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Kimberly A. Yuracko

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VALUES AT WORK: HOW SEX DISCRIMINATION LAW MOVED FROM JOKE TO JUGGERNAUT IN 50 YEARS

Kimberly A. Yuracko[*]

I. INTRODUCTION

Since Title VII was enacted fifty years ago,[1] the scope of its sex discrimination protection has expanded dramatically. When the Act was passed, its target was clear and fairly narrow. It sought to end women's exclusion from particular jobs and to challenge their relegation to a "pink collar" ghetto.[2] In challenging these forms of categorical exclusion, the Act has been extremely effective. In the decades that followed, discrimination has become more subtle and complex. No longer are women categorically excluded from jobs, but their inclusion does require that they "fit" the corporate mold. An employer might be happy to hire female lawyers, for example, as long as they do not appear too "macho" or masculine. Challenges to workplace fit demands have been labeled "second generation" discrimination claims and have become a focal point of antidiscrimination litigation and scholarship.[3]

In response to such claims, courts in recent years have interpreted Title VII's prohibition on sex discrimination in increasingly expansive ways. Not only are workers protected from discrimination based on their biological sex, they are increasingly protected from discrimination based on the ways they express their gender identity. Men perceived as inappropriately feminine, women perceived as inappropriately masculine, and transsexuals are winning protection from workplace demands that they conform to the dominant social norms of their sex.[4]

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[*] Stanford Clinton, Sr. and Zylpha Kilbride Clinton Research Professor of Law, Northwestern University School of Law. I would like to thank Associate Dean Jeremy Telman for the invitation to give this lecture. I am also grateful to the Valparaiso faculty and students for their engagement with the topic and for their insightful questions and comments. This talk is based on a larger book project.

[1] Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e *et seq.* (2006).

[2] *See* Erica E. Hoodhood, Note, *The Quintessential Employer's Dilemma: Combatting Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard*, 45 VAL. U. L. REV. 111, 114–15 (2010) (discussing the purpose behind Title VII); *see also* Keiko Lynn Yoshino, Note, *Reevaluating the Equal Pay Act for the Modern Professional Woman*, 47 VAL. U. L. REV. 585, 590–98 (2013) (discussing wage disparity claims under the Equal Pay Act, the predecessor to Title VII).

[3] *See generally* Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006) (discussing trait discrimination, or "second generation" discrimination, under Title VII).

[4] *See infra* notes 5–7 and accompanying text (providing examples of such successful suits).

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Yet, not all gender nonconformists are winning protection. The result is a body of case law that is both on a trajectory of expansion, while still being something of a muddle. In this talk, I seek to make sense of the values and social commitments that are driving contemporary sex discrimination case law, and I seek to raise a note of caution about its trajectory.

To illustrate both the current muddle and the trajectory, I want to begin with a few somewhat stylized fact patterns based on actual cases.

The Aggressive Woman: Ann is a senior manager at a large accounting firm. Ann works hard. She is successful at winning new contracts for the firm and at advising clients. Yet, when she is considered for promotion, she is denied admittance to the partnership. Some partners find her too aggressive and unladylike. To improve her chance of promotion the following year, she is advised to dress more femininely, wear makeup and jewelry, and have her hair styled. Ann sues for sex discrimination. She wins.[5]

The Effeminate Man: Antonio works as a food server at a restaurant chain. For several years, he is subjected to a steady stream of insults and name-calling from some of his male co-workers. They refer to him using female pronouns and mock him for carrying his tray like a woman. Antonio complains about the harassment to his supervisor to no avail. Antonio sues for sex discrimination. He wins.[6]

The Transsexual: Philecia is a transsexual police officer who has been diagnosed with Gender Identity Disorder ("GID"). As part of her transition from male-to-female, Philecia begins living off duty as a woman. While still presenting as male at work, Philecia does display some feminine characteristics on the job. She has a French manicure, arched eyebrows, and sometimes comes to work wearing makeup. Philecia is denied a promotion to sergeant. In justifying the denial, one supervisor explains that she is not sufficiently masculine; she is criticized by several others for lacking "command presence." Philecia sues for sex discrimination. She wins.[7]

The Garden-Variety Gender Bender: Darlene works as a bartender at a casino. In order to protect its image, the casino has rigid and detailed grooming codes for female and male employees. The code for female employees requires them to wear makeup, have their hair styled,

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[5] For the case on which the preceding scenario is based, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990).

[6] For the case on which the preceding scenario is based, see *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

[7] For the case on which the preceding scenario is based, see *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

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and wear nail polish. The code for male employees prohibits them from wearing makeup. Darlene does not object to any aspect of the grooming code for women, except for the makeup requirement. She refuses to wear makeup and is fired. Darlene sues for sex discrimination. She loses.[8]

These cases raise several questions. Why do courts increasingly protect workers from discrimination based on their gender presentation in addition to their biological sex? Why do some employees receive more protection from stereotypes than others? In particular, why are transsexuals winning their challenges to sex-based gender conformity demands while garden-variety gender benders are not?

In this talk, I seek to make two core arguments. First, antidiscrimination law has always reflected a mosaic of principles and values rather than a single commitment or requirement. It is the search for a single antidiscrimination principle that makes antidiscrimination law look particularly inconsistent and incoherent. Second, the most recent expansion of protection for gender nonconformists is due to an increasing medicalization of gender in the courts. Protection for transsexuals, in particular, has depended in large part upon courts' acceptance of testimony by medical experts affirming the fixed, stable, and immutable nature of gender identification in workers who suffer from GID. Such evidence, however, serves to essentialize not only the gender experience of transsexuals, but of women and men generally. Paradoxically, then, the current trajectory of expansion may be bringing new protections for individual gender nonconformists at the expense of a subtle hardening of gender expectations for everyone.

My talk will proceed by examining the work being done by three quite traditional antidiscrimination values or commitments. They are: (1) neutrality, (2) antisubordination, and (3) status protection.[9] I will show the extent to which each value is driving the most recent expansion of sex discrimination protection. I will then conclude by raising a note of caution about some of the unintended consequences the expansion in protection may have for sex equality, gender flexibility, and workplace freedom.[10]

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[8] For the case on which the preceding scenario is based, see *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

[9] *See infra* Parts II–IV (analyzing these values in the context of Title VII sex discrimination claims).

[10] *See infra* Part V (posing potential issues with the expansion of Title VII sex discrimination law).

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II. NEUTRALITY

The value that most clearly and firmly grounds American antidiscrimination law is "neutrality."[11] Women and men must be treated alike in the workplace because they are fundamentally, and in most respects, alike. Antidiscrimination law's demand for neutrality ended employers' dual track hiring processes and gave women a road out of the pink collar ghetto. Yet courts' commitment to neutrality in sex discrimination cases has always been limited and partial for reasons both theoretical and practical. As a result, neutrality demands have not been the driving force behind recent expansions in sex discrimination protection.

Neutrality requires that women and men who are similarly situated be treated the same. The question for determining whether treatment is non-neutral becomes in effect: is a woman being penalized for possessing a trait that a man is not penalized for possessing and vice versa. Yet, neutrality demands in sex discrimination cases are often more indeterminate and less useful than generally recognized.

The problematic nature of cross-sex neutrality is most clear in cases where specific biological traits are at issue. In such cases, determining whether an employer is behaving non-neutrally by comparing its treatment of women and men with precisely the same trait is not possible. Findings of non-neutrality and discrimination must, therefore, depend on approximate cross-sex comparisons, which are themselves indeterminate and socially loaded.

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[11] *See, e.g.*, R. Richard Banks, *Class and Culture: The Indeterminacy of Nondiscrimination*, 5 STAN. J. C.R. & C.L. 1, 17–18 (2009) (explaining that the nondiscrimination mandate is premised on the "simple sense of neutrality" that "directs one to treat likes alike"); Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM U. J. GENDER SOC. POL'Y & L. 13, 16 (2005) (explaining that Title VII's "primary commitment [was] to equality and gender neutrality"); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2325 (2006) (noting that "[b]road agreement across the political spectrum supports the concept of discrimination as colorblindness"); Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 341 (1999) (describing the antidiscrimination principle as informed by the injunction that "likes must be treated alike"). Legal scholars often refer to this demand for neutrality as an "anticlassification" requirement. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 955 (2012) ("[A]nticlassification principles prohibit practices that classify people . . . on the basis of a forbidden category.") (internal quotation ommitted); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification of Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (explaining that the anticlassification principle "holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category").

Consider, for example, an employer who happily hires both women and men but refuses to hire women with high-pitched voices. The employer has no problem hiring or promoting women; the employer simply finds female high-pitched voices grating and so refuses to hire women with such voices. In order to determine whether a woman with a high-pitched voice is being discriminated against in the sense of being treated non-neutrally, it is necessary to compare her treatment to that of a man with the same trait. Men, though, will not possess the very same trait. Some men may possess high-pitched male voices, but none will possess a high-pitched female voice. It is not possible, therefore, to assess the high-voiced woman's sex discrimination claim by looking to the employer's treatment of men with the very same attribute.

Yet gender norms complicate neutrality determinations in all cases. In a gendered society, women and men can never possess the same trait in precisely the same way. Gender norms will always make traits look and mean different things for women and men. Traits such as competitiveness or active leadership, for example, are perceived very differently when possessed by women or men.[12] In order to be operational, even in cases in which technical trait parity is possible, sex-blind neutrality requires a rejection of gender norms. Neutrality must be defined in a literal and formalistic way, without regard to the actual social meaning of the traits and attributes at issue. To use Professor Mary Anne Case's colorful example, if women are free to wear "frilly pink dresses" at work then men must be free to do so as well,[13] despite the fact that a frilly pink dress signals conservatism in a woman and transgression in a man.

Courts, however, have never taken their commitment to neutrality this far. The Ninth Circuit's decision in *Jespersen v. Harrah's Operating*

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[12] *See, e.g.*, Victoria L. Brescoll & Eric Luis Uhlmann, *Can an Angry Woman Get Ahead?: Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 PSYCHOL. SCI. 268, 273 (2008) (finding that "[p]rofessional women who expressed anger were consistently accorded lower status and lower wages, and were seen as less competent, than angry men"); Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48, 54–57 (1990) (finding that women who engaged in group leadership activities received more displeased responses and fewer pleased responses from group members than did men engaging in the same behavior and making the same suggestions and arguments); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001) (finding that female job candidates in a controlled study who emphasized "agentic" qualities such as competitiveness were rated "less socially skilled and likeable than an identically presented man").

[13] Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 7 (1995).

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Co.[14] provides the most high-profile recent example of neutrality's legal limits. Far from rejecting gender norms, the Ninth Circuit did not even seem to notice them. It both upheld the requirement that women, but not men, wear makeup and proclaimed, without explanation, that the requirement did not reflect sex stereotypes at all.[15] Yet in *Jespersen*, the Ninth Circuit was merely reaffirming a limit on neutrality that had been drawn by courts over the preceding four decades.

Antidiscrimination law did not require formal neutrality between women and men with regard to dress and grooming codes, even in those instances where technical trait parallelism was possible. Courts have consistently held, for example, that men with long hair need not be treated the same as women with long hair,[16] and that men with earrings need not be treated the same as women with earrings.[17] Courts have

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14 444 F.3d 1104 (9th Cir. 2006).

15 *Id.* at 1105–06.

16 *See, e.g.*, Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (per curiam) (holding that a male employee fired for not complying with employer's short hair requirement for men could not state a claim for sex discrimination); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) (holding that a grooming code requiring men to maintain shorter hair length than women does not constitute a prima facie violation of Title VII); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (finding a "sex-differentiated hair length regulation" was permissible under Title VII); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) (holding that "requiring short hair on men and not women does not violate Title VII"); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) ("Private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights."); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (finding minor differences between men's and women's hair length in grooming regulations does not violate Title VII); Baker v. Cal. Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974) (holding "that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees" without violating Title VII); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973) (holding that the employer's hair-length regulations did not violate Title VII).

17 *See, e.g.*, Kleinsorge v. Eyeland Corp., No. CIV.A. 99-5025, 2000 WL 124559, at *1–2 (E.D. Pa. Jan. 31, 2000) (holding that the employer's grooming code allowing female, but not male, employees to wear earrings did not violate Title VII); Capaldo v. Pan Am. Fed. Credit Union, No. 86 CV 1944, 1987 WL 9687, at *1 (E.D.N.Y. Mar. 30, 1987) (holding that the employer's grooming code prohibiting men, but not women, from wearing earrings did not constitute sex discrimination); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 801, 804 (Iowa 2003) (holding in response to a sex discrimination claim brought by a male employee fired for refusing to stop wearing an earring that "personal grooming codes that reflect customary modes" of distinctly gendered grooming do not constitute sex discrimination); Macissac v. Remington Hospitality, Inc., 811 N.E.2d 524, 524 (Mass. App. Ct. 2004) (unpublished table decision) (holding that enforcement of a grooming code prohibiting male, but not female, employees from wearing earrings did not constitute sex discrimination); Lockhart v. La.-Pac. Corp., 795 P.2d 602, 602 (Or. Ct. App. 1990) (holding

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viewed such burdens as too insignificant to warrant antidiscrimination protection. Any principled commitment to neutrality has been outweighed in such cases by the perceived value of protecting comfortable gender conventions.

Indeed, even when courts have protected workers from sex-specific conformity demands, a commitment to neutrality does not seem to be the reason. Consider courts' increasing willingness to protect individuals diagnosed with GID from sex-based dress and grooming demands.[18] Under a principle of formal neutrality, it is impossible to distinguish between a man who wants to wear a dress or earrings because he suffers from GID and one who wants to do so because of a personal proclivity. Yet this is precisely the distinction that courts make when they permit a man diagnosed with GID to transgress sex-based grooming codes but refuse to permit nontransexual men or garden variety gender benders to do so.

Similarly, it seems unlikely that protection for effeminate men stems from a commitment to formal neutrality. It is not at all clear, for example, that a man who is harassed for walking like a woman or acting like a woman is doing so in any real or technical sense. Certainly it would be difficult to conclude that he is walking in precisely the same way as a female co-worker. If neutrality toward men and women doing the same thing were driving antidiscrimination protection, it would be very strange for courts to provide protection in the effeminate men and masculine women cases, but not in dress and grooming code cases in which cross-sex comparators are more apparent and neutrality demands more clear. Yet, again, this is precisely the distinction that courts currently make. Such distinctions help to demarcate neutrality's limits as an antidiscrimination commitment. They also suggest that a principle other than neutrality is driving recent expansions of protection for gender nonconformists.

III. ANTISUBORDINATION

American antidiscrimination law is committed to more than simply the neutral treatment of individual workers without regard to protected characteristics. It is committed as well to dismantling particular caste-like hierarchies that have been entrenched by pervasive historical discrimination.[19] It is concerned, in other words, about groups, not just

that the employer's grooming code prohibiting male, but not female, employees from wearing facial jewelry did not constitute sex discrimination).

[18] *See* case cited *supra* note 7 (providing an example of such a case).

[19] *See* Areheart, *supra* note 11, at 964 ("Title VII—though seemingly designed to combat irrational discrimination and a statute that holds out the hope of moving beyond the

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individuals. Antisubordination values have shaped the doctrine and coverage of contemporary sex discrimination law, driving courts not only to require that women be given access to jobs, but also to require that certain jobs be redefined, and social norms shifted, so as to make their success more likely.

Interestingly, although antisubordination ideals are most directly reflected in Title VII's disparate impact framework—which prohibits facially neutral policies that operate to disadvantage a protected group while not serving a business necessity[20]—antisubordination goals have also shaped Title VII's disparate treatment coverage. In particular, courts' willingness to permit non-neutral treatment of women and men in deference to socially salient gender norms has been tempered by courts' concerns about group equality and relative access.[21]

Within the disparate treatment framework, courts have expressly identified two tests that focus on and target harms to the group, rather than focusing solely on the individual. The first is the unequal burdens test, which calls upon courts to strike down sex specific dress and grooming demands that disproportionately burden one sex.[22] The second is the double bind test, which calls upon courts to reject sex specific dress, grooming, or behavior demands if they make it more difficult for workers of one sex to succeed professionally.[23]

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consideration of, for example, race—has also sought to effect the redistribution of resources through policies such as affirmative action, reasonable accommodation (in certain instances), and the disparate impact doctrine."); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 838 (2003) (describing the goal of antidiscrimination law as "reducing subordination and social inequality"); Balkin & Siegel, *supra* note 11, at 32 ("To claim that the struggle for equality in this country has not been about subordinated groups seeking to dismantle the social structures that have kept them down makes a travesty of American history. The moral insistence that the low be raised up—that the forces of subordination be named, accused, disestablished, and dissolved—is our story, our civil rights tradition.").

[20] *See* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 953–67 (2005) (discussing the history of disparate impact discrimination under Title VII); *see also* Leah M. Provost, Note, *Excavating from the Inside: Race, Gender, and Peremptory Challenges*, 45 VAL. U. L. REV. 307, 324 n. 63 (2010) ("Title VII reaches facially neutral practices that have a disparate impact on a protected group . . . ." (citing, in part, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988))).

[21] *See* cases cited *supra* notes 16–17 (providing examples of courts that have upheld employer grooming regulations that treat men and women differently).

[22] *See infra* Part III.A (discussing the unequal burden test used as an alternative to disparate treatment).

[23] *See infra* Part III.B (discussing the double bind test used as an alternative to disparate treatment).

A. Unequal Burdens

Courts first articulated the unequal burdens test in the 1970's to provide some check on sex-specific dress and grooming requirements that seemed to disadvantage one sex relative to the other.[24] The test was used with great effectiveness in its early years to strike down sex specific employment demands in the airline industry. For example, requirements that female flight attendants wear only contact lenses, while male flight attendants could wear either contacts or eyeglasses, and requirements that female flight attendants meet stricter relative weight requirements than male flight attendants fell as courts emphasized that the burdens imposed on female workers were disproportionate and unequal to those imposed on male workers.[25]

B. Double Bind

The double bind test, by comparison, was articulated most famously by the Supreme Court in *Price Waterhouse v. Hopkins*.[26] The test addresses and targets workplace gender performance demands that conflict with professional role demands. In *Price Waterhouse*, the employer had created a double bind by demanding that Ann Hopkins be demure and ladylike, when successful performance of her job as a manager required more traditional male attributes such as assertiveness and competitiveness.[27] The Supreme Court refused to allow Price Waterhouse to punish Hopkins for deviating from its feminine ideal.[28] Instead, it shielded Hopkins from this double bind, thereby facilitating her move up the corporate ladder. As the Court explained: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch

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[24] *See, e.g.*, Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 789–90 (D.D.C. 1973), *aff'd in part*, *vacated in part*, 567 F.2d 429 (D.C. Cir. 1976) (holding employer policies that placed certain restrictions only on female employees violated Title VII).

[25] *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 847, 857 (9th Cir. 2000) (holding a weight policy inflicted only on female employees violated Title VII); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 610 (9th Cir. 1982) (holding a weight policy applicable only to female employees violated Title VII); *Laffey*, 366 F. Supp. at 789–90 (holding a policy restricting only female employees from wearing glasses and imposing weight restrictions on only female employees violated Title VII).

[26] 490 U.S. 228 (1989); *see infra* text accompanying note 29 (providing the double bind test articulated by the Supreme Court).

[27] *See Price Waterhouse*, 490 U.S. at 234–35 (describing the traits displayed by the female employee in the office).

[28] *See id.* at 258 (holding that when a Title VII plaintiff proves an employment decision was based on gender, the defendant may only avoid liability by proving it would have made the same decision even if it had not considered the plaintiff's gender).

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22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[29]

Double-bind concerns of the sort articulated in *Price Waterhouse* help to explain courts' willingness to strike down gender conformity demands that sexually objectify female workers. Courts check sexualization demands in a range of different cases. While their reasons for doing so are poorly articulated, the double-bind principle provides a unifying thread.

First, courts check sexualization demands in cases in which women are harassed as a result of their objectification. Rather than simply hold employers liable for the harassment, courts routinely deny them the power to objectify their female employees in the first place. For example, in *EEOC v. Sage Realty Corp.* the district court would not permit a New York City office building to sexualize its female lobby attendant by requiring her to wear a revealing uniform.[30]

Courts also check such demands in cases in which only female workers are held to a sexualized ideal. Consider again the airline cases in which courts struck down dress and appearance requirements for female flight attendants.[31] While these are often thought of as unequal burdens cases, broad double-bind concerns may also be at work.

Finally, courts check sexualization demands in cases in which employers seek to add sexual titillation as a job requirement for otherwise mainstream nonsexualized jobs, and to engage in explicitly sex-based hiring. In *In re. Guardian Capital Corp. v. N.Y. State Division of Human Rights*, for example, a New York appellate court refused to allow a Ramada Inn to "sex up" its restaurant by firing its male waiters and replacing them with scantily clad female waitresses.[32]

It is not impossible for female flight attendants, waitresses, and lobby attendants to perform the technical functions of their jobs while looking sexy—particularly if the employer prevents actual harassment. Nonetheless, satisfying sexual objectification demands may make satisfying nonsexualized job demands more difficult for female workers in two ways. First, sexualization demands may distract women from the nonsesexualized aspects of their jobs and diminish the energy they have left to devote to them. Second, sexualization demands may distract customers and coworkers and diminish their perceptions of the competence of female workers.

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[29] *Id*. at 251.

[30] 507 F. Supp. 599, 607, 611 (S.D.N.Y. 1981).

[31] *See* cases cited *supra* note 25 (providing examples of such cases).

[32] 360 N.Y.S.2d 937, 937 (App. Div. 1974).

Certainly, courts do not seek to eliminate female sexuality or the female gaze object from all jobs. They recognize that women's bodies and appearance may be an important part of the experience being sold in many service sector jobs. Nonetheless, broad double-bind concerns may help explain why courts are particularly suspicious of sexual objectification demands for female employees and why they use Title VII to keep sex out of many jobs and minimized in others.

Concerns about relative group advantage and disadvantage permeate sex discrimination jurisprudence in ways that are both explicit and unspoken. Certainly courts have not interpreted Title VII's prohibition on sex discrimination to require substantive workplace equality between women and men. Nonetheless, concerns about relative group power in and access to the work world have led courts to challenge some social norms and reconstruct certain job descriptions. Yet, the changes have been highly context dependent. Gender conformity demands may be struck down in one workplace while identical demands may be upheld in another because the broader implications of the demands play out differently in the different contexts—female bartenders may be required to wear makeup, but female professors probably could not be. Despite these limits, the impact of courts' antisubordination concerns has been sweeping, gaining women access to jobs throughout the economy and encouraging a critical take on social gender norms.

IV. Status

Yet, the most significant and dramatic recent expansions of Title VII's sex discrimination protection—those protecting individual workers' gender expressions—do not stem either from courts' commitment to neutrality or antisubordination. They seem to flow instead from courts' concerns about status-based harms combined with a new medicalization of gender that serves to essentialize and ossify not only the biological aspects of sex, but also the social and cultural meanings of gender.

American antidiscrimination law not only prizes neutrality and seeks to undermine group subordination, it also cares about the particular ways in which workers are burdened and constrained. Indeed central to antidiscrimination jurisprudence is the distinction between status and conduct—with burdens on the former being viewed as far more deserving of antidiscrimination protection than burdens on the

latter.[33] Certainly, gender expressions, even those that seem to be the product of GID, do not reflect status in the narrowest sense of ascriptive status. Ascriptive status is determined at birth, is not easily changed, and is independent of individual conduct.[34] However, individuals who are discriminated against because of their gender expressions are targeted precisely because of their conduct, not independent of it.

Yet the Supreme Court has also recognized a broader definition of status. According to the Supreme Court in *Robinson v. California*, status also refers to those conditions that an individual has a lack of ability to change and a lack of responsibility for acquiring.[35] It is this broader definition of status, along with courts' increasing reliance on expert medical testimony regarding gender, that helps explain courts' expanding protection for workplace expressions of gender identity.

Consider, for example, courts' newfound willingness to provide antidiscrimination protection for transsexuals.[36] Such protection has

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[33] *See* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 353 (1997) ("For the most part . . . a line between status and volitional conduct separates employer actions that are prohibited by Title VII from those that fall under the discretion of the employer, outside of Title VII's scope."); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1200–01 (2004) (describing the "involuntary/voluntary or 'status/conduct' distinction in Title VII cases"); Charity Williams, Note, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 360 ("Immutable traits are characteristics of status, whereas mutable traits are considered conduct, and 'only discrimination based on status is forbidden.'" (quoting Engle, *supra*, at 431)); *see also* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'" (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (explaining that "[t]he EEO Act does not prohibit all arbitrary employment practices. It does not forbid employers to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all. It is directed only at specific impermissible bases of discrimination—race, color, religion, sex, or national origin. . . . Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter . . . or that impose a burden on an employee on one of the prohibited bases." (footnotes omitted)).

[34] *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505 (1976) ("[T]he legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual . . . ."); *Weber*, 406 U.S. at 176 (suggesting heightened scrutiny is triggered by discrimination based on "status of birth"); RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 2 (2005) (arguing that civil rights law "properly focuses on ascriptive racial status, not on a metaphysics of ancestry or the unplumbed depth of subjective identity").

[35] 370 U.S. 660, 662–63 (1962).

[36] *See* case cited *supra* note 7 (providing an example of such decision).

depended upon the medicalization of GID and expert testimony regarding the pain one would experience as a result of this condition if one were forced to alter a particular gender expression.[37] By focusing on the individual's pain, the medical testimony has helped establish a judicial perception of transsexualism as a condition beyond one's control to change.

The importance of such medical evidence was most pronounced in the case of *Doe v. Yunits*, which involved a claim of sex discrimination in education rather than employment.[38] Doe was a fifteen-year-old student who had been diagnosed with GID.[39] Although biologically male, Doe identified as female and often wore girls' clothes, makeup, and accessories to school.[40] On such occasions, the principal would send Doe home to change.[41] At the start of the next school year, Doe was told that she would not be permitted to enroll if she wore any girls' clothing or accessories to school.[42] Doe sued for sex discrimination and filed a motion for preliminary injunction.[43] In concluding that Doe had shown a likelihood of success on her sex discrimination claim, the court relied on medical testimony and stated that forcing Doe to come to school in boys' clothes would actually "endanger her psychiatric health."[44]

In recent employment discrimination cases involving transsexuals, medical evidence has played a similar role. For example, in *Smith v. City of Salem*, the first circuit court decision to use the sex-stereotyping theory to protect a transsexual worker under Title VII, the court emphasized that the plaintiff suffered from GID and that his female gender expression through dress and grooming was part of the accepted medical treatment of his condition.[45] As in *Yunits*, this information seemed important to the court because it reinforced that, for Smith, cross-dressing was not a voluntary choice but a medical necessity—one that could be avoided only with great pain and hardship.[46]

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37 *See infra* text accompanying note 38–44.

38 No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*. at *2.

43 *Id*.

44 Memorandum of Decision and Order on Defendant's Partial Motion to Dismiss and Plaintiff's Motion for Leave to Amend, Doe v. Yunits, No. 00-1060A, 2001 WL 664947, at *6 (Mass. Super. Feb. 26, 2001).

45 378 F.3d 566, 568 (6th Cir. 2004).

46 *See* Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 179 (2005) ("Although the [*Smith*] court did not say so explicitly, this medical authority seemed to influence the court in seeing Smith's behavior as pursuant to trustworthy medical advice, and therefore less her fault or choice.").

Judicial concern about protecting immutable or status-like gender expressions—but not those that are mutable and conduct-like—also helps explain why transsexuals are winning their challenges to sex-based grooming requirements while nontranssexuals are not. Transsexuals are beginning to win because they are able to convince courts that, for them, sex-based grooming demands are painful.[47] In contrast, nontranssexual gender benders lose precisely because courts view the burdensomeness of such conformity demands as trivial for them.[48]

Concerns about status harms and compliance costs also helps makes sense of courts' protection of men harassed because of their perceived effeminacy. Typically, such men are harassed not because of a simple discrete trait that they can easily change and undo. Instead, they are harassed because of how they walk, talk, and stand—traits that are largely unconscious and difficult to alter.[49]

Certainly employees do not always win simply by showing that a particular employment practice burdens a type of gender expression that is difficult for them to change. However, when employees can show that such status-like gender traits are at issue, a presumption of protection does seem to attach, and to overcome the presumption an employer must present a business justification for the gender conformity demand.[50] Status-like expressions of gender are being protected, in other words, not absolutely, but through a burden-shifting framework.

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[47] *See, e.g.*, Lie v. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397, at *2, *5 (Mass. Super. Ct. Oct. 7, 2002) (holding plaintiff made a prima facie case of sex discrimination where the plaintiff was diagnosed with GID, the treatment of which involved psychotherapy and hormones). The court in *Lie* explained:

> The plaintiff avers that she is a biological male who has desired to live as a woman for a number of years, that she has been diagnosed with gender identity disorder, that she engages in psychotherapy, and that she takes hormones as part of her treatment. . . . Consequently, the plaintiff has alleged sufficient facts to establish she is a transsexual, not simply a man who prefers traditionally female attire.

Id. at *2.

[48] *See, e.g.*, Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998) ("[H]air length is not an immutable characteristic, for it may be changed at will."); Pecenka v. Fareway Stores, Inc. 672 N.W.2d 800, 805 (Iowa 2003) ("Wearing an ear stud is not an immutable characteristic.").

[49] *See, e.g.*, Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (stating that plaintiff suffered harassment for walking and carrying a tray like a woman); Doe v. City of Belleville, 119 F.3d 563, 566 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998) (stating the plaintiff's coworkers referred to him as "the 'fag' or the 'queer'" because he wore an earring).

[50] *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (holding that employer presented "legitimate" concerns about potential liability from having a biological male use women's public restrooms which justified its prohibition on transsexual employee doing so).

V. CAUTIONS

I want to conclude my talk by raising a note of caution about the expanding conception of gender as status that has been used so effectively in recent years to broaden the scope of Title VII's sex discrimination protection. Certainly, courts' willingness to treat some expressions of gender as more immutable and status-like than others, and to award antidiscrimination protection as a result, has brought important and much needed protection to previously excluded individuals and groups. There are, however, risks in expanding Title VII's coverage by relying on the Act's concern with status harms.

Most obviously, the focus on status-like expressions of gender means that those whom I refer to as "garden variety gender benders" will (continue to) lack antidiscrimination protection. Male workers who are generally comfortable with their masculinity will not be protected if they want to express their feminine side through dangling earrings or nail polish in violation of their employer's grooming code for men. Female workers who are generally comfortable with their femininity will not be protected if they want to express a more masculine side by rejecting such adornments in violation of their employer's grooming code for women. Such workers will be unable to convince courts that noncompliance reflects some essential gender core rather than more transient personal preference. Without new medical evidence to the contrary, courts will continue to view noncompliance for such casual gender benders as a matter of personal taste, and compliance as relatively painless.

What may be less clear, and more pernicious, however, is that the focus on whether gender expressions are status-like may actually reinforce gender stereotypes and encourage highly gender-stereotypical behavior in the workplace. To prove that a gender expression is status-like—and that its abandonment would have high compliance costs—employees must demonstrate that the attribute at issue is a core part of their gender identity. An attribute looks more central and essential the more it fits within a coherent gender package. As a result, in the quest for protection, gender-bending workers have an incentive to exaggerate their gender dysphoria by conforming those traits about which the worker feels less strongly to the gender of the traits for which the worker seeks protection. The result, somewhat oddly, is that workers may adopt a more extreme gender dysphoria than they actually feel, and manifest this dysphoria through more consistent and coherent expressions of the gender code associated with the opposite sex.

Moreover, the pressure on plaintiffs to prove their gender expressions are immutable not only encourages a particular kind of gender performance, it actually entrenches a particular understanding of

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what it means to be gender female and gender male. Reliance by courts on the medical definition of GID to understand how transsexuals experience their gender offers the clearest example. In order to receive a diagnosis of GID, transsexuals must experience and express a strong commitment to the gender norms typically associated with the other sex. Those who do not experience transsexualism in the prescribed ways will either be (newly) pathologized or discredited. Either way, they are likely to be excluded from the current antidiscrimination framework. Those who seek to avoid such exclusion must articulate, if not actually experience, their gender in the ways courts say that they do.

Courts' reliance on a medical narrative about transsexualism, however, reifies not only transsexualism, but also gender more generally. When medical experts testify that a plaintiff suffers from GID, the experts are saying something not only about transsexualism, but also about femininity and masculinity more generally. Judicial acceptance of such accounts gives them particular social power. Consider, for example, the court's acceptance of the medical evidence presented effort in *Yunits*—the case involving the middle school boy who came to school in girls' clothing.[51] According to the court, a diagnosis of GID meant that "Doe ha[d] the soul of a female in the body of a male."[52] Having the soul of a female meant that Doe needed to wear stereotypically female clothing, and that coming to school in boys' clothing would "endanger her psychiatric health."[53]

If, however, courts believe that women have female souls and that such souls require women to wear stereotypically feminine clothing, then the pain of women who seek to challenge some but not all feminine gender conventions will always be invisible. Similarly, the alleged pain or discomfort caused to women in nontraditional jobs may be too easily believed by courts, making them far too willing to accept employers' claims of a lack of interest defense in cases where women are excluded from nontraditional jobs.

Perhaps even more troubling, however, is that judicial conceptions of gender may in fact become real and come to affect how people view themselves, what they aspire to, and what they ultimately accomplish. Those who identify as gender female may, for example, come to believe that they really are and must be most comfortable in skirts and makeup. Hence they may shy away from jobs that require masculine attire and

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[51] *See* text accompanying notes 38–44 (discussing the *Yunits* case).

[52] Memorandum of Decision and Order on Defendant's Partial Motion to Dismiss and Plaintiff's Motion for Leave to Amend, Doe v. Yunits, No. 00-1060A, 2001 WL 664947, at *1 (Mass. Super. Ct. Feb. 26, 2001).

[53] *Id.* at *6.

dirty physical labor. Those who identify as gender male may come to believe that they really are and must be aggressive and competitive. Hence they may shy away from jobs requiring nurturing and caregiving. Legal scripts do have the power to shape the actual lives of women and men.

VI. CONCLUSION

The changes brought about by Title VII's prohibition on sex discrimination have indeed been dramatic. No longer are women excluded from broad segments of the work world. They compete, instead, on roughly the same terms as men. The focus of Title VII litigation has shifted from challenging exclusions based on sex to challenging those based on gender identity and expression. Increasingly, individual gender nonconformists are winning protection from particular gender conformity demands. Yet their victories have depended heavily on an increased medicalization of gender, which actually serves to narrow and ossify gender categories for all workers. As courts increasingly treat an individual's femininity or masculinity as fixed, stable, and legally meaningful, they are also potentially redrawing the social boundaries that limit and define workers' lives. No longer does sex define the aspirations and future possibilities of girls and boys in the ways it once did. The danger, at present, however, is that gender will come to circumscribe life choices and possibilities in the ways sex once did.