

Stereotyping as Institution:

**On *Price Waterhouse v. Hopkins* and the Socio-Structural Roots
of Gender Discrimination**

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This essay argues that an assessment of the socio-structural roots of gender stereotyping is a fundamental prerequisite for the effective analysis and resolution of legal disputes involving alleged instances of gender discrimination. It argues that, where gender discrimination forms a legal cause of action, neither the substantial content of the facts, nor a determination of most effective and lasting remedy can be properly construed without first taking into account the underlying *causes* and *contexts* which serve as the origins of gender stereotyping.

This essay advances its arguments under the auspice of *The Convention on the Elimination of All Forms of Discrimination Against Women*.¹ It begins by drawing on current clinical and academic research to establish a broad framework for discerning the cognitive, legal, and socio-structural dimensions of stereotyping; it will then apply this framework to the leading U.S. Supreme Court decision on gender discrimination, *Price Waterhouse v. Hopkins*, in order to demonstrate how the particularized stereotyping in that case was but an extension of pre-existing stereotypes operating at the institutional base of *Price Waterhouse*;² and lastly, it will consider how the *Price Waterhouse* decision may have been improved in light of Articles 5, 11, and 4(1) of *CEDAW* and the aims of transformational equality generally. Throughout this analysis, this essay will seek to demonstrate why the effective treatment and diagnosis of gender discrimination, especially in the employment context, hinges on exposing and examining the socio-

¹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981 [*CEDAW, the Convention*]

² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), at 231-238; 25058 (United States, Supreme Court) [*Price Waterhouse*].

structural and ideological roots of stereotyping. It will then conclude by canvassing the risks inherent to the implementation of the contextual approach, as well as a legal test for when it should be adopted as a powerful tool for exposing and remedying systemic gender discrimination.

From Innocence to Insidiousness: the Cognitive and Legal Dimensions of Gender Stereotyping

In seeking to criticize and to improve upon current legal approaches to issues of gender discrimination, an appreciation of stereotyping as both a cognitive and a legally relevant phenomenon is an invaluable asset. As it will be seen, such conceptual underpinnings serve to inform the direct relevance and, indeed, the necessity of examining the socio-structural roots of gender stereotyping for the purposes of its effective diagnosis and elimination. What follows, therefore, is a broad and synthetic overview, drawing primarily on the *Amicus Brief* tendered in the *Price Waterhouse* decision, of current clinical and academic perspectives on stereotyping generally - its cognitive and legal dimensions.³

The *Price Waterhouse Amicus Brief* affirms the widely held view that stereotyping is the result of the benign and very normal cognitive process of “categorization”. As a psychic expedient, human beings simplify and set into order the vast quantities of information which surrounds them by categorizing and generalizing about their environment. As Michelle O’Sullivan notes, “we...use language to relate something

³ American Psychological Association, “In The Supreme Court of the United States: *Price Waterhouse v. Ann B. Hopkins*. Amicus Curiae Brief for the American Psychological Association,” (1991) 46 American Psychologist 1061 at 1063 [*Amicus Brief*].

unknown to something that we have already known;” thus, our individual ability to situate ourselves in a sea of endless facts “depend[s] upon and manifest[s] our ability to draw similarities, to conceive of relations and to substitute one thing for another in an implicit or explicit comparison.”⁴ Where the subject of our simplified comparisons and generalizations are other human beings, this cognitive process of categorization carries with it the risk of stereotyping. As Zenita Fenton succinctly explains, “Stereotypes are just cognitive associations [i.e. categorizations] of traits within particular social groups.”⁵ Thus, where a generalization about a particular social group - defined along any number of racial, gender, or sexual lines - is imputed or held to apply as a matter of course to an individual belonging to that group, a stereotype has emerged.

Social science generally categorizes stereotypes along two lines: descriptive stereotypes, which merely “specify the attributes characteristic” of a given social group - i.e., women are weaker than men - and prescriptive or normative stereotypes, where the stereotype serves to “dictate which behaviors are *appropriate*” for the group in question - i.e., women *should be* hospitable, men *mustn’t* cry.⁶ As pointed out in the *Amicus Brief*, stereotypes “are not necessarily any more or less accurate, biased, or logically faulty than are any other kinds of cognitive generalizations.”⁷ In fact, descriptive stereotypes have been distinguished from their normative counterparts because they are often supported by “a statistical correlation between that property and being a member of [the stereotyped

⁴ Michelle O’Sullivan, “Stereotyping and Male Identification: ‘Keeping Women in their Place’” (1994) *Acta Juridica* 185, reprinted in Christina Murray ed., *Gender and the New South African Legal Order* (Kenwyn: Juta, 1994), 185 at 187.

⁵ Zanita E. Fenton, “Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence,” (1998-1999) 8 *Columbia Journal of Gender Law* 2, at 14.

⁶ *Amicus Brief* at 1064 [emphasis mine].

⁷ *Ibid.*

group]:” for example, women generally *are* physically weaker than men.⁸ What, then, makes stereotyping a legally cognizable wrong?

Sophia Moreau highlights two ways in which stereotypical thinking can translate into an ethical or a legal wrong. Firstly, because a stereotype is by definition an overgeneralization and an oversimplification, it “may fail to describe [an] individual accurately.” Thus, where a person is deprived of a benefit, interest or privilege on the basis of such a stereotype, he or she will rightfully hold that the denial is arbitrary.⁹ This model of arbitrary deprivation is particularly amenable to consideration through the lens of descriptive stereotypes. In the employment context, for example, because “traits stereotypically associated with women and men are not only different *but...are seen as differently desirable*,” women often suffer marked disadvantages in their attempts to enter the professional workforce owing to traditional stereotypes pertaining to their perceived intelligence and “natural” traits. Put differently, they are precluded from employment or promotion opportunities on bases *other* than their actual skills or abilities.¹⁰ Through Moreau’s model of harm, therefore, descriptive stereotypes are seen as fundamentally adverse to the model of equality of opportunity, since they serve to corrupt the very foundations thereof.

A second way to conceive of the harms inherent to stereotyping is as a loss of autonomy. As Moreau argues, it will often be the case that where the denial of a benefit is rooted in stereotypical thinking about a person’s race, gender or sexual orientation, it

⁸ Anthony Appiah, “Stereotypes and the Shaping of Identity” (2000) 88 California Law Review 41 at 47.

⁹ Sophia R. Moreau, “The Wrongs of Unequal Treatment” (2004) 54(3) University of Toronto Law Journal 291 at 298.

¹⁰ *Amicus Brief* at 1065.

will severely “limit [that individual’s] power to define and direct his life in important ways - to shape his own identity and to determine for himself which groups he belongs to and how these groups are to be characterized in public.”¹¹ In such cases, the individual is left with no choice but to be “publicly defined by another group’s image of him”; her destiny and identity is defined by the unchecked overgeneralizations of others.¹² This second type of harm might be seen as the direct result, albeit not exclusively, of normative stereotyping - or “identity scripts,” as Anthony Appiah terms them.¹³ Because normative stereotypes “specify [the] behaviours that are thought to be not only characteristics of each sex, but also desirable and encouraged,”¹⁴ women (or men) who are perceived to engage in behaviour which violates the stereotypes which govern them – i.e. a woman being assertive, or a man being overtly sensitive - are often subject to social sanctions. Zanita Fenton defines this process as inherently “violent”:

Because of the impersonal and general nature, stereotypes devalue their objects, compounding the violence by re-victimizing the victim. Thus, the mere existence of stereotypes is itself a form of violence.¹⁵

As a result, Fenton, like Moreau, refuses to differentiate between benign or “positive” and purely “negative” stereotypes. Because stereotypes necessarily constrict and pre-define what behavior is appropriate for and expected of a particular social group, they are always inherently negative.

In sum, therefore, while many stereotypes may, in fact, be supported by statistical

¹¹ Moreau, *supra* note 9 at 299

¹² *Ibid.* at 299

¹³ Appiah, *supra* note 8 at 51.

¹⁴ *Amicus Brief* at 229.

¹⁵ Fenton, *supra* note 5 at 11-12

derivations about the characteristics shared among the members of a particular group, the operative point is that there is no guarantee that such characteristics necessarily apply to the individual subject to them - resulting in a loss of opportunity and identity. What is most problematic is that, given the cognitive role as psychic expedients that stereotypes play, stereotypes preclude the need to “use the effort to *really* know about a person or *really* understand her situation...”¹⁶ Put differently, because human beings assume that the categories they use to describe others in this way are “natural” rather than constructed, such categories become immune from criticism.¹⁷ As a result, all stereotypes are liable to persist unless and until they are exposed.

Getting at the Root: The Socio-Structural Dimensions of Stereotyping

Recent scholarship has demonstrated the ways in which, beyond their role as cognitive expedients, stereotypes serve to regulate and maintain fundamental structures of unequal social relations. In their seminal work “Sexism and Other Isms,” Glick and Fiske explore how stereotypes accrue their basic content by reference to “the structural relations between groups.”¹⁸ Delving into the actual content or character traits laden within descriptive and normative stereotypes, they argue that such traits can generally be traced along a dual spectrum of “competence” and “likability”. What ultimately determines the values assigned to each spectrum – whether amounting to “competent and likeable,” “incompetent and unlikeable,” or any combination of the two – is directly

¹⁶ Fenton, *supra* note 5 at 11 [emphasis in original].

¹⁷ O’Sullivan, *supra* note 4 at 187.

¹⁸ Peter Glick and Susan T. Fiske, “Sexism and other ‘Isms:’ Interdependence, Status, and the Ambivalent Content of Stereotypes,” in W.B. Swann, Jr., L.A. Gilbert and J. Langois, eds., *Sexism and Stereotypes in Modern Society: The Gender Science of Janet Taylor Spence* (Washington D.C.: American Psychological Association, 1999), at 216.

related to the nature and character of a subordinate group’s social relations to that of the group possessing greater social power and control.¹⁹ More precisely, these stereotypes depend on and vary according to the relative status of the two groups, the stability of their interrelations, and their degree of interdependence.²⁰ Thus, for example, where a particular subordinate group is seen to pose a threat to the social order currently under the control of the dominant group, stereotypes as to the former’s “unlikeability” and “incompetence” are likely to emerge; conversely, where a dominant group is considering the conferral of a benefit (i.e. employment) to an individual who shares that dominant group’s basic identity, the individual may be stereotyped as “competent” and “likeable”.

Glick and Fiske discuss the application of their model in contexts akin to the employment sector where men hold the reins of social power. In such a stable system of social relations, where “differences in group status [between men and women] are large...and in which the groups are interdependent in ways that promote daily intergroup contact,” the result is the emergence of a form of *exploitative interdependence*. As a means of maintaining their higher status and social control, the dominant group stereotypes the out-group as socially agreeable but incompetent, or “liked but disrespected.”²¹ What is more, the particular content of such a stereotype is seen, not merely as a practical and consciously-applied tool for the retention of social power, but as a largely unconscious, ideological means of self-justification and rationalization. In other words, Glick and Fiske highlight the fact that, stereotypes do not merely perpetuate inequality, they *demand* inequality as a matter of conscience.

¹⁹ *Ibid.* at 197

²⁰ *Ibid.* at 216

²¹ *Ibid.* at 204

Conveniently, Glick and Fiske examine the basic factors which inform and illuminate the form of exploitative interdependence that exists as between men and women in the professional context. They note, for example, the ways in which men's emotional and procreative dependencies on women, coupled with their concurrent desire to maintain a dominant social, economic, legal, and religious position, have served to erect an ideology of "paternalistic benevolence". This ideology, in turn, gives rise to a series of "system-justifying beliefs," or descriptive and prescriptive stereotypes about the particular aptitudes and proper roles of women.²² What determines whether the stereotype is prescriptive or merely descriptive hinges on the degree to which the dominant social group (men) depends on the particular function and dimension of the subordinate group (women).²³ As the authors put it, "[t]he greater these dependencies, the more stake the dominant group has in maintaining the status quo and, in turn, the more prescriptive the resultant stereotypes are..."²⁴ As a result, where women are seen not to pose any significant threat to the maintenance of differential status, they tend to be the subject of *benevolent*, descriptive stereotyping ("women are warm and hospitable"); on the other hand, where their actions or behaviors disrupt the structural relations upon which men depend, they are targeted by *hostile*, prescriptive stereotypes ("she shouldn't be so assertive").²⁵ Not surprisingly, then, "nontraditional" career women who pose an economic threat to a male-dominated work force are treated with greater hostility than "traditional," "prototypic" homemakers who pose no such threats and upon whom a man might rely for intimacy. Where the latter accommodates both the descriptive and

²² *Ibid.* at 206

²³ *Ibid.* at 208

²⁴ *Ibid.* at 209

²⁵ *Ibid.*

prescriptive norms pertaining to her competence and social character - “likable but incompetent” - the former has forced her way to an appraisal as being “competent,” but for that very reason *must* be disrespected and disliked.²⁶ As a threat to the dominant social order, professional women of this kind break the normative codes designed both to “keep them in their place” and to keep men in *their* place, effectively forcing such women to defined and enslaved by the image which others have of them. On this point, Glick and Fiske add new depth to Fenton’s vision of the “violent” effects which such normative stereotypes have, noting: “[In stable systems of exploitative interdependence,] cooperation is inherently coercive. Subordinate group members cooperate because of a lack of choice to do anything but that.”²⁷

In this way, the invaluable research conducted by Glick and Fiske has produced, not only a new way to think about gender stereotyping – as a means both of exercising and *retaining* power - but also a powerful and effective tool for exposing and dissecting the real socio-structural and ideological roots of stereotyping generally. As it will be shown, it is this context-sensitive analysis that is the missing ingredient in the U.S. Supreme Court’s decision in *Price Waterhouse v. Hopkins*. Without it, the individual may enjoy redress, but the stereotype is guaranteed a long life.

On *Price Waterhouse v. Hopkins*

Having fleshed out the cognitive, legal, and socio-structural dimensions of stereotyping, it becomes possible to apply this broad framework to the U.S. Supreme Court’s seminal decision treating issues of gender discrimination in *Price Waterhouse v.*

²⁶ *Ibid.*

²⁷ *Ibid.* at 205.

Hopkins. The object of this exercise is to illustrate how the multiple, often plain indicators of gender discrimination in the case correlate and essentially “boil down” to a restatement of the bold proclamation: “Social power, its acquisition and maintenance, is the driving force behind the formulation of stereotypes.”²⁸ The following analysis, therefore, seeks to prove why an effective diagnosis and treatment of gender stereotyping – in this case, within the employment context - hinges upon the exposure and examination of the ideological, socio-structural roots giving rise to and fostering those very stereotypes. Going further, it will attempt to demonstrate how such contextual dimensions might be understood, not merely as the *source* of stereotyping harms, but as an insidious embodiment of harm itself.

In many ways, *Price Waterhouse* is the prototypical gender discrimination lawsuit. As an intrepid and courageous businesswoman trapped in an overtly male-dominated profession, Hopkins’ plight is notable, not only for the sensitive and sophisticated - albeit imperfect - judgment it evokes from the U.S. Supreme Court, but also for its ability to legitimize and to flesh out vast quantities of current social science literature on gender stereotyping.

Ann Hopkins sued Price Waterhouse under Title VII of the Civil Rights Act 1964, alleging that her bid for partnership with the firm had been rejected because she was a woman.²⁹ The firm’s decision may have seemed benign enough, were it not for the presence of clear indicators of a reliance on both structural and individual stereotyping at the firm. For one thing, at the time of her nomination “[Hopkins] had more billable hours

²⁸ Fenton, *supra* note 5 at 15

²⁹ *Price Waterhouse* at 234.

than any other person proposed for partnership that year, had brought in business worth \$25 million, her clients praised her, and her supporters recommended her as driven, hard working, and exacting.”³⁰ Notwithstanding her achievements, Hopkins was the only female among the 88 candidates proposed for partnership that year, in a firm that had the lowest representation of women partners among any of the “big-eight” accounting firms at the time. Remarkably, this glaring inequality at the institutional level managed to find clear expression in the written submissions tendered against Hopkins’ promotion by her colleagues. Some described her “macho,” recommended that she take a “course at charm school,” and even went so far as to advise her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewellery.”³¹ Even those comments which came by way of a defense of Hopkins bore the hallmarks of stereotypical thinking: one colleague, for example, noted Hopkins’ “...matur[ation] from a tough-talking somewhat masculine [manager]...to an authoritative, formidable, but *much more appealing* lady ptr candidate;” another remarked that those who criticized her for using profanities did so only “because it’s a lady using foul language.”³² Whatever seemingly *valid* and non-stereotypical criticisms were levied against Hopkins, tended to express a variant on the view that, while she was certainly intelligent, she was also “sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff” – to use the language of Glick and Fiske, competent but not likable.³³

³⁰ Susan T. Fiske *et al.*, “Social Science Research on Trial: Use of Sex Stereotyping Research in *Price Waterhouse v. Hopkins*,” (1991) 46 *American Psychologist* 1049 at 1050.

³¹ *Price Waterhouse* at 228.

³² *Ibid.* [emphasis mine].

³³ *Ibid.* at 216-17

As a firm, then, Price Waterhouse of the mid-1980s may well have served as a veritable case study on the function, formation, wrongs and maintenance of gender stereotyping. Beginning, for our purposes, from the broadest and most structural perspective, the marked underrepresentation of woman partners at the firm might be seen both as both the *result* of and the *situs* from which the firm's male employees developed their complacency towards and complicity with the kind of stereotypical thinking to which Hopkins was subject. In this sense, it becomes possible to trace many of the firm's practices and protocols as distinct manifestations of a system of "self-justifying" beliefs supporting the maintenance of the differential treatment of women at the firm. The *Amicus Brief* tendered in the case, for example, sets out three conditions which social scientists believe promote stereotyping. It argues that these conditions - which include the underrepresentation of members of a particular group (in this case women), ambiguity in the evaluative criteria used in determining that person's fitness for promotion, and a scarcity of information pertaining to that person's relevant qualities - were all present at Price Waterhouse. In the first instance, there can be little doubt that as "[a] member of a group comprising 15% or less of the total work force..." Hopkins was "considerably more likely to be stereotyped" than if she were a man.³⁴ Indeed, just 2% of the partners at Price Waterhouse were women at the time of Hopkins' application for promotion, casting her - in the eyes of her male colleagues - into the category of a distinct subordinate group susceptible to stereotyping. This underrepresentation becomes exceedingly problematic in its interaction with the second condition promoting stereotyping in the employment context: a lack of objective evaluative criteria. The U.S. Supreme Court highlights the

³⁴ *Amicus Brief* at 1067

fact that "the recommendation of the Admission Committee, and the decision of the Policy Board [at Price Waterhouse], [were] not controlled by fixed guidelines."³⁵ Within such ambiguity of evaluative criteria, the *Amicus Brief* argues, the process of inference-drawing required to assess an individual's fitness for promotion becomes increasingly susceptible to stereotypical thinking. Indeed, where it is coupled with an individual's scarcity or membership in a threatening subordinate group, its presence virtually guarantees the dominant group's consideration of factors wholly irrelevant to the question of promotion – such as whether an employee walks or talks "femininely" enough. Once again, this second condition is seen to interact harmfully with the third: a paucity of information being available to the evaluators as to an individual's characteristics. In Hopkins' case, not only was she criticized on grounds not germane to her suitability for partnership, but those who criticized her often barely knew her. While the "partners in the firm [were]...invited to submit written comments on the candidate - either on a 'long' or 'short' form, depending on the partner's degree of exposure to the candidate," several partners tendered "intensely critical" comments despite a lack of personal acquaintance with her.³⁶ Such comments, which ranged from stating that Hopkins was "universally disliked," to calling her "consistently annoying and irritating," seem to have adhered to the mould of attacking Hopkins on irrelevant points of character. What is more, they must be seen as a manifestation of the structural inequalities already *built into* Price Waterhouse; inequalities evidenced directly in the firm's pre-existing and dire lack of female partners, in its lax or indeed *ad hoc* evaluative criteria, and in the firm's willingness to give credence to and legitimize commentary wholly lacking in relevance.

³⁵ *Price Waterhouse* at 234.

³⁶ *Price Waterhouse* at 235.

Taken together, the end result of these procedural and structural factors is the production of an atmosphere where gender stereotyping is clearly permitted to flourish in the open. As Mr. Justice Brennan points out in his majority judgment, evaluating females “in sex-based terms” was a recurrent theme at Price Waterhouse, with one senior partner “repeatedly comment[ing] that he could not consider any woman seriously as a partnership candidate...”³⁷ This comment, which was not only not discouraged but formally entered into Hopkins’ final evaluation, stands as the very ideological slogan which the firm’s practices, and, more specifically, its stereotypical judgments of Hopkins, were made to rationalize. More broadly, it is an emblem for the deep-rooted, socio-structural *source* of gender stereotyping generally – one which must be attacked to derive a lasting cure.

Turning to a more specific socio-structural analysis of the case, the plight of Ann Hopkins seems to fit the mould of a “subordinate” group member struggling against coercive tyranny in a system of exploitative interdependence all too well. While in many ways Hopkins represents the “nontraditional” subtype of woman – one who “may be viewed by traditionally minded men as the types of women on whom they are not dependent and who are merely competitors for status and resources” - this definition requires slight alteration given the facts.³⁸ For given Hopkins’ situation both as a woman and as a subordinate professional (i.e. non-partner), she must have been the object of *both* financial dependency *and* dominance-driven competition at Price Waterhouse. In other words, the very superiors who were evaluating Hopkins likely shared a dominant-group

³⁷ *Ibid.* at 236.

³⁸ Glick and Fiske, *supra* note 18 at 214

motivation of "keeping her in her place" as a woman, while simultaneously depending on her competence to reel in future multi-million dollar contracts. The stereotypes to which Hopkins was subject, then, derive their content from an undercurrent element of competition fused with dependence, tracking remarkably well in the final synthesis with Glick and Fiske's model of how traditional men view "nontraditional" professional women. To use their language, Hopkins was respected but not liked. Within the relatively stable and interdependent environment of her workplace, Hopkins was the subject of both descriptive and punishing prescriptive stereotyping pertaining to the expected and "proper" behavior of women. These two forms of stereotypes can be traced along the lines of Hopkins' double role: as a professional whose remarkable performance posed a threat both to her colleagues vying for partnership and for the current partners with whom she would be competing, Hopkins was the target of *hostile* stereotypes tending to treat her as "nasty...aggressive, selfish, and cold;"³⁹ at the same time, being a professional *woman*, Hopkins was equally subject to certain deep-seated *benevolent* stereotypes pertaining to the perceived natural strengths and weaknesses of the "prototypical" woman upon whom men emotionally depend. As Glick and Fiske point out, such "prototypic women" are generally assessed "in terms of their pleasant interpersonal skills."⁴⁰ The forms of stereotyping to which Hopkins was subject must thus be understood as a dynamic cross between both benevolent and hostile, descriptive and normative stereotypes converging negatively on the essential point of *character*. In this way, the sweeping statement made by one senior partner that "he could not consider any woman seriously as a partnership candidate" can be dissected and construed as

³⁹ *Ibid.* at 216.

⁴⁰ *Ibid.*

harboring each of these conflicting elements. The statement is at once descriptive and benevolent insofar as he presumes that women are *incapable* of seriously fulfilling the demands of partnership; and it is simultaneously hostile and normative insofar as it seeks to *keep* Hopkins in her inferior social and professional designation, lest she pose a threat either to her male superiors or to the “prototypical” woman. The result of such complex stereotyping is what the U.S. Supreme Court describes as the “intolerable and impermissible Catch-22” in which women like Hopkins find themselves: “[they are out] out of a job if they behave aggressively and out of a job if they do not.”⁴¹ As competitors, professional women are required and expected to be both competent and assertive; as a result, they are by necessity required to breach the benevolent stereotypes that apply to *all* women. As the *Amicus Brief* succinctly puts it, “women who violate norms of feminine passive-dependency are penalized.”⁴² Thus, escaping social sanction in the context of the employment sector is all but impossible for professional women. This leads us to a consideration of how both the specific instances of stereotyping, and more importantly, how the structural inequalities built into Price Waterhouse as a whole contributed to and constituted wrongs against her person.

Stereotyping as an Institution: How Hopkins was Wronged

Sofia Moreau argues that stereotypes wrong an individual where they deprive that individual of the “power to define and direct his life in important ways.”⁴³ Based on this account, indicators at the institutional level alone point to the fact that Hopkins had been

⁴¹ *Price Waterhouse*, at 251.

⁴² *Amicus Brief*, at 1066.

⁴³ Moreau, *supra* note 9 at 299.

deprived of the opportunity for promotion well in advance of her nomination.

We have explored, for example, the ways in which procedures, practices and pre-existing structures in place at Price Waterhouse contributed to stereotypical thinking as a means of justifying male-dominance. This institutional machinery, however, must not be thought of a purely neutral source which fosters and allows for the use of stereotypical thinking; rather, it can and must be seen as a legitimate and cognizable form of stereotyping itself. As a "unified means of control, defining the appropriate manifestations of [a woman's "proper" behavior,]" structural inequalities in place at Price Waterhouse and other professional work environments can be seen as the very tools through which identity is "constricted" for the purposes of creating and maintaining social power. Before any *particularized* expression of stereotyping arises, such an institutionalization of stereotypical thinking constitutes the deepest and most insidious harm. Indeed, it is only through an understanding of stereotyping as an institution that the true depth, nature and character of the difficulties and harms experienced by subordinate group members like Hopkins that the actual roots of inequality can be exposed and destroyed. One such challenge and harm, for example, might be considered in light of Hopkins' own awareness that her chances at acquiring partnership were very slim. In a major firm possessing less female partners than can be counted on the fingers of two hands, such cognizance might thus be construed, not only as unequal results made manifest, but as an unfair inducement to overcompensation. In the year leading up to her candidacy for partnership, for example, Hopkins billed more hours than any of her colleagues, leading one partner to touch directly on the heart of the matter: "[she]

overcompensated for being a woman.”⁴⁴ To be more precise, she overcompensated *because* she was a woman (the “for” only suggests more descriptive stereotyping). Regardless, if it is true, in fact, that Hopkins “overcompensated for being a woman,” examining the structural makeup of Price Waterhouse leads us to a clear idea why: amidst such an unequal playing field, she felt she had to. Returning to the procedural aspect of Price Waterhouse’s operations, Hopkins was not only working against the dominant view (in practise) that women were not “fit” to be partners; what is more, her efforts were knowingly being poured into an assessment system which was effectively tailored to exclude whomever the partners did not wish to promote. As the *Amicus Brief* stresses, “ambiguous criteria [systems such as the one employed at Price Waterhouse] are easier to distort on the basis of stereotypes...[since] the greater the amount of inference required in the evaluation system, the more likely it is that evaluation bias will be found.”⁴⁵ Given Price Waterhouse’s all but non-existence evaluation criteria, Hopkins must have known that the firm’s partners could and would easily overlook any “information clearly relevant to and crisply diagnostic of the target decision [i.e. her promotion]...” unless she had made disproportionate strides to stand out.⁴⁶ In this way, the marked underrepresentation of women at Price Waterhouse, coupled with the absence of clear evaluative criteria which would restrict the purview of senior partners to relevant considerations for the purposes of promotion, must be viewed as forming a nexus of stereotyping promoting disproportionate behavior for the purposes of acquiring equal benefits. Such a nexus embodies the essence of stereotyping insofar as it operates to curtail and to limit human

⁴⁴ *Price Waterhouse* at 235.

⁴⁵ *Amicus Brief* at 1067.

⁴⁶ *Ibid.* at 1068.

behavior and opportunity on the basis of perceived notions as to who is capable or should do what. In this case, the particular harms associated with working against such institutionalized stereotyping are an inducement to overcompensation, overwork, and perhaps most significantly, subjection to an oppressive and largely hostile atmosphere.

The forms of personal and directed harms to which Hopkins was subject – for example, through her colleagues’ evaluations – are effectively an offshoot or extension of the macrocosmic, or institutionalized stereotyping already in place at Price Waterhouse. In other words, to reaffirm the fact that, with respect to gender discrimination *context is everything*, Price Waterhouse’s lax policies and procedures serve both to embody a macrocosmic *situs* of stereotyping (generating a hostile and unfair working environment), as well as fostering or promoting the specific instances of descriptive and normative stereotyping to which Hopkins was directly subject. Because such explicit forms of stereotyping have doubtless assumed more subdued forms in the twenty-first century, we are actually fortunate that Hopkins’ colleagues enjoyed the liberty of voicing their stereotypes so freely. For in their opinions these specific instances of stereotyping highlight both the violent constriction of identity which lax corporate policies may foster, as well as the deep reasons for why such a constriction is so violent to begin with. We have already seen, for example, how female professionals are generally held to an impossible double standard: to use the words of the *Amicus Brief*, they are “evaluated negatively if they do their jobs well.”⁴⁷ Yet to appreciate why and how this double standard is so harmful, one needs only survey just how *arbitrarily* positive traits are translated as negative once filtered by a stereotypical lens. As the *Amicus Brief* states:

⁴⁷ *Amicus Brief* at 1066.

In the present case, Ms. Hopkins' supporters described her behavior as outspoken, independent, self-confident, assertive and courageous. Her detractors interpreted the same behavior as overbearing, arrogant, self-centered and abrasive.⁴⁸

Effectively, owing in large part to a lack of clear procedural policies pertaining to the qualities and characteristics relevant for promotion purposes, this telling extract highlights Ann Hopkins' inability to know just how to comport herself. It suggests, in fact, that there may not have *been* an appropriate model for Hopkins' behavior - one which would have permitted her to execute her employment duties both efficiently and, in the eyes of her male colleagues, respectably. Based on a traditional conception of the harms of stereotyping, linear psychological constriction constitutes a harm and a wrong in itself; yet, in Hopkins' case this violence was compounded by the fact that there was, in effect, *no appropriate model of behavior*. Within the scope of her professional development, she was irrevocably bound by whatever stereotypical thinking and discriminatory structures the partners and, indeed, the very institution at Price Waterhouse desired to inflict upon her. This *arbitrariness*, coupled with the firm's replete lack of promotion guidelines, underscores the insidious coercive element in Glick and Fiske's model of systems of interdependent exploitation; for just as "[s]ubordinate group members cooperate because of a lack of choice to do anything but that," Hopkins could do little or nothing to counteract the oppressive, violent, and largely unrealistic stereotypes which many of her colleagues held her to.⁴⁹ As hard as she tried, she would be punished.

⁴⁸ *Ibid.* at 1065.

⁴⁹ Glick and Fiske, *supra* note 18 at 205.

Transformational Equality and Article 11 of CEDAW: Assessing the Merits of the U.S. Supreme Court Decision

There is much to laud about the *Price Waterhouse* decision. The case has been hailed as a milestone in the U.S. Supreme Court’s understanding and appreciation of stereotyping as both an ethical and a legally cognizable harm. Indeed, as to the court’s foundational understanding of gender discrimination, there is little that can be faulted. The court made strong headway when Mr. Justice Brennan interpreted Title VII of the Civil Rights Act so boldly and succinctly:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.⁵⁰

As Susan Fiske points out: “One could not have asked for a better understanding of the psychology of stereotyping.”⁵¹

The decision has also been received positively for its use and, thereby, its perceived legitimization of social science literature. For the first time, the U.S. Supreme Court cites the findings and opinions of a social scientist as to the existence of gender discrimination within a specific context, introducing such testimony and the *Amicus Brief* which accompanied it into the pantheon of acceptable courtroom evidence – albeit in a limited way. In fact, precisely because the U.S. Supreme Court took such an emboldened stance on the issue of gender discrimination – facing the issue squarely at one point and

⁵⁰ *Price Waterhouse* at 250

⁵¹ Fiske, *supra* note 30 at 1054.

proclaiming that “[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school’” – questions still surround the court’s actual treatment of and stance towards social science as an aid to understanding and analyzing the issue in-depth.⁵² As Fiske again points out:

One can interpret [the court’s direct treatment of sex stereotyping] in various ways: as dismissive, saying that the social science testimony was all common sense; as merely taking social psychological expertise for granted; or as suggesting that one does not necessarily require expert witnesses to identify stereotyping when the evidence is egregious.⁵³

Given the wealth of highly probative and practical aides laid out in the *Amicus Brief* tendered in the *Price Waterhouse* decision, and notwithstanding the Supreme Court’s laudable grasp of the basic dimensions of gender stereotyping, it is perhaps unfortunate that the Supreme Court did not pay more heed to the treasure trove of expert opinion available at its fingertips. As a comparison of the court’s results with the transformative aims of *CEDAW* makes clear, there was far more that the Supreme Court could have done in improving their judgment and the court’s alignment with the cause for equality more generally. For this purpose, an understanding of general principles and aims underlying *CEDAW* becomes necessary.

Sandra Fredman rightfully interprets *CEDAW* as a convention seeking to promote the highest ideal of equality: as transformation. Transformational equality, according to Fredman, transcends traditional conceptions of formal equality, equality of opportunity, and equality of outcome. Where these conceptions seek to ensure legislation that treats

⁵² *Price Waterhouse* at 256.

⁵³ *Ibid.*

women in the same way as men, neutrality with respect to the barriers facing women’s advancement, and equal distribution of benefits between men and women respectively, transformational equality is seen to entail a fundamental “re-structuring [of] society *so that it is no longer male-defined.*”⁵⁴ In this sense, transformational equality presents a view of women’s equality which does not hold that “women are [merely] equal to men,” but which rather seeks to ensure that legitimate differences between the sexes are adequately taken into account, with a view to the eventual crumbling of the private/public divide and “a redistribution of power and resources in the institutional structures which perpetuate women’s oppression.”⁵⁵ The attainment of equality as transformation necessarily implies the effective attainment of all previous conceptions thereof. In a word, where transformational equality is attained, laws will necessarily cease to discriminate against women, opportunities would, in fact, become gender neutral, and a marked rise in the participation of women in the private sector could be expected. For our purposes, however, the most critical aspect of transformative equality – and the various forms of equality captured by the *CEDAW* convention more broadly - is *its* explicit dependence on examining the socio-structural and cultural roots of gender discrimination. In a word, the attainment of transformative equality is impossible without taking context into account.

Fredman locates the ideals of transformative equality in Articles 3 and 5 of the Convention especially. Article 3, which calls for States Parties to “take in all fields...all

⁵⁴ Sandra Fredman, “Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights” in I. Boerefijn *et al* eds., *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Antwerpen: Intersentia, 2003) at 111, 114 [emphasis mine].

⁵⁵ *Ibid.*

appropriate measures...to ensure the full development and advancement of women" is an example of transformative equality's objectives of breaking free from the dichotomous thinking of men's vs. women's rights, demonstrating remarkable focus on the advancement of women "in all fields;" Article 5, on the other hand, makes explicit the *methodology* of attaining transformative equality by calling for the direct modification of "social and cultural patterns...with a view to the elimination of prejudices and customary...practices... based on the idea of the inferiority or superiority of either of the sexes." Together with Article 2(e), which places upon States Parties the positive duty to "Take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise," Article 5 grants the courts the ability to supervise and to condemn the discriminatory customs and practices of the private sector. As we will see, it is precisely this crucial, foundational aspect of Article 5 that is lacking in the *Price Waterhouse* decision.

At the outset, it is important to note that the United States had been a signatory to the *CEDAW* Convention for nearly nine years in at the time of rendering its judgment in *Price Waterhouse*. Article 11 of *CEDAW* speaks directly to the issue of gender discrimination in the employment sector. It requires that "States Parties...take all appropriate measures to eliminate discrimination against women in the field of employment..." to ensure the equal rights of women, particularly with respect to:

(b) The right to the same employment opportunities, including the application of the same evaluative criteria for selection in matters of employment;

and,

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

Article 11 must be read in light of the provisions contained in Part I of the Convention, including Article 5 which, as we have seen, requires a robust examination of the underlying, social and cultural factors fostering and promoting gender discrimination.

The critical flaw which plagues the *Price Waterhouse* decision rests in the Supreme Court's unwillingness to tackle the patent issues of structural inequalities present at the appellant's (Price Waterhouse's) firm. As we have already seen, these structural inequalities, which were made manifest in a drastic underrepresentation of women partners at the firm, the *absence* of evaluative criteria and policy guidelines directing the promotion selection process, and an *absence* of discouragement generally with respect to the stereotypical comments directed at Hopkins by her colleagues, constitute a form of institutionalized stereotyping. This form of institutionalized stereotyping effectively deprived Hopkins of her ability to be considered fairly for the purposes of promotion and led to the establishment of an oppressive atmosphere in which the satisfaction both of her professional duties and of her expected comportment became an impossibility. As a result, Hopkins' identity had been subjected to the harms of a violent form of constriction, and her ultimate partnership refusal was clearly substantiated on irrelevant grounds having more to do with social sanctioning than an accurate assessment of her skills or abilities. Had the Supreme Court wrestled with the existence of stereotyping as subsumed by Price Waterhouse's institutional makeup and particular policies, such institutionalized stereotyping might have effectively been treated as in default breach of Article 11 of *CEDAW*.

With respect to Article 11(b), for example, we have demonstrated how the normative and descriptive stereotypes to which Hopkins was subject ensured that she had been deprived, *a priori*, of “the right to the same employment opportunities, including the application of the same evaluative criteria for selection in matters of employment.” Because such evaluative criteria did not exist, and because Hopkins belonged to a subordinate or out-group perceived to pose a threat to the institutionalized male-dominance at the firm, the Supreme Court might have expanded the scope of their analysis *away* from the particularized harms suffered by Hopkins to more generalized view of whether *any* woman was likely be treated fairly for the purposes of partnership promotion at the firm. In the face of such egregious statements as those already alluded to – “[She should take] a course at charm school;” “[I cannot] consider any woman seriously as a partnership candidate...” – such a shift would have grappled with the issue of gender discrimination at its primary site (the institution), and effectively secured a remedy that could have reached beyond the particularized harms suffered by Hopkins. In this regard, it is evident that the absence of clear evaluative criteria at Price Waterhouse clearly led to an atmosphere permissive of stereotypical thinking at the evaluation stage. Failing to address such a basic issue in order to fine-tune certain standards of proof has effectively guaranteed the survival of widespread stereotyping at Price Waterhouse for future generations of female employees.

As per Article 11(d) of the Convention, the *Amicus Brief* does well to explain how and why Hopkins’ resounding successes as a senior partner might well have been diminished by the very stereotypical thinking which curbed her chances at promotion. We have already noted, for example, how Hopkins’ positive personal traits were likely

and arbitrarily filtered by the stereotypical perceptions of her male colleagues and thus translated as wholly negative. This was evidenced, for example, by the disparate views as to Hopkins as "independent, self-confident and courageous," on the one hand, and "overbearing, arrogant, [and] self-centered" on the other.⁵⁶ Yet, as the *Amicus Brief* highlights, this same principle of arbitrary diminishment and distortion often applies equally to a female professional's actual *output*:

Women's achievements are perceived in a way which fit with stereotypic ideas regardless of whether facts about an individual woman objectively support the perception. As a result, accomplishments by women are significantly more likely to be discounted than the same accomplishments by men because the successful performance of women is attributed to ephemeral or unstable causal factors.⁵⁷

Had the Supreme Court more carefully considered the invaluable advice tendered in the *Amicus Brief*, they may have discerned the actual, hidden content contained within such patronizing and pejorative statements as, "[She] overcompensated for being a woman."⁵⁸ What is more, the Supreme Court would have properly noted that, in the face of Hopkins' tireless work ethic and astounding earnings for the firm, comments such as these constitute veiled but fulsome attacks on Hopkins' right to "equal treatment in respect of work of equal value." They are demeaning and dismissive by nature, and an example of benevolent, patriarchal stereotyping which undermines the value of a woman's legitimate achievements and hard work.

The above two illustrations of the U.S. Supreme Court's specific failure to accord with Article 11 of the *CEDAW* Convention alludes to some of the grave shortcomings of

⁵⁶ *Amicus Brief* at 1065.

⁵⁷ *Ibid.* at 1066.

⁵⁸ *Price Waterhouse* at 235.

gender discrimination analyses which overlook the foundational issue of socio-structural contexts and origins: without delving into such origins, the courts cannot discern the actual content of the evidence before them; they cannot attack the gender discrimination at its roots; and, as a direct result, they cannot fashion remedies that provide lasting and meaningful relief for particular stereotyped out-groups seeking legal redress.

Indeed, one might describe Supreme Court's approach to gender discrimination in *Price Waterhouse* as felling a tree by pruning its leaves. In the face of so much egregious and explicit inequality at both the individual and structural level, the court makes the basic error of treating the case on a particularized, fact-driven basis. It discusses the harms suffered by Hopkins, the stereotypical comments directed at her, and how the Civil Rights Act serves to protect her equality interests. But it fails to consider the basic inequalities *built into* Price Waterhouse as a whole – its makeup and procedures – and how such inequalities would surely escape the shallow grip of the court's analysis. As a result, the U.S. Supreme Court not only forfeits an invaluable opportunity to expose, diagnose, and to treat an institution of its patent equality ills, but what is more, fails to notice how its own methodology is incapable of fleshing out and interpreting even the most basic facts interpreted in the case. Early in the court's judgment, for example, Mr. Justice Brennan notes in the interest of Price Waterhouse that "[l]ong before her bid for partnership, partners evaluating [Hopkins'] work had counseled her to improve her relations with staff members." Yet, within the complex world of stereotyping, even such basic evidence begs the question: without delving into the structural and contextual roots of the stereotyping which pervaded the atmosphere at Price Waterhouse, how can the court be certain that even *this* criticism was not rooted in stereotypical thinking? In short,

it cannot. And given the pervasiveness of such stereotyping at both the institutional and individual levels at Price Waterhouse, it may almost assuredly have been the product of a stereotypical response to Hopkins' perceived breach of her "proper" role as a woman. Therefore, given these shortcomings inherent to the U.S. Supreme Court's approach to Hopkins' case, we now turn to a consideration of how the court may have improved its decision both through an application of specific recommendations and through the adoption of a socio-structurally oriented, contextual approach generally.

As previously mentioned, the *Amicus Brief* outlines three key conditions which are seen to promote gender stereotyping in the workplace: rarity of the individual (i.e. women at Price Waterhouse), ambiguity in evaluative criteria, and paucity of information regarding the applicant. According to the *Amicus*, all three of these conditions were present at Price Waterhouse, creating an environment where stereotypical thinking was not only not discouraged, but actually fostered.⁵⁹ To counteract the harmful effects which flow from the presence of these three conditions, the *Amicus Brief* sets out three practical and common-sense measures which Price Waterhouse might have implemented for the purposes of monitoring and reducing the firm's widespread reliance on and use of stereotypical thinking. Given the U.S. Supreme Court's predilection for a focused, individualized analysis, it is not surprising that the court completely omits any mention these three easy-to-implement recommendations; for they each operate at the *institutional* level. The *Amicus Brief* makes mention, for example, of the simple need to garner more information about an individual prior assessing him or her. Such information "can undermine the use of stereotypes" by the simple fact that actual information (facts) and

⁵⁹ *Amicus Brief* at 1067.

stereotypes (oversimplifications) are, by their very natures, incompatible.⁶⁰ Where an individual is forced to take greater account of another’s actual, rather than perceived strengths and weaknesses, the result is an assessment that is more likely to be based on “information clearly relevant to and crisply diagnostic of the target decision...”⁶¹ Along these same lines, the *Amicus Brief* also recommends that decision-makers pay “increased attention” to such added information. Attention alone, the *Brief* suggests, can be lethal to stereotypes; they can interrupt the process of their formation, and allow more particularized information to “temper the tendency to stereotype” altogether.⁶² And lastly, the *Amicus Brief* recommends “motivational incentives that support increased attention and indicate a consensual disapproval of stereotyping.” Such policy measures should explicitly encourage interdependence and teamwork (thus forcing greater sub and dominant-group interaction), remind decision-makers that “the subordinate’s future depends on their judgments” (thereby promoting greater diligence, attention and accuracy), and may even call for a third party’s opinion to weigh in on the decision-making process, *where that third party is known to discourage stereotyping.*⁶³

These recommendations are notable both for what they seek to achieve and what they consciously avoid. In their unobtrusiveness and simplicity, they represent a highly deferent and sensitive approach to seeking to curtail the harmful effects of stereotyping within the private sector. Accordingly, they do not speak directly to some of the major causes of concern at Price Waterhouse; the *Amicus Brief*’s does not explicitly address the issue of an individual’s “rarity,” for example, by recommending that more women be

⁶⁰ *Ibid.* at 1068.

⁶¹ *Ibid.*

⁶² *Ibid.* at 1069.

⁶³ *Ibid.*

promoted to partnership; nor does the *Brief* seek to redress the issue of “objective evaluative criteria” - the absence of which it had previously lamented – by seeking to mandate them. In fact, the *Amicus Brief* is silent on these issues. Given the level of intervention and structural change which this latter class of remedies would require, the it must thus be seen as a exercise of considerable wisdom and restraint, as well as an illustration of the spectrum of tools available to a court for the purposes of eliminating gender discrimination. Because the particular tools proffered by the *Amicus Brief* were so broad and easy to implement, the U.S. Supreme Court’s failure to mandate them becomes increasingly problematic. What is even more problematic, however, is that the court also fails to take direct issue with the larger, residual issues with which the *Amicus Brief* does not contend – the underrepresentation of women and the lack of evaluative criteria, for example. What follows is a methodology that the U.S. Supreme Court might have adopted in seeking to achieve lasting results with respect to these more substantial sources of inequality.

The Contextual Approach as a Remedial Tool: In Isolation and in Concert

As noted, the transformative character of the *CEDAW* Convention, as typified by Article 5, requires that States Parties delve into the socio-structural roots of gender discrimination in order to attain lasting substantive equality for women. This same approach has been advocated throughout this essay, and further buttressed by the major principles contained in the *Amicus Brief* pertaining to the causes and possible remedies for gender stereotyping in the workplace. It is, in effect, the most powerful tool for

grappling with the underlying sources and causes of gender discrimination at the social and institutional level. For the purposes of devising a sound legal methodology, however, the contextual approach must be divided into two distinct phenomenological processes: as a means of *thinking* about gender stereotyping, and a means of *legally analyzing* the same. From the judge's point of view, an assessment and profound awareness of what has variously been termed the socio-structural, ideological or contextual roots of gender discrimination must always be active in order to ensure a fulsome and accurate picture of the scope and depth of the alleged stereotyping which has taken place. As it has been argued, the absence of such an awareness or mental framework will necessarily deprive a court of its ability to properly interpret the evidence before it, to locate the real *situs* of gender discrimination, and thus to fashion a lasting and meaningful remedy. Nevertheless, this *mental* process must be distinguished from sound legal reasoning, which may or may not require or be amenable to the adoption of the contextual approach. A major theme common to virtually all social science literature is the exceeding complexity and subtlety of stereotyping as a cognitive phenomenon. Given the difficulty associated with drawing the many inferences required to accurately pinpoint the socio-structural origins of gender discrimination, and given the significance and finality which a legal judgment may have, courts should be exceedingly careful before seeking to name and to expose such socio-structural origins within the content of their decisions. Such an approach, if adopted too freely, runs the risk of unjustifiably stigmatizing the defendants in a given case, and thus constituting an act of juridical stereotyping in and of itself. Therefore, as a tool for legal reasoning (i.e. written decisions), the contextual approach should be reserved for cases only where there is

ample and varied evidence as to the existence of systemic stereotyping, where the court is satisfied that an important piece of evidence can only be properly construed in light of its underlying, ideological motivational factors, or where justice demands that the probable sources of discrimination be exposed to the public eye. Where a court is satisfied that the evidence surpasses this threshold, the contextual approach should be applied flexibly and with a rigor that is proportionate to the scope and severity of systemic discrimination alleged. This may call for a gentle allusion to the possible sources of discrimination; conversely, it may require a fulsome exposure and condemnation the same in order to ensure a lasting effect. Where, however, a court will have to engage in excessive inference-drawing for the purposes of locating the socio-structural factors, or else where evidence of such systemic stereotyping is less than ample, the contextual approach may better serve its function as a tool of mental, but not legal reasoning. A judge must always be mindful of the complex nexus of factors which contribute to stereotyping; on this point, social science literature is helpful. Nevertheless, this does not mean that courts should in all cases seek to expose the roots of the particular discrimination at issue. While the contextual approach might afford an avenue for directness only in rare circumstances, a court's primary weapon in combating inequality are its remedies. Judges, therefore, must be mindful always of the socio-structural dimensions of the cases of gender discrimination before them, and thus seek to issue those remedies which will attack such discrimination at their institutional roots. Mandating the incorporation of such an analysis explicitly into each and every judgment, however, would require rampant breaches of sound judicial reasoning, and also run the grave risk of backlash at the hands of those stigmatized by the contextual approach and their sympathizers. In this

way, a judge should recall that, within the context of cases of gender discrimination, his or her primary duty is towards the attainment of transformational equality, not punishment.

Where the facts of a case are not amenable to a fulsome contextual approach, alternative measures exist for the purposes of correcting breaches of gender equality and imposing corrective remedies on the guilty party. Where the particular court is a signatory, *CEDAW* is always engaged in cases of alleged gender discrimination against women. We have noted the ways in which various Articles under Part I of the Convention impose positive duties on States Parties to eliminate discrimination against women in all fields of public and private life. Notably, Article 4(1) permits States Parties to take “special measures” for the attainment of basic equality of opportunity and outcome. Furthermore, Article 4(1) ensures States Parties that such “temporary special measures...shall not be considered discrimination...” so long as any resultant unequal standards are “discontinued,” or else modified to reflect the relative position of the sexes, once they have attained their substantive goals. Significantly, *CEDAW* has interpreted Article 4(1) of the Convention as mandating an assessment of the “underlying causes of discrimination against women.”⁶⁴ The document, which elaborates upon the content and purpose of Article 4(1), further emphasizes the transformative nature of the article and of the Convention as whole in the following way:

The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of

⁶⁴ CEDAW, General Recommendation 25, Temporary Special Measures, U.N.Doc. CEDAW/C/2004/I/WP.I?Rev.1, 30 Jan 2004 (Advanced Unedited Version)

power and life patterns.⁶⁵

Article 4(1), therefore, constitutes both a re-affirmation of the ideal of equality as transformation, as well as an exceedingly powerful tool for implementing or supporting sweeping policies for the purposes of eliminating gender discrimination.

Price Waterhouse is a prime example of a case amenable to both the contextual approach and to temporary special remedies issuable under Article 4(1) of *CEDAW*. With respect to the former, the combination of the repeated, egregious and unmitigated stereotypical comments made at the firm constitutes an open invitation for precisely the type of fulsome contextual treatment aimed at exposing and diagnosing the institutional dimensions of stereotyping. Had the U.S. Supreme Court taken this route, it thus could have easily expanded the scope and effectiveness of its judgment by requiring the implementation of the *Amicus Curiae* recommendations, as well as the adoption of a set of rigorous guidelines and policies designed specifically to curb and to denounce reliance on stereotypical thinking while promoting an atmosphere of genuine interdependence and mutual understanding. Such a remedy would not have been outside the scope of the court’s powers, and may even have taken the form of obiter. On this point, it is important to appreciate that the stigma which invariably attaches upon subjection to the contextual approach will often be enough to stimulate policy changes within the institution under scrutiny.

Where the contextual approach may have solved the issue of the stereotype-permissive policies at *Price Waterhouse*, Articles 11 and 4(1) of *CEDAW* could have

⁶⁵ *Ibid.* at 10.

provided the heavy artillery needed for a much-needed redistribution of structural power at the firm. Given the blatant – and in the case of Hopkins, unjustifiable – social status disparities as between the men and women at Price Waterhouse, the court could have found Price Waterhouse to have been in breach of Article 11 of the *Convention* on the two grounds previously enumerated: application of equal evaluative criteria, and equality of treatment in the evaluation of the quality of work. It could have then moved to Article 4(1) in order to argue that breaches of Hopkins’ employment rights are indicia of the unequal treatment of women at Price Waterhouse generally - as evidenced, for example, by women’s marked underrepresentation at the partnership level of the firm. In fact, because such power disparities were so outrageous in the *Price Waterhouse* case, the Supreme Court may well have turned directly to Article 4(1) of the Convention alone and mandated immediate “special measures” to the effect that a certain percentage of women comprise the makeup of Price Waterhouse’s partnership within a certain time frame. Such a remedy would accord with Article 4(1)’s explicit concern with “the objectives of equality of opportunity and treatment,” and with the Convention’s transformational goals of “ensuri[ng] the full development and advancement of women” more generally. In this way, the U.S. Supreme Court could have employed Article 4(1) in concert with the contextual approach and the recommendations of the *Amicus Brief* in order to effectively heal every site and source of inequality at the level of Price Waterhouse’s institution.

The aims of transformational equality are nothing if not grandiose. The ultimate vision of women’s *de facto* equality with men – one, in fact, which no longer depends on dichotomous thinking to derive its meaning – is a laudable but distant goal. The

advancement of the cause for women has had to perpetually assume new forms of subtlety and sophistication throughout its historic successes. What began as a simple quest for equal rights under the black letter of law soon grew into an ideal of equal opportunity and finally into equality of outcome with men. Today, equality seeks to realize the abolition of a world that is male-defined altogether. In so doing, the very concept of equality has pushed to a new level of interiority; it has entered the very fiber of social relations in a quest to destroy the invisible virus called "stereotype". This brave new conception of equality requires brave new legal methodologies. Statutory interpretation remains an effective tool for altering the scope and application of ordinary laws; but in order to rid the world of the cancers of stereotypical thinking about women, something much deeper is necessary. That something, this paper has argued, is a profound and informed understanding and appreciation of the socio-structural roots and origins of stereotyping. Armed with such an awareness, the world's courts will be better fit to exact remedies which cure, not merely the harms suffered by the individual seeking redress, but the very social relations from which such harms were allowed to materialize. It is only in this way, this paper has argued – it is only by shifting focus away from the individual towards the broader, underlying social origins of the harms suffered – that the courts, scholars, men and women of today will be able to wage their war against ignorance and oppression on the new battlefield of transformative equality.

