirmed or devalued. Littleton's third "inequality" theory, sexual subordination, provides a bridge to the theory of those who see the gender problem as a "power" problem rather than as an equality problem. It also correlates with studies discussed in Part II that show clearly, at least as they pertain to management positions in the current workforce, that the stereotypical notions of women's roles and traits strongly devalue women.

Professor Catharine MacKinnon, a "radical" feminist, views the gender issue not as a question of equality, but rather as a question of power or dominance. While some may argue that equality and power are interchangeable or that equality is a prerequisite of power, the concept of gender as a power problem offers a viable and unifying framework for analysis of the evolution of women into positions of power in the workforce.

37. Littleton, supra note 29, at 1045.
38. Id.
39. Littleton puts the Hopkins case in this category as well as the case of DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), in which a male nursery school teacher was fired because he was considered too effeminate. Littleton, supra note 29 at 1045-46.
40. Id. at 1046. Littleton describes child-raising as the "classic case" of sexual subordination. She also cites Catharine MacKinnon's focus on the harm of pornography as a devaluation of women. Id.
41. MacKinnon distinguishes "radical" feminists from "liberal" feminists who view the gender issue as an "equality" issue (or, as she terms it, a "differences" issue). See Feminist Discourse, supra note 23, at 21. A somewhat similar division among feminists is described by Professor Robin West as "cultural" feminism versus "radical" feminism. See West, supra note 22, at 13.
42. Actually, MacKinnon uses the term "dominance" rather than "power." She views gender as "a hierarchy—in which some people have power and some people are powerless, relatively speaking." See Feminist Discourse, supra note 23, at 21. She also describes equality theory as a theory of "difference" that focuses on whether women are the same as or different from men. Id. at 22-23. As noted above, she finds true "equality" unavailable for women until the current male power structure is dismantled. See supra note 36 and accompanying text. See generally, C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987).
Initially it may seem anomalous to view the “power” theory as a unifying one. Stereotypical notions of feminists are of abrasive, aggressive, bra-burning “pushy broads.” To view the gender problem as a power issue seems tantamount to setting this outmoded image in concrete. But, the word “power” embodies a range of notions from the negative of “powerless” to the positive of “powerful.” “Power,” in other words, suggests both the power “not to be” powerless and the power “to be” powerful.

When MacKinnon speaks of gender as a power issue, she cites statistics detailing the degree to which women are power/less in our society. She cites the staggering rates at which females are abused as children, raped, sexually harassed in the workplace, battered, forced to engage in prostitution, exploited through pornography, and condemned to a life of poverty. This concept of the powerlessness of women highlights what is perhaps the most fundamental agreement among those engaged in the debate on gender issues. There are few who would argue that women, simply by reason of their gender, should be raped, abused, battered, exploited, harassed, or poor. In other words, while the parameters of some of these issues may vary according to the degree of one’s commitment to feminist thinking, it is generally agreed that women should not remain powerless in our society.

Given the consensus that women should not be perennial victims in our society, the next question is the degree to which they should be allowed to participate in the activities of modern society. While there may be some peripheral sociological debate regarding the role of women, again there seems to be little disagreement, at least from a legal perspective, that women should be allowed to participate as members of the current workforce. Along the spectrum of “power,” therefore, the

43. In Feminine Discourse, supra note 23, at 26, MacKinnon cites the following statistics from Russell, The Incidence and Prevalence of Interfamilial or Extrafamilial Sexual Abuse of Female Children, 7 CHILD ABUSE & NEGLECT 137 (1983): 38% of young girls (and 10% of young boys) are sexually abused by male family members; 40-44% of women are raped or are victims of attempted rape; 85% of working women have been sexually harassed in the workplace; 25%-33% of women have been battered; 12%-15% of American women have been or are prostitutes; and the average woman makes 59 cents for every dollar the average man earns.

44. In Feminine Discourse, supra note 23, at 26-27, MacKinnon noted that even such conservative thinkers as Phyllis Schlafly find these statistics abhorrent and unacceptable. She also pointed out, however, that Schlafly does not equate these problems with sex difference or sex dominance.

45. See, e.g., Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (concluding, prior to the enactment of the Pregnancy Discrimination Act, discussed infra note 47, that the employers’ policy of refusing to allow female employees to accumulate seniority during maternity leave violated § 703(a)(2) of Title VII); Mills v. International Bhd. of Teamsters, 634 F.2d 282 (5th Cir. 1981) (Union violated Title VII of the Civil Rights Act of 1964 when it refused to refer the
The consensus is not only that women should not be powerless, but also that women should be equally "empowered" to enter and maintain jobs in the workplace. Applying a power-spectrum construct, freedom from victimization causes women to leave the realm of "powerlessness"; freedom to enter and maintain jobs in the workplace causes women to become "empowered," the middle ground of the power construct. It is at this point that power and equality most clearly coincide or, as Littleton theorizes, that the issue of sex discrimination becomes the focus. Equality for women in the American workplace entails being allowed to enter and remain in that workplace to the same degree as men. Equality involves the ideal that the "best person" for the job (rather than the "best man") is hired. In addition, equality has come to include equal treatment of those workers who engage in reproductive activity as a result of the Pregnancy Discrimination Act, which requires employers to treat pregnancy no differently than any other disability.

Craft, Hishon, and Hopkins already had travelled beyond the realm of powerlessness, through the middle ground of empowerment (that is, beyond sex discrimination in hiring). They were stopped in their tracks when they attempted to enter the upper end of the power spectrum—when they attempted to become "powerful." Just as victimization comprises a negative form of power and entering the workforce coincides with a somewhat neutral form of power, becoming "powerful" entails entry into the realm of positive power: the power "to be." This positive power, the power "to be," manifests itself in the forms of personal bene-

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47. Another example of the attention given to women's particular needs in the workplace is the response of several states to the need for parental leave policies. California currently has a law that requires employers to provide a maximum of four months unpaid disability leave for their pregnant female employees. This law was upheld by the United States Supreme Court in California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 227 (1987). Eight other states also require employers to provide some type of pregnancy leave. These states are Connecticut, Hawaii, Illinois, Massachusetts, Montana, New Hampshire, Ohio and Washington. Only Hawaii and California, however, provide for at least partial payment of wages during this period and a reemployment guarantee. Haase, Evaluating the Desirability of Federally Mandated Parental Leave, 22 Fam. L.Q. 341, 344-45 (Fall 1988). Recently, bills were introduced in each House of Congress (S. 249, 100th Cong., 1st sess. (1987) and H.R. 925, 100th Cong., 1st sess. (1987), which would require certain employers to provide unpaid family leave (for both male and female employees) after the birth or adoption of a child. Id.
fits and benefits in relation to other people. The personal benefits of power include the ability to command and receive a high price for services rendered and thereby to enjoy a comfortable, if not opulent, lifestyle. In relation to others, a person of power wields influence, exercises authority, and often receives both respect from peers and deference from those in positions of less power. In other words, a person with positive power has the power to be rich, influential, and well-respected, and, perhaps most importantly, to define the conditions under which other people will or will not be allowed to share in this abundance.\textsuperscript{48} Such a person may be an executive, a political leader, a tenured professor, an anchorperson at a major television news station, or a partner in a major law or accounting firm.

While it can be argued that promotions to powerful positions themselves should be allocated on an "equal" basis—without regard to gender or stereotypical notions as to gender—it is naive to think that the movement of women into powerful positions is merely a question of "equality." Movement into the "club"\textsuperscript{49} of the powerful is not accomplished as easily as was the movement by women into the workplace. Although at the time of women's movement into the workplace it was not self-evident, in retrospect it is clear that it was relatively easy for women to prove their gender should not bar entry into certain job areas.\textsuperscript{50} On the

\textsuperscript{48} MacKinnon extends the concept of power even further, noting that power entails among other things, that when someone says "[t]his is how it is," it is taken as being that way.... [T]he world is not entirely the way the powerful say it is or want us to believe it is. If it appears to be, it is because power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse. Powerlessness means that when you say "This is how it is," it is not taken as being that way.

C. MacKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 164 (1983).

\textsuperscript{49} Littleton uses the "club" terminology to illustrate an entity that takes on an existence apart from its individual members and thus may prevail in certain types of activities (e.g., sexist exclusions) even though many of its members may not subscribe individually to the theory behind those activities. Littleton, \textit{supra} note 22, at 1318 n.201. In an \textit{amicus} brief filed in support of Ann Hopkins by three committees of the New York City Bar, professional partnerships were referred to as having "a 'club-like' atmosphere" in which "some decision-makers may choose to select 'one of their own,' and thereby exclude minorities and women from joining their ranks." Brief of the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York as Amicus Curiae in Support of Respondent, at 10, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167) [hereinafter Brief of Committees of NYC Bar] (citing Epstein, \textit{Encountering the Male Establishment: Sex-Status Limits on Women's Careers in the Professions}, 75 AM. J. SOC. 965, 968 (1970).

\textsuperscript{50} Compare Bradwell v. State, 83 U.S. 130, 144 (1872) (noting that the "destiny" of a woman is to become a wife and mother) \textit{with} Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (finding that the employer's policy not to assign women to the position of "switch-man" constituted sexual discrimination in violation of Title VII and that the employer
other hand, as women attempt to rise to positions of power, a new set of evaluation standards, based on intangible personal assets, is applied. When looking for leaders in law firms, accounting firms, or newsrooms, decisionmakers search for more than just physical ability or technical competence. Personal attributes take on prime importance. Stereotypical notions of how persons of each gender should or will act (or look or dress) then become determinative.

At this point, when women enter the realm of "positive power," male decisionmakers recognize (whether consciously or not) that their own positions of power are threatened. Unlike entry-level positions, which pose no threat to those already in power, the promotion of women to positions involving prestige and influence is a direct threat to male decisionmakers. In other words, women do not just want jobs—they want their jobs. The tension at this level is not relieved by insistence from a legal perspective that women be treated "equally." Here it must be conceded that the issue is actual distribution of power. If men refuse to let women into these positions, the reason is not simply that they feel women do not deserve or cannot perform well in these positions. The questions go beyond whether an "equally competent" male would be promoted under the same circumstances. A new question arises whether men will in fact allow women to enter this realm in equal numbers. Equality theory assumes that men and women are intrinsically equally competent to perform certain tasks (for example, administering a law firm). Equality theory in and of itself, however, is not forceful enough to withstand obstacles thrown up by men who will not promote women considered either "too feminine" or "too masculine" because this theory does not recognize that issues other than actual competence may influence employment decisions. Equality theory thus cannot adequately address the obstacles encountered by women seeking high positions in their professions because it ignores the basic ingredient of "power." Persons of power in a society or profession define the qualities individuals must possess to rise to similar positions. As demonstrated in Part II,

failed to establish that being male was a bona fide occupational qualification for the position, notwithstanding the fact that the job occasionally required lifting equipment in excess of thirty pounds and working alone late at night) and Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) (Employer refused to promote the plaintiff to Vice President of International Operations, claiming that its South American clients would not do business with a female. The court rejected this defense, ruling that not even the preferences of foreign nations could "compel the non-enforcement of Title VII." Id. at 1277).

51. As seems to have been the case for Hishon.
52. As was obviously the case with Hopkins.
53. See supra note 48 and accompanying text.
current definitions of "power" attributes are imbued so deeply with sex stereotyping that it is virtually impossible in many situations for women\textsuperscript{54} to meet these criteria.

The \textit{Craft} and \textit{Hopkins} cases illustrate this tension. In both cases, the female plaintiffs ostensibly were held to the same standards that males were required to meet. Craft's employer claimed that she failed to satisfy personal appearance criteria applied to both male and female newscasters. Hopkins' employer claimed that she lacked the interpersonal skills necessary for male or female partners. In both cases, the employers clearly relied on stereotypical notions of how women should look and act.\textsuperscript{55} In \textit{Hopkins}, for example, the Supreme Court pointed to the blatant and subtle sexist overtones of the promotion criteria as applied to the plaintiff.\textsuperscript{56} Despite the fact that both decisionmaking processes were laden with stereotyping, the courts tied a finding of liability not to the discrimination inherent in the stereotyping process, but rather to a showing that the purportedly neutral reasons articulated by the employers (Craft's poor clothing aptitude and Hopkins' poor interpersonal skills) would have resulted in negative employment decisions even if these women had been men.\textsuperscript{57}

\textsuperscript{54} This is not to say that no woman will be promoted to positions of power, but rather that women will continue to be required to do everything far better than the average male in order to be treated the same as that male.

\textsuperscript{55} See supra notes 17-19.

\textsuperscript{56} Hopkins, 109 S. Ct. at 1793. See also id. at 1796 (O'Connor, J., concurring). At other times, however, the hope that the courts (also currently male-dominated) would even be able to recognize sex stereotyping has been somewhat dim. Consider for example, the following explanation by a district court judge as to why Elizabeth Hishon should not be allowed to pursue her claim against King & Spalding:

\begin{quote}
In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all.
\end{quote}


\textsuperscript{57} Admittedly such a showing can at times be difficult. In \textit{Craft}, the district court refused to find that the news station had treated the plaintiff in a manner that differed in any way from its treatment of male anchors. The court blamed Craft's demotion on her "below-average aptitude in matters of clothing and makeup" and her "attitude that her appearance was not critical to her success as an anchor." 572 F. Supp. at 878. On the other hand, in \textit{Hopkins}, the
An appropriate alternative theory in these cases will accomplish two goals. First, an employer will suffer some legal cost for allowing stereotyped notions to govern its promotion practices. The prevalence of stereotyping in the decisionmaking process, once proved, will establish a Title VII violation. For the purpose of determining a remedy, the burden will then shift to the employer to show that the female candidate would have been denied promotion or fired absent the stereotyping. In other words, the employer must show that the female candidate in question received the same treatment as any male candidate would have received under the same circumstances. This approach is designed to combine the "power" and "equality" theories by dismantling the stereotyping framework of many employment settings while at the same time preventing unqualified candidates from entering the higher ranks of the workforce. A detailed discussion of the prevalence of stereotypes in the workplace and of the current doctrinal approach to employment discrimination cases that follows is necessary as a background for further explanation of this theory.

II. Sex Stereotyping in the Workplace

Both Craft and Hopkins clearly illustrate the courts' discomfort with the concept of sex stereotyping. In Hopkins, controversy surrounded the weight allocated by the district court to the testimony of Dr. Susan Fiske, an expert in the field of sex stereotyping. Dr. Fiske cited a variety of psychological studies documenting "that men evaluating women in managerial occupations sometimes apply stereotypes which dis-

Supreme Court found that discriminatory animus had indeed played a motivating part in the decision not to promote the plaintiff. The Court placed on the defendant the heavy burden of separating obviously stereotyped attitudes from gender-neutral perceptions about her interpersonal skills. 109 S. Ct. at 1795.

58. In its Brief to the Supreme Court, Price Waterhouse referred to Dr. Fiske's testimony as only "gossamer evidence" and criticized her for failing to focus on the "actual behavior" of Hopkins at the accounting firm. Brief for the Petitioner at 35a-36a, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167) [hereinafter Brief for Petitioner]. This attempted devaluation of the role of psychological studies in sex discrimination cases prompted the American Psychological Association (the "APA") to file an amicus curiae brief in which it outlined the extent and quality of sex stereotyping research and the general acceptance of such research in the scientific community. Brief for Amicus Curiae American Psychological Association in Support of Respondent, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167) [hereinafter Brief for APA]. The APA noted that five decades of research in the area had yielded "an internally valid pattern of consistent, mutually confirmatory findings as well as considerable convergence across time, about the judgmental and behavioral consequences of sex stereotypes, including in the employment setting." Id. at 9-10.

59. These are but a few of the myriad of studies in this area which have been conducted over the last 15-20 years. In its Brief the APA noted that some 12,689 articles on human sex differences had been published between 1967 and 1982 and that over 300 articles on sex stereotyping had appeared from 1974-1987. Brief for APA, supra note 58, at 7 n.8.
criminate against women." Studies of this nature are telling in their descriptions of the characteristics and personality traits usually attributed both to men and to women. The stereotyped characterization of males typically matches the common perception of "good managers," while the stereotyped view of women is exactly the opposite.

A stereotype has been defined as a "shared belief or set of beliefs only partially or not at all true about a group of people." Stereotypes involve a "set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group." Individual women attempting to achieve positions of leadership and power in the workplace typically encounter a variety of stereotypes that project barriers to their advancement.

A. The Context

The complicated dynamics of sex stereotyping in the workplace are best explained using a hypothetical case. Kate, a young lawyer, applies for admission into the partnership for which she works as an associate attorney. Her colleagues John and Jim apply for partnership the same year. The law firm specializes in personal injury litigation. The credentials and background of all three applicants demonstrate qualification for promotion in terms of length of service and number of hours worked. The firm's four senior partners (all male) examine the credentials of the applicants and speak with their colleagues, clients, and the staff members who have worked closely with each candidate. Partner A votes against Kate because, as he has repeatedly stated in the past, he just would not

60. Hopkins, 618 F. Supp. at 1117.

61. The term "stereotype" has been chosen for this Article as it is the term used in the Hopkins case. In her recent insightful article on professional women, Professor Deborah Rhode has distinguished three levels of "unconscious gender bias": "(1) prototypes, the images associated with members of a particular occupation; (2) schema, the personal characteristics and situational factors that are used to explain conduct; and (3) scripts, definitions of appropriate behavior in a given situation." Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1188 (1988).


63. Heilman, Sex Bias in Work Settings: The Lack of Fit Model, 5 Research in Organizational Behavior 269, 271 (1983), cited in Brief for APA, supra note 58, at 8 n.11. In reality, the prominent issue in sex stereotyping cases is not whether the stereotypes may have some basis in truth, but rather whether these notions about a group (whether true or false) are applied indiscriminately to individual group members.

feel comfortable having a woman in a leadership position in his firm. Partner B has not had the opportunity to work closely with Kate, although he has had several "informal" discussions about her with John, the associate with whom he works most often. Partner B votes against Kate because he assumes that her style of dealing with clients will be too "personalized"; that she will become so emotionally involved with their stories that she will be unable to weigh objectively whether a certain case will be of any value to the partnership. Partner C votes against Kate because he feels that she is too hard-driving and demanding once she takes on a case and thus lacks the interpersonal skills necessary to enable her to motivate effectively staff and other colleagues. Partner D supports Kate. He informs his colleagues that he has consistently encouraged her to "lighten up," not to take everything so seriously and to become more "demure" in her dealings with other people. With a 3-1 vote against her, Kate is not promoted to partner. Her colleague John, himself a very ambitious and intense worker, is promoted. Her colleague Jim receives negative votes from Partners B and C, but these votes are based on his careless handling of a case on which he worked with these two partners rather than on any perceived deficiencies in his personality.

This example illustrates the multidimensional character of sex stereotyping. Stereotypes are imposed externally by a number of parties who have direct or indirect influence on the decisionmaking process. These parties include not only the candidate's employer, but also the candidate's colleagues, staff, and clients. This stereotyping may consist

65. Studies indicate that the possibility of bias based on stereotypical notions increases when no information or only ambiguous information is available as to the actual performance of an employee. Ruble, Cohen & Ruble, supra note 64, at 352. See also Brief for APA, supra note 58, at 23-25 ("Stereotyping is most likely when decisionmakers have available a paucity of information.") (commenting on the fact that some of Hopkins' critics knew her only slightly).

66. Kate's "weaknesses" of being too emotional and too abrasive specifically reflect the results of a survey by the American Bar Association Journal, in which male lawyers were asked to articulate what they perceived to be the major weaknesses of female lawyers. 69 A.B.A. J. 1384 (Oct. 1983), cited in Brief of Committees of NYC Bar, supra note 58, at 9.

67. See Milvad, WHAT YOU GET WHEN YOU Go For It 171 (1987) (discussing studies that indicate that people seem to gravitate toward, trust, and feel safe with someone whom they feels shares their personal characteristics); Rhode, supra note 61, at 1190 (discussing the problems of the plaintiff in Hishon who was denied partnership in a major Southern law firm partially because she did not "fit in" with her colleagues); Schwartz, supra note 4, at 70 (discussing that men generally are more comfortable with other men than with women).

68. See Ely, Attitudes Toward Women and the Experience of Leadership in WOMEN'S CAREERS 65 (1988). Ely discusses findings that subordinates' stereotyped notions about sex roles influence the subordinates' perceptions of a leader's abilities.

69. Philip A. Lacovara, President of the Washington, D.C. Bar Association, wrote recently of "the belief [shared among lawyers]—now withering but not dead—that most male
of a secretary who claims she cannot work for women or of a partner who claims that women do not have what it takes to be partner. It can also take the more complex form of colleagues or decisionmakers believing that a certain trait (e.g., being "hard-driving") is a requirement for effective management, but that there is something perverted about a woman who exhibits such a trait. A further complication occurs because some of these parties (i.e., the partners) also have stereotyped notions of what other parties (e.g., clients) prefer in the work context.

An often overlooked detrimental effect of such sex stereotyping is that women so subjected may internalize the stereotypes. This internalization may result in lowered self-esteem as well as behavior alterations designed to compensate for the perceived weaknesses related to her gender. For example, Kate may overcompensate by being hard-driving in order to dispel the commonly held belief that women are not as ambitious as men.

B. The Stereotyping Process

Most stereotyping involves a two-step process: categorization and attribution. The first step is the actual categorization of individuals into groups, usually expressed as opposites (e.g., male and female, black and white, old and young). The second step involves the attribution of certain traits (e.g., personality characteristics, intentions, goals, motivations, attitudes) to persons by virtue of the group into which they have been categorized.

Sex stereotyping in the workplace is embedded in a complicated matrix of interlocking beliefs that reflect this two-step process. Initially

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70. A surprising result in a recent study of the perceptions of men and women in leadership roles was that even "liberal" women expressed as much discomfort in a group with a female leader as did "conservative" men. These women were also as positive in their evaluation of male-led groups as were the "conservative" men. See Ely, supra note 68, at 77.
71. The Hopkins record includes evidence that one partner stated on at least one occasion that he could never vote for a female partner. Hopkins, 109 S. Ct. 1783.
72. See supra note 69 and accompanying text.
73. Rhode, supra note 61, at 1189-90.
74. One of the Price Waterhouse partners, in commenting on Hopkins' aggressiveness, observed that "she may have overcompensated for being a woman." 618 F. Supp. at 1116-17.
75. Ruble, Cohen & Ruble, supra note 64, at 340.
76. Anthropological studies have revealed the interesting phenomenon that "everywhere in the world masculinity is considered the opposite of femininity, even when the traits and jobs associated with males in one culture are those associated with females in another culture." C. Tavris & C. Offr, supra note 62, at 16.
77. The discussion that follows comprises an overview of some of the many studies rele-
employees are viewed in the polarized categories of "male" as opposed to "female." Then, particular traits are attributed to each category. Many of the stereotyped attributes assigned in this array are couched in terms of the following questions:

a) What is "women's work" versus "men's work"?
b) What are "feminine" versus "masculine" personality traits?
c) What are "feminine" versus "masculine" management and leadership styles?

For women who attempt to move into the higher ranks of the workplace, an intertwining set of beliefs is also operative. These beliefs are based on the categorization of executives as "effective" or "ineffective" and the attribution of perceived gender and personality traits to each of these categories. Questions that give rise to consistent, stereotyped responses in this field include:

a) Are effective executives more likely to be male or female?
b) Which personality traits are most typical of effective executives?
c) Which management and leadership styles are most effective?

As one might expect, the stereotyped responses to these latter three questions tend to favor males substantially over females. This leads to the final complication for women in their pursuit of the higher echelons of the workplace: the clash between being a "woman" (with all its attendant stereotyped attributions) and behaving like a man. A third level of negative stereotyping arises in light of this attempted role reversal.

(1) "Women's Work," "Men's Work," and Leadership

In every society there appears not only a polarization of the concepts of "male" and "female," but also a division of occupations along sex lines. The dichotomy in Western culture clearly reflects a perception of the male as the dominant, self-confident leader and the female as

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78. Art, religion, and the physical and social sciences constantly explore and challenge the notion that "male" and "female" are polar opposites. As noted earlier, however, the process of stereotyping initially involves dividing individuals into categories that are easy to understand and, in the case of most individuals, easy to recognize. Ruble, Cohen & Ruble, supra note 64, at 340.

79. The obvious reaction of a rational human being to the structure of these questions is that roles, occupations, and traits cannot always be tortured into one of these two categories. As the studies discussed infra will indicate, however, many people are not only accepting of but also feel quite confident in their ability to deal with this separation by gender.

the docile, gentle follower. Men occupy lucrative positions of power and prestige in our society while women dominate lower-paid occupations related to nurturing, caring, and service. Typically, doctors, lawyers, politicians, and business leaders are men, while nurses, elementary school teachers, and librarians are women.

A variety of theories—biological, psychological, and social—have attempted to explain the evolution of the phenomenon of male dominance in the more prestigious, powerful, and lucrative positions in the workforce. For purposes of this discussion, the salient issue is not the manner in which this state of affairs has developed, but rather the effect it has on current thinking about the appropriateness of men and women in certain occupations.

Studies indicate that the actual distribution of men and women in occupational categories profoundly affects the perception of who should in fact perform certain types of work. In other words, the more men there are in a job (e.g., lawyers), the more common is the perception that the job (practicing law) is “man’s work.” Following from this perception is the conclusion that the job is thus inappropriate for women.

81. Prather blames the current status of women in the workplace on the deeply embedded images of women as “sex objects” and “servants.” As sex objects, women gravitate toward occupations in which they are valued for their appearance (e.g., actress, hostess). Attractive women are not taken seriously in the workplace while unattractive women typically lack the self-confidence necessary to succeed in a career. As servants, women tend toward the nurturing, helping occupations and are used to working for little or no money as volunteers. Prather, Why Can’t Women Be More Like Men?, 15 AM. BEHAV. SCI. 172, 173-75 (1971).

82. Ruble, Cohen & Ruble, supra note 64, at 341-42.

83. Even in the professions in which women have managed to gain entry, they tend to occupy the less prestigious sectors of the profession. In a recent comparative study of women in the legal profession throughout the world, Menkel-Meadow observed that women tend in every country to cluster in the “lowest echelons” of the legal profession, even though the form of practice in that echelon may differ from country to country. Menkel-Meadow, The Comparative Sociology of Women Lawyers: The “Feminization” of the Legal Profession, 24 OSGOODE HALL L.J. 897, 907-11 (1986).

84. Prather, supra note 81, at 175; Ruble, Cohen & Ruble, supra note 64, at 342. At the time Hopkins was first nominated for partner at Price Waterhouse, the national accounting firm had 662 partners, only seven of who were women. Hopkins, 109 S. Ct. at 1781.


86. Eichner describes two ways in which the exclusion of women from certain jobs is accomplished through job stereotyping. Some jobs, she noted, are “mischaracterized” so that the job appears to require male traits and physical characteristics (e.g., height and weight requirements). Other jobs, such as the practice of law, are “misstructured” so that they can only be performed by those having the lifestyle characteristic of men in our society (long hours, substantial travel, night work, constant overtime). Eichner, Getting Women Work That Isn’t Women’s Work: Challenging Gender Biases in the Workplace Under Title VII, 97 YALE L.J. 1397, 1401-04 (1988).
Numerous studies have shown that candidates for any job or position are evaluated most favorably if the job or position is viewed as one appropriate for their gender.  

For women attempting to move into positions of power in the workforce, this basic concept of "women's work" includes the notion that leadership positions per se are inappropriate for women. Thus, many women striving for upper level promotions will suffer the same fate as Kate, when Partner A voted against her. Partner A perceives the notions of "female" and leadership position as incompatible. Partner A's thought process does not involve the second step of stereotyping (attribution). He reaches his decision based on categorization alone. The logic of his position is clear and straightforward: Management and leadership are "men's work." Kate is a woman. Therefore, Kate cannot perform in a management or leadership position.

A telling study of ninety-five bank supervisors indicates that Partner A's attitude is not unique. The supervisors were asked to make promotion decisions on the basis of hypothetical personnel files in which the gender of equally qualified applicants was varied. The supervisors were far more likely to promote men than women. They also rated male applicants more favorably than females in terms of their potential for customer and employee relations. The study also sought the reaction of the supervisors if another supervisor requested the termination or, as a less preferable alternative, the transfer of a subordinate who had performed poorly. If the supervisor requesting the action was male, the termination request was most likely to be honored. If the supervisor was female, a transfer (rather than termination) of the subordinate was recommended. The study noted that "[o]ne speculative interpretation of these findings is that subjects had greater confidence in the ability of a

88. See studies cited in Ruble, Cohen, & Ruble, supra note 64 at 344. See also Ely, supra note 68, at 67 (discussing findings that persons with conservative notions about women's roles in the workplace are uncomfortable when they encounter women in nontraditional leadership roles).  

89. Rosen & Jerdee, Influence of Sex Role Stereotypes on Personnel Decisions, 59 J. of APPLIED PSYCHOLOGY 9, 11 (1974). It is unfortunate that many of the major studies in the arena of sex stereotyping were performed prior to the 1980s. An argument can be made that the makeup of the workforce has changed appreciably since that time, as has general sensitivity to gender issues. On the other hand, the character of responses reported by such a highly sophisticated firm as Price Waterhouse, as recently as 1986-87, indicate that these studies may still reflect attitudes that have not disappeared entirely from the workplace. In its Brief to the Supreme Court, the APA noted that one recent study of male MBA graduates revealed that their attitudes toward women executives were as negative in the 1980s as they had been in the 1970s. Brief for APA, supra note 58, at 13 n.20, (citing Dubno, Attitudes Toward Women Executives: A Longitudinal Approach, 28 ACAD. OF MGMT. J. 235 (1985)).  

90. Rosen & Jerdee, supra note 89, at 12.
male supervisor than a female supervisor to appraise the seriousness of a performance problem.”

Equally debilitating for women seeking positions of leadership and power is the stereotypical notion that any interaction between men and women “naturally” results in men being in the dominant position. A 1982 study of ninety-five managers indicated that men are generally assumed to hold higher positions than women. In this study, the same “script” was presented to each of the respondents. The script involved two employees of the same corporation, one who eventually convinced the other to adopt a certain plan of action. The gender of the parties in the dialogue was varied among the scripts distributed to the different respondents. The respondents were then asked a number of questions about the perceived corporate position, personality, and effectiveness of the parties. In those cases in which the “influencer” was male and the “target” was female, the influencer was usually perceived as holding a higher corporate position relative to the target. When the influencer was female and the target male, the females were significantly less likely to be perceived as holding higher positions. Additionally, a female influencing a male was seen as far less “powerful” than a female influencing another female or a male influencing either a female or a male.

(2) “Feminine” Personality Traits, “Masculine” Personality Traits, and the Traits of an Effective Executive

While Partner A refused to vote for Kate’s promotion simply because she was a woman, Partner B’s decisionmaking was somewhat more complex. Partner B attributed certain personality traits to Kate based on her gender. He then compared these traits with the traits he perceived as requisite for a good leader, manager, and litigator. Because the “feminine” traits of nurturing and compassion did not match his stereotype of “effective managing partner” traits, Partner B concluded that Kate should not be promoted.

91. Id. Another interesting portion of this study indicated that some stereotypes may work against men, particularly men who are devoted to their children and family life. When the managers were asked to approve a leave of absence to care for small children, they found the leave far less appropriate when the hypothetical employee requesting the leave was a male rather than a female. Id. at 12-13.


93. Id. The APA noted that “even when behavior is held constant in carefully controlled laboratory conditions, males are seen as more influential, more confident, and somewhat more deserving of respect than women. . . .” Brief for APA, supra note 58, at 11 (citing Taylor, Fiske, Etcoff & Ruderman, Categorical and Contextual Bases of Person Memory and Stereotyping, 36 J. PERSONALITY & SOC. PSYCHOLOGY 778 (1978)).
In what has been referred to as the "definitive work on sex-role stereotypes,"94 Broverman measured the degree to which various personality traits were perceived as typical of men or of women.95 Adjectives that consistently were viewed as describing "male" traits included the following: aggressive, independent, unemotional, objective, not easily influenced, dominant, calm, active, competitive, logical, worldly, skilled in business, direct, adventurous, self-confident, ambitious.96 Adjectives representing "female" traits included: talkative, does not use harsh language, tactful, gentle, aware of other's feelings, religious, neat, quiet, easily expresses tender feelings, very strong need for security.97 Broverman's study also showed that the qualities associated with one sex tended to be the reverse of those associated with the other sex98 and that "male" qualities generally were rated as more positive.99

Another commonly cited study, the 1978 Bem Sex Role Inventory,100 lists a similar group of perceived "male" and "female" traits. Adjectives and phrases describing males include: self-reliant, of strong personality, defends one's beliefs, forceful, independent, analytical, athletic, possessing leadership abilities, assertive, willing to take risks.101 Females are perceived as yielding, loyal, cheerful, compassionate, shy, sympathetic, sensitive to others' needs, flatterable, understanding.102

As these adjectives indicate, and as numerous studies have confirmed,103 the "masculine" traits generally are associated more strongly

95. Broverman, Vogel, Broverman, Clarkson, & Rosenkrantz, Sex-Role Stereotypes: A Current Appraisal, 28 J. OF SOC. CHANGE 59 (1972) [hereinafter Sex-Role Stereotypes].
96. Id.
97. Id. An earlier study (1936) of sex differences revealed findings similar to those of the later research. Lewis Terman (creator of the Stanford-Binet IQ Test) and Catherine Cox Miles engaged in a systematic study of sex differences from which they concluded as follows: The males directly or indirectly manifest the greater self-assertion and aggressiveness; they express more hardihood and fearlessness, and more roughness of manners, language and sentiments. The females express themselves as more compassionate and sympathetic, more timid, more fastidious and aesthetically sensitive, more emotional in general . . . , severer moralists, yet admit in themselves more weakness in emotional control and (less noticeably) in physique.
98. Sex-Role Stereotypes, supra note 95. See also C. TAVRIS & C. OFFRIR, supra note 62, at 16.
99. Sex-Role Stereotypes, supra note 95.
101. Id.
102. Id.
103. The APA described gender-related stereotypes as follows: "men are thought to be
in our society with good mental health. Consequently, these traits are viewed (by both males and females) as being those to which a mature adult should aspire. These stereotypes are laden with a variety of internal and external inconsistencies. The labeling of certain traits as "masculine" or as "feminine" leads easily to the misperception that most men possess most of the masculine personality traits and most women possess most of the feminine personality traits. In reality, a substantial number of people exhibit some combination of these traits. A commonly accepted classification of personality types involves measuring the predominance in individuals of the "masculine" and "feminine" traits against a mean or median. Individuals who exhibit above-median degrees of masculine as well as feminine traits are classified as "androgy nous" while those who exhibit below-median degrees of both types of traits are referred to as "undifferentiated." In a study in which sixty-six middle-aged career women evaluated their personal exhibition of "masculine" and "feminine" traits, thirty-eight of the women ended up in the "androgy nous" or "undifferentiated" categories while only twenty-eight fell clearly into either the "masculine" or "feminine" categories. The notion that male qualities are positive and thus more desirable than female qualities also falters upon closer examination. Many of the qualities that are termed "male" persistently are themselves indicative of...
a range of behavior rather than of one identifiable trait. For example, studies typically refer to "aggressiveness" as a male trait. In the form of effective assertiveness, aggressiveness may in fact be a desirable and positive quality. On the other end of the spectrum, however, "aggressive" may be viewed as bullying, violent, and physically abusive. This manifestation of aggressiveness probably would not appear on any person's list of "desirable" qualities.

Feminist theorists have challenged the concept of "male is better" from a variety of angles. A common approach involves recognition that even if biological and sociological differences between men and women do in fact exist, the issue is not the relative strengths or weaknesses of these differences, but rather the failure of our society to recognize the inherent value of traditionally "female" characteristics. This approach defies the idea that male characteristics constitute the norm toward which all mature adults should strive.

Despite the numerous criticisms that may be leveled against the sex stereotyping of personality traits, an important phenomenon is that the "masculine" traits are correlated strongly with success in the workplace. The study of sixty-six middle-aged career women revealed that those women who exhibited a high degree of "feminine" traits (as

108. In an amicus curiae brief in support of Ann Hopkins submitted by the NOW Legal Defense and Education Fund, the ACLU, the Women's Legal Defense Fund, and a variety of other groups devoted to ensuring equal rights for women, it was noted that the range of acceptable behaviors for men is also much wider than the range for women. In support of this proposition, the Brief cited stories of successful American corporate managers (all male) who were described in a variety of terms, ranging from "humble" and "mild-mannered" to "tough" and prone to "ego-shredding, criticism, insatiable demands, and Wagnerian fits of anger." Brief of Amicus Curiae NOW Legal Defense and Educational Fund, American Civil Liberties Union, Women's Legal Defense Fund, et al. at 19, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) [hereinafter NOW Brief] (citing Peterson, A Humble Hero Drives Ford to the Top, FORTUNE, Jan. 4, 1988, at 23; Flax, The Toughest Bosses in America, FORTUNE, Aug. 6, 1984, at 18).


110. See Nieva, Equity for Women at Work: Models of Change in SEX ROLE STEREOTYPING AND AFFIRMATIVE ACTION POLICY 187-88 (1982). Nieva theorizes that the correlation between masculine traits and success at work could stem either from the fact that men generally hold superior positions to women and thus that their traits are deemed superior, or that "male" characteristics did in fact meet the demands of the workplace in the early days of industrialization. She also points out that these early requirements for "rugged individualism" are falling prey in the modern workforce to requirements for service activities, more "befitting" feminine traits. Id. at 205. See also Case, Cultural Differences Not Deficiencies: An Analysis of Managerial Women's Language in WOMEN'S CAREERS 41 (S. Rose & L. Larwood eds. 1988), C. TAVRIS & C. OFFRIR, supra note 62, at 16-17.
measured by the Bem Sex-Role Inventory) tended to be far less successful in their careers than those women who exhibited a balance of "masculine" and "feminine" traits, or in whom the "masculine" traits predominated.\(^{111}\)

Power and leadership traits also tend to be more strongly correlated with "masculine" traits than with "feminine" traits. In a study cited by Dr. Fiske in the Hopkins case,\(^{112}\) one researcher found that the personality traits ascribed to "successful middle managers" were far more similar to characteristics typically ascribed to men than those typically ascribed to women.\(^{113}\) Three hundred male middle line managers were asked to compare ninety-two descriptive terms with their own perceptions of the traits of "men in general," "women in general," and the "successful middle managers."\(^{114}\) The researcher then calculated the degree to which the "men in general" traits correlated with the "successful middle manager" traits and the degree to which the "women in general" traits correlated with the "successful middle manager" traits. For sixty of the descriptive traits, the ratings of "successful middle managers" were more similar to the ratings of "men in general" than of "women in general." Descriptions found to be representative of this pairing included: "emo-

\(^{111}\) Wong, Kettlewell & Sproule, supra note 106, at 763. The study examined other factors that are generally believed to be predictive of females' successes in the workplace (marital status, parental expectations, mother's employment status, age, employment history, education) and found that "only education attainment and assessed masculinity in women were significant predictors of women's career achievement." Id. Additionally, the study found that when education was not included in the analysis, the only significant predictor of success was the subject's degree of "masculinity" or "femininity." Id. at 763-64. Finally, the study appraised those factors to which the women attributed their success. The "feminine" women tended to attribute their success less to "internal" factors (such as ability and effort) than did the "masculine" women. From this finding the researchers concluded that the "feminine" women "feel less competent and less proud of their career accomplishment. Femininity seems to be associated with an attribution pattern that tends to lower one's aspirations and career striving." Id. at 766.

\(^{112}\) Hopkins, 618 F. Supp. at 1117.


\(^{114}\) Each manager was asked to rate the descriptive terms as they applied to only one of the stereotype categories. For example, some managers received forms which instructed them to rate the descriptive terms according to their characterization of "men in general." Others received forms asking them to rate the characteristics of "women in general," and still others received forms asking them to rate the characteristics of "successful middle managers." Schein, supra note 113, at 96-97. The Descriptive Term Index used in the study was composed from a variety of sex stereotype studies and was finalized after an independent study administered to 24 male and female college students. Id. at 96.
tionally stable, aggressive, leadership ability, self-reliant, (not) uncertain, vigorous, desires responsibility, (not) frivolous, objective, well-informed and direct.”

For only eight of the ninety-two items was there a stronger pairing between “successful managers” and “women in general.” These descriptive pairings included “‘employee-centered’ or ‘consideration’ behaviors, such as understanding, helpful and intuitive.”

For eighteen of the items there was no significant relationship between sex stereotyping and managerial stereotyping.

An even more dramatic study, involving 884 male managers, was conducted in 1976. The managers were asked to compare males and females on sixty-four vocationally relevant characteristics that were grouped into the following four scales: aptitude, knowledge, and skills; interest and motivation; temperament; work habits and attitudes. As anticipated, men were rated more favorably than women on all four scales. “With respect to temperament, men were viewed as better able to cope with the stress and pressure of tough managerial roles. Women were viewed as more emotional, timid, jealous, and sensitive to criticism, as compared to men.”

Women also were viewed as less dependable and less reliable employees.

Even if the subconscious pairing of desirable leadership traits and “masculine” traits is no more than a reflection of the fact that men currently dominate the upper echelons of the workplace, women continue

115. Id. at 98.
116. Id. at 100.
117. Id. at 98. Another interesting finding of Schein’s study was that older managers (age 49 and above) showed a greater tendency to pair female traits with successful managerial traits than did their younger counterparts. Schein concluded that

Older male managers may have more interaction with women for whom the role of labor force participant is more salient than that of mother-homemaker. This age effect interpretation implies that as more women become active participants in the labor force, the increased experience with working women will reduce to some extent the relationship between sex role stereotypes and requisite management characteristics among all age groups. Consequently, this psychological barrier to women in management will be lowered, thereby affording a greater opportunity for women to enter into and advance in managerial positions.

119. Id. at 841.
120. Id.
121. Id.
122. See supra note 110. See also Eichner, supra note 87, at 1402. Eichner discusses the phenomenon whereby jobs commonly performed by men are deemed to require “male” traits in light of a comparison between the job of physician in the United States and the Soviet Union. Physicians are typically male in the U.S. and typically female in the Soviet Union. In the U.S., that job is perceived as requiring the rational detachment generally attributed to
to suffer (as Kate did at the hands of Partner B) because they are women and as such are perceived as too "emotional" (timid, shy, gentle, etc.) to be executives. Women also are perceived by many as employing strategies and styles that are incompatible with effective leadership and management.

(3) "Feminine" Strategies, "Masculine" Strategies, and Effective Leadership Strategies

Stereotypical power strategies commonly thought to be used by males include coercion, expert argument, and convincing information, while women are perceived as employing more indirect and personal strategies. Indicative of these categories are the descriptions of "masculine" as opposed to "feminine" strategies from a recent study of perceptions of power strategies. The strategies associated with men included: "argue and yell; claim superior knowledge or skill; state point directly; use physical force; use reason and logic." Feminine power strategies were described as: "act in subtle ways by suggestions and hints; compromise; make appeal based on common group membership and other shared attributes; make things difficult by being a nuisance; use flattery, deceit, lies; plead, beg or pray." As is perhaps obvious from the above descriptions,

[t]hose power styles and strategies that are most associated with being perceived as powerful and competent, with being effective or persuasive, are also associated with being masculine. . . . On the other hand those strategies that are perceived as being least effective and are least associated with being powerful are those indirect and personal styles commonly associated with femininity. Interestingly, while there is little argument that such sex stereotypes regarding power strategies and styles are prevalent, research has shown males. In the Soviet Union, the job is perceived as requiring the nurturing and caring characteristics generally attributed to women. Case cites studies that indicate that perceptions of women’s speech in managerial situations may be based on preconceived images of the characteristics of their gender. "Since women are thought to be emotional, indecisive, submissive, supportive and interpersonally oriented . . . their speech is rated likewise. Similarly, since men are seen as behaving aggressively, instrumentally, bluntly and decisively . . ., their speech is also rated consistent with that role image." Case, supra note 110, at 43.

123. See, e.g., A. Harriman, supra note 94, at 204-07; Case, supra note 110, at 42-43; French & Raven, The Bases of Social Power, in STUDIES IN SOCIAL POWER 150 (D. Cartwright ed. 1959); Gruber & White, Gender Differences in the Perceptions of Self's and Others' Use of Power Strategies, 15 SEX ROLES 109 (1986); Johnson, Women and Interpersonal Power, in WOMEN AND SEX ROLES 310-17 (1978).

124. Gruber & White, supra note 123, at 113 (Table I).

125. Id. at 112.

126. A. Harriman, supra note 94, at 207. See also Wiley & Eskilson, supra note 92, at 9 (discussing women’s difficulties in coping with managerial and authoritative roles).
that, in practice, men and women exhibit few differences in terms of their leadership styles.\textsuperscript{127}

\textit{(4) "Masculine" Women in the Workplace}

One temptation upon review of the above studies is to suggest that women use this information to their advantage and simply adopt those personality traits, leadership styles, and power strategies that are perceived as "masculine." While some women may have accomplished this feat successfully,\textsuperscript{128} there are both philosophical and psychological difficulties with this reasoning.

From a philosophical perspective, the adaptation of women to male norms may operate only as a temporary solution to the problems women face in the workforce. An obvious problem is that women are biologically different from men and, to date, are the only gender physically capable of bearing children. Sociologically, the task of child-rearing also has fallen primarily to women. To force professional women to "be like men" in order to succeed is tantamount either to forcing these women to forego bearing children or forcing their children to adapt to growing up without parents. The male norm is not adequate if women are to be integrated fully into the workplace. This norm not only ignores the responsibility that all of society has to raise healthy children, but also ignores the tremendous contributions that so-called "female" attributes can make to the workplace.\textsuperscript{129}

From a psychological perspective, attempts by women to be "more like men" can take a toll both in terms of women's own mental health and of their acceptance in the workplace. Women who pursue careers constantly are reminded that they have chosen a path that is "different" for women.\textsuperscript{130} The conflict created by this perception may affect a woman's work performance. Work environments in which stereotyping is prevalent may even contribute subtly to the inability of women to "measure up" to the demands of leadership positions.\textsuperscript{131} Studies of "tokens"

\begin{itemize}
  \item \textsuperscript{127} A. Harriman, \textit{supra} note 94, at 195-200.
  \item \textsuperscript{128} See \textit{supra} text accompanying notes 106-07.
  \item \textsuperscript{129} See articles and treatises cited \textit{supra} note 33.
  \item \textsuperscript{130} This statement is easily proved by watching the advertisements that accompany an evening of "prime time" television viewing. Women are invariably portrayed as either "sex objects" or as cheerful housewives (or both!).
  \item \textsuperscript{131} An interesting aspect of the Gruber & White study was that the same subjects who characterized the various strategies as typical of men in general or women in general were also asked to evaluate their own use of these strategies. Most of the subjects reported a significantly lower personal use of any of these strategies than the use they perceived by men and women in general. They perceived themselves as being "more diplomatic and reasonable" than the average man or woman. Gruber & White, \textit{supra} note 123, at 117. The male subjects reported a
indicate that such persons are alienated and isolated from their colleagues and even pressured into acting in stereotypical ways.\footnote{32} Low self-esteem and poor job performance have been documented in numerous cases of workers for whom their superiors held artificially low achievement expectations.\footnote{33} One study even showed that women leaders tended to fulfill the group’s sex-based expectations by being less influential in groups that took a conservative view of women in leadership roles.\footnote{34}

Additionally, women who use power strategies typically associated with the opposite sex may be deemed to be engaging in a type of behavior which is “unnatural.”\footnote{35} One study has shown that, even when men and women engage in exactly the same power strategies, women using these strategies are viewed as “colder” and less likeable than the men.\footnote{36} This study also pointed out that the power styles deemed effective for men were deemed inappropriate for women, and that the power styles deemed appropriate for women were “unreliable.”\footnote{37}
Women have devoted many hours and much money to learning how to be more assertive and aggressive, to speak and act "with power." Yet numerous studies have shown that even though "feminine" management styles are deemed weaker and inadequate, women who are perceived as using "masculine" management styles are, at best, deemed ineffective and, at worst, resented and viewed as overbearing. A woman attempting to exert leadership and power thus could be left in a double bind. "If she uses expert power, a more effective style for a man, she will be viewed as acting in a deviant manner, and will be seen as less effective than a man using the same strategy; if she uses reward power she will be seen as acting in a stereotypically female manner, but will still be seen as less powerful and less effective than the man."

Ann Hopkins was characterized as a "macho" and "masculine" woman who should "take a course at charm school." She was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." She was also criticized as being "tough-talking" and "a lady using foul language." The focus of most of this criticism seems to have been that she was a

138. See discussion in Case, supra note 110, at 42.
139. Id. at 55. See also Ely, supra note 68, at 77. But see supra note 106 and accompanying text. A similar reaction occurred initially when women began to work in fields that were traditionally relegated to males. The costs imposed on such women were both external—in the forms of ostracism and even hostility—and internal—in the form of alienation, anxiety, and self-doubt. See Nieva, supra note 110, at 200.
140. A. Harriman, supra note 94, at 206. See also Rhode, supra note 61 at 1189; Brief of APA, supra note 58, at 14-16. In the amicus curiae brief filed by the NOW Legal and Educational Defense Fund the "double bind" concept was referenced by a quote of Ambassador Jeane Kirkpatrick, in which she noted, "if a woman seems strong, she is called 'tough', and if she doesn't seem strong, she's found not strong enough to occupy a high-level job in a crunch." 5 News for Women in Psychiatry 14, 14-15 (Oct. 1986) (reprinting speech of Jeane Kirkpatrick given to the Women's Forum, New York City, 12/19/84), cited in NOW Brief, supra note 108, at 10. Similarly, the report of a New York task force studying women in the court system reported that "whereas aggressive behavior by male attorneys was rewarded or tolerated, it was viewed as inappropriate for female attorneys." Brief of Committees of NYC Bar, supra note 49, at 8 (citing The Report of the New York Task Force on Women in the Courts 230-32 (1986)). In the plurality opinion in Hopkins, Justice Brennan referred to the double-bind mode of thinking as placing women "in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't." Hopkins, 109 S. Ct. at 1791.

The "double bind" extends even to the manner in which a female professional presents herself to the public. At KMBC, Christine Craft's news station, women who had soft feminine hairstyles were told to wear more masculine clothes to establish credibility while women with masculine hair styles were told to wear more feminine clothes lest they appear too aggressive. Craft, 766 F.2d at 1214.

141. Hopkins, 109 S. Ct. at 1782.
142. Id.
143. Id.
woman who acted too much like a man. Christine Craft also was criticized for her “masculine” ways of dressing and was encouraged to buy clothes with more “feminine touches” that would articulate her “professional elegance.” In our hypothetical, Partner C criticized Kate for her “male” traits of being demanding and hard-driving and Partner D encouraged her to be less intense and more “demure.” In all of these situations, the female worker is caught in the classic double bind—if she is too “feminine” she will not succeed because feminine traits typically are not correlated with success, and if she is too “masculine” she will not succeed because she will be perceived as engaging in deviant behavior unbecoming to her gender. The question decisionmakers in these situations ignore is whether each woman is in fact qualified and competent for the position she seeks. The approach described in Part IV of this article is an attempt to refocus the attention of courts on individual competence while at the same time preventing deeply embedded and pervasive sex-stereotyping in the workplace to continue with impunity.

III. Sex Stereotyping in the Context of Title VII Cases

The studies described above indicate three commonly shared perceptions about men and women in the workplace:

a) Management and leadership are “man’s work.”

b) The traits and leadership styles perceived as “masculine” are more positive and desirable than those perceived as “feminine” and are more closely connected with success, power, and leadership in the workplace.

c) Women who exhibit “masculine” personality traits or use “masculine” power strategies are deviant in both comportment and behavior.

In the example described in Part II, the partners’ view of Kate was the result of all of these stereotypes. Partner A assumed that a woman could not do the “man’s work” of being a law partner. Partner B attributed to her, by virtue of her gender, the “feminine” trait of compassion, which is deemed to be less desirable in the workplace than certain male

144. The APA noted that Hopkins’ supporters described her behavior in positive terms associated with a competent partner (“outspoken, independent, self-confident, assertive and courageous”) while her critics had described her in “Iron Maiden” terms—“over-bearing, arrogant, self-centered, and abrasive.” Brief for APA, supra note 58, at 15. See also Hopkins, 109 S. Ct. at 1782-83 (descriptions of commentaries praising and criticizing Hopkins).

145. Craft, 766 F.2d at 1214.

146. Compare these situations with that of the woman who applied to be a police officer in Fadhl v. City and County of San Francisco, 741 F.2d 1163 (1984), aff’d on rehearing, 804 F.2d 1097 (9th Cir. 1986), but who was found to be “too much like a woman.” Id. at 1165. See also Thorne v. City of El Segundo, 726 F.2d 459, 463 (9th Cir. 1983) (police officer applicant perceived to be “a very feminine type person who is apparently very weak in the upper body”).
traits. Partners C and D criticized her for exhibiting the "masculine" trait of being hard-driving. Even though Partner D voted for her, his commentary about her attitude gave credence to Partner C's assessment. Finally, Kate's colleague Jim was not promoted, but the negative decision about him was related to his performance rather than to a stereotyped notion of his gender.

Despite the strength of criticisms leveled against stereotypical notions of men and women, the salient point is that these notions are entrenched in the workforce and have both an internal and an external effect on the achievement and promotion of women. The task of uprooting and dispelling these stereotypes falls to legislators, employers, employees, parents, teachers, philosophers, artists, sociologists, lawyers, anthropologists, and psychologists alike. Feminist legal theorists already have made substantial contributions toward this project by engaging in a restructuring of legal approaches on both a practical and theoretical level. While it would be idealistic and naive to assume that the legal system is the only, or even the most effective, tool available to eradicate this dangerous form of sexism, there are a variety of incremental ways in which the legal system can aid in the process of relieving sex stereotypes of their power.\textsuperscript{147} Part IV will outline one approach by advocating a bifurcation of Title VII sex discrimination cases, combined with an allocation of presumptions predicated on a recognition of the pervasiveness of sex stereotypes in employment decisions. Part III examines the current legal approach to discrimination based on sex stereotyping, with a particular emphasis on the Supreme Court's recent decision in Hopkins.

Both Christine Craft and Ann Hopkins encountered sex stereotyping in their workplaces. This stereotyping profoundly affected their rise to positions of "power" in these workplaces. Although their cases were decided under different legal theories, it is important to note that each case revolved around disparate treatment of an individual "because of" her sex.

In 1982, Ann Hopkins applied for admission as a partner in Price Waterhouse, one of the nation's largest accounting firms. Hopkins was the only woman among eighty-eight candidates under consideration.\textsuperscript{148} At the time of her application, Hopkins had generated more business for

\textsuperscript{147} But see Brown, Parmet & Baumann, The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 BUFFALO L. REV. 573, 590-619 (1987), in which the authors argue that current discrimination law relies on an ostensibly neutral, formalistic analysis, while ignoring social context, and thus is inadequate to address meaningfully issues of gender equality.

\textsuperscript{148} Hopkins, 109 S. Ct. at 1781.
the partnership and billed more hours than any of the other candidates, yet she was not invited to join the partnership but rather was placed on a one-year “hold,” along with seventeen of the male candidates. All of the male candidates placed on the one-year hold were renominated in the following year. Hopkins was not. When she inquired as to the basis of her rejection, Hopkins was told that her difficulties in “interpersonal skills”—most particularly her aggressive, tough, “macho” behavior—had contributed substantially to her failure to attain acceptance into the partnership.

Hopkins sued Price Waterhouse, alleging that the accounting firm had permitted stereotyped notions of women and appropriate “female” behavior to play a significant role in the denial of her partnership application. The District Court for the District of Columbia found that the promotion decision had been impermissibly influenced by sex stereotyping in the partnership’s evaluation process, but refused to direct that Hopkins be promoted because she failed to prove that she had been constructively discharged. The Court of Appeals for the District of Columbia Circuit affirmed the District Court on the question of liability, but reversed the judgment that no constructive discharge had been shown, and remanded the case for the determination of appropriate damages and relief. The Supreme Court reversed the district court’s liability determination, but only because Price Waterhouse was held to a higher standard of proof than the Court deemed appropriate in Title VII cases. As will be discussed later in this Part, the decision was still a victory for Ann Hopkins.

In 1982, Christine Craft agreed to join KMBC-TV as a co-anchor after making it clear that she did not intend to engage in the type of

149. “In a jointly prepared statement supporting her candidacy, the partners in Hopkins’ office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it ‘an outstanding performance’ and one that Hopkins carried out ‘virtually at the partner level.’” Id. at 1782. Of the 88 candidates who applied for partnership status, 47 were accepted, 21 were rejected and 20 were placed on hold. Two of the candidates were placed on a two-year hold, while Hopkins and 17 other (male) candidates were placed on a one-year hold. Hopkins, 825 F.2d at 462.

150. Of these one-year hold candidates, 15 were eventually admitted to the partnership. Id.


152. Id. at 1782. Her supporters in the evaluation process made a variety of comments about her personality traits that were also imbued with gender stereotypes. See supra note 17. In addition, stereotypical comments about other women who sought promotion were admitted by the court. 825 F.2d at 467.


154. Hopkins, 825 F.2d at 473.

personal "makeover" which had been attempted by a former employer. Evidence indicated that she had been hired to "soften" the image of the male co-anchor. Soon after her initial broadcasts, Craft was criticized for her clothing and was assigned several consultants and a "clothing calendar" in an attempt to help her create an acceptable image. Viewer surveys of Craft remained negative and Craft was eventually reassigned to the less prestigious job of field reporter.

Craft sued Metromedia, the owner of the news station, on four grounds. On the Title VII count, Craft alleged that KMBC's appearance standards were based both on stereotyped notions of how women should look and dress and on stereotypical customer preferences. The district court found that the station's appearance standards were not discriminatory because they were "consistent with community standards" and were applied evenly to male and female newscasters.

In each of these disparate treatment cases, the underpinnings of sex stereotyping clearly were shown to exist. The question arising in any case of this nature involves the role that evidence of sex stereotyping will play in proving a violation of Title VII and in fixing an appropriate remedy for the plaintiff.

156. Craft, 766 F.2d at 1208. When Craft joined CBS to host the "Women in Sports" broadcasts, she was required to cut and bleach her hair and to wear heavy makeup on the air. Id.
157. Id.
158. Id. at 1208-09.
159. Id. at 1209. Craft claimed that she was told that she was removed as anchor because she was "too old, too unattractive and not deferential enough to men." Id. However, the district court refused to credit this testimony. Id.
160. See supra note 14.
161. Craft, 766 F.2d at 1210.
162. Craft, 572 F. Supp. at 878. The district court relied primarily on the "grooming code" cases under Title VII which have traditionally allowed great deference to an employer to promulgate different codes for males and females provided such codes are designed to maintain a business-like (as opposed to sexually provocative) appearance and meet accepted community standards. Id. (citing Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979)). For a discussion of the court's uncritical reliance on these cases, see Note, supra note 15, at 190-94. The author of this Note suggests that, in grooming cases in which the factors at play are subjective (as opposed to objective factors such as hair length), courts should engage in a "business necessity" type of test that would "balance the right of the employer to run his business in a manner which he perceives to be economically profitable against the harm resulting to the individual employee's life-style as a result of the employer's decision." Id. at 108. The author believes that Metromedia would still have been successful had such an alternative test been applied. Id.
A. Proving Disparate Treatment Cases Under Title VII

Under Title VII it is an "unlawful employment practice...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's...sex."163 This law permits a court that finds an employer has engaged intentionally in an unlawful employment practice to enjoin the employer from engaging in such practice. The court can then order "such affirmative action as may be appropriate [including but not limited to] reinstatement or hiring of employees, with or without back pay,...or any other equitable relief as the court deems appropriate."164 Additionally, the court may allow attorney's fees for the "prevailing party."165

The ultimate issue in a disparate treatment166 case is whether the defendant has discriminated intentionally against the plaintiff.167 The

164. Id. § 2000e-5(g).
165. Id. § 2000e-5(k).
166. "Disparate impact" cases deal with employer policies that perpetuate past discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under the Griggs analysis, a facially neutral employment policy may violate Title VII if it discriminates against a protected group, and is not sufficiently related to job performance. Id. at 431. The plaintiff has the burden of showing that the employer's policy, though neutral on its face, adversely affects a protected group of which she is a member. Unlike disparate treatment cases, motive and intent do not have to be proven. Whether the employer had good intentions in enacting the rule does not matter if the rule discriminates against a protected group and is not related to a person's capability to perform the job in question. Id. at 432.
167. As discussed below, courts typically require a showing that intentional discriminatory treatment has resulted in a negative employment decision. One commentator argues that Title VII embraces all discriminatory activity, whether or not it is "outcome determinative." He points out that the Civil Rights Act fosters the right of individuals to be free of all "different" treatment based on impermissible grounds, even if that treatment does not directly affect final employment decisions. Stonefield, Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law, 35 BUFFALO L. REV. 85, 86-90, 134 (1986). As described in Part IV, this author adopts Stonefield's approach indirectly by espousing the theory that an employer may violate Title VII and yet not be forced to provide equitable relief to the plaintiff, if the employer can show that the same employment decision would have been made absent the discriminatory behavior. A simple analogy best explains this approach. Assume that car A drives over a hill, speeding at 85 miles per hour, and hits car B, which is making a left turn. In speeding, car A has already violated the traffic laws. If the driver of car B attempts to sue the driver of car A for damages, however, the question is whether the illegal action by car A "caused" the wreck. Suppose car B was running a red light when car A came over the hill. Clearly, the illegal actions of both cars contributed to the result. A court would be hard-pressed to hold that car A's illegal action was the only cause of the wreck. On the other hand, if car B was making a legal turn, the illegal actions of car A will be considered the legal cause of the damage to car B. If we assume that the employer who engages in sex stereotyping is the speeding car A, it is clear that the employer has already violated the law. Whether this violation was the legal cause of negative employment decision does not relieve the employer's responsibility for violating the law. The "outcome determinative" nature of the employer's action is relevant to the question of relief ("damages") for the plaintiff.
Supreme Court noted in *International Brotherhood of Teamsters v. United States*\(^{168}\) that disparate treatment occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."\(^{169}\) As the decisions following the *Teamsters* case have evidenced, however, a showing of intentional discrimination is not a "simple" process. Courts have engaged in increasingly complex analyses of the terms "discriminate" and "because of," analyses that have caused them to forget the basic notion that semantic interpretation is often not a science in itself, but rather a process for making policy decisions.

The manner in which disparate treatment cases are adjudicated has evolved as the courts, litigants, and attorneys have become more sophisticated in dealing with employment decisions.\(^{170}\) Initially, disparate treatment cases proceeded under the theory that a single reason motivated the defendant's unfavorable treatment of the plaintiff.\(^{171}\) Through the use of circumstantial or direct evidence, the plaintiff attempted to prove that the reason underlying the employment decision was a discriminatory reason as opposed to the legitimate, nondiscriminatory reason proffered by the defendant as the "real" reason for the decision. As it became increasingly apparent that most employment decisions are motivated by a number of different reasons, some of which may be unlawful, some of which are not, the courts developed the more complex causation analysis that was employed in *Hopkins*. As the divergent concurring and dissenting opinions in *Hopkins* indicate, however, there remains a fair amount of overlap between the single motive analysis and the "mixed motive" causation analysis.

(1) Single Motive Analysis

Single motive analysis is simply the theory that one reason—whether legitimate or not—motivated the negative employment decision at issue. No separate showing of causation is necessary in single motive analysis because causation is inherent in the determination that a particular reason was the *only* determining factor behind a firing, failure to hire, or failure to promote. This single motive is subject to proof by both circumstantial and direct evidence.

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\(^{169}\) Id. at 335-36.


It was evident early on, however, that most disparate treatment cases were not easily subject to proof by direct evidence. Recognizing that such evidence of intentional discrimination is often unavailable or under the sole control of the employer, the United States Supreme Court devised a method by which intentional discrimination could be proved using circumstantial evidence. In *McDonnell Douglas Corp. v. Green*, the Supreme Court set out the following three-step model for proving intentional discrimination: 1) the plaintiff establishes a prima facie case of discrimination; 2) the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the business decision that was made; and 3) if the defendant carries that burden, the plaintiff must then show that the proffered reason was a mere "pretext" for discrimination. A major purpose of this burden-shifting technique, as refined in *Texas Department of Community Affairs v. Burdine*, is "to frame the factual issue with sufficient clarity so that the plaintiff will have

172. See Loeb v. Textron, 600 F.2d 1003, 1014 (1st Cir. 1979).


174. A prima facie case is established by showing that the plaintiff belonged to a protected class, that she applied for and was qualified for a job for which the employer was seeking applicants, that she was rejected, and that the position remained open and the employer continued to seek applicants for the position. *McDonnell Douglas*, 411 U.S. at 802. The Court noted, in *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 358 (1977), that establishing the prima facie case "serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection," the absence of a job vacancy or the lack of qualifications by the applicant. See *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1556 (11th Cir. 1983). The prima facie case serves to raise an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

175. *McDonnell Douglas*, 411 U.S. at 802. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981), the Supreme Court confirmed that the defendant's burden at this point is merely one of production, rather than one of persuasion. The defendant's articulated reason must be "clear and reasonably specific." *Id.* at 258.

176. *McDonnell Douglas*, 411 U.S. at 804. "Because of the employee's easy burden of establishing a prima facie case and the employer's normal ability to articulate some legitimate nondiscriminatory reasons for its actions, most disparate treatment cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination." *Miles v. M.N.C. Corp.*, 750 F.2d 867, 870 (11th Cir. 1985). The plaintiff is not necessarily required to introduce new evidence in order to show pretext. The Supreme Court noted in *Burdine* that the evidence introduced for the prima facie case may be considered by the trier of fact on the pretext issue and "there may be some cases where the plaintiff's initial evidence, combined with effective, cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine*, 450 U.S. at 255 n.10.

a full and fair opportunity to demonstrate pretext.”178 The burden of persuasion, however, remains at all times with the plaintiff.179

The plaintiff will prevail in a circumstantial evidence case if she satisfies the trier of fact “that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision,”180 but rather a pretext for unlawful discrimination.181 She may do this by showing that the employer’s proffered explanation is “unworthy of credence.”182 This method of proof has been described by one court as “permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation.”183

In simpler terms, a single motive case proved by circumstantial evidence proceeds along these lines: Plaintiff initially raises the inference

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178. Id. at 255-56.
179. Id. at 257.
181. The McDonnell Douglas-Burdine paradigm does lend itself to situations in which more than one reason may have contributed to the adverse employment decision. In a case analyzed in accordance with this model, the court determined that the plaintiff’s case showed that the defendant’s articulated reasons were pretextual in part—that is, that some but not all of the articulated reasons were pretextual. In Germane v. Heckler, 804 F.2d 366 (7th Cir. 1987), the defendant proffered five reasons for the employment decision. The district court found that two of these reasons were probably pretextual but that at least two of the reasons probably were not pretextual. The court of appeals sustained the district court’s finding that the plaintiff had not proved that discriminatory intent was the “but for” cause for the decision. 804 F.2d at 368. See discussion of “but for” causation infra text accompanying notes 207-09.
182. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). One recent case, Tye v. Board of Educ. of Polaris Joint Vocational School Dist., 811 F.2d 315 (6th Cir. 1987), cert. denied, 484 U.S. 924 (1987), illustrates the use of direct evidence to prove the falsity of the defendant’s proffered nondiscriminatory reason. To meet its burden of production in this case, the defendant submitted a list of ten reasons for its decision to retain a male rather than a female guidance counselor. Later in the trial, however, the school official solely responsible for making the decision testified that the stipulated reasons were “reconstructed” specifically for the litigation and that he in fact had no specific reason in mind when he made the employment decision. Id. at 319. This direct testimonial evidence was accepted by the court of appeals as proof of pretext; the plaintiff had “disprov[ed] all of the defendants’ proffered reasons.” Id. at 318. It is important to note that the evidence presented by the plaintiff in Tye was not direct evidence of discriminatory motive, but rather direct evidence that the nondiscriminatory explanation given by the defendant was not the true reason why the plaintiff was not retained. The plaintiff prevailed in this case without the need for any further proof that she was the victim of intentional discrimination. In proving the falsity of the proffered reasons, she had rebutted the defendant’s presumption of nondiscrimination. This presumption having been rebutted, the court was left with plaintiff’s initial, non-rebutted, prima facie case of discrimination.
183. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).
that the employment decision in question was discriminatory in nature. Defendant then articulates that Reason X (a nondiscriminatory reason) was in fact the reason for the employment decision. If Plaintiff rebuts Reason X by showing that the stated nondiscriminatory reason is merely a pretext for disguising impermissible discrimination, the court is then left with the original, now unrebutted showing of discrimination.\textsuperscript{184} Plaintiff is deemed to have established that the adverse employment decision was made “because of” her gender.\textsuperscript{185}

After the \textit{McDonnell Douglas-Burdine} model of proof was introduced, some courts had difficulty deciding whether to apply this model in cases in which direct evidence of bias actually was presented.\textsuperscript{186} The Supreme Court had observed in \textit{McDonnell Douglas}\textsuperscript{187} that Title VII fact situations vary and that the model outlined in that case was not necessarily applicable to every fact situation. The Eleventh Circuit, after examining district court cases in which \textit{McDonnell Douglas} was rigidly

\begin{itemize}
\item \textsuperscript{184} The \textit{Burdine} Court noted that if the employer is “silent” in the face of the prima facie case, “the court must enter judgment for the plaintiff because no issue of fact remains in the case.” \textit{Burdine}, 450 U.S. at 254.
\item \textsuperscript{185} Christine Craft attempted to prove her discrimination case through circumstantial evidence. She also attempted to use as direct evidence of discrimination the remark purportedly made by her superior that she was “too old, too unattractive and not deferential enough to men.” However, the district court refused to credit this testimony. \textit{Craft}, 572 F. Supp. at 874. Craft offered documentary and witness testimony indicating that the clothing standards at KMBC were stereotypical and were enforced more strictly for females than for males. Craft showed that the female newscasters were required to meet a standard of “professional elegance” while the male newscasters’ standard was “professional image.” Females were not allowed to wear the same outfit on the air for extended periods of time (3-4 weeks) while men could get away with wearing the same suit once or even twice a week. Craft was encouraged to wear “designer” clothes. Media Associates advised its female on-air personnel with “soft” hairstyles to dress in a masculine manner so as to reflect authority and credibility while females with short, mannish hairstyles were told to soften their clothing styles lest they appear too aggressive. \textit{Craft}, 766 F.2d at 1214. The district court held the standards permissible in light of prevailing community standards, and thus did not constitute a pretext for discrimination. \textit{Craft}, 572 F. Supp. at 876-79. The court accepted Metromedia’s articulated nondiscriminatory reason (Craft’s low ratings in viewer polls) as the “real” reason for demoting Craft. \textit{Id.}
\item \textsuperscript{186} These courts were perhaps confused by the discussion in \textit{Burdine} regarding the allocation of burdens. The \textit{Burdine} Court described how the defendant’s successful articulation of a legitimate reason ordained that the plaintiff “now must have the opportunity to demonstrate” pretext. \textit{Burdine}, 450 U.S. at 256. The Court went on to note that the plaintiff’s burden of persuasion at this stage “now merges with the ultimate burden” of proving intentional discrimination, either directly or indirectly. \textit{Id}. Noting this merger concept, courts attempted to use the \textit{McDonnell Douglas-Burdine} model as a “Procrustean bed within which all disparate treatment cases must be forced to lie.” Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556 (11th Cir. 1983), \textit{cert. denied}, 467 U.S. 1204 (1984). See Perryman v. Johnson Products Co., 698 F.2d 1138, 1143 (11th Cir. 1983); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982).
\item \textsuperscript{187} \textit{McDonnell Douglas}, 411 U.S. at 802 n.13.
\end{itemize}
applied, concluded in *Bell v. Birmingham Linen Service,*\(^{188}\) that the model "pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking."\(^{189}\) The court stated that direct evidence of discrimination, if accepted by the trier of fact, proved the "ultimate issue of discrimination" rather than a mere prima facie case.\(^{190}\) "If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically. . . ."\(^{191}\)

The important function of direct evidence, which is illustrated by the Eleventh Circuit's approach,\(^{192}\) is that direct evidence can serve to carry the plaintiff's burden of persuasion on the issue of discriminatory intent. If the direct evidence is strong enough, a defendant's rebuttal that consists merely of articulating a nondiscriminatory reason is inadequate.\(^{193}\) The direct evidentiary showing will allow the plaintiff to short-

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189. *Bell,* 715 F.2d at 1556. The United States Supreme Court later made this same statement in an Age Discrimination in Employment Act context in *Trans World Airlines v. Thurston,* 469 U.S. 111, 121 (1985) ("the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination"). *But see infra* notes 192, 212-14 and accompanying text.

190. *Bell,* 715 F.2d at 1557.

191. *Id.*

192. *See also* Buckley *v. Hospital Corp. of America,* 758 F.2d 1525 (11th Cir. 1985) (lower court's directed verdict for defendant reversed where plaintiff presented direct evidence of discriminatory intent); Miles *v. M.N.C. Corp.,* 750 F.2d 867 (11th Cir. 1985) (defendant bears heavier burden when case is proved by direct evidence). This approach has also been adopted by the Sixth Circuit, in the context of a mixed motive case, Blalock *v. Metal Trades, Inc.,* 775 F.2d 703 (6th Cir. 1985), and has been applied in age discrimination cases in the Fourth and Tenth Circuits. Spagnuolo *v. Whirlpool Corp.,* 641 F.2d 1109 (4th Cir. 1981); EEOC *v. Wyoming Retirement Sys.,* 771 F.2d 1425 (10th Cir. 1985). In *Craft,* the Court of Appeals for the Eighth Circuit refused to consider whether it should adopt the approach because it found that the district court had not credited any of Craft's proffered "direct" evidence. 766 F.2d at 1211. In *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), an age discrimination case, the Supreme Court seemed to adopt the direct evidence doctrine when it said "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." *Id.* at 121. The "direct evidence" in this case was a policy that forced pilots to retire at age 60. It has been argued that this "holding" by the Supreme Court, which may be dicta (the burden of proof issue was not raised by the parties), is questionable due to its reliance on easily distinguishable precedents. *See Edwards,* *supra* note 188, at 3-4. The age-based retirement policy at issue in *Thurston* constituted overt disparate treatment and, consequently, there was no need to engage in the causation showings required in *Craft* and *Hopkins.*

193. *Lee v. Russell County Bd. of Educ.,* 684 F.2d 769, 774 (11th Cir. 1982).
circuit the *McDonnell Douglas-Burdine* analysis. In a single motive case, the plaintiff's burden has been carried if the trier of fact finds from direct evidence that a discriminatory motive influenced the employment decision.

Direct evidence can serve a variety of other functions in a disparate treatment case. In the Eleventh Circuit approach described above, strong direct evidence of a discriminatory statement could serve to circumvent the *McDonnell Douglas-Burdine* process and to carry the plaintiff's burden of proving that an impermissible factor motivated the employment decision. In a *McDonnell Douglas-Burdine* circumstantial evidence case, direct evidence still may be introduced, not for the purpose of proving the existence of an impermissible factor, but rather for proving pretext. For example, the plaintiff may offer direct evidence that the defendant's articulated nondiscriminatory reason was fabricated.

In both circumstantial and direct evidence cases, if the defendant is deemed to have been motivated either by a discriminatory or a nondiscriminatory reason, the court does not engage in the process of finding a causal connection between the discriminatory factor and the employment decision. A finding of causation is inherent in the determination that the discriminatory reason was the "real" reason for the outcome. In some cases, however, direct evidence may in fact demonstrate the existence of both permissible and impermissible factors, thus forcing the courts into a further process of deciding the degree to which the employment decision was affected by either of these factors.

194. See the discussion of the variety of forms which "direct evidence" can take in a disparate treatment case in Edwards, *supra* note 188, at 14-15.

195. See, e.g., *discussion supra* note 182.

196. In *Bell*, for example, the Eleventh Circuit initially attempted a single motive analysis, but eventually reached a decision that implicitly recognized the existence of multiple motives. In a footnote, the court observed that "it is unclear whether this case presents a 'mixed motive' situation." *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1558 n.9 (1983). The plaintiff presented direct evidence of a discriminatory statement made in the context of the employment decision. The supervisor responsible for promotions had said that if he promoted a woman to the washroom, "every woman in the plant would want to go into the washroom." *Id.* at 1553. The defendant countered with evidence that the plaintiff was originally given the job in question, but that certain additional responsibilities required by the job could not be performed by a woman. The defendant also offered evidence that the male who had eventually gotten the job had superior qualifications for the position. The court rejected the relevancy of the latter evidence, framing the question on remand as whether the defendant had imposed the additional responsibilities on the plaintiff because of her gender. *Id.* at 1552. The court attempted to narrow the question to either/or status: either the decision was motivated by a discriminatory reason (artificially imposed responsibilities) or a nondiscriminatory reason (legitimate additional responsibilities). Although the court found the direct evidence of the discriminatory remark to be "highly probative evidence of illegal discrimination," it did not end its analysis after crediting that evidence. It stated that the direct evidence carried the plaintiff's burden of
Single motive analysis is based on the assumption that one reason (either discriminatory or not) motivated the employment decision at issue. Mixed motive analysis in Title VII cases developed with the realization that an either-or approach to employment decisions does not reflect realistically the variety of factors at play in the decisionmaking process. As one commentator has noted, this type of analysis "reflects the contrast between the discrete nature of the regulatory prohibition proving discrimination. But the court extended the liability determination to give the defendant a chance to rebut the plaintiff's case. The Eleventh Circuit stated that the defendant could only rebut the plaintiff's showing by proving that the same employment decision would have been reached absent plaintiff's gender. Id. at 1558 n.13 (citing Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977)). The court found it "particularly appropriate" that the defendant should bear the burden of persuasion as to the determinative nature of the nondiscriminatory reason: the defendant "clearly has greater access to proof of these facts than does [the plaintiff]." Id. In this case, the court recognized the possible existence of two or more factors influencing the employment decision. The burden placed on the defendant was not that of negating the discriminatory factor (that is, of negating that which was proved by the direct evidence), but rather of proving that another, nondiscriminatory factor was determinative. 

"Mt. Healthy" was not an employment discrimination case brought under Title VII. In that case, a school teacher, who had engaged in a variety of questionable activities (arguing with school officials, making obscene gestures to students) was fired after he released the school's teacher dress code to a radio station. The Court noted that the burden fell first on the plaintiff to prove that this constitutionally protected conduct had been a "substantial factor" in the decision. Once the teacher carried this burden, however, the burden of proof shifted to the school board to show that the same decision would have been reached absent the constitutionally protected conduct. Mt. Healthy, 429 U.S. at 287. In Mt. Healthy, the court provided the defendant the opportunity to prove that the teacher would have been fired even if he had not engaged in the constitutionally protected activity. The lower court, upon finding that one of the several reasons for firing the plaintiff was impermissible, ordered reinstatement and backpay without giving the defendant a chance to respond. Id. at 284.

The degree of overlap between the single motive and mixed motive methods of analysis was made clear by the variety of approaches taken by the parties and the amici curiae who filed briefs in the Hopkins case. The D.C. Circuit Court of Appeals characterized the case as a mixed motives case. Hopkins, 825 F.2d at 470. Price Waterhouse argued that the mixed motive analysis was inappropriate because there was no showing that the stereotyped remarks had a causal link with the promotion decision. Therefore, they argued, the case should have been analyzed under the McDonnell Douglas-Burdine paradigm. Brief for Petitioner, supra note 58, at 42-49. An amicus curiae brief filed in support of Price Waterhouse by the Equal Employment Advisory Council ("EEAC") used the single motive, McDonnell Douglas-Burdine analysis without ever directly characterizing the case as a "single motive" case. Brief of the Equal Employment Advisory Council in Support of the Petitioner at 13-16, Price Waterhouse v. Hopkins, 109 S. Ct 1775, (1989) (No. 87-1167) [hereinafter EEAC Brief]. In its amicus curiae brief filed in support of Hopkins, the AFL-CIO referred to the case as a "relatively straightforward mixed motive case." Brief of AFL-CIO, as Amicus Curiae at 1. The United States, as amicus curiae, argued that the same analysis should apply, regardless of whether the case was deemed a "single motive" or a "mixed motive" case. Brief for the United States as Amicus Curiae at 16, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167) [hereinafter U.S. Brief]. The brief filed by civil rights and women's rights groups argued that neither single motive nor mixed motive analysis was appropriate but rather the analysis used in "sex-plus"
[against discrimination] and the richness of human interactions. . . . [P]eople’s motives are complex and multi-faceted. It can rarely be said that any single stimulus is totally responsible for a particular act; many factors normally contribute.”198

Thus, a more extensive type of analysis is appropriate when several factors have contributed to a particular employment decision. Assuming the plaintiff can show that at least one of these factors was discriminatory, the issue then is one of connection and causation—in what respect and to what degree is the discriminatory factor correlated with the unfavorable outcome? The first question to be resolved is whether the discrimination in the particular workplace was connected directly to the employment decision or merely consisted of discriminatory attitudes “in the air” at the time the decision was made. If a direct connection is present, the second question is the degree to which the discriminatory factor affected the decision—that is, whether it was “a” factor in the decision, a “motivating” factor, or a “substantial” factor. Finally, once it is shown that a discriminatory factor contributed directly and in the appropriate degree to the decision’s outcome, a court must then determine whether the decision would have been the same absent the discriminatory factor. In conjunction with this determination, a court must decide which party should bear the burden of proving the various facets of causation. A court also must ascertain whether the issues of violation and remedy can be separated at any point or whether there is no violation of Title VII unless there is sufficient causation shown to result in an order for the hiring, reinstatement, or promotion of the plaintiff.

cases in which a facially neutral employment requirement is applied disproportionately to one gender. NOW Brief, supra note 108, at 34-36.

198. Stonefield, supra note 167, at 113. Another perspective on the evolution of mixed motive analysis is that courts were forced to develop a new form of analysis in reaction to the increased sophistication of employers in hiding discriminatory motives. At the time Title VII was passed, a job advertisement which noted that “women need not apply” was not uncommon. As the scope of Title VII became more apparent, however, employers that really wanted to discriminate were forced into more subtle forms of discrimination—e.g., unnecessary height/weight requirements. It should be noted, however, that the concept of mixed motives was discussed in the legislative history surrounding Title VII. An amendment to Title VII was introduced in the Senate that would have changed the causation language of Section 703(a) to prohibit employment decisions made “solely because of” sex (race, religion, etc.). 110 CONG. REC. 13837 (1964). Both Houses of Congress rejected the amendment. In discussing this rejection, Senator Case noted that the proposed language presumed the employment decision had only one motivation, the discriminatory one. He observed that, “If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.” 110 CONG. REC. 13837 (1964).
a. Initial Showing of a Causal Connection

Before standard of causation issues can be raised in a mixed motives case, there must be some initial showing that a causal connection existed between the discriminatory factor and the employment decision at issue. In Hopkins, Price Waterhouse argued that the stereotyped remarks made about Hopkins and other female candidates showed no more than discrimination "in the air" and bore no direct connection to the negative decision on Hopkins' promotion. The accounting firm attacked Dr. Fiske's conclusion that the stereotyped remarks actually were related to the employment decision on four grounds, stating: 1) that the remarks were made primarily by Hopkins' supporters; 2) that some of the remarks pertained to women who had in fact been promoted; 3) that the persons making the remarks had little or no say in the actual decision; and 4) that the implications of the remarks were "either utterly benign or, at worst, ambiguous, requiring a healthy imagination to assign illicit motivation to them."
The Supreme Court assigned little weight to these arguments by Price Waterhouse. In the plurality opinion, Justice Brennan observed that the causal connection between the remarks and the decision was obvious. He referred to Dr. Fiske's testimony as "icing on Hopkins' cake," noting that "it takes no special training to discern sex stereotyping" in some of the partners' remarks. Brennan pointed out that the method by which Price Waterhouse chose partners included a reliance on the comments of all partners, regardless of the stereotyped nature of the comments. He also observed that a "negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate...." Justice O'Connor, in her concurring opinion, characterized the stereotyped remarks as "direct evidence" that Price Waterhouse had allowed an impermissible factor to play a part in its decisionmaking process. Having disposed with this initial inquiry, the Court went on

Supp. at 869. See also Vant Hul v. City of Dell Paris, 428 F. Supp. 828, 831 (1978) (female manager was replaced because the mayor was convinced that the job "needs a man"). Compare the foregoing with Fields, in which the court found that the "pervasively sexist attitude on the part of the male members of the sociology department" constituted direct evidence of discrimination against the female teacher they failed to tenure. 817 F.2d at 935. The American Psychological Association bolstered the showing of a causal link in its amicus curiae brief, describing the three accepted factors for promoting stereotypes in the workplace (rarity of the stereotyped individual within the evaluation setting, ambiguity of the criteria used to make the evaluation, and paucity of information available to evaluators) and stating that Dr. Fiske had clearly demonstrated the existence of these factors at Price Waterhouse and that the firm had taken no effective steps to cure this problem. Brief of APA, supra note 58, at 20-25.

201. Hopkins, 109 S. Ct. at 1793.
202. Id.
203. Id. at 1781. At Price Waterhouse, a senior manager may be considered for partnership when the partners in a local office make a partnership nomination. Other partners are invited to submit either "long" or "short" form written comments on the candidate. Not every partner, however, submits comments on each candidate. After reviewing the comments and interviewing the partners who submitted them, the Admissions Committee recommends either "accept", "hold," or "deny" to the Policy Board. The Policy Board then decides whether to submit the candidate to the entire partnership for a vote, to hold, or to reject. Id.
204. Id. at 1794.
205. Id. at 1803. Justice O'Connor characterized the evidence as follows:
It is as if Ann Hopkins were sitting in the hall outside the room where the partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decision-making process that her gender was a major reason for the rejection of her partnership bid.
Id. at 1802. Justice O'Connor would not, however, have been content merely with Dr. Fiske's testimony that gender "played a role" in the decision. The Justice noted that gender and race always "play a role" in employment decisions. Rather, Justice O'Connor would require plaintiffs to show that the role played by the impermissible factor was "substantial". Id. at 1803.
206. Justice Kennedy, though agreeing that "[e]vidence of use by decisionmakers of sex
to the more complex analysis of whether the impermissible stereotyping was the legal "cause" of the negative employment decision.

b. Standard of Causation Prior to Hopkins

Assuming that a causal link between the stereotyped assertions and the employment decision has been shown, the next step in a disparate treatment case of this type is to determine the degree to which the stereotyping affected the employment decision. The two intertwined issues arising here are the weight the stereotyping factor had in the decision and the allocation of the burden of proving that weight. By far the most stringent causation standard applied by courts in mixed motive cases prior to Hopkins was that which forced the plaintiff to carry the burden of proving "but for" causation.207 Borrowed from tort law,208 the "but for" test comprises a showing that the impermissible factor (e.g., sex stereotyping) was the "determining" factor in the employment decision—that is, the decision would have been favorable to the employee "but for" the sex stereotyping. This test also is referred to as the "same decision" test in that it must be shown that the same decision would have been made absent the impermissible consideration of the plaintiff's sex, as evidenced by the stereotyping. An important difference among courts that recognize this test is that some courts assign the burden of showing "but for" causation to the plaintiff rather than to the defendant.209

stereotypes is . . . quite relevant to the question of discriminatory intent," refused to separate the finding of a causal connection from the determination that the stereotypes were the legal cause of the negative decision. Id. (Kennedy, J., dissenting). In a footnote, he spoke disparagingly of the district court's reliance on the testimony of Dr. Fiske, stating that any "plaintiff who engages the services of Dr. Fiske should have no trouble showing that sex discrimination played a part in any decision." Id. at 1813 n.5.

207. See Stonefield, supra note 167, at 113-21; Brodin, supra note 170, at 301-10.

208. See Brodin, supra note 170, at 313-16.

209. Prior to Hopkins, the Supreme Court had said little about the standard of causation applicable in a Title VII disparate treatment test. Courts in the First, Third, and Seventh Circuits adopted the stringent causation standard, placing the burden of showing "but for" causation on the plaintiff. Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979) (age discrimination case); Mack v. Cape Elizabeth School Bd., 553 F.2d 720 (1st Cir. 1977). However, in Fields v. Clark University, 817 F.2d 931 (1st Cir. 1987), the First Circuit Court of Appeals appeared to retreat somewhat from its earlier decisions when it determined that, in cases in which direct evidence of discrimination is present, the burden shifts to the defendant to show that the same employment decision would have been made absent the discriminatory factor. Id. at 937. See Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987); Wheeler v. Snyder Buick, Inc., 794 F.2d 1228 (7th Cir. 1986); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) (age discrimination case). These courts drew their authority from both the language of Title VII and the case law construing that language. They began by pointing out that Title VII prohibits discrimination "because of" an individual's race, gender, etc. See McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 664 (7th Cir. 1987); Loeb v. Textron, 600 F.2d
Placing the “but for” burden on the plaintiff requires the plaintiff to prove three things. First, the plaintiff must show the existence of a discriminatory factor in the employment context. Second, the plaintiff must show that the discriminatory factor directly affected the employment decision; a mere showing of discrimination in the employment unit at large is not enough. Finally, the plaintiff must show that the employment decision would have been favorable “but for” the employer's impermissible consideration of her gender. Theoretically, these showings can be made with direct evidence, with circumstantial evidence using the McDonnell Douglas model of proof or by a combination of the two. The court’s assessment of liability depends, finally, upon whether the

1003, 1019 (1st Cir. 1979) (construing “because of” language of the Age Discrimination in Employment Act). They then cited a footnote from McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). In that case, in the context of a definition of “pretext,” the United States Supreme Court noted a plaintiff is not required to show that the impermissible factor was the sole cause of the unfavorable employment decision; rather, “no more is required to be shown than that [the impermissible factor] was a ‘but for’ cause.” Id. Courts coupled this quote with the Burdine statement that the ultimate burden of persuasion remains at all times with the plaintiff and concluded that the plaintiff bears the burden of proving “but for” causation. In a footnote in Hopkins, Justice Brennan explained that McDonald was distinguishable from the case at bar because it was a “pretext” case and thus did not involve mixed motives. He also stated that the footnote in McDonald “does not suggest that the plaintiff must show but-for cause; it indicates only that if she does so, she prevails.” Hopkins, 109 S. Ct. at 1785 n.6.

The courts that adopted this standard of “but for” causation usually did so in the context of a McDonnell Douglas analysis. See Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1233 n.4 (7th Cir. 1986), in which the court noted that the “but for” test is “embodied in the third step of the McDonnell Douglas test.” See also Fields v. Clark University, discussed supra note 198, in which the First Circuit shifted the burden of proving the “but for” cause to the defendant if there was direct, rather than circumstantial, evidence of discrimination. In Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), the Third Circuit noted that a causation analysis is relevant at the “pretext” stage of a McDonnell Douglas case. Id at 915. The Lewis court did not characterize the case as a “mixed motives” case. A comment the court made in a footnote, however, seemed to imply that the “but for” analysis, while appropriate in a mixed motive case, may serve to narrow the mixed motives down to a single motive. The court noted that “[t]here may be several determinative factors which lead to any given decision, all of which can be ‘but for’ causes of the challenged action. The ultimate ‘but for’ test, however, subsumes within its determination all such factors.” Id at 917 n.8.


211. Congress rejected a proposed amendment to Title VII that would have established a “sole factor” test. 110 Cong. Rec. 13837-38 (1964). See discussion supra note 198. The dissenting judge in Lewis v. University of Pittsburgh, 725 F.2d 910, 922 (3d Cir. 1984) (Adams, J., dissenting), argued that placing the “but for” burden on the plaintiff amounted to little more than a “sole basis” test.

212. Cases such as Lewis, 725 F.2d at 915 and Snyder, 794 F.2d at 1233 n.4, indicate that the “but for” test is in fact incorporated into the third step of the McDonnell Douglas model.

213. LaMontagne v. American Convenience Products, 750 F.2d 1405 (7th Cir. 1984) (court applied “but for” standard to plaintiff’s attempts to prove age discrimination using both direct evidence and the McDonnell Douglas model).
plaintiff has proved that the same employment decision would have been made absent consideration of the impermissible factor.

Prior to Hopkins, several other circuit courts took the position that the plaintiff's burden in a mixed motive case was not to show "but for" causation, but rather to show that the impermissible factor was a "significant" or at least a "discernible" factor in the employment decision. This burden obviously includes the burden of proving an initial causal connection between the decision and discriminatory animus present in the workplace. It does not force the plaintiff, however, to show that the impermissible factor was the determining factor in the decision.

Some courts that adopted this approach pointed out that it was a particularly appropriate approach for mixed motive cases. They agreed with the notion that a "but for" finding is inherent in the McDonnell Douglas analysis if the pretext eliminates all possible nondiscriminatory reasons underlying the employment decision. They noted, however, that, in a mixed motive case, "a finding of pretext does not necessarily translate into Title VII liability." Rather, direct or circumstantial evidence may serve merely to show that there was a discriminatory factor at work in the employment decision.

Most courts that required the plaintiff to demonstrate an impermissible factor played a role in the employment decision still used the "but for" causation test. The difference, however, was that once the plaintiff demonstrated a discriminatory factor, these courts shifted the burden to the defendant to show that the same employment decision would have been made absent consideration of the impermissible factor.

214. See Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) (age discrimination case); Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980).

215. See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985).

216. Haskins v. United States Dept. of Army, 808 F.2d 1192, 1198 n.3 (6th Cir. 1987). See also Blalock v. Metal Trades, Inc. 775 F.2d 703, 709 n.8 (6th Cir. 1985) (McDonnell-Douglas test is designed to ascertain true reason for discharge).

217. See Perryman v. Johnson Products Co., 698 F.2d 1138, 1143 (11th Cir. 1983); Spanier v. Morrison's Management Serv., 822 F.2d 975, 979-80 (11th Cir. 1987); Blalock v. Metal Trades, Inc., 775 F.2d 703, 711 (6th Cir. 1985). But see Smith v. State, 749 F.2d 683, 687 (11th Cir. 1985) (indicating that this type of analysis was available only if the plaintiff had proved discrimination by direct evidence).

218. This approach is similar to and in some senses indistinguishable from the direct evidence approach taken by the Eleventh Circuit, discussed supra text accompanying notes 188-95. The courts base their approach on three United States Supreme Court cases that were not decided in the context of Title VII. See Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (first amendment case discussed supra note 196); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (fourteenth amendment); NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (unfair labor practices case discussed infra at note 220). See Brodin, supra note 170, at 304-08, for a discussion of Mt. Healthy and
Some courts considered this causation showing at the liability phase of the trial. In these cases, a "same decision" showing by the defendant was similar to an affirmative defense. The plaintiff demonstrated that the defendant had discriminatory intent that affected the employment decision at least in part. The defendant then was required to show that, though it may have considered impermissible factors, the decision would have been the same absent those factors. If the defendant makes this showing, there is no Title VII liability.

Other courts allowed the defendant to make a "same decision" showing only at the remedy phase of the trial. These courts borrowed

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**Village of Arlington Heights.** See also discussion of evolution of burden of proof theories from labor law cases in Edwards, supra note 188, at 4-8.


220. Blalock, 775 F.2d at 711. This approach is borrowed from the Supreme Court's decision in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). In this unfair labor practice case, the Court accepted the NLRB's position that once certain union-related conduct has been shown to have been a "motivating" factor in the discharge of an employee, the burden shifts to the employer to prove that the same decision would have been made absent this union activity. The Court justified this burden-shifting as follows:

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Id. at 403. In affirming the approach taken by the NLRB, the Supreme Court also affirmed the NLRB's reasoning in an earlier case, NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). The labor cases are closely analogous to Title VII cases in that the law in question, § 158(a) of National Labor Relations Act, 29 U.S.C. § 158(a) (1982), makes it an "unfair labor practice for an employer... (1) to interfere with, restrain, or coerce employees in the exercise of [the employee's right to engage in union activity] ... (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In Wright Line, the First Circuit refused to permit the NLRB to place the burden on the employer to prove that the same decision would have been made absent the improper consideration of an employee's union activity. The court distinguished Mt Healthy, discussed supra note 196, from "most labor cases" in that the employer in Mt Healthy admitted that the teacher had been fired due, at least partially, to his speech activity, while the employer in most labor cases "vigorously disputes the determining reason for the discharge." Wright Line, 662 F.2d at 906. The First Circuit stated that the Mt Healthy burden-shifting applied only to the issue of remedy, after a violation of the Constitution had been proved. Id. In Transportation Management, the Supreme Court did not address the inaccuracy of this distinction, stating only that the "analogy to Mt Healthy drawn by the [NLRB] was a fair one." 462 U.S. at 403.

221. Blalock, 775 F.2d at 712.

222. See, e.g., Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (print shop supervisor); Marotta v. Usery, 629 F.2d 613, 618 (9th Cir. 1980) (reverse discrimination, Dept. of Labor); Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976) (hospital employee). See also Smallwood v. United Airlines, Inc., 728 F.2d 614 (4th Cir. 1984) (age discrimination case). For a discussion
this approach from Title VII class action cases, in which the plaintiff initially makes a showing of a pattern of discriminatory activity by the employer.223 Once liability is established, the employer has the opportunity to show for each individual plaintiff that the same employment decision would have been made for that plaintiff absent the discriminatory motive.224 The employer's liability is established once the discrimination showing is made. Thus, the plaintiff may be entitled to some combination of an injunction, a declaratory judgment, and attorneys' fees.225 This finding of liability is deemed appropriate to the Title VII purpose of "the rooting out and deterrence of job discrimination."226 Before remedies such as backpay, promotion, or reinstatement are awarded, however, the defendant is allowed to prove that the plaintiff would not have had a favorable decision absent the consideration of the impermissible factor. This causation finding prevents the plaintiff from being awarded a windfall to which she otherwise would not have been entitled.227

Of those courts that placed the "same decision" burden on the defendant, at least two circuits decided that the defendant should carry this burden by clear and convincing evidence rather than merely by a preponderance of the evidence.228 One judge on the D.C. Circuit noted that this

of Bibbs and other cases which have separated the liability and remedy findings, see Title VII Mixed-Motive Cases: The Eighth Circuit Adds a Second Track of Liability and Remedy, 36 Drake L. Rev. 155 (1987); Comment, Bibbs v. Block: Standard of Causation and Burden of Proof in an Individual Disparate Treatment Action under Title VII, 42 Wash. & Lee L. Rev. 1439 (1985) (authored by Robert W. Humphries).


224. See, e.g., East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (discriminatory no-transfer rule and seniority system); International Bhd. of Teamsters v. U.S., 431 U.S. 324 (1977) (discrimination in hiring line drivers); Franks v. Bowman Transp Co., 424 U.S. 747 (1976) (discrimination in hiring truck drivers); Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976), was in fact a class action case. It has been argued, although unsuccessfully, that the D.C. Circuit's opinion in Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983), was designed to limit this bifurcated approach to class actions. See Haskins v. United States Dept. of Army, 808 F.2d 1192, 1198 n. 2 (6th Cir. 1987).

225. Bibbs, 778 F.2d at 1322-24. The major criticism of the Bibbs approach has come from a court which objected to the fact that the Bibbs court only required the plaintiff to prove that discrimination played "some part" (rather than a substantial part) in the employment decision. See Blalock, 775 F.2d at 712.

226. Bibbs, 778 F.2d at 1324.

227. See Brodin, supra note 170, at 323-26. This solution to the causation problems in mixed motive cases was originally proposed by Brodin.

more stringent standard "may well discourage unlawful conduct by em-
ployers." Until the D.C. Circuit decision in Hopkins, this clear and
convincing standard was applied only when the defendant was using the
"same decision" test to defeat retroactive relief rather than to rebut the
showing of liability.

c. Standard of Causation after Hopkins

In his discussion of the standard of causation in Hopkins, Justice
Brennan accurately characterized the current state of the law on this is-
ssue as one of "disarray." As discussed above, courts had created stan-
dards of causation ranging from the impermissible factor playing "any"
part in an employment decision, to the factor playing a "discernible" or
"motivating" part, to the factor playing a "substantial" part, and finally
to requiring the factor to play the determinative part in the decision.
Additionally, courts had intertwined inextricably the standard of causa-
tion with the allocation of burdens of proof, and had vacillated between
the causation standard as a necessary component in the liability determi-
nation, or only in arriving at a remedy. The Supreme Court's decision
purported to settle all three of these problems. In reality, after sifting
through the semantics of the plurality opinion, the two concurrences,
and the dissent, it remains unclear exactly what has been accomplished
by Hopkins.

Justice Brennan began the plurality opinion by disclaiming the "but-
for" standard of causation. He pointed out that the prohibition in Ti-
tle VII against actions taken "because of" an individual's gender "meant
to condemn even those decisions based on a mixture of legitimate and
illegitimate considerations." He concluded that any employer who
took gender into account, who made gender a relevant factor in the deci-
sionmaking process, had violated Title VII. He did not end the liabil-
ity inquiry at this point, as might have seemed logical in the construct he
had created. Rather, he went on to state that an employer who was
shown to have allowed gender to play a "motivating part" in an employ-
ment decision still would have the opportunity to avoid liability by prov-
ing that the same decision would have been made absent the

229. Toney, 705 F.2d at 1373 (Tamm, J., concurring).
231. He explained that the footnote in McDonald v. Santa Fe Transp. Co., discussed supra
note 209, did not require a showing of but for causation, but rather indicated that a plaintiff
who did make such a showing would win. He also noted that McDonald was a pretext case
which he distinguished from the "mixed motives" case at bar. 109 S. Ct. at 1785 n.6.
232. Id. at 1785.
233. Id.
impermissible factor.\textsuperscript{234} Justice Brennan likened this showing on the part of the employer to an “affirmative defense,”\textsuperscript{235} explaining that it mirrored the balance in Title VII between employee rights and employer prerogatives.\textsuperscript{236}

Justice Kennedy criticized the plurality’s inconsistency, pointing out that Justice Brennan had denounced the “but for” standard of causation and yet re-incorporated it into the liability showing by allowing the employer to prove that the “same decision” would have been made.\textsuperscript{237} In essence, Justice Brennan had not changed the standard of causation; he had merely shifted the burden of meeting that standard to the employer. Justice Kennedy criticized this burden-shifting, finding that it gutted the long-accepted \textit{McDonnell Douglas-Burdine} order of proof.\textsuperscript{238} He stated that paradigm was adequate for mixed motive cases as well as pretext cases and that the difficulties in enforcing this new “dual burden-shifting mechanism” would outweigh greatly any of its benefits.\textsuperscript{239}

In her concurring opinion, Justice O’Connor sought to find a middle ground between the plurality and the dissent. She advocated the burden-shifting mechanism but limited the shifting to those cases in which the plaintiff has shown by direct evidence that the employer placed “substantial” reliance on impermissible factors in making the employment decision.\textsuperscript{240} She agreed with Justice Kennedy that the “but for” standard remained the appropriate standard of causation. She also pointed out,

\begin{footnotesize}
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\item \textsuperscript{234} \textit{Id.} at 1787-88.
\item \textsuperscript{235} \textit{Id.} at 1788.
\item \textsuperscript{236} \textit{Id.} at 1784-85. Justice Brennan cited \textit{Mt. Healthy} and \textit{Transportation Management}, the same cases used by the Eleventh Circuit in \textit{Bell}, discussed supra text accompanying notes 189-95, when it originally departed from the \textit{McDonnell-Douglas-Burdine} paradigm in direct evidence cases.
\item \textsuperscript{237} \textit{Id.} at 1808-09 (Kennedy, J., dissenting).
\item \textsuperscript{238} \textit{Id.} at 1810-11. Justice Kennedy also criticized the plurality’s reliance on \textit{Mt. Healthy} and \textit{Transportation Management}, finding them irrelevant to the Title VII discussion. \textit{Id.} at 1811.
\item \textsuperscript{239} \textit{Id.} at 1812. Justice Kennedy noted that courts would have difficulty deciding when to apply the \textit{Hopkins} mechanism because they first would have to determine whether a factor had played a “substantial” role and whether evidence was “direct,” “indirect” or “circumstantial.” \textit{Id}. In fact, none of these terms were used by Justice Brennan in the plurality opinion. Rather, it was Justice O’Connor who had insisted that the impermissible factor play a “substantial” role and that the evidence be direct. Justice Kennedy also stated that “almost every plaintiff is certain to ask for a \textit{Price Waterhouse} instruction.” \textit{Id}. This statement is somewhat puzzling because Title VII plaintiffs are not entitled to jury trials. Finally, Justice Kennedy pointed out that in age discrimination cases (in which jury trials are allowed), it might become standard practice to bifurcate the trial, requiring the jury first to make a finding of whether the impermissible consideration played a substantial role in the decision and then as to whether the employer had adequately made a “same decision” showing. \textit{Id.}
\item \textsuperscript{240} \textit{Id.} at 1801 (O’Connor, J., concurring).
\end{itemize}
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however, that both evidentiary probabilities and the Title VII purpose of deterring discrimination in any form justified a departure from the *McDonnell Douglas-Burdine* paradigm in certain cases. Justice O'Connor argued that Hopkins had "taken her proof as far as it could go." Hopkins had proved not only that Price Waterhouse had allowed stereotyped attitudes to play a part in her promotion decision but also that the part these attitudes had played had been a significant one. To require the employer at this point to bear the risk of nonpersuasion, she reasoned, is consistent with Title VII's purpose of deterring discriminatory conduct.

It is difficult to articulate the effect of the *Hopkins* opinions. Clearly, the burden of proving "but for" causation no longer is on the plaintiff in all Title VII cases. Also, the showing by the employer that the same decision would have been made absent the impermissible consideration remains a part of the liability finding and does not constitute a separate showing designed to limit relief. Finally, the employer need only carry this burden by a preponderance of the evidence, rather than by clear and convincing evidence. The important issue of the weight that an impermissible factor must have carried in an employment decision in order to shift the burden to the employer, however, remains in a limbo between the "motivating factor" standard of the plurality and the "substantial factor" standard of Justice O'Connor.

Perhaps what the *Hopkins* case failed to accomplish is more relevant to the status of professional women. The Court chose to treat the case as a typical mixed motives case. In such a case, a negative employment

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241. *Id.* Justice O'Connor distinguished the *McDonnell Douglas/Burdine* paradigm as one that applied primarily in cases in which there was only circumstantial evidence of discriminatory intent. She noted that an employer is not "entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII." *Id.*

242. *Id.* at 1802.

243. *Id.* at 1804. Justice O'Connor looked to the decisions in Title VII class action cases as precedent for her approach. *Id.* at 1799. See supra note 223 and accompanying text.

244. The Supreme Court remanded the case to the court of appeals because that court had required Price Waterhouse to prove the same decision would have been made by clear and convincing evidence. *Id.* at 1792.

245. Justice Kennedy, however, disagreed that a model of proof different from the *McDonnell Douglas-Burdine* paradigm was necessary for mixed motives cases. He insisted that paradigm could be applied either in cases where the plaintiff sought to show pretext or in cases where the plaintiff sought to show directly that discrimination motivated the employer's actions. *Id.* at 4485 (Kennedy, J. dissenting). Two decisions handed down since *Hopkins* indicate that the circuit courts are readily distinguishing "pretext" cases from "mixed motives" cases and are relying on *Hopkins* as the model of proof for the latter. Waltman v. International Paper Co., 875 F.2d 468, 481 (5th Cir. 1989); McMillian v. Svetanoff, 878 F.2d 186, 190 (7th Cir. 1989).
decision is motivated by a combination of factors, only some of which are legitimate. If we assume for the sake of simplicity that two reasons, a discriminatory reason and a nondiscriminatory reason, are shown to have motivated the decision, the question in a mixed motives case is whether the same decision would have been made absent the discriminatory reason. Justice Brennan would have the defendant bear the burden of proof in this case, while Justice Kennedy would have the plaintiff prove that the discriminatory reason "tipped the scales" against the plaintiff. In either case, in order for the plaintiff to prevail, a court must conclude that the discriminatory reason carried at least fifty-one percent of the weight in the decision.246

The application of this reasoning is flawed in two respects. First, as Justice Kennedy pointed out, if both reasons contributed equally to the decision (that is, if either the discriminatory or the legitimate reason, standing alone, would have produced the result), the plaintiff will lose because it could be shown that the same decision would have resulted absent the discriminatory reason.247 In other words, if an employer engages in the type of sex stereotyping that alone would have produced a negative employment decision, but the employer is able to prove another, legitimate, equally powerful reason for the employment decision, the employer will not be found to have violated Title VII.248 The alternative approach outlined in Part IV below is designed to hold an employer liable in such cases. This approach would not, however, require promotion of an employee the employer would not have promoted even if it had not engaged in sex stereotyping.

The second flaw in the Hopkins approach relates to the nature of the so-called "legitimate" reason articulated by Price Waterhouse for denying Hopkins' promotion. In a typical mixed motives case, an employer

246. A simple example illustrates this point. Suppose an employer makes two statements: "we do not think women can do this job" and "we do not hire people from New York." The first consideration is obviously the type which Title VII addresses while the second consideration clearly is not, assuming that it is done for legitimate business purposes. A woman from New York applies for a job and is turned down. In her suit, she successfully proves that her gender played an important part in the employer's refusal to hire her. Under both Brennan's and Kennedy's construct, however, the employer will prevail because it can be easily proved that the same decision would have been made even if she had been a male from New York. Therefore, under the approach approved in Hopkins, an employer may refuse to hire all women provided he also considers another factor that conceivably could exclude some men. Such actions by the employer would not be considered a "violation" of Title VII.

247. Hopkins, 109 S. Ct. at 1808 n.2 (Kennedy, J., dissenting). Justice Kennedy was responding to Justice Brennan's argument that, under the same circumstances, neither reason could meet the "but for" cause definition required by Justice Kennedy—that is, neither reason could be found to be the "determining" cause of the action. Id. at 1786.

248. See example described supra note 246.
offers a legitimate, objective reason for the negative decision. For example, objective reasons for not promoting Hopkins might have included low billable hours, low billings, inability to bring in new business, or even lack of favorable relationships with the firm’s clients. The record showed that Hopkins not only exhibited none of these defects, but actually excelled in each of these areas. Price Waterhouse articulated its legitimate, nondiscriminatory reason for not promoting Hopkins as her deficiencies in “interpersonal skills,” particularly in her relations with staff members. The Supreme Court seemed to accept this articulated reason as a separate and discrete reason for not promoting an individual. The Court devoted little discussion, however, to the fact that a judgment so subjective as that of an individual’s “interpersonal skills” is exactly the type of judgment prone to stereotyped conclusions, particularly when made by a group of men, some of whom had barely met the applicant. In other words, rather than treating the case as one that combined illegitimate motives (Hopkins’ gender, as evidenced by the stereotyped remarks) and legitimate motives (her purported lack of interpersonal skills), the analysis in this case should have focused on the inextricability

249. In Hopkins, Justice Brennan noted that the employer should be able to offer “some objective evidence as to its probable decision in the absence of an impermissible motive.” Id. at 1791. In his concurring opinion, however, Justice White stated that there is “no special requirement that the employer carry its burden by objective evidence.” He would accept an employer’s “credible” testimony that the same decision would have been made absent consideration of Hopkins’ gender. Id. at 1796.

250. See supra note 149 and accompanying text.

251. For example, Justice Brennan, in his recitation of the background of the case, stated that, “On too many occasions, however, Hopkins’ aggressiveness apparently spilled over into abrasiveness.” Id. at 1782. Later in the opinion, however, Justice Brennan did point out that it takes no “expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.” Id. at 1793.

252. The subjective nature of an evaluation of interpersonal skills has been recognized by a number of courts. These courts have recognized the potential for such evaluations to result in conscious or unconscious discrimination, but have generally accepted them as relevant to promotion decisions that involve supervisory positions. See, e.g., McCarthy v. Griffin-Spalding County Bd. of Educ., 791 F.2d 1549 (11th Cir. 1986) (white female not promoted because she was perceived to be inflexible, abrasive, and overly aggressive); Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132 (7th Cir. 1985) (male Sri Lankan not promoted because perceived to be secretive, asocial, and quarrelsome); Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985) (black female not promoted because she was found to be abrasive and lacking in interpersonal skills); Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976) (nine blacks sued company that used subjective hiring and promotion practices emphasizing demeanor and adaptability); Mira v. Monroe County School Bd., 687 F. Supp. 1538 (S.D. Fla. 1988) (white female not promoted after complaints of her abrasiveness). See generally Rogers v. International Paper Co., 510 F.2d 1340, 1345-46 (8th Cir. 1975). In Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988), the Supreme Court held that disparate impact analysis is applicable in cases that involve subjective, discretionary promotion decisions.
of the stereotyped attitudes and the subjective evaluations. This is exactly the type of analysis that Dr. Fiske’s testimony undertook. Even Justice Brennan seemed to diminish the effect of Dr. Fiske’s testimony, however, referring to it only as “icing on Hopkins’ cake.” Additionally, this type of analysis would bear some resemblance to the pretext analysis discounted by the plurality in that the articulation of “interpersonal skills” as a separate, legitimate motive may well have been a euphemism for the partners’ and staff’s inability to respond positively to an aggressive woman manager. In short, the real focus of the Hopkins decision should have been not whether the stereotyped attitudes outweighed Hopkins’ lack of interpersonal skills, but rather whether the stereotyped comments were merely a sexist articulation of an objective, nongender-oriented problem or a clear indication that any aggressive woman who applied for partnership at Price Waterhouse would be rejected. In any event, as will be discussed further in Part IV below, the unrestricted flow of stereotyped comments at Price Waterhouse was itself a clear sign of the type of discrimination Title VII was designed to prevent. The approach taken by the Court, of coupling the liability finding with the “same decision” affirmative defense, is inadequate to address the prevalence of this type of discrimination in the workplace.

IV. A Suggested Alternative Approach to Sex Stereotyping Cases

Despite Justice Brennan’s assertions to the contrary, the Hopkins Court adopted the concept of “but for” causation as a prerequisite for holding an employer liable under Title VII. The Court did shift the burden of showing such causation to the employer once a showing has been made that the employer allowed an impermissible factor to play a motivating role in the employment decision at issue. Nevertheless, reliance

253. At the end of the plurality opinion, Justice Brennan did discuss the District Judge’s finding that the complaints about Hopkins’ personality may have been legitimate, although to some degree they may have been reactions to her gender. Justice Brennan noted that the job of the Supreme Court was not to determine whether Hopkins was “nice,” but “to decide whether the partners reacted negatively to her personality because she is a woman.” Hopkins, 109 S. Ct. at 1795.

254. Id. at 1793.

255. See generally Morris, Stereotypic Alchemy: Transformation Stereotypes and Antidiscrimination Law, 7 Yale L. & Pol’y Rev. 251, 258-73 (1989), in which the author proposes an analysis for cases such as Hopkins that recognizes that a “suspect characteristic” (gender) may be combined by evaluators with a “non-suspect characteristic” (personality trait, such as aggressiveness) in such a manner that the non-suspect characteristic itself becomes a discriminating criterion for evaluators.

256. Hopkins, 109 S. Ct. at 1786.
on this causation standard will allow many employers who make gender relevant in their decision-making processes to escape liability completely if they can prove that the same decision would have been made even if gender had not been considered. If one accepts the assumption that a major purpose of Title VII is to deter employers from considering impermissible factors in decisionmaking, then the insistence on but-for causation as a prerequisite to liability is inadequate to deal with all but the most blatant forms of employment discrimination.

The approach outlined in this Part is based on a separation of the issues of liability and remedy, based on the theory that an employer who allows sex stereotyping to influence the decisionmaking process has already violated the Title VII prohibition against sex discrimination, even if the plaintiff might not otherwise have received a favorable employment decision. From a broader perspective, this approach combines both the "power" theory of sex discrimination (by imposing a cost on employers who attempt to perpetuate the white male domination of the workplace) and the "equality" theory (by allowing only make-whole remedies for plaintiffs whose individual negative employment decisions would have been different if gender were not a consideration). This approach is both an evolution from and a combination of two important theories already set forth by Professors Mark Brodin and Sam Stonefield, and by Professor Nadine Taub. The approach presented here adopts Brodin's and Stonefield's method of separating liability and remedy findings in Title VII "mixed motive" cases and Taub's concept that characterizing sex stereotyping as discrimination per se is completely consistent with the goals of Title VII and other fair employment legislation. The approach (although potentially unpopular with both plaintiffs and defendants) attempts to offer an alternative to cases such as Craft and Hopkins by imposing a legal cost on employers who engage in persistent stereotyping without forcing those employers to retain or promote persons who would not receive these employment opportunities regardless of gender considerations. To the extent that the approach does favor plaintiffs

257. See infra note 267.
258. See discussion of Professor Brodin's theory, supra note 170.
259. See discussion of Professor Stonefield's theory, supra note 167.
261. See discussion of Professor Brodin's theory supra note 170. The approach articulated, however, is not dependent upon a "pretext"."mixed motive" dichotomy. See discussion of Professor Stonefield's approach, supra note 167.
262. See Taub, supra note 77, at 397-409. In his dissent in Hopkins, Justice Kennedy said, "I think it is important to stress that Title VII creates no independent cause of action for sex stereotyping." 109 S. Ct. at 1813 (Kennedy, J., dissenting).
over defendants (in that an employer is found to have violated Title VII though the employer's discriminatory actions may not have been the determining "cause" of a negative employment decision), the author asserts only that this approach is framed within the context of the currently male-dominated workplace, which Catharine MacKinnon has described as the "affirmative action plan [already] in effect."263

This approach is based on language of Title VII that makes it an unlawful employment practice for employers "to discriminate . . . because of such individual's . . . sex."264 In Hopkins, Justice Brennan clearly articulated that a decision is made "because of" sex when "an employer considers both gender and legitimate factors at the time of making a decision."265 At this point the employer has violated Title VII even though it may later be shown that the same decision would have been made had the employee been male.266 Under the theory developed in Hopkins, however, an employer may stereotype at will provided it is able later to show that other legitimate factors were considered as determinative in the employment decision. Under the alternative approach suggested here, an employer for whom gender is a motivating factor pays some legal cost for violating Title VII.267 The "same-decision" test is relevant only on the issue of remedy.

In the first phase of this approach, a finding of liability would be based on a determination that sex stereotyping played a part in the decisionmaking process. In this regard, the author adopts Justice Brennan's standard of discriminatory factors playing a "motivating" role in the decision.268 The evidence presented in this phase usually will consist of

263. C. MACKINNON, supra note 42, at 36.
265. Hopkins, 109 S. Ct. at 1785. Several other comments made by Justice Brennan indicate that he favors the theory that an employer violates Title VII when it takes gender into account in employment decisions. See, e.g., id. ("Congress' intent to forbid employers to take gender into account in making employment decision appears on the face of the statute."); Id. at 1786 ("Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities."). Justice O'Connor also articulates this theory: "There is no doubt that Congress considered reliance on gender and race in making employment decision an evil in itself." Id. at 1798. Yet both of these Justices adhered to the theory that an employer would not be found to have violated Title VII if it can prove that the same decision would have been made absent the gender considerations.
266. As noted supra note 246, the Hopkins theory allows an employer to avoid liability even if the impermissible factor contributed equally in the decision-making process as the legitimate factor.
267. This is completely consistent with Title VII's purpose of deterring "conduct which has been recognized as contrary to public policy and harmful to society as a whole." Id. at 1798 (O'Connor, J., concurring).
268. The author hesitates to adopt Justice O'Connor's "substantial factor" test in recognition of the problems articulated by Justice Kennedy in forcing courts to distinguish between
remarks that either relate personally to the plaintiff and other female employees, or comments that indicate that the employer consistently relies on stereotypical attitudes when making decisions about promoting or retaining women. In the latter category, comments such as "women are too emotional for this job" or "a man's objectivity is necessary to our business" are fairly easy to recognize. When the comments are directed towards certain individuals, they may not be as obviously stereotypical. For example, comments like "Is she tough enough for this job?" or "She is too hard-driving to work effectively with the staff," while not blatantly sex-oriented, still may be strong indications that preconceived notions about women are governing the decisionmaking process. In this case, expert testimony, such as that of Dr. Fiske in the Hopkins case, will be appropriate.

Expert testimony also will be appropriate to discern whether the attitudes present in the employment situation actually affect the decision-making process. For example, one or two casual remarks by lower-level staff members in and of themselves may not constitute appropriate evidence of actionable sex stereotyping. On the other hand, such remarks may support other evidence illustrating a pervasive company attitude directly relevant to advancement efforts by female employees. Additionally, stereotyped remarks by supporters of an individual's promotion may or may not necessarily indicate the plaintiff's employment decision was negatively affected by sex stereotyping. Such remarks may indicate that, although this plaintiff may have been lucky enough to escape the negative effects of the remarks with a particular set of supporters, the next woman considered may not be so fortunate. It is important to focus the inquiry at this stage not on whether the stereotyped attitudes may have been the determining cause of the negative employment decision for the individual plaintiff, but rather on whether the stereotyping played a "substantial," as opposed to "discernible" factors. See id. at 1812 (Kennedy, J., concurring). It is, however, important to note that the terms "motivating factor" and "substantial factor" were used interchangeably by the Court in Transportation Management, 462 U.S. at 401 (discussed supra note 220) and Mt Healthy, 429 U.S. at 287 (discussed supra note 196).

Some company policies may also fall into this category, such as the KMBC News requirement that women anchors portray "professional elegance" as opposed to the male requirement of "professional image." Craft, 766 F.2d at 1214.

In her concurring opinion in Hopkins, Justice O'Connor pointed out that "stray remarks in the workplace," "statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process" would not alone suffice to carry the plaintiff's burden of showing the gender considerations played a substantial role in her negative employment decision. 109 S. Ct. at 1804.

See, for example, remarks made by Hopkins' supporters, supra note 17, and remarks made by Partner D in the hypothetical situation described supra text accompanying notes 66-69.
prevalent role in the decision. If the evidence shows that sex stereotyping played such a role, the employer should be found to have violated Title VII and thus be held responsible for attorneys' fees and court costs.

Opponents of this approach will argue that, because the finding of liability at the first phase is not based specifically on a "determining" causal connection between the plaintiff's negative employment decision and the defendant's tainted process, such a finding of liability is outside the scope of Title VII. The approach is not designed, however, to ignore the need for a causal connection between the employer's impermissible considerations and the employee's negative employment decision. Rather, the approach assumes that an employer whose decisionmaking process is imbued with sex stereotyping is incapable of making an employment decision about a female employee that is not affected by this impermissible factor. In other words, the liability phase is designed to show whether the employer is a "wrongdoer" under Title VII, that the employer allows gender to play a role in its decisionmaking process. At this phase, the burden of proof is correctly on the plaintiff. The plaintiff, however, need only show that sex stereotyping pervaded the process that resulted in the negative employment decision. This showing in and of itself will comprise partial causation, and thus, discrimination. At the second phase, the remedy phase, the employer is given the opportunity to show that, despite the fact that the employer's attitudes were imbued with sex stereotyping, the employee simply would not have received a favorable decision, even if she had been a man. The fact that the employer is now a "proven wrongdoer" causes the burden of proof to shift to the employer. Again, this is logical. The employer must now show that any employee with plaintiff's "problems" would have received the same treatment. The easiest way for the employer to show this is by comparing the plaintiff with similarly situated male employees who also received negative decisions. The employer alone will have access to the type of evidence necessary to engage in such proof. If the employer can

272. Compare Professor Brodin's theory that the finding at the liability stage is whether a prohibited criterion was a "motivating factor" in the decision made, Brodin, supra note 170, at 323, with Professor Taub's theory that discrimination per se can be found to exist when it can be shown that an adverse employment decision was based on a stereotyped role expectation for members of a certain class. Taub, supra note 77, at 390-91.

273. In this regard, the author adopts Justice Brennan's standard that the "because of" terminology in Title VII refers to any case in which an impermissible factor, such as gender, is taken into account in making employment decisions. Hopkins, 109 S. Ct. at 1785.

274. Compare this term with the use of the term in the evidence cases described supra note 220.
make this showing the employer should not be forced to compensate the plaintiff for damages in the form of back pay, promotion, or reinstatement.\textsuperscript{275}

Obviously, in cases such as Hopkins, in which the legitimate reason articulated by the employer was of such a subjective nature as to itself invite stereotyping, the employer bears the additional burden of showing that the stereotyped attitudes did not so pervade the subjective evaluation as to destroy the articulated reason's legitimacy. In cases in which such subjective factors as "interpersonal skills" are offered as the determining cause for the negative employment decision, Justice Brennan's mandate in Hopkins that "the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive"\textsuperscript{276} should be adopted.

This approach is not designed to require courts or parties to decide whether they are dealing with a pretext case as opposed to a mixed motives case. The liability finding should fit comfortably within the framework of the McDonnell Douglas-Burdine paradigm. The difference, however, is that courts must be willing to make a finding of discriminatory intent (the liability finding) separate from awarding a remedy. Courts must be flexible enough to realize that a pretext showing may either negate completely the employer's articulated reason and thus result in both liability and "make whole" remedies (as in a "single motive" case), or may only serve to negate the articulated reasons in part, thus establishing intent but providing the employer an opportunity to show that the same decision would have been made absent the discriminatory factor (as in a "mixed motives" case).

This approach also is not designed to be applied only in so-called "direct" evidence cases. Rather, the showing of liability may be made both with direct or circumstantial evidence. In this way it is hoped that the courts will not have to engage in the time-consuming and often semantic task of distinguishing between the different types of evidence.

The approach outlined in this Part IV is based on three assumptions:

\textsuperscript{275} Section 706(g) of Title VII gives the trial court the discretion to enjoin a defendant from engaging in an unlawful employment practice and to award make-whole remedies, such as reinstatement, promotion, and back pay. The latter remedies will not be available, however, if a negative employment decision was made "for any reason other than discrimination on account of . . . sex." 42 U.S.C. § 2000e-5(g) (1982).

\textsuperscript{276} 109 S. Ct. at 1791 (emphasis added). In his concurring opinion Justice White opined that "there is no special requirement that the employer carry its burden by objective evidence" but rather that credible testimony by an employer would suffice. \textit{Id.} at 1796.
1) Sex stereotyping, which studies have shown to be deeply embedded in the American workplace, perpetuates the power position of males by effecting a universal cognitive dissonance between the concepts of “female” and “feminine” and those of “effective manager” and “able leaders”;

2) The purposes of Title VII include the rooting out of entrenched discrimination caused by prevalent sex stereotyping, but not the granting of windfall judgments to plaintiffs who would not have succeeded even if they had been men;

3) Many women who have neither the evidence nor the means to pursue litigation will continue to suffer discriminatory treatment unless employers are encouraged to purge their decisionmaking processes of this conscious and unconscious stereotyping.

This approach establishes sex stereotyping as discrimination per se. Employers who engage in such stereotyping will have to pay a legal cost for failing to root out such attitudes in the upper levels of their management structure. The approach has been constructed in the feminist jurisprudential framework surrounding decisions such as those in Craft and Hopkins. This is not to say that the framework should be limited only to the context of the promotion of professional women. The motivation behind the development of this framework, however, has been the realization that, at least in this area, Title VII as currently applied has been far from successful in rooting out the types of subliminal discrimination that continue to hold women back. Professional women forced to proceed even along the somewhat broader path outlined in Hopkins will continue to meet the roadblock of sex stereotyped attitudes. These views are so deeply entrenched that the judicial system, and certainly the white-male dominated business community, have not yet appreciated their most insidious forms. Only by holding employers responsible for taking gender into account, even in ways that are subconscious or apparently benevolent, will Title VII make a substantial contribution to the eradication of employment discrimination and societal norms that rely primarily, if not exclusively, on the standards and values of white men.

Conclusion

The discussion above has taken three routes: a survey of the evolution of feminist jurisprudence, which has accompanied the realization that “equality” is not possible for women in a world dominated by the male norm; an examination of numerous psychological and sociological studies evidencing the concept that, particularly in professional and managerial positions, women face a subliminal “double bind” over which
they have little or no control; and a review of the judicial attempt to respond to this built-in "Catch-22" without ignoring the rights of those who consciously or unconsciously perpetuate the male norm in the workplace. While respectful of these rights, an alternative judicial approach would present an approach that opens the door for the success of professional women in both the short and the long term.

In the short term, the suggested response on a judicial level must recognize the dominant status of the male norm, the "double bind" in which professional women find themselves, and the elusive reflection of this bind in sex stereotyping. Courts must focus on exposing the hindering effects of that bind and discouraging employers from making employment decisions that reflect it. In the long range, however, the ultimate goal is the structuring of a business society in which the "best" of both genders are free to contribute and no individuals are favored or discounted solely on the basis of their status as male or female. The suggested approach, while penalizing employers for reliance on the male norm, does not advocate promoting women solely on the basis of their gender. Admittedly, this approach is somewhat optimistic in that it assumes a good faith attempt on the part of decisionmakers to separate neutral criteria from sex-based criteria. Information is a vital aspect of this separation. As Part II indicates, such information certainly is not lacking. The approach outlined in Part IV is designed to integrate that information first into judicial decisionmaking and, more importantly, into workplace decisionmaking. The dismantling of the perception that women, or people with "female" qualities, cannot be effective managers and leaders is vital to the effort of building a society in which there exists a balance between that which is traditionally "male" and that which is traditionally "female."

277 It is this author's suggestion and hope that the academic and at times arrogant refusal of different disciplines to engage in interconnected studies in such areas will succumb to the growing complexity of the problems considered in this Article. Courts and businesses cannot continue to regard psychological and sociological studies as mere "icing" on a plaintiff's cake. As noted above, sex stereotyping will not be rooted out of the workplace without the cooperation of experts and influential persons in all disciplines and all occupations. This Article and the approach herein outlined are offered in the spirit of that cooperation.