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DISCOMFORT AT WORK: WORKPLACE ASSIMILATION DEMANDS AND THE CONTACT HYPOTHESIS*

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Recent research on the contact hypothesis—the idea that intergroup contact can reduce prejudice—reveals that permitting identification with socially salient categories like race and gender is more likely to translate into reduced prejudice than attempting to eliminate or eclipse entirely those categories. This research has important implications for a number of issues of pressing social and legal concern, from broad views about integration and the cultural consequences of immigration to more narrow questions about diversity in education and the role and shape of affirmative action. This Article considers the implications of the contact hypothesis research for one of these issues: the debate about employer demands that people of color and women "cover" their race and gender by conforming their behavior and appearance to a white, male norm (known as the "workplace assimilation" debate). The degree of diversity represented in the workplace relative to other social institutions and the sustained nature of interaction at work makes the workplace a uniquely promising venue for attaining the relational benefits of intergroup contact. The workplace assimilation debate therefore serves as a useful lens for understanding the implications of the contact hypothesis research more broadly.

To date, scholars and courts have framed the workplace assimilation debate largely in terms of individual interests: on one side sits the employer's interest in easing customer or coworker

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discomfort with difference, and on the other side sits the employee's interest in being saved the identity, time, and economic costs involved in complying with behavior requirements that are drawn along a white, male norm. This Article reframes the debate by considering how workplace assimilation demands impact the end-goal of antidiscrimination law—social equality. Drawing on the vast social science research and theory on the contact hypothesis, it argues that regulating workplace assimilation demands to permit signals of group identification is likely to result in greater prejudice reduction than the prevailing policy of permitting those demands. More specifically, it proposes that employees should be provided space to signal membership in groups protected by Title VII of the Civil Rights Act through employer accommodation to appearance. This proposal aims to attain the societal benefit possible from contact at work without risking essentialization of group traits. In doing so, the proposal embraces an understanding of workplace diversity that includes behavioral signals of group-based identities as much as biologically prescribed ones. Perhaps even more important, the proposal represents a new vision of integration, one in which discomfort with difference is overcome instead of avoided.

INTRODUCTION

Assimilation demands have surfaced as one of the most important—and controversial—issues facing employment discrimination law today. Should it be unlawful for an employer to prohibit all-braided hairstyles, to expect that women refrain from wearing makeup, or to require that all employees speak English only at work? Should it be unlawful, in other words, for an employer to demand, whether formally or informally, that women and people of color "cover" their race or gender to succeed at work? The issue is important because assimilation demands represent one of the more subtle and common ways in which discriminatory biases can translate into subordination and exclusion of women and people of color from the modern workplace. It is controversial because assimilation demands often involve behavior or appearance, rather than categories per se, and, relatedly, because norms regarding behavior and appearance are frequently so entrenched that they go unquestioned. At an even deeper level, the issue of workplace assimilation demands is important and controversial because it confronts us with the question of what integration—in the workplace and in other social institutions—should look like. A policy that permits employers to impose assimilation demands is likely to result in a workplace that is experienced as less diverse than a policy that regulates those demands.

The burgeoning legal scholarship on this issue has uncovered the business incentives that drive employers to make gender- and race-

related workplace assimilation demands,[1] has identified the costs, both economic and noneconomic, to the individuals being subjected to the demands,[2] and has struggled to devise a doctrinal scheme that would protect individuals from demands to assimilate to a white, male norm at work, without entrenching stereotypes or limiting identity choices for other members of a group.[3] The scholarship has only begun to explore, however, the costs of workplace assimilation demands for the broader antidiscrimination goal of social equality. Indeed, the current debate tends to frame the issue largely in terms of individual interests: on one side sits the employer's interest in easing customer or coworker discomfort with difference (whether in appearance, behavior, speech, or, more directly, group membership),[4]

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1. *See generally* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (book review) (identifying a "homogeneity incentive" for employers).

2. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (emphasizing harms to sense of self); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (providing an account of the noneconomic harm caused by assimilation demands); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (discussing both material and identity harms). Although most of the assimilation scholarship has focused on race, the issue arises in other contexts, including gender, sexuality, and disability. *See generally* Carbado & Gulati, *supra* (identifying common cause in covering for gays, racial minorities, and women). In this Article, I focus on race and sex (and gender), categories protected from discrimination in employment by Title VII of the Civil Rights Act. 42 U.S.C. §§ 2000e to 2000e-17 (2000). The analysis, however, should be helpful in other contexts as well.

3. *See, e.g.*, Carbado & Gulati, *supra* note 1, at 1821 (sketching a "Difference Model" of discrimination); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2038–51 (1995) (proposing a "foreseeable impact" model and an "alternatives" model); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2006) (identifying work culture as a source of discrimination and proposing a non-legal-rights approach to trigger change in discriminatory work culture); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 810 (1994) (arguing that Title VII should be amended to prohibit discrimination based on "ethnic traits"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1142 (2004) (arguing that Title VII's definition of race and national origin should be expanded to include "performed features associated with racial and ethnic identity"); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 410 (2006) (proposing a "moderately interventionist approach" for determining "when trait requirements relevant to soft qualifications should be deemed legitimate or nonlegitimate").

4. I use the phrase "discomfort with difference" to refer to the anxiety that people experience when interacting with those who differ from themselves in socially salient ways. *See* E. Ashby Plant, *Responses to Interracial Interactions Over Time*, 30 PERS. & SOC. PSYCHOL. BULL. 1458 (2004) (relaying studies in which interracial anxiety predicted a desire to avoid interactions with outgroup members); Walter G. Stephan & Cookie White Stephan, *Intergroup Anxiety*, 41 J. SOC. ISSUES 157, 159–60 (1985) (arguing that

and on the other side sits the employee's interest in being saved the identity, time, and economic costs involved in adhering to relational requirements that are drawn along a white, male norm. To the extent that social equality surfaces as a policy consideration, it does so in the form of concern about rendering certain traits essential to members of particular groups, thus tempering efforts to define an equality right to difference.[5]

In this Article, I reframe the debate concerning workplace assimilation demands to expressly include the end-goal of social equality. Bringing the goal of social equality—of reducing group-based subordination, stigmatization, and intergroup hostility—to the fore renders the debate more complete. At the same time, bringing the social equality goal to the fore helps counteract the prevailing tendency to view the problem of discrimination as individualized and, increasingly, cognitive, divorced from intergroup tensions and hostility.[6] It is true, of course, as science has made abundantly clear,

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people experience anxiety in intergroup relations that stems from fear of negative consequences); *see also* Eric J. Vanman & Norman Miller, *Applications of Emotion Theory and Research to Stereotyping and Intergroup Relations*, *in* AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION 213, 229–31 (Diane M. Mackie & David L. Hamilton eds., 1993) (discussing some of the ways in which emotion can affect behavior in interaction, including avoidance, displays of anxiety, and frustration from negative emotions, as well as helping, friendliness, and risk-taking from positive emotions).

5. *See, e.g.*, YOSHINO, *supra* note 2, at 189 (proposing a liberty-based right to be free from covering demands in part because "analyzing civil rights in terms of universal liberty rather than in terms of group-based equality . . . avoids making assumptions about group cultures"); Carbado & Gulati, *supra* note 1, at 1823–24 (identifying problems of "determinacy" and "authenticity" as costs of the difference model); Green, *supra* note 3, at 672–74 (proposing a non-legal-rights approach to triggering change in discriminatory work cultures in part because of essentialism concerns).

6. Social cognition theory, which emerged in the social sciences in the late 1960s and early 1970s, posits that intergroup bias can result from basic human processing and need not always be attributable to motivational processes. *See* David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 127, 134–37 (John F. Dovidio & Samuel L. Gaertner eds., 1986). The cognitive revolution in understanding prejudice, evidenced both in the social sciences and in legal scholarship, has made it easy to lose sight of the affective components of prejudice. For a review of the emphasis in social psychology on categorization and the consequences of categorization, and a critique of that emphasis, see Bernadette Park & Charles M. Judd, *Rethinking the Link Between Categorization and Prejudice Within the Social Cognition Perspective*, 9 PERS. & SOC. PSYCH. REV. 108 (2005). The legal scholarship emphasizing the cognitive component of prejudice and discrimination is too extensive to list here. For one of the most prominent, providing extensive review of the social science literature, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

that we all categorize to make sense of the world,[7] but intergroup subordination and stigmatization are not solely a product of cognitive categorization. The intergroup biases and negative group stereotypes that fuel subordination and stigmatization of outgroups are interactional or relational, as much as cognitive, even when they surface at an unconscious level.

With that reframing in place, I then examine the effect of workplace assimilation demands on one means of attaining social equality: reducing prejudice. I define "prejudice" here as an unfair negative attitude toward a social group or a person perceived to be a member of that social group.[8] This definition is consistent with that of social scientists, who conceive of prejudice, like other attitudes, as having cognitive (belief), affective (emotional), and conative (behavioral predisposition) components.[9] Prejudice under this definition involves hot emotions as well as cool cognitive beliefs, including stereotypes.[10] Moreover, although prejudice can—and frequently does—involve antipathy toward other groups, such as racism and anti-Semitism, some prejudices are more ambivalent and not uniformly hostile, such as many whites' attitudes toward blacks today and men's attitudes toward women.[11] Finally, prejudice is multidirectional. We tend to think of prejudice as a problem that inheres in the psyche of individual members of the dominant group, but it is in fact a problem of intergroup relations; members of subordinated groups hold prejudices just as members of dominant groups do.[12]

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7. *See* Krieger, *supra* note 6, at 1190 ("Categories are guardians against complexity.").

8. *See* John F. Dovidio et al., *Reducing Contemporary Prejudice: Combating Explicit and Implicit Bias at the Individual and Intergroup Level*, *in* REDUCING PREJUDICE AND DISCRIMINATION 137, 137–38 (Stuart Oskamp ed., 2000); Alice H. Eagly & Amanda B. Diekman, *What Is the Problem? Prejudice as an Attitude-in-Context*, *in* ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 19, 20 (John F. Dovidio et al. eds., 2005) [hereinafter ON THE NATURE OF PREJUDICE] (noting that the "minimalist definition of prejudice as overall negative attitude toward a group . . . became widely accepted in social psychology").

9. Dovidio et al., *supra* note 8.

10. *See id.* at 138 (defining a stereotype as "a set of characteristics associated with a cognitive category, and these characteristics are used by perceivers to process information about the group or members of the group"); Susan T. Fiske, *Social Cognition and the Normality of Prejudgment*, *in* REDUCING PREJUDICE AND DISCRIMINATION, *supra* note 8, at 39 (identifying stereotypes as "the cognitive aspect of intergroup biases").

11. *See* Eagly & Diekman, *supra* note 8.

12. *See id.*

The contact hypothesis[13]—the idea that intergroup contact can reduce prejudice—forms the fundamental link between workplace assimilation demands and prejudice reduction. A vast social science literature spanning several decades explores the hypothesis and gives us insight into whether and under what conditions intergroup contact can best reduce prejudice.[14] This research reveals that the workplace presents a uniquely promising venue for realizing the benefits of intergroup contact. At the same time, the research raises the question of whether workplace assimilation demands, which require members of different socially salient[15] groups to assimilate to dominant relational norms, are likely to further or hinder prejudice reduction.[16]

My suspicion when I undertook an examination of the contact hypothesis research was that it would show that assimilation performances help build personal connections among individuals of different groups and, therefore, that assimilation demands are likely to further rather than hinder prejudice reduction. For this reason, I expected this Article to be a cautionary tale for advocates of a right to be free from assimilation demands at work.[17] On the contrary, my examination of the social science literature on the contact hypothesis revealed that although personal connections are unquestionably important, permitting identification with socially salient categories such as race and gender is more likely to translate into reduced prejudice than attempting to eliminate or eclipse entirely those categories.[18]

This realization has important implications for a number of issues of pressing social concern, from broad views about integration

13. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 281 (1954).

14. For an examination of some of the prejudice research conducted since Allport's classic, *The Nature of Prejudice*, was published in 1954, see ON THE NATURE OF PREJUDICE, *supra* note 8.

15. Social scientists tend to define a "socially salient" category as one that psychologically influences a person's perception and behavior and also influences how others treat the individual. *See* JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 118–19 (1987). I use the term here to refer to those categories that are both socially salient in the social science sense and subject to protection under antidiscrimination laws, categories like race, sex, gender, and national origin or ethnicity.

16. In doing so, the research reveals the social impact of workplace interaction. Intergroup relations at work are not set apart from relations outside of work; they are influenced by and, more important to the antidiscrimination project, they influence those out-of-work relations.

17. That finding would also have presented starkly the possible tension between individual interests and group (or social equality) interests.

18. *See infra* Part II.

and the cultural consequences of immigration to more narrow questions about diversity in education and the role and shape of affirmative action. If we take this research seriously, we can no longer assume that the more people of color act white, the more easily stereotypes, biases, and intergroup hostilities will break down. Personal connections may be easier to forge in that context, but those personal connections, the research shows, are likely to have a less positive effect on long-term intergroup relations than connections made in a context of difference.

In what ways does the contact hypothesis research inform the question of whether—and how—to regulate workplace assimilation demands? At the very least the research identifies a group benefit, reduced prejudice, associated with regulating workplace assimilation demands. Nowhere have legal commentators recognized such a benefit.[19] But the research does more than that. It suggests on a more practical level that employees should be provided space to signal their identification with socially salient groups, particularly those groups that are protected from discrimination by civil rights laws. In doing so, it opens the door to viable regulation of workplace assimilation demands that would further social equality, without canonizing substantive group difference.

Taking policy into practice, I propose in this Article that employees should be provided space to signal membership in groups protected by Title VII of the Civil Rights Act through employer accommodation of appearance. Appearance is one of the most powerful means of signaling group membership, and regulating workplace assimilation demands regarding appearance would foster reduced hostility between groups at the same time that it would unseat group boundaries and stereotypes. Under this proposal, *signals* of socially salient identities become important as an antidiscrimination concern.

The Article is organized in three parts. In Part I, I situate the current workplace assimilation debate within a broader recognition of the social goals of employment discrimination law. Whether attained by decreasing the gap in material wealth and job success, by breaking down subordinating role expectations and negative stereotypes, or by reducing biases and intergroup hostility, social equality emerges as a

19. The policy analysis therefore progresses from considering costs to the individual of not regulating assimilation demands versus costs to the employer and to the group of regulating assimilation demands, to costs to the individual and to society of not regulating assimilation demands versus costs to the employer and to the group of regulating the demands.

dominant end-goal of antidiscrimination law. In this Part, I uncover the assumptions regarding equality that are implicit in current judicial treatment of workplace assimilation demands and trace the social equality goal as it surfaces in existing legal scholarship on the issue.

In Part II, I ask whether forbidding workplace assimilation demands is likely to translate into greater social equality by reducing prejudice. Reviewing some of the vast social science literature on the contact hypothesis, I argue that the existing judicial approach to workplace assimilation demands is consistent with an oversimplified understanding of the research—one that focuses too narrowly on individuals and relies too heavily on personalized contact and cognitive de-categorization. This approach misses important difficulties in generalizing to the group improvements in attitude toward individuals and, relatedly, in generating change in negative group stereotypes from interactions with individuals who are easily seen as atypical of the stigmatized group. Moreover, it underestimates the risk of exacerbated intergroup tensions arising from challenges to socially salient identity categories like race and gender. Taken as a whole, the research reveals the importance of maintaining subgroup identity for reducing prejudice and suggests that greater and more generalized reduction in prejudice will be gained from workplace contact if women and people of color are permitted to signal identification with gender and racial categories.

In Part III, I consider the implications of this research for the contours of the law. On a macro level, the research reveals the importance of creating space in the workplace for women and people of color to signal subgroup identification. It complicates the question whether the law should regulate employer demands to assimilate at work by suggesting that the law should protect signals of group identity as a way of enhancing the prejudice-reducing benefits of workplace contact. I begin this Part by identifying implications and addressing concerns at this macro level, including concerns about relying too heavily on contact hypothesis research in forming antidiscrimination policy. With this more complicated analysis in mind, I then provide a specific doctrinal proposal modeled on the accommodation required for appearance tied to religion and disability. This doctrinal move, I argue, would provide employees with space to signal identification with a racial or gender group without essentializing certain appearance traits or unduly interfering with social relations. At the same time, it would cabin employer prerogative in a relatively narrow range of cases, while sending a broader message about the importance, as a matter of social equality,

of providing space for employee identification with socially salient groups.

I. BROADENING THE DEBATE

The current debate about workplace assimilation demands tends to bury the social goals of antidiscrimination law. It pits the employer's interest in easing coworker or customer discomfort against the employee's interest in being saved the costs involved in adhering to performance and behavior requirements that are drawn along a white, male norm, with little to no recognition of the law's broader social implications. In this Part, I recast the debate with an emphasis on social equality. In doing so, I identify a crucial gap in the discourse: a failure to examine whether forbidding workplace assimilation demands is likely to further social equality by reducing prejudice.

A. The Social Goals of Employment Discrimination Law

To understand the importance of social goals (and ultimately the relevance of the social science research on reducing prejudice) to the current workplace assimilation demand debate, one must first be aware of and accept two interrelated points: (1) beyond any redress of harm caused to a single individual, antidiscrimination law aims to reduce social inequality; and (2) one of the ways in which employment discrimination law works to achieve that broader goal is by reducing prejudice and stigma through intergroup contact at work.

1. Antidiscrimination Law and the Goal of Social Equality

Although antidiscrimination laws have developed in ways that frequently mask their broader social goals,[20] they are, at their foundation, public policy.[21] Indeed, scholars for some time now have stressed the importance of understanding antidiscrimination law as a social practice with social goals.[22] And, although it may not always be

20. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1477 (2004) ("History shows that antisubordination values live at the root of the anticlassification principle—endlessly contested, sometimes bounded, often muzzled.").

21. For a clear explanation of rights as public policy, see RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 68–70 (2005).

22. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839 (2003) ("Antidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society.").

explicit, the end-goal of social equality surfaces consistently in debate about a wide range of antidiscrimination policies, from sex-based job qualifications to affirmative action.

Professor Robert Post is most frequently credited with this view, which he calls a "sociological account" of antidiscrimination law.[23] In his article, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*,[24] Post uses Title VII's law of sex discrimination to illustrate the point. Employer dress and grooming rules that distinguish between men and women are not "neutral," as courts have held, simply because they track "generally accepted community standards of dress and appearance."[25] Nor does the law seek to eliminate sex stereotyping altogether. On the contrary, Post shows that rather than demarcating a line of neutrality, or eliminating entirely norms regarding gender appearance, courts are demarcating a line of acceptable gender norms. When the employer's dress policy steps over the line of judicially demarcated acceptable gender norms—for example, if it permits men to wear "customary business attire" but requires women to wear a uniform—the policy is rejected as being " 'demeaning,' as embodying the offensive stereotypes prohibited by Title VII."[26]

Professor Post's view is consistent with those who have argued for antisubordination as a defining principle of antidiscrimination law, including the constitutional guarantee of equal protection.[27] Under this principle, laws may not "aggravate" or "perpetuate ... the subordinated status of a specially disadvantaged group."[28] Despite

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23. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination*, 88 CAL. L. REV. 1, 31 (2000).

24. *Id.*

25. *Id.* at 29 (quoting Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1092 (5th Cir. 1975)).

26. *Id.* (quoting Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029, 1032 (7th Cir. 1979)). Post thus points out that "[a]n antidiscrimination law informed by the sociological account would ... not approach the problem of lookism by attempting to make us blind to appearances, but rather 'by directing attention to' and seeking to alter 'oppressive social norms of beauty.' " *Id.* at 31 n.147 (quoting Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 335 (1999)).

27. *See id.* at 31 n.148 (recognizing that "much of the scholarly work on anti-subordination [sic] theory can be interpreted as advocating principles that could guide the application of antidiscrimination law under a sociological approach" but insisting that "antisubordination theory is by no means the only source for such principles").

28. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (elaborating the "group-disadvantaging principle"). Using the prohibition on stereotyping as an example, Professor Cass Sunstein has similarly argued that "the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the harmful long-

several Supreme Court cases rejecting that interpretation of the Equal Protection Clause, scholars have illustrated that antisubordination values endure in other ways in equal protection jurisprudence.[29] It is also difficult to understand the disparate impact doctrine of Title VII and the non-prohibition of certain affirmative action programs, whether under Title VII or the Constitution, without reaching to the idea that antidiscrimination law aims to protect against group-based subordination.[30]

More recently, work in the disability context has further advanced an understanding of civil rights laws as stigma-combating. Professor Samuel Bagenstos, for example, has argued for an antisubordination approach to disability law.[31] He has illustrated that antidiscrimination law's identification of specific protected categories and its prohibition on rational discrimination (a prohibition that surfaces in laws concerning race, sex, and disability) cannot be justified by theories of animus or stereotyping alone, and instead must refer to the harm done to members of particular groups.[32] This work reveals that the law protects against discrimination on the basis of particular characteristics, race, sex, religion, age, or disability, because discrimination against groups sharing those characteristics has historically caused them damage (and is likely to cause them damage in the future).

Recognizing social equality as an end-goal of antidiscrimination law does not require, however, that one adopt whole scale an antisubordination approach to equal protection or to civil rights statutes like Title VII.[33] Perhaps the most helpful illustration of this point is the debate regarding affirmative action. The basic

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term consequence of perpetuating group-based inequalities." Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2418 (1994).

29. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (arguing that "antisubordination values have shaped the historical development of anticlassification understandings"); Siegel, *supra* note 20, at 1477.

30. *See* Fiss, *supra* note 28, at 159–64 (explaining how antisubordination theory leads us to impugn facially neutral laws with a disparate impact and to legitimate affirmative action).

31. Bagenstos, *supra* note 22; *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000).

32. Bagenstos, *supra* note 22, at 837–44; Bagenstos, *supra* note 31, at 418–45.

33. Even Paul Brest, who has argued in favor of a narrow antidiscrimination principle, justified that principle as the best means of furthering economic and social equality. *See* Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 11 (1975) (arguing that the prevention of "stigmatic and cumulative harms, as well as concern for process," justifies the antidiscrimination principle, defined narrowly as anticlassification).

antisubordination argument in favor of affirmative action is well known. It maintains that affirmative action preferences are justifiable as a tool to redress past (and present) subordination of particular groups in our society. As stated by Justice Brennan in *United Steel Workers v. Weber*[34] and *Johnson v. Transportation Agency*,[35] Title VII aims to "break down old patterns of . . . segregation and hierarchy."[36] Numerous scholars have argued, with little success in the Supreme Court, that an antisubordination principle similarly should warrant deference in equal protection analysis.[37]

Less frequently recognized, however, is the fact that much of the argument *against* affirmative action has also taken social equality as an end-goal. Critics of affirmative action have consistently argued that affirmative action is not good policy, at least in part because affirmative action preferences exacerbate intergroup tensions and perpetuate stereotypes and other forms of intergroup bias.[38] Justice Thomas warns in his concurrence in *Adarand Contractors, Inc. v. Peña*,[39] for example, that the conscious use of race "stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences," and engenders in others "attitudes of superiority."[40] Indeed, even ardent supporters of affirmative action have cautioned that "affirmative action can be expected, at least under some conditions, to injure intergroup relations in a variety of troubling ways."[41]

My aim here is not to challenge or defend these claims about the effects of affirmative action on intergroup relations; rather, it is to make clear that social equality is an end-goal of antidiscrimination law, and one that is more central to an antidiscrimination policy analysis than many might think. Recognizing social equality as an end-goal of antidiscrimination law requires that we ask whether there is a benefit to society to be gained, in the form of decreased relational

34. 443 U.S. 193 (1979).

35. 480 U.S. 616 (1987).

36. *Weber*, 443 U.S. at 208; *see also Johnson*, 480 U.S. at 628 (quoting *Weber*, 443 U.S. at 208).

37. *See, e.g.*, Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Fiss, *supra* note 28.

38. *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1256 (1998) (stating that "affirmative action opponents commonly argue that group preferences actually injure beneficiaries, both by creating self-doubt and by provoking negative responses in non-beneficiaries").

39. 515 U.S. 200 (1995).

40. *Id.* at 241 (Thomas, J., concurring).

41. Krieger, *supra* note 38, at 1258.

subordination, stigma, and intergroup hostility, from the use of any particular regulatory tool. This inquiry is necessarily group-based—conscious of the fact that material and relational subordination of particular groups forms the bedrock for social inequality—but sensitive to the benefits of social equality for society as a whole.[42]

Indeed, the Supreme Court's ruling in *Grutter v. Bollinger*[43] resonates along these lines. The precise doctrinal issue in the case was whether the state's interest in diversity in higher education was sufficiently compelling to overcome the constitutional presumption that race-based decisionmaking promotes inequality.[44] In holding that diversity in higher education was sufficiently compelling, the Court relied in substantial part on the "democracy-enhancing" benefits of diversity in education.[45] According to the Court, "reduced intergroup hostilities" surfaces as an important institutional goal, consistent with ideals of equality, because it "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[46]

The Court's ruling in *Grutter* also highlights the importance of research on the contact hypothesis. In holding that diversity in higher education is a compelling government interest because it promotes "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different

42. The social equality benefit should be understood as a benefit to society as a whole, rather than exclusive to members of either historically dominant or subordinated groups. *See id.* at 1257 (explaining that "one important goal of civil rights policy is to lessen the tendency toward intergroup strife inherent in any diverse society"). Antidiscrimination scholars, however, have not always recognized this point. *Compare* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PENN. L. REV. 789, 794 n.12 (2006) (framing integration as a "benefit [to] typically-developing children who are then exposed to a more diverse classroom"), *with* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1482 (2007) (reframing the issue to one of "whether individuals with disabilities benefit from the nondisabled community having early exposure to individuals with disabilities").

43. 539 U.S. 306 (2003).

44. *Id.* at 326–27.

45. For a brief, insightful discussion of *Grutter* as representing a shift in focus to the social benefits of integration, see Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795 (2004). For discussion of the import of this shift for affirmative action in the workplace, see Cynthia L. Estlund, *Putting* Grutter *To Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005). *But see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2742 (2007) (declining to extend a *Grutter*-type social benefit analysis to secondary education). For an argument that *Parents Involved* stifles the potential of *Grutter*, see Michelle Adams, *The Correction* (unpublished draft, on file with the North Carolina Law Review).

46. *Grutter*, 539 U.S. at 330 (citation omitted).

races,"[47] the Court accepts (or, more accurately, presumes) that intergroup contact will lead to those results. Integration in education is a compelling interest under *Grutter* not just because students benefit from diversity in viewpoints, a presumption that the Court has relied on before,[48] but because integration in education promotes long-term societal benefits from intergroup interaction.

2. Social Equality and Employment Discrimination Law

With the broad goal of social equality in mind, it becomes easier to see that employment discrimination law advances that goal *both* by increasing material equality, that is, by increasing the job success of members of historically subordinated groups, and by reducing prejudice between members of those and other groups. Interactions at work are not cut off from outside-of-work communities and social relations; they are influenced by and, less often recognized, they influence those outside-of-work relations.

Again, scholarship and advocacy in the disability context help open our eyes to the ways in which antidiscrimination laws, including employment discrimination laws, build on the contact hypothesis to advance the goal of social equality. Disability scholars have more forthrightly understood the Americans with Disabilities Act ("ADA")[49] as a tool to combat stigma as well as to reduce material disadvantage. The ADA seeks to combat stereotypes and exaggerated fears about disabilities by bringing individuals with disabilities into the mainstream to interact with individuals who do not have—or do not see themselves as having—disabilities.[50] By this account, the benefit of social interaction inures both in day-to-day contact with others who are different and in the reframing of difference as socially constructed rather than as innate deficiency.[51]

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47. *Id.* (alteration in original) (quoting Petition for Writ of Certiorari app., at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

48. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–15 (1978) (accepting diversity as a compelling government interest).

49. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

50. *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PENN. L. REV. 579, 668 (2004) (arguing that the ADA's integrative mandate "lessen[s] the identity of the disabled as 'other,' and increase[s] nondisableds' general familiarity with people with disabilities").

51. According to the social model of disability, "factors exogenous to a person's own impairments largely determine the extent to which a given disabled individual can participate in society." Michael Ashley Stein, *Generalizing Disability*, 102 MICH. L. REV. 1373, 1386 (2004); *see also* Bagenstos, *supra* note 31, at 428 (describing the "social-relations approach," which "treats human differences as constructed by, and residing in, social relationships"). This is contrasted with the medical model of disability, dominant

The workplace presents a uniquely promising venue for attaining the relational benefits of intergroup contact.[52] Residential segregation persists across much of the country, and primary and secondary public schools, despite their notoriety as the landmark of desegregation, are still attended by children of predominately one race.[53] Even institutions of higher education have seen little in the way of integration, particularly in states where legislatures have outlawed consideration of race.[54] Most workplaces, in contrast, are at least moderately integrated, and integration in the workplace faces less ideological resistance than does integration in housing and schools.[55]

Research suggests that work also has the potential to foster the *type* of contact—intimate, sustained, cooperative contact—that is thought to best facilitate prejudice reduction.[56] Casual contact between members of different groups, studies show, is much less successful in reducing prejudice than intergroup friendship.[57] Work facilitates friendships both by bringing people together on a regular basis, for long periods of time, and by requiring that people work

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until the 1970s, which locates the problem of disability in the individual. *See* Bagenstos, *supra* note 31, at 427.

52. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 60–69 (2003).

53. *Id.* at 8. Census data, for example, shows continued high levels of segregation in housing. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 64 (1993).

54. *See, e.g.*, ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002) (chronicling Boalt's efforts to integrate and the effect of Proposition 209, the California voter initiative banning affirmative action, on that effort).

55. *See* ESTLUND, *supra* note 52, at 66. Recent research on desegregation in private-sector workplaces with 100 or more employees (those required to file EEO-1 reports) since 1966 shows mixed progress. *See* Donald Tomaskovic-Devey et al., *Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966–2003*, 71 AM. SOC. REV. 565 (2006) (finding that sex-based desegregation continued into the 1990s, but that black-white desegregation and Latino-white desegregation has stalled since the 1980s).

56. *See* ESTLUND, *supra* note 52, at 120 ("The social science research . . . offers some empirical basis for the notion that the convergence of diversity and common ground that is found in the workplace (and almost only there) is particularly likely to challenge individual preconceptions, biases, and ignorance about others."); H.D. FORBES, ETHNIC CONFLICT: COMMERCE, CULTURE, AND THE CONTACT HYPOTHESIS 84–97, 112 (1997) (reviewing studies of proximity and prejudice and concluding that those studies "show no clear and consistent correlation between greater proximity [like that found in integration in housing] and lower levels of prejudice").

57. *See, e.g.*, Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. OF PSYCHOL. 65, 76 (1998) ("Optimal intergroup contact requires time for cross-group friendships to develop.").

cooperatively together to get jobs done.[58] Indeed, the involuntary nature of much workplace interaction becomes one of its greatest assets; work helps to offset people's tendency to avoid others who are different,[59] and fosters sustained interpersonal contact to overcome socially salient differences.

B. The Current Debate

Despite the importance of social equality as an end-goal of antidiscrimination law, the debate concerning workplace assimilation demands thus far has tended to focus on individual interests: the costs to employers in prohibiting the demands and the costs to employees in meeting those demands. From the perspective of the group, much of this debate has focused on material equality (with the understanding that at least some existing social stratification is due to economic inequality) rather than on social equality directly. Recently, scholars have begun to expand the policy analysis to consider the effects of the law—or the practices that it forbids—on groups as a whole. Missing from even this expanded analysis, however, is an examination of whether workplace assimilation demands are likely to further or hinder prejudice reduction.

The prevailing judicial response to workplace assimilation demands reflects the paradigmatic focus on individual interests. According to the courts, so long as the complaining individual can conform to the employer's demand, that individual can still succeed on an equal basis as other employees. The individual suffers no loss of job opportunity. The case of *Rogers v. American Airlines, Inc.*[60] provides a good example of this reasoning. In that case, an African American woman sued American Airlines for discrimination on the basis of race when it fired her for wearing an all-braided, "corn row" hairstyle to work.[61] The court held that American Airlines could

58. *See, e.g.*, ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 42 (1997) (reporting survey results suggesting that employees share information with and value the company of their coworkers, and that they frequently turn to coworkers for advice and emotional support in times of emergency).

59. *See* Plant, *supra* note 4. For discussion of anxiety as a mediating factor in intergroup interaction, see generally *infra* note 115 and accompanying text.

60. 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (stating that an all-braided hairstyle, "even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer" (citation omitted)).

61. *Id.* at 231.

forbid the plaintiff from wearing her hair in corn rows.[62] Braided hairstyles, according to the court, represent a personal choice, an "easily changed characteristic," rather than a protected immutable racial or gender characteristic.[63] And, as such, grooming regulations have "at most a negligible effect on employment opportunity."[64] In contrast, said the court, even if the plaintiff could establish some nonnegligible effect on opportunity, the employer had adopted its policy to project a "conservative and business-like image," a consideration that the court suggested would serve as a "bona fide business purpose" that would weigh against liability.[65]

Although the court in *Rogers* focuses exclusively on individual interests, its reasoning reflects common beliefs about the effect of assimilation demands on group interests. The court's reasoning suggests a belief that discrimination on the basis of mutable traits does not detrimentally affect the economic or social equality of groups. If the individual can easily change to assimilate to employer demands, then the group as a whole should suffer no material disadvantage. Any group disadvantage is solely a matter of choice by individuals, rather than a matter of discrimination.

The recent case of *Jespersen v. Harrah's Operating Co.*[66] reflects a similar view, while more expressly taking into account the effect of an employer's policy on the group. There, the Ninth Circuit en banc majority was willing to conclude that the employer's policy requiring female bartenders to wear makeup was discriminatory only if the plaintiff could show that the policy imposed a "significantly greater

62. *Id.* at 232.

63. *Id.*

64. *Id.* at 231.

65. *Id.* at 233 (quoting Fagan v. Nat'l Cash Register, Co., 481 F.2d 1115, 1124 (D.C. Cir. 1973)) (involving a challenge to a hair length policy as sex-based discrimination in which the court stated that "employers, like employees, have rights" and suggesting that a ruling for the plaintiff in a case of grooming codes would be a "ridiculous, unwarranted encroachment on a fundamental right of employers, i.e., the right to prescribe reasonable grooming standards which take cognizance of societal mores").

66. 444 F.3d 1104 (9th Cir. 2006) (en banc). I should point out that *Jespersen* is not an assimilation demand case. Rather, it is a case of an employer enforcing distinct gender norms (i.e., women should look feminine; men should look masculine). *See generally* YOSHINO, *supra* note 2, at 23, 142–54 (on the distinction between covering and reverse-covering). Although my proposal is likely to push change in these differing gender norms at the same time that it eases assimilation demands, the contact hypothesis research and analysis building on that research is not equally applicable to the gender norm cases. *See infra* notes 211–13 (discussing the homogeneity incentive and discomfort with difference, which apply primarily to assimilation demands).

burden of compliance" on women as a group.[67] If complying with the policy costs women as a group substantially more, in time or money, then, said the court, the employer's policy would be a form of disparate treatment.[68] This reasoning, like the reasoning in *Rogers*, rests on assumptions about material inequality. Absent a significantly greater burden of compliance, women can be expected to comply with little effect on their opportunity for employment.

Understandably, scholars have responded primarily along these lines, pushing for recognition of the costs, both economic and noneconomic, associated with compliance with assimilation demands.[69] Professors Devon Carbado and Mitu Gulati sit at the forefront of this endeavor. In their work, they have documented the costs in time and effort that individuals must bear to meet assimilation demands, whether the more formal appearance code regulations involved in cases like *Rogers*, or more informal behavioral expectations. In their article *Working Identity*, Carbado and Gulati describe the "extra identity work" that outsiders, often women and people of color, must perform to send the message that they fit in.[70] The time, money, and energy devoted to this extra work, they argue, is time, money, and energy that is not being devoted to performance tasks and accordingly can lead to less success.[71]

Others have emphasized the cost to identity itself. It is possible to frame identity costs in terms of their effect on social equality: forcing assimilation devalues and perpetuates stigmatization of the outgroup. Most identity scholars, however, have emphasized the identity interest of the individual to the exclusion of any broader

67. *Jesperson*, 444 F.3d at 1110 (quoting Gerdom v. Continental Airlines, 692 F.2d 602, 606 (9th Cir. 1982) (en banc)); *see id.* at 1110 ("Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.").

68. *Id.* (applying the unequal burdens test to determine whether the employer's policy is "facially discriminatory").

69. This line of scholarship is particularly important because it helps establish the existence of an employer wrong against an individual in the workplace, thus providing a normative foundation—and political traction—for legal regulation as well as a foothold for an individualized legal-right approach to regulation. *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (discussing the distinction between antidiscrimination and accommodation mandates).

70. Carbado & Gulati, *supra* note 2, at 1262. Carbado and Gulati provide a number of examples of this identity work, from a black law professor who uses the Socratic method against his pedagogical impulses to the Asian professor who refrains from disagreeing with his colleagues. *Id.* at 1277–84.

71. An argument like this seems to underpin the reasoning of the unequal burdens test of *Jespersen*.

social effect. These authors argue, in other words, that individuals should be provided a right of action because they are harmed (expanding the harm to include identity harm), rather than arguing that individuals should be provided a right of action because they are harmed *and* because providing them a right of action will best further the broader goal of social equality.[72] Indeed, a growing number of scholars have gone so far as to argue that an individual's interest in being free from assimilation demands should be recognized as a right to autonomy, liberty, or privacy rather than as an equality concern.[73]

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72. Professor Kenji Yoshino takes this approach in his recent book, *Covering*, when he explains that the "ultimate determination [of whether to prohibit an employer assimilation demand like an English-only rule] should balance the interests of the individual against the interests of the employer." YOSHINO, *supra* note 2, at 138; *see also* Carbado & Gulati, *supra* note 2, at 1289 (describing the noneconomic cost of workplace assimilation demands as one of "Compromising the Sense of Self"). More than a decade earlier, Barbara Flagg made a similar argument in her well known article, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, that Title VII should be used to protect employees' "racial sense of self," Flagg, *supra* note 3, at 2034 ("[T]he 'choice' with which [the black worker faced with assimilation demands] is faced is in effect a choice to retain her racial identity as she understands it, or to renounce it."), as did Paulette Caldwell, when she described the black woman's choice of hairstyle as one that "is associated in the minds of the women themselves and others with an extension of the personality, a dignitary interest," Caldwell, *supra* note 2, at 387. It would be going too far to say that these scholars do not see a social equality effect of assimilation demands. Indeed, scholars have articulated a broader social equality effect in various ways, if not incorporated it fully into the debate. *See, e.g.*, Perea, *supra* note 3, at 848–50 (explaining judicial decisions regarding English-only rules as "Judicial Enforcement of 'American' Identity"); Yuracko, *supra* note 3, at 377–78 (explaining that workplace assimilation demands "may stigmatize group members by attacking and denigrating traits that are associated with group identity"). There is also a line of critical race scholarship that looks beyond the individual to the ways in which assimilation destroys community and culture of minority groups, but that scholarship has tended to focus on integration outside of the workplace. *See* Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 265–66 (2006) (describing an "identity-based, community-centered" perspective of integration).

73. *See* YOSHINO, *supra* note 2 at 184–96 (urging a universal rights approach to assimilation demands); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006) (proposing a privacy analysis of employer appearance demands); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006) (proposing a new theory of freedom of dress). Several of these scholars seem to be responding to a social equality concern of essentialism and to concern about backlash and political viability of an equality-based approach. *See, e.g.*, YOSHINO, *supra* note 2, at 189–90 (relaying essentialism concerns through story about a colleague); *id.* at 183 (expressing skepticism that courts will accept a group-based accommodation model); Fisk, *supra*, at 1113–14 (same). Professor Ford, too, seems to lean toward such an approach. *See* FORD, *supra* note 21, at 205–07 (explaining that "[w]e might seek to promote individual autonomy through legal rights that apply regardless of identity or group affiliation"). Feminist scholars have argued for years for freedom in appearance for women on autonomy grounds. *See, e.g.*, NAOMI WOLF, THE BEAUTY MYTH 272 (1991) ("The real issue has nothing to do with whether women wear

These proposals divorce the individual's interest in being free from employer-imposed assimilation demands from the antidiscrimination project altogether. They frame the problem as a wholly individualized interest in being free from "humiliating workplace requirements"[74] or from intrusion into the expression of one's "True" or "authentic" self.[75]

Professor Richard Ford's recent book, *Racial Culture: A Critique*, in contrast, underscores the need to think about the effect of individual rights on social equality. Ford broadens the right-to-difference debate beyond harm to the individual (and the employer) to expressly include the goal of social equality. As he explains, he is "concerned less with preventing subjectively experienced injury to individual plaintiffs than with the social consequences of anti-discrimination law for the social practices that reinforce ascribed statuses generally."[76] By stressing the group risks of recognizing an individual right to difference, Ford's work pushes us to think more clearly about the effects of antidiscrimination law on broader social goals. We have to consider, in other words, whether a particular legal regulation furthers the goal of social equality, even when we have decided that individuals rightly benefit from that regulation.

But even Ford's broader analysis is incomplete. Ford articulates two specific group-based concerns regarding assimilation demands: one involving material inequality, the other more directly involving social inequality. On the material front, Ford points out that providing a legal right to be free from assimilation demands (to speak Spanish in the workplace, for example) may result in economic disadvantage to the group in the form of lower wages.[77] On the relational front, and more central to his book, Ford argues that recognizing certain traits as "essential" to a particular race risks entrenching stereotypes and trapping group members into behaving in certain ways to avoid allegations of inauthenticity.[78] Ford casts his

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makeup or don't, gain weight or lose it, have surgery or shun it, dress up or down, make our clothing and faces and bodies into works of art or ignore adornment altogether. *The real problem is our lack of choice.*"); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992) (proposing a right to appearance autonomy, supplemented by market reconstruction in bargaining).

74. Fisk, *supra* note 73, at 1114 ("Privacy analysis will thus better identify and accommodate the employer's interest in the appearance of its workforce with interests of various employees in being free from humiliating workplace requirements.").

75. YOSHINO, *supra* note 2, at 185.

76. FORD, *supra* note 21, at 172.

77. *See id.* at 148.

78. *See id.* at 70–78.

argument in terms of costs to the group,[79] but his concern is clearly one of social equality. He worries that what he calls the "cultural rights" movement has pushed individuals into displays of stereotypical group behavior, and that the law will be used to reproduce and augment group difference and, ultimately, to exacerbate social divisions.[80]

Absent from this discussion, though, is the effect of workplace assimilation demands on prejudice—defined here to include both attitudes toward members of other groups and use of negative stereotypes with regard to those groups. If, as I have argued, one way in which antidiscrimination law furthers social equality is by reducing prejudice through intergroup contact, then we have to ask whether prohibiting assimilation demands in the workplace is likely to advance or hinder that goal.[81] Put another way, we have to ask whether regulating workplace assimilation demands would add to the group cost that Ford identifies or, alternatively, provide a benefit to the group that might weigh in favor of regulation. In the next Part, I consider that question. Drawing on an extensive social science research on the contact hypothesis, I argue that regulating workplace assimilation demands to provide space for individuals to signal membership in identity categories is likely to lead to greater prejudice reduction and, accordingly, is likely to further rather than hinder the goal of social equality. This argument complicates Ford's analysis and reinforces the importance of understanding assimilation demands as an antidiscrimination concern, rather than solely as one of individual autonomy or liberty.

79. *See, e.g., id.* at 10 ("If some cultural minorities do not bear the costs of integration, then someone else will bear the cost of their failure to integrate .... Much of this book will focus on these costs—especially the cost to members of the group itself.").

80. *See, e.g., id.* at 6 ("I worry that robust group identification threatens to exacerbate social divisions that we should work to lessen ....").

81. Professor Linda Hamilton Krieger has made a similar point with regard to affirmative action. *See* Krieger, *supra* note 38, at 1257 ("If we accept the premise that at least one important goal of civil rights policy is to lessen the tendency toward intergroup strife inherent in any diverse society, then one can assess the value of a particular policy tool only in light of its expected effect on people's attitudes and behaviors toward members of other social groups."). For an insightful examination of some of the possible social equality benefits that have been thus far missed in the disability context, see Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. (forthcoming 2008).

II. ASSIMILATION DEMANDS AND RESEARCH ON THE CONTACT HYPOTHESIS

The social science research on the contact hypothesis suggests that greater and more generalized reduction in prejudice will be gained from workplace contact if women and people of color are permitted to signal continued identification with their racial or gender identities. More specifically, the research suggests that intergroup hostility and negative stereotypes are exacerbated rather than ameliorated by intergroup contact in which identity categories are weakened or threatened. At least two main reasons stand out in the literature why social scientists have come to believe that a model that implicates a multiculturalist approach to intergroup contact is more likely to foster greater prejudice reduction than one that seeks to eliminate or reduce significantly category salience: (1) the difficulty in generalizing attitude and stereotype change from purely interpersonal contact and (2) the potential for increased hostility resulting from attempts to eliminate or eclipse socially salient identity categories, like race or gender.

A. The Contact Hypothesis: Reducing Prejudice Through Intergroup Contact

Social psychologists have been conducting research on the contact hypothesis for more than half a century now. As early as the 1930s and '40s, scientists were exploring the influence of interracial contact on whites' attitudes toward blacks. In his book, *An Experiment in Modifying Attitudes Toward the Negro*, published in 1943, F. Tredwell Smith describes a program in which white Columbia University students had a series of positive interracial social and intellectual contacts with black leaders in Harlem, and reported significantly improved attitudes toward "Negroes" after the contact.[82] Several studies published soon after World War II similarly pointed to interracial contact, this time necessitated by racial integration of combat troops, as a factor leading to more positive racial attitudes.[83]

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82. F. TREDWELL SMITH, AN EXPERIMENT IN MODIFYING ATTITUDES TOWARD THE NEGRO 25–48 (1943). *See generally* John F. Dovidio et al., *Intergroup Contact: The Past, Present, and Future*, 6 GROUP PROCESSES & INTERGROUP REL. 5, 6–8 (2003) (describing the history of the contact hypothesis).

83. *See, e.g.*, SAMUEL A. STOUFFER, THE AMERICAN SOLDIER (1949); Henry A. Singer, *The Veteran and Race Relations*, 21 J. EDUC. SOC. 397 (1948). Another early study of interracial contact in the Merchant Marine found that the more voyages that white seamen took with black seamen, under conditions of mutual interdependence, the more positive their interracial attitudes became. *See* Ira N. Brophy, *The Luxury of Anti-Negro*

In 1954, Gordon Allport formalized the contact hypothesis in his influential book, *The Nature of Prejudice*.[84] Allport emphasized that intermixing alone is not sufficient to reduce prejudice. Rather, the contact hypothesis as framed by Allport states that regular interaction between members of different groups, provided it occurs under favorable circumstances, will tend to reduce intergroup prejudice.[85] According to Allport:

> Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.[86]

Allport's formulation of intergroup contact theory—including the four conditions of equal status, common goals, intergroup cooperation, and support of authorities, law, or custom—has inspired extensive research ranging across a variety of groups and situations.[87]

Although Allport emphasized the personality dimension of prejudice in his work,[88] others quickly picked up on the social dimension, arguing that the source of racial prejudice is to be found not in the individual, but in "a complicated social process in which the individual is himself shaped and organized."[89] By the 1970s, self-categorization theory and its close relation social identity theory had emerged as the theoretical cornerstones of research on intergroup relations. According to these theories, people make sense of the

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Prejudice, 9 PUB. OPINION Q. 456, 462 (1946). For a more recent examination of the conditions of integration in the military, with an emphasis on the involuntary nature of associations, see Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981 (2004).

84. ALLPORT, *supra* note 13.

85. *Id.* at 281.

86. *Id.*

87. *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 752 (2006). Over 500 individual studies have been conducted using a wide range of research methods and procedures, including field studies, laboratory experiments, surveys, and archival research. *Id.* at 753.

88. For a discussion of some of the early research emphasizing the personality dimension of prejudice, see Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1375–78.

89. Herbert Blumer, *Race Prejudice as a Sense of Group Position*, 1 PAC. SOC. REV. 3, 6 (1958). *See generally* FORBES, *supra* note 56, at 27–28 (describing the shift to recognizing the importance of groups).

world and of themselves through a process of social categorization by which individuals are categorized as ingroup and outgroup members.[90] This process of social categorization has, in turn, "a profound impact on affective, cognitive, and behavioral responses toward others."[91] As one review of the research explains:

> Emotionally, people spontaneously experience more positive affect toward other members of the ingroup than toward members of the outgroup, particularly toward those ingroup members who are most prototypical of their group. Cognitively, people retain information in a more detailed fashion for ingroup members than for outgroup members, have better memory for information about ways in which ingroup members are similar to and outgroup members are dissimilar to the self, and remember less positive information about outgroup members. And behaviorally, people are more helpful toward ingroup than toward outgroup members, and they work harder for groups identified as ingroups.[92]

Highly influenced by social identity theory and self-categorization theory, research on the contact hypothesis has led to three main models for best reducing prejudice through contact: the de-categorization model, the common ingroup identity model (a form of re-categorization), and the mutual intergroup differentiation model. Although each of these models has some empirical support, the trend has been toward a model—or a combination of models—that seeks to maintain the salience of categories rather than to de-emphasize them. Before exploring the reasons for this trend, I take a moment in the next subsection to summarize the results of an important recent meta-analysis of contact hypothesis research showing a positive relationship between contact and prejudice reduction.

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90. According to social identity theory, categorization is an inevitable part of human interaction; people are driven to categorize, both to make sense of themselves and the world and as a means of enhancing their self-esteem. *See* Mathew J. Hornsey & Michael A. Hogg, *Intergroup Similarity and Subgroup Relations: Some Implications for Assimilation*, 26 PERSONALITY & SOC. PSYCH. BULL. 948, 948 (2000) ("[O]ne of the fundamental motives underlying group behavior is the drive to see the ingroup as being positively distinct from other groups."); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 40–43 (William G. Austin & Stephen Worchel eds., 1970).

91. Dovidio et al., *supra* note 82, at 11.

92. *Id.*; *see also* Fiske, *supra* note 10, at 38–41 (detailing some of the cognitive biases underlying and resulting from categorization).

B. *The Benefits of Contact*

Despite the extensive research on the contact hypothesis, the idea that intergroup contact leads to reduced prejudice has been questioned. Some of the literature reviews published over the past several decades in the social science journals have shown general support for contact theory, while other reviews have reached more mixed conclusions.[93] These conflicting reviews regarding the effects of contact have led some social scientists[94] and legal scholars[95] to discard contact theory.

A recent article published in 2006 by social psychologists Thomas F. Pettigrew and Linda R. Tropp addresses concerns raised by these scholars.[96] Specifically, the article identifies and addresses three major shortcomings of the past literature reviews: incomplete samples of relevant papers, absence of strict inclusion rules, and nonquantitative assessments of contact effects.[97] To account for these shortcomings, Pettigrew and Tropp conducted a quantitative meta-analysis of the contact hypothesis research literature.[98] They tested for alternative explanations for contact-prejudice effects, such as participant selection, the causal sequence problem, and the publication bias problem,[99] and they measured the rigor of the research studies that produced contact effects.[100]

The results of their study indicate that contact typically reduces intergroup prejudice. A random effects analysis of all of the included

93. *See* Pettigrew & Tropp, *supra* note 87, at 752 (surveying past reviews of the contact hypothesis literature).

94. *See, e.g.*, Nick Hopkins et al., *On the Parallels Between Social Cognition and the "New Racism,"* 36 BRIT. J. OF SOC. PSYCH. 305, 306 (1997) (stating that the "initial hopes of contact theorists have failed to materialize").

95. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002) (stating that "the 'contact hypothesis'—the notion that prejudice can be reduced simply through contact with members of the stereotyped groups—has proven wildly overoptimistic").

96. *See* Pettigrew & Tropp, *supra* note 87.

97. *Id.* at 752–53.

98. *Id.* at 753. A meta-analysis is a statistical analysis that combines the results of several studies that address a related research hypothesis. A central goal of the Pettigrew and Tropp analysis was to "assess the overall effect between intergroup contact and prejudice on the basis of the population of empirical studies that constitute the research literature of the 20th Century." *Id.*

99. *Id.* at 752–54.

100. *Id.* at 754 ("If less rigorous research was largely responsible for the average effect size between contact and prejudice, we would hesitate to accept it as established. But if the more rigorous studies produce stronger contact effects, it would lend credibility to the results."). Pettigrew and Tropp used five rated variables of rigor: type of study, type of contact measure, type of control group, quality of contact measure, and quality of the prejudice measure. *Id.* at 759–60.

studies yielded mean rs that ranged from -.205 to -.214,[101] and the mean effect rose sharply for more rigorously conducted studies and experiments.[102] In addition, ninety-four percent of the samples in their analysis showed an inverse relationship between intergroup contact and prejudice.[103] Moreover, although their results showed that establishing Allport's optimal conditions in the contact situation generally enhances the positive effects of intergroup contact, those conditions did not surface as essential conditions for intergroup contact to achieve positive outcomes.[104] In short, according to the Pettigrew and Tropp meta-analysis, intergroup contact does reduce prejudice, and it does so even if Allport's conditions are not attained.

C. *Moving Toward a Multicultural Model*

Once the benefit of intergroup contact on prejudice is established, the question then becomes how best to facilitate reduced prejudice through intergroup contact. On this front, social scientists have moved away from an approach that seeks to de-categorize subgroups and toward an approach that seeks to maintain the salience of those subgroups.

1. De-categorization

The first categorization-based approach to intergroup contact, de-categorization, seeks to reduce bias by reducing or eliminating the salience of existing social categorizations. According to the de-categorization model, contact is most beneficial when respective group memberships are made less salient and social relations are made highly personal.[105] This model is most consistent with existing judicial treatment of assimilation demands.[106] The goal under the de-categorization model is to personalize interactions and to blur category boundaries, and assimilating behavior is likely to do that by

101. *Id.* at 757 ("With random effects analysis, the 515 studies, 713 samples, and 1,383 tests yield mean rs that range from -.205 to -.214.").

102. *Id.* at 758–61.

103. *Id.*

104. *Id.*

105. *See* Dovidio et al., *supra* note 82, at 11 ("The *personalization* perspective on the contact situation proposes that intergroup interactions should be structured to reduce the salience of category distinctions and promote opportunities to get to know outgroup members as individual persons thereby disarming the forces of categorization."); Marilynn B. Brewer & Norman Miller, *Beyond the Contact Hypothesis: Theoretical Perspectives on Desegregation*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 281, 288 (Norman Miller & Marilynn B. Brewer eds., 1984).

106. *See supra* notes 60–68 and accompanying text.

differentiating the individual from his or her social category. A black man speaks "perfect" English; a woman participates in and even initiates sports-related talk; a black woman straightens her hair. Each of these moves makes the outgroup member more like one of the ingroup, and thus makes it easier for the two individuals to connect on a personal level.

This model is also consistent with the prevailing understanding of many legal scholars. In her well-known article exploring the empirical assumptions underlying the affirmative action debate, Professor Linda Hamilton Krieger cites exclusively to research supporting a de-categorization model of intergroup contact, explaining that "the only way to reduce intergroup discrimination is to lessen the salience of intergroup distinctions."[107] Based on this research, she asks, "how as a society can we reduce the salience of intergroup distinctions based on race, sex, national origin, or religion?"[108] More recently, Professor Richard Brooks takes a similar stance when he explains the contact hypothesis as predicting that "members of different groups will over time de-categorize and personalize out-group members."[109]

A number of studies, including the Pettigrew and Tropp meta-analysis, support the view that personalized interactions promote more positive attitudes toward outgroup members present in the contact situation.[110] From a practical standpoint, however, it is difficult—if not impossible—to eliminate categories like race or sex. Even social scientist proponents of the de-categorization approach recognize this reality.[111] More importantly, a substantial body of research, discussed below, calls into question the de-categorization

107. Krieger, *supra* note 38, at 1331.

108. *Id.*

109. Richard R.W. Brooks, *Diversity and Discontent: The Relationship Between School Desegregation and Perceptions of Racial Justice*, 8 AM. L. & ECON. REV. 410, 412 (2006) (analyzing data from a recent study of desegregated schools in Chicago and finding that black and Latino students reported greater perceptions of racial injustice at schools with larger percentages of white students).

110. *See* Norman Miller, *Personalization and the Promise of Contact Theory*, 58 J. SOC. ISSUES 387 (2002); Pettigrew & Tropp, *supra* note 87.

111. As one such social scientist explains:

> [I]n most of the contact situations that are of interest to those concerned with intergoup relations, cues providing information about the category identity of the interacting persons are constantly present .... Thus, although we had never explicitly emphasized the logical necessity of salient category cues for the generalization of positive contact, we did not disagree with Hewstone and Brown's emphasis on the need for it. Instead, we fully concur with them.

Miller, *supra* note 110, at 399–400.

model. This research shows that contact must be intergroup in nature, rather than merely interpersonal in nature, to promote generalization of attitude and stereotype change. It also suggests that attempts to de-categorize can exacerbate intergroup hostility and reliance on stereotypes by increasing identity threat.

2. The Problem of Exceptionalizing

Although the research shows that intergroup contact consistently improves attitudes toward the participant in the immediate contact situation, the research is more ambiguous when it comes to generalization of attitudes and stereotype change toward members of the participant's group as a whole. The meta-analysis by Pettigrew and Tropp shows that the effects of intergroup contact on attitudes typically do generalize beyond participants in the immediate contact situation. Indeed, according to the Pettigrew and Tropp meta-analysis, intergroup contact improves attitudes "toward the entire outgroup, outgroup members in other situations, and even outgroups not involved in the contact."[112] However, Pettigrew and Tropp also point out that "the demands of the contact research situation (or the need for reflection by those reporting on past contact) [is likely to have] led to high group salience in most of the studies."[113] This fact makes the meta-analytic findings consistent with studies that have demonstrated that contact effects are more likely to generalize when group membership is salient.

Moreover, a substantial body of research shows that personalized interactions in which identity categories are not salient are less likely to result in changes in attitude and, particularly, stereotypes regarding the group than personalized interactions in which identity categories are salient. It has long been understood that when people encounter a person who differs from a previously held stereotype, they tend not to change the stereotype, but to create a new subtype to accommodate the exception.[114] Further studies show that personalization and distancing from the group result in even less

112. Pettigrew & Tropp, *supra* note 87, at 766.

113. *Id.* at 767.

114. *See* Fiske, *supra* note 10, at 39 ("People create small subtypes to contain the exceptions, thereby protecting their overall categories." (citations omitted)); Christopher Wolsko et al., *Intergroup Contact: Effects on Group Evaluations and Perceived Variability*, 6 GROUP PROCESSES & INTERGROUP REL. 93, 96 (2003) ("Going back to Allport (1954), stereotype-disconfirming information is generally thought not to impact the content of the stereotype because the disconfirming individual is 'fenced off', subtyped, or excluded from consideration as a relevant and informative group member.").

generalization of stereotype change.[115] The very same conditions that promote de-categorization, it seems, turn out to be "antithetical to the categorical generalization of contact effects."[116]

This difficulty in generalizing attitude and stereotype change from personalized contact is not new to legal academics. In their recent article, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, Professors Devon Carbado and Mitu Gulati describe the problem, which they label "exceptionalism." To describe this exceptionalism, they discuss a hypothetical Latino law firm associate, Marco, and his options for signaling to members of the firm that he does not conform to stereotypes about male Latinos.[117] They explain:

> Given both the cost and difficulties of negating stereotypes at the group level, minorities may attempt to disrupt stereotypes at the individual level. The problem with this strategy is that it allows the firm's decisionmakers to engage in what we call racial exceptionalism .... If Marco employs an individual identity strategy and succeeds, the institutional message would be: *Marco may be a Latino, but he is not like other Latinos. He*

115. *See* Rupert Brown et al., *Changing Attitudes Through Intergroup Contact: The Effects of Group Membership Salience*, 29 EUR. J. SOC. PSYCHOL. 741, 744 (1999) ("Experimental studies of stereotype change, for example, have shown that stereotype-disconfirming information has greater impact (stronger generalization) when it is associated with an outgroup exemplar who is otherwise 'typical' of the group or a good 'fit' to the category prototype." (citations omitted)); Matthew J. Hornsey & Michael A. Hogg, *Assimilation and Diversity: An Integrative Model of Subgroup Relations*, 4 PERSONALITY & SOC. PSYCHOL. REV. 143, 147 (2000) ("[A] number of studies have demonstrated that outgroup attitudes are more likely to be generalized outside the contact situation when group memberships are made clear."); Alberto Voci & Miles Hewstone, *Intergroup Contact and Prejudice Toward Immigrants in Italy: The Mediational Role of Anxiety and the Moderational Role of Group Salience*, 6 GROUP PROCESSES & INTERGROUP REL. 37, 39 (2003) ("The importance of group membership salience during contact has been demonstrated both experimentally and in correlational studies. Evidence provided by these studies shows that the generalization process, from the judgments concerning single individuals to the whole out-group, is favored by the presence of a link between these individuals and the group." (citations omitted)). *See generally* Dovidio et al., *supra* note 82, at 13; Wolsko et al., *supra* note 114, at 95–96 (describing the problem of generalization).

116. Marylinn B. Brewer & Norman Miller, *Contact and Co-operation: When Do They Work?*, *in* ELIMINATING RACISM: PROFILES IN CONTROVERSY 318 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988). Brewer and Miller nonetheless maintain that personalized interaction should generalize in the long run. *See id.* at 320 ("Frequent individualization of out-group members results in loss of meaning and utility of the broader category distinction."). *See generally* Brown et al., *supra* note 115, at 744 (describing the generalizing difficulties of a de-categorization model).

117. Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1682 (2004).

> *is exceptional. Therefore, the stereotypes we hold about Latinos should not be applied to Marco.* Note that the firm has not revised its impressions of Latinos, only its impression of Marco.[118]

Other legal scholars have described a similar phenomenon in other contexts. Professor Rogelio Lasso, for example, describes his experience as a part-black college student in Texas in 1969:

> I lived with a family friend from Panama. Roberto was blond, blue-eyed and had lived in the United States for years, so he spoke English without an accent. Soon after I arrived, Roberto asked me to join him and two of his white friends for dinner. At the restaurant, the waiter asked me where I was from. I answered, "Panama." He politely told me that although the restaurant was not integrated, he could serve me because I was not an American. He explained that the restaurant did not serve "Negroes or Mexicans," but since I was neither, I was "OK." I pointed out that I was part Black and Native American. "But you are a Panamanian," he patiently explained. "You are welcome to eat and drink here."[119]

Research on the contact hypothesis provides scientific foundation for this concern, which has thus far surfaced in the legal literature in largely anecdotal and hypothetical form. The research shows that in order for stereotypes to change in response to disconfirming information (e.g., a non-lazy Latino) the individual with whom one has contact must both disconfirm the stereotype (act industriously) and nevertheless be seen as typical of the group (as a Latino).[120] The common ingroup identity model, a second model for reducing prejudice through intergroup contact, takes this research into account and proposes that contact is most beneficial when pre-

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118. *Id.*; *see also* Carbado & Gulati, *supra* note 2, at 1303 ("Partial passing strategies provide a political opportunity for insiders to engage in outsider exceptionalism." (emphasis omitted)). Carbado and Gulati include statements like "We don't really think of you as [black]" as examples of exceptionalism. *Id.* They also make an important point that assimilation behavior, or "partial passing," provides insiders "with a way to avoid confronting their use of stereotypes." *Id.*

119. Rogelio Lasso, *Some Potential Casualties To Moving Beyond the Black/White Paradigm To Build Racial Coalitions*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 81, 82 (2005). Although frequently discussed in the context of race, the problem of exceptionalism is not limited to race. A woman who exhibits stereotypically male behaviors, like following sports or using crass language, is also likely to be seen as an exception to the female group. She is deemed "one of the boys" and "not like other women."

120. *See* Wolsko et al., *supra* note 114, at 105 (discussing findings of study involving Latino confederates in cooperative interaction).

existing subgroup boundaries are eclipsed, but not eliminated, by a more inclusive superordinate identity.[121] Maintaining subgroup identity category salience according to this view promotes generalization of attitude and stereotype change, while establishing a superordinate identity category dampens the "us vs. them" mentality of subgroup identity category membership.[122]

3. The Problem of Identity Threat

There is also very little evidence that increasing (or maintaining) the strength of category boundaries leads to more hostile intergroup relations.[123] On the contrary, the evidence suggests that efforts to eliminate or substantially eclipse socially salient category boundaries can increase intergroup hostility, exacerbating rather than reducing prejudice. A third model of prejudice reduction, the mutual intergroup differentiation model, builds on social identity theory and the concept of identity threat to advocate maintaining identity category salience during intergroup contact. According to social identity theory, people are motivated to identify themselves in group terms for two main reasons: to reduce uncertainty about themselves and others and to enhance self-esteem.[124] This fundamental need for positive intergroup distinctiveness can be achieved in a number of ways, some "celebratory" and others "destructive."[125] Prejudice,

121. Dovidio et al., *supra* note 82, at 11 ("According to [the Common Ingroup Identity Model], intergroup bias and conflict can be reduced by factors that transform participants' representations of memberships from two groups to one, more inclusive group."). Dovidio and Gaertner stress that "the development of a common ingroup identity [does] *not* require people to forsake their racial or ethnic identities," and they cite to several studies in which dual identity in the race context seemed to have beneficial results. *See* Dovidio et al., *supra* note 8, at 153 (citing, among others, a survey study of white adults showing that respondents with a strong superordinate American identity, regardless of how strongly they identified with being white, were more likely to base their support for affirmative action on the fairness of the policy than on whether the policy would increase or decrease their personal well-being, and an interethnic high school survey finding that students who described themselves as both American and as a member of their racial or ethnic group have less bias toward other groups in the school than did those who described themselves only in terms of their subgroup identity).

122. Dovidio et al., *supra* note 8, at 152 ("The development of a common ingroup identity contributes to more positive attitudes toward members of other groups who are present in the contact situation, and in addition, recognition of the separate group memberships provides the associative link by which these more-positive attitudes may generalize to other members of the groups who are not directly involved in the contact situation.").

123. *See* Park & Judd, *supra* note 6 (challenging the assumption, perpetuated by social cognition theories, that strong category boundaries lead to hostile intergroup relations).

124. Hornsey & Hogg, *supra* note 115, at 144.

125. *Id.*

discrimination, and negative stereotyping are aggressive, destructive intergroup strategies that are used to maintain or achieve positive distinctiveness in relation to other groups. The mutual intergroup differentiation model posits that aggressive intergroup strategies like prejudice and discrimination are more likely to be adopted in a context of identity threat when group distinctiveness is challenged.[126] This model therefore proposes that prejudice is best reduced by leaving the basic category structure of the intergroup contact situation intact, and changing only the context of the contact to one of interdependence.[127]

In line with the mutual intergroup differentiation model, a growing body of research reveals that attempts to assimilate subgroup members into a shared superordinate category can exacerbate intergroup hostilities.[128] Researchers Matthew Hornsey and Michael Hogg have conducted several studies that support this prediction.[129] In each study, when participants were categorized at the superordinate level and not at the subgroup level, there was a tendency to show more bias against similar outgroups than against dissimilar ones.[130] In other words, the more similar the members of the two subgroups seemed, the more negative bias was exhibited. According to Hornsey and Hogg, this finding is consistent with previous research indicating that "when superordinate goals or categories are emphasized, and subgroup boundaries are

126. *See id.* at 145 ("The search for distinctiveness becomes aggressive when it is conducted within the context of identity threat."). In the absence of identity threat, distinctiveness is maintained through more benign strategies, such as use of symbols and icons. *Id.* at 144–45; *see also* Rupert Brown & Hanna Zagefka, *Ingroup Affiliations and Prejudice*, *in* ON THE NATURE OF PREJUDICE, *supra* note 8, at 54, 59–61 (distinguishing between ingroup bias and negative intergroup attitudes and identifying identity threat as a factor in translating "an (over)-attachment to the ingroup into a detachment from or dislike of outgroups" (citing Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429 (1999))).

127. *See* Dovidio et al., *supra* note 82, at 12.

128. This research is consistent with recent research identifying the importance of emotion and sense-of-self as they relate to discriminatory behavior. One meta-analysis revealed that emotional prejudice predicted discriminatory behavior as well as behavioral intentions (equivalent to r = .38), while cognitive beliefs and stereotypes predicted behavior at a much lower rate (equivalent to r = .15). *See* Fiske, *supra* note 10, at 46.

129. *See* Matthew J. Hornsey & Michael A. Hogg, *Intergroup Similarity and Subgroup Relations: Some Implications for Assimilation*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 948, 948 (2000); *see also* Hornsey & Hogg, *supra* note 115, at 143 (arguing that "minimization of distinctiveness threat is a prerequisite for harmonious subgroup relations").

130. Hornsey & Hogg, *supra* note 129, at 956–57 (discussing their findings).

deemphasized, people are motivated to restore the distinctiveness of the subgroups."[131]

* * *

As even this brief summary of the literature reveals, the research on prejudice reduction and stereotype change through intergroup contact is varied and complex. It would be a mistake to suggest that one model dominates the field.[132] Nonetheless, there appears to be general consensus among social scientists that a pure assimilation approach, one that seeks to eliminate or eclipse entirely socially salient categories, is not as effective at reducing prejudice as a multiculturalist approach, under which categories are maintained and salient during intergroup interaction, even if other, overarching categories are also emphasized. In the next Part, I consider more specifically what this research might mean for the law's regulation of workplace assimilation demands.

III. IMPLICATIONS FOR THE LAW

At the very least, the social science research on the contact hypothesis complicates the existing analysis of the effect of regulating assimilation demands on the group. It identifies a group benefit associated with regulating workplace assimilation demands, and it highlights the importance of understanding assimilation demands as an equality concern rather than solely as a liberty or autonomy concern. But it does more than that. It suggests on a more practical level that employees should be provided space to signal their identification with socially salient groups. In doing so, it opens the door to viable legal regulation of assimilation demands that would further social equality, without canonizing substantive group difference.

131. *Id.* at 953; *see id.* at 956–57 (arguing that the results of the studies "contribute[] to a growing body of evidence that assimilation of subgroup members into a shared superordinate category can exacerbate intergroup hostilities").

132. Recently, scholars have begun to synthesize and reconcile the three models. *See, e.g.*, Hornsey & Hogg, *supra* note 115, at 153 (arguing for an "integrative analysis of subgroup relations" that promotes "dual identification or subgroup identification contextualized by superordinate identification"); Voci & Hewstone, *supra* note 115, at 49 (describing an "integrative approach" to improving intergroup relations, but emphasizing the importance of "intergroup" contact in which group membership is salient).

A. *Macro Implications and Concerns*

Professor Ford's analysis in *Racial Culture: A Critique*[133] pushes us to consider the impact of legal regulation on groups as well as on the individuals that it purports to protect.[134] In this way, Ford urges us to think beyond the individual to the group when making decisions about antidiscrimination policy. The social science research on the contact hypothesis makes a similar push from focusing on the individual in isolation to the individual as a member of a group (or groups). It reveals the importance of maintaining the salience of group identity for reducing prejudice and improving intergroup relations. Of course, the remainder of Ford's analysis still stands, largely unimpinged. Employers will sometimes have a "legitimate" interest in avoiding the costs associated with signals of group identity (uncovered long hair, for example, may present risk of fire in kitchens); employees will frequently have a personal interest in avoiding the economic and identity based costs associated with assimilation; and other members of protected groups (and society) will have an interest in avoiding the cost of essentializing certain traits and entrenching stereotypes.[135] But where Ford sees the risk of group cost as tipping the scales against regulation, he misses the group benefit derived from a regulation that provides space within which individuals are permitted—but not required—to signal membership in protected groups.

The contact hypothesis research also highlights the importance of understanding assimilation demands as an equality concern rather than solely as a liberty or autonomy concern. Kenji Yoshino is one of several scholars who have responded to Ford's essentialism critique by advocating a universalistic, liberty-based approach to assimilation demands.[136] These scholars argue that demands to perform identity in certain ways are made of everyone, and that framing those demands as a problem of discrimination "leaves vulnerable those employees who either do not find or cannot prove that their objection ... is based on a protected identity characteristic."[137] That may be so, but even if "everyone covers," not everyone is asked to cover in a

133. FORD, *supra* note 21.

134. *Id.* at 170–74.

135. *See generally id.* at 169–79 (discussing costs associated with rights to difference for employers, individuals, and groups).

136. *See* YOSHINO, *supra* note 2, at 184–96.

137. Fisk, *supra* note 73, at 1139; *id.* at 1146 ("Regardless of whether you can identify your self-definition with a group currently protected under antidiscrimination law, the right to define your *self* is at the very core of what the right of privacy should protect.").

historical context of group stigmatization and subordination. Workplace assimilation demands that suppress signals of identification with socially salient groups are likely to perpetuate stereotypes and intergroup hostility in a way that covering demands of other sorts and in other contexts are not. Freedom in relational behaviors, then, becomes important not just as a matter of individual autonomy, because relational behavior shapes identity, but also as a matter of social equality, because this same relational behavior can signal membership in a socially salient subgroup, which, the research suggests, can improve intergroup relations.[138]

An equality-based approach—one that protects signaling of membership in particular, protected groups (those groups that have historically suffered from stigmatization and subordination)—also better incorporates a dialogic understanding of identity. As Professor Paul Horwitz points out in his recent review of Yoshino's book, if human identity is social and dialogical, formed in response to others as well as in response to self, "then many of the identity traits we value can only be understood if they belong to wider affective communities . . . that lend them meaning."[139] Whether an individual's signal of group membership represents an "internal choice of belief" or an "external reality" of social categorization[140] does not matter to an equality-based project that seeks to provide space for signaling of identification with socially salient groups.[141] Instead, the social science research on the contact hypothesis suggests that individuals should be provided the space within which to signal identification, regardless of their reasons for doing so, or even whether they decide to do so.[142]

Creating space for signaling group identification is also consistent with recent research on social comparison. It is well known that victims of discrimination frequently do not challenge their treatment as discriminatory, or even perceive of their treatment as

138. *See supra* Part II.

139. Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1298 (2007) (reviewing KENJI YOSHINO, THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006)).

140. *Id.* at 1297 (predicting an argument by religious individuals that their identity "is not an internal choice of belief, but a submission to the overwhelming external reality of God"). A similar argument could be made in the context of race and sex, once identity is understood as dialogical rather than atomistic.

141. Providing space within which identity categories can be maintained also takes into account research suggesting that members of minority groups are less likely to prefer a policy of assimilation than whites. *See* Dovidio et al., *supra* note 8, at 154.

142. *See infra* Part III.B.5 (discussing limitations and concerns).

discriminatory.[143] One explanation of this phenomenon is system justification theory, which posits that humans are motivated to "defend, justify, and bolster the social status quo," even when it is harmful to their material interests.[144] Another explanation focuses on individual versus group comparisons. This line of research uncovers an American tendency to individualize comparison, and reveals that individualized comparison tends to result in low levels of perceived personal discrimination by members of devalued groups, even in the face of knowledge that members of the group as a whole experience high levels of discrimination.[145] Making groups salient, in contrast, tends to trigger group comparison. And group comparison in turn tends to result in greater dissatisfaction with collective situation and also, importantly, in greater collective concern and willingness to challenge unfairness.[146] Salience of group membership in intergroup contexts, according to this line of research, may make it easier for members of devalued groups to engage in collective action, and ultimately to reduce group inequality.[147]

It is true, of course, that increased group identification can lead to increased intergroup tension, particularly when groups perceive themselves to be competing for scarce resources.[148] Nonetheless, social science studies have repeatedly shown that familiarity and

143. *See* Muriel Dumont et al., *Social Comparison and the Personal-Group Discrimination Discrepancy*, *in* SOCIAL COMPARISON AND SOCIAL PSYCHOLOGY: UNDERSTANDING COGNITION, INTERGROUP RELATIONS AND CULTURE 228, 228 (Serge Guimond ed., 2006) [hereinafter SOCIAL COMPARISON].

144. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1121 (2006).

145. *See* Dumont et al., *supra* note 143, at 228 (describing the "personal-group discrimination discrepancy").

146. *See* Donna M. Garcia et al., *Attitudes Toward Redistributive Social Policies: The Effects of Social Comparisons and Policy Experience*, *in* SOCIAL COMPARISON, *supra* note 143, at 151 (arguing that "the presence or absence of gender-based redistributive policies in employment settings convey different identity and comparison information, which then affects people's responses to gender differences in employment outcomes and whether they support or oppose policies that alter [the] outcomes"). The social comparison research also suggests an alternative explanation for the increased perception of racial injustice by minority students in desegregated schools: increased awareness of inequality. *Cf.* Brooks, *supra* note 109, at 411 (suggesting that the increased perception of injustice may represent a negative outcome from intergroup contact).

147. *See* Brenda Major et al., *Reducing Prejudice: The Target's Perspective*, *in* REDUCING PREJUDICE AND DISCRIMINATION 211, 232 (Stuart Oskamp ed., 2000) (suggesting that collective action is the best way to combat institutionalized prejudice and inequality).

148. *See* JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HEIRARCHY AND OPPRESSION 3–33 (1999) (examining various intergroup relation theories).

cooperative, personal interaction can reduce the feelings of threat and uncertainty that people experience in intergroup contexts, even when group salience is high.[149] In fact, some studies suggest that intergroup anxiety is more easily reduced when group salience is high.[150] As the authors of these studies explain, "[I]t was the combination of positive contact with individuals from the out-group and the salience, during it, of group memberships, which led to reduced anxiety and to more positive orientations toward the out-group in general."[151]

With the understanding that group-based legal rights can exact group-based social costs associated with essentialism, the challenge for antidiscrimination law becomes one of creating "space" for signaling group identification without reifying group boundaries and perpetuating the view that specific "cultures" exist, "whose form and substance we must take more or less as given."[152] In the next Part, I take on that challenge by proposing a doctrinal change that would require accommodation of certain group-identifying signals. But before I turn to the details of the doctrinal proposal, I address anticipated concerns about my reliance on the contact hypothesis research for formulating antidiscrimination policy.

The first anticipated concern is that of using social science to formulate antidiscrimination policy. This concern, however, finds little traction once one realizes that the existing law already rests on an empirical foundation, whether assumed or documented.[153] The existing assimilationist bias reflects a particular empirical assumption about the effect of workplace assimilation demands on social equality.[154] It assumes that assimilation demands at work either have no effect on social equality, or further social equality.[155] The social science on the contact hypothesis simply fills in that hole.[156] It makes

149. Pettigrew & Tropp, *supra* note 87, at 766 (identifying a "tendency for familiarity to breed liking").

150. *See* Voci & Hewstone, *supra* note 115, at 48–49.

151. *Id.* at 49.

152. FORD, *supra* note 21, at 7. The identified benefit, in other words, does not trump the cost—or risk of cost—identified by Professor Ford. Rather, the challenge is to formulate a regulatory scheme that obtains the societal benefit without imposing, or at least minimizing, the cost of essentializing group traits.

153. For a recent discussion of the value of social science research to antidiscrimination law and policy, see Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

154. *See supra* notes 60–68 and accompanying text (discussing cases).

155. *Id.*

156. *See* Krieger & Fiske, *supra* note 153, at 1006. A more pointed concern might be aimed at the contact hypothesis research, but, given the over fifty years of data amassed, and numerous meta-analyses of the studies and their results, the concern is likely to be less

clear that we are wrong to assume that prejudice is best reduced through intergroup contact in an environment of required assimilation.

On other grounds, some critical race scholars have argued that research on the contact hypothesis is unhelpful to the antidiscrimination project. Pointing to Allport's condition of equal status and to the fact that social interaction between members of different racial groups in America frequently involves unequal status, these scholars argue that the contact hypothesis is self-conflicting.[157] As one commentator explains, "[T]he contact theory fails to identify a means for reducing racism and instead offers little more than a picture of a nonracist situation or society: members of different social groups would be equal and would together pursue superordinate goals."[158] These scholars are right to highlight the benefit of equal status among those engaging in interaction for reducing prejudice and to point out that many workplaces remain highly stratified, with women and people of color working primarily in jobs of lesser status than white men.[159] Nonetheless, the claims about the inutility of workplace contact for reducing prejudice predate much of the categorization-based contact hypothesis research and, accordingly, tend to exaggerate the importance of equal status for obtaining prejudice-reducing benefits. The Pettigrew and Tropp meta-analysis shows to the contrary, that Allport's conditions, including equality of status, facilitate but are not necessary for prejudice reduction.[160]

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one of reliance on the research at all than one of reliance on particular studies or mistaken interpretation.

157. *See, e.g.*, Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 682 (1997) (emphasizing that "[f]or social contact to alleviate prejudice, the contact must take place between equals and relate to a common objective or goal"); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1860 (1992). Professor Feldman goes on to suggest that contact research has dominated social psychology because white males have controlled the field. Feldman, *supra*. He ultimately does recognize, however, the importance of the emergence of social identity theory for contact research, and his view coincides with the more recent research showing the benefit of maintaining categories during contact. *Id.* at 1864.

158. Feldman, *supra* note 157, at 1860.

159. *See supra* note 104 and accompanying text (reviewing research suggesting that greater equality in status results in greater prejudice reduction from contact).

160. *See* Pettigrew & Tropp, *supra* note 87, at 766–67 (stating that "although 94% of the 713 samples in [their] analysis showed an inverse relationship between intergroup contact and prejudice, only 19% of the samples involved contact situations structured in line with Allport's conditions"). This general finding holds for studies conducted in real-world contexts as well as in laboratory settings. In one study, "rural Afrikaans-speaking White housewives who had close contact with their African domestic workers had more favorable attitudes toward Africans in general." *Id.* at 767. In another study, "adult African Americans who reported having played with Whites as children were less anti-

This is not to say that stratification does not pose a problem for reducing prejudice through intergroup contact at work. Interaction between two law firm partners is unquestionably different from interaction between a partner and a secretary, and we should strive for more interaction of the former rather than the latter by increasing numbers of racial minority and women partners. Moreover, the stark stratification of the American workforce should remind us that prejudice is at least in part group-based, serving as an ideological defense of group interest.[161] Interaction at work, even in a context of equal status, may therefore ease feelings of personal animosity and anxiety in interaction without altering the relationship of inequality among groups. But these realities say less about the question of whether to regulate assimilation demands than about how far we have to go to attain the broader goal of social equality. As I have argued, the contact hypothesis research reveals a benefit to regulating workplace assimilation demands that has gone unrecognized. In the next section, I develop a proposal that seeks to realize that benefit.

B. A Proposal

To create space for maintaining identity category salience, I propose that employers be required to provide accommodation for appearance traits that an employee (or applicant) claims signal identification with a subgroup recognized by Title VII, such as race, sex, or national origin. As this framing suggests, the trigger for accommodation would be subjective, dependent on the employee's claim that the particular appearance trait at issue signals identification with a protected group.[162] Like in the area of religion,

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White, although they had experienced racially segregated neighborhoods and elementary schools." *Id.* For a recent, single study to the contrary, see JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 140 (2004) (reporting no significant effects of contact at work on reconciliation in post-apartheid South Africa and speculating that the hierarchical nature of work interactions undermines any likely benefits).

161. *See supra* notes 8–12 and accompanying text (describing prejudice as group-based). For a critique of contact hypothesis research as being too focused on individuals in isolation, see Mary R. Jackman & Marie Crane, *"Some of My Best Friends Are Black . . .": Interracial Friendship and Whites' Racial Attitudes*, 50 PUB. OPINION Q. 459, 480–81 (1986) (urging a more "political conception of intergroup attitudes" in which "the issue is how a relationship of intimacy with individual subordinates modifies the manner in which dominant-group members defend their privilege"), and FORBES, *supra* note 56.

162. Although the individual seeking accommodation under the proposal must sincerely believe that the appearance trait at issue signals membership in a protected group, the identity category need not rise to the level of a religious belief. *Cf.* Welsh v. United States, 398 U.S. 333, 342–43 (1970) (excluding from religion beliefs that "rest[] solely upon considerations of policy, pragmatism, or expediency"); United States v.

employees seeking accommodation under this proposal would not be required to show, or to claim, a correlation between the trait and the group.[163] Employers would be required under the proposal to provide accommodation—an exception, in most cases, to the employer's appearance policy—unless the employer could show undue hardship.[164] Like in the area of disability, undue hardship would be defined narrowly to exclude coworker or customer discomfort with difference.[165]

This proposal is consistent with the work of identity scholars who stress that individual employees suffer real costs, both economic and identity-based, when employers make decisions based on racial or gender performance.[166] However, the rationale for protection under the proposal is in significant part group-based and centered on the value of maintaining identity categories for prejudice reduction.

Seeger, 380 U.S. 163, 176 (1965) (defining a religious-based belief as a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption"); 29 C.F.R. § 1605.1 (2006) (defining religious belief to include ethical and moral beliefs that are held "with the strength of traditional religious views").

163. *See, e.g.*, Heller v. EBB Auto. Co., 8 F.3d 1433, 1438 (9th Cir. 1993). Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship." 42 U.S.C. § 2000e(j) (2000). Courts have delved deeper in some religion cases to determine whether a particular practice is religious in nature, and therefore whether the government is prohibited from unreasonably interfering under the First Amendment, *see, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 433 (2d Cir. 1981), but such an inquiry would not be necessary under this proposal, which involves only statutory-based accommodation to signals of membership in a protected group under Title VII.

164. I place consideration of competing concerns here in the undue hardship inquiry largely because I think the employer should bear the burden of persuasion. *Cf.* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2000) (defining discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . .").

165. In the disability context, not only is discomfort with difference in appearance excluded from undue hardship, the definition of disability includes the employer's perception that the individual's appearance substantially limits him/her in a major life activity. *See* Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 282–83 nn.9–10 (1987) (citing to legislative history of Rehabilitation Act and to agency regulations). The narrow construction of undue hardship under the proposal differs substantially from the religion context. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (stating that more than a de minimis cost amounts to an undue hardship). *See generally* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII*, 76 TEX. L. REV. 317, 388–89 (1997) (arguing that courts have undermined the broad reach of the statute by expansively applying the undue hardship defense).

166. *See supra* notes 69–76 and accompanying text.

Employees should be provided this space, in other words, not just because an individual employee has an equality or liberty interest in expressing his or her identity, but also because the broader antidiscrimination goal of social equality is advanced by a policy that permits the maintenance of identity categories.

1. Framing and Situating the Proposal

That this proposal is framed as an accommodation requirement is likely to be unsettling to some. Indeed, all of the scholarship urging the development of a legal right to be free from discrimination in racial and gender performance has framed that right under either disparate treatment theory or disparate impact theory, or has dodged the issue of framing altogether by discussing the problem at a high level of abstraction.[167] I frame this proposal as an accommodation requirement for several reasons, both practical and political.

First, at a level of analytic coherence, unlike both disparate treatment theory and disparate impact theory, the employer's obligation under the proposal is not to refrain from making decisions based on the trait at all; it is to refrain from making decisions based on the trait when the trait signals racial, ethnic, or gender group membership. This individualized accommodation approach promotes appearance code change incrementally through exceptions, rather than whole cloth.[168] The accommodation requirements for

167. *See, e.g.*, Carbado & Gulati, *supra* note 1, at 1806 (describing a "differentiation" model but not exploring how it would be incorporated into law); Flagg, *supra* note 3, at 2039–51 (describing two models "grounded in the disparate impact provision of the Civil Rights Act of 1991"); Perea, *supra* note 3, at 860–64 (arguing that Title VII should be amended to prohibit discrimination on the basis of "ethnic traits," which would permit disparate treatment claims, subject to a "bona fide occupational qualification" defense); Rich, *supra* note 3, at 1142 (arguing for "redefine[ing] Title VII's definition of race and ethnicity to include ... performed features associated with racial and ethnic identity"); Yuracko, *supra* note 3, at 415 (proposing a framework with several factors to consider in determining whether "trait discrimination is an impermissible form of race discrimination"). The exception is Professor Yoshino, who in his book professes to believe that an accommodation model would be most helpful but proposes a universal liberty model in part because he sees it as more likely to be adopted in American society. *See* YOSHINO, *supra* note 2, at 183. The accommodation proposal made here, however, is unlike the accommodation model envisioned—and rejected—by Yoshino because it is not group-based in the sense that it is not limited to members of traditionally subordinated groups. *See infra* notes 202–07 and accompanying text.

168. Disparate impact theory has been used in some cases to obtain an exception to an appearance requirement, but even then courts seem to recognize that they are requiring accommodation. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (applying disparate impact theory but concluding that "Domino's is free to establish any grooming and dress standards it wishes; we hold only that reasonable accommodation

appearance in the religion and disability context help illustrate this point. Neither Title VII's religion section nor the ADA requires employers to refrain from prohibiting head scarves or blemished faces.[169] Rather, the statutes require exceptions to those prohibitions for individuals who wear scarves for religious observance or whose blemished faces rise to the level of a disability.[170] Similarly, the proposal does not prohibit employers from adopting appearance codes that forbid braided hair; it does, however, require employers to provide accommodation—most often in the form of exception to the code—for individuals who claim that their braided hair signals membership in a racial or gender group.

Second, as I discuss in greater detail below, regulating assimilation demands requires some way to take competing considerations into account, and to tailor those considerations to the particular racial or gender signal at issue. In some circumstances, for example, safety concerns might caution against providing an exception to the employer's appearance code, such as wearing a long necklace that can catch on machinery or tools. The most analytically coherent way to take this competing consideration into account is through an individualized reasonableness or undue hardship inquiry.[171] Such an inquiry would provide employers with leeway to set appearance rules and also facilitate consideration of alternative means of accommodation. For example, if long necklaces raise legitimate safety concerns when an employee is operating machinery, the employee might be required to tuck jewelry into a shirt during those periods.

Use of an accommodation requirement in this way is also consistent with similar cases in the religion and disability contexts, and therefore allows courts and scholars to draw more readily on case law and scholarship in those areas in thinking about trait discrimination in the race and gender context. The woman who wears

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must be made for members of the protected class who suffer from PFB [a skin disease that makes shaving very painful]").

169. *See* 42 U.S.C. § 2000e(j) (2000) (requiring accommodation, absent undue hardship, of "religious" observance and practice); 42 U.S.C. § 12112 (2000) (requiring accommodation of impairments that rise to the level of a "disability").

170. § 2000e(j); § 12112.

171. Under the ADA, the safety issue would be analyzed as part of the "direct threat" defense, under which employers must show that the threat posed by the employee cannot be eliminated with reasonable accommodation. *See id.* § 12113(a),(b); *see also id.* § 12111(3) (defining direct threat as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation"); Chevron Inc. U.S.A. v. Echazabal, 536 U.S. 73, 76 (2002) (extending "direct threat" to include risk to health or safety of self as well as others).

a pin to work based on her religious belief is not altogether unlike the black man who wears his hair in an Afro style as a signal of his racial identification. There are differences, of course, but the concept of accommodation helps us think in new ways about race and gender discrimination.

My use of the term accommodation, however, should not be taken to suggest that the appearance codes are themselves race- or gender-neutral.[172] I have argued elsewhere that in many cases they are not.[173] But the proposal made here does not turn on the racial or gendered nature of the appearance codes. Instead, it focuses on signals of membership in certain socially salient groups as a way of furthering social equality, at the same time that it vindicates individual rights to be free from discrimination in the performance of race or gender.[174] Much like the law regarding discrimination based on disability and religion, the proposal seeks to carve out space for difference by requiring tolerance. It breaks down racial and gendered appearance codes indirectly through tolerance, rather than directly through whole-scale prohibition.

Nor should the proposal be taken to suggest that performance of race or sex stands apart from race or sex as ancestry or phenotype. To the contrary, the proposal is intended to make clear to employers that rigid appearance and behavioral expectations can be problematic as a matter of equal opportunity, just as status requirements are problematic. The disability context again provides a good illustration. The ADA prohibits disparate treatment on the basis of disability, which means that an employer cannot refuse to hire or otherwise treat differently an individual with a disability on the basis of that person's status as an individual with a disability.[175] More often than not, however, employers today do not categorically exclude

172. This is one of the dangers of adopting an accommodation requirement. *See* Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345 (2003) (arguing that notions of formal equality have hindered development of accommodation as a means of combating discrimination).

173. *See* Green, *supra* note 3, at 646–50 (discussing the human and structural dimensions of discriminatory work cultures).

174. As I explain more fully below, the right to accommodation under the proposal reaches beyond members of traditionally subordinated groups, largely to permit internal dissent and to avoid essentializing group traits. In that circumstance, it imposes an accommodation mandate, one that obtains its normative force from the employer's contribution to social inequality rather than from an employer wrong against an individual in the employment relationship. *See* Green, *supra* note 69, at 870–73 (distinguishing between antidiscrimination and accommodation mandates).

175. § 12112(a).

individuals with disabilities from the workplace. Instead, particularly in cases involving appearance, employers discriminate by failing to provide exceptions to prevailing norms, refusing to place individuals with visible scars or behavioral differences, for example, in positions involving customer contact. In each case, whether the exclusion is categorical or individualized, the ADA rightly recognizes that the employer has engaged in discrimination.[176]

Relatedly, this proposal should be understood as one part of a broader, multi-pronged antidiscrimination project. I argue elsewhere that it is critical to that project that we begin to understand the ways in which work culture—the informal, day-to-day behavioral expectations developed through social interaction in an organizational context—can be a source of discrimination.[177] In *Work Culture and Discrimination*, I proposed several ways in which the law might be used to trigger change in the organizational contexts that shape the development of discriminatory work cultures.[178] The contact hypothesis research examined here reveals that such an organization-focused approach is not sufficient. It identifies a need to provide more space at the individual level for signals of membership in socially salient groups, thus transforming relational expectations from the bottom up as well as from the top down.

In much the same way, the proposed accommodation requirement can work in tandem with efforts to define discrimination under Title VII to include decisions based on intragroup as well as intergroup differences.[179] The employer that denies a promotion to an African American woman because her conduct—whom she lunches with, how she wears her hair, what topics she chooses to raise (or not to raise) in hiring meetings—makes her less racially palatable than another African American woman (or man) should be

176. *See, e.g.*, 29 C.F.R. § 1630.15(a) app. (2006) (noting that unlawful discrimination occurs when an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee); *id.* § 1630.2(1) app. (noting that a prominent facial scar or involuntary head jerk may be perceived as an impairment that substantially limits a major life activity when an employer discriminates against the person because of customer complaints). Indeed, the hurdle for ADA plaintiffs is the courts' narrow definition of an individual with a disability. *See, e.g.*, Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1097–98 (7th Cir. 1998) (holding that person with missing teeth moved from counter because of concern about customer reaction was not an individual with a disability under the ADA).

177. Green, *supra* note 3.

178. *Id.* at 674–83.

179. *See* Carbado & Gulati, *supra* note 1, at 1820–22 (describing a "difference model" that would recognize intra-racial distinctions as well as inter-racial distinctions as race-based).

understood to violate Title VII. The employer is, after all, making employment decisions based on discomfort with race (those who do not "cover" or make their race less salient are treated differently than those who do). This reconceptualization of discrimination is powerful and important.[180] As a practical matter, however, proving that the employer made its promotion decision on the ground of racial palatability will be difficult, for by the time the promotion decision is made the employer will have amassed a number of seemingly race-neutral reasons for its decision (e.g., the other woman "was a stronger team leader" or "was more professional").[181] The challenges posed in deconstructing these seemingly neutral business reasons after-the-fact within a disparate treatment framework illustrate the need for a more direct, up-front means of creating space for signals of group membership. An accommodation requirement like the one proposed here permits employees to challenge (and identify) an employer's rigid appearance expectation as involving performance of race or gender sooner rather than later. As early as the hiring stage, an applicant might identify an appearance trait as a signal of membership in a racial or gender group.[182] In this way, a reasonable accommodation requirement can bring performative aspects of race and gender to the surface and put employers on notice that they should be careful not to discriminate on the basis of those aspects.

2. Why So Narrow? Appearance and Relational Behavior

Assimilation demands are not limited to appearance. As I and others have argued elsewhere, assimilation demands manifest across a spectrum of relational behavior, from responsiveness to jokes and use of language to boasting and choice in lunch companions.[183] Why,

180. In theory, this reconceptualization should also create some space for signaling of group membership. If employers take seriously a Title VII prohibition on intragroup distinctions based on racial palatability, then they should permit a greater range of racial performance.

181. For a discussion of some of the limits of individual disparate treatment theory for addressing discrimination in workplace dynamics, see Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 113–19 (2003). This problem of proof, of course, will also arise in some claims under my proposal. *See infra* note 232 and accompanying text.

182. For example, an applicant might point out in an interview that her braided hairstyle is a signal of membership in a racial group, raising the same kind of awareness in the employer that it is likely to experience when interviewing an applicant who wears a yarmulke.

183. For examples of some of the relational behavior associated with assimilation demands, see generally Carbado & Gulati, *supra* note 1, and Green, *supra* note 3.

then, limit the proposed regulation to appearance? At least four, largely interrelated reasons justify the proposal's narrow scope.

First, appearance is one of the most prominent signals of group belonging. Professor Sandra Bem's story comes to mind:

> [My son Jeremy] naively decided to wear barrettes to nursery school. Several times that day, another little boy insisted that Jeremy must be a girl because "only girls wear barrettes." After repeatedly insisting that "wearing barrettes doesn't matter; being a boy means having a penis and testicles," Jeremy finally pulled down his pants to make his point more convincingly. The other boy was not impressed. He simply said, "Everybody has a penis; only girls wear barrettes."[184]

This story reminds us that appearance traits, particularly dress, frequently signal to others membership in socially salient groups. How we look not only helps define ourselves, as other scholars have stressed; it tells others how we define ourselves and, in many cases, how society defines us.[185]

Second, on a practical level, employer demands involving appearance are likely to be easier to identify than demands involving other relational behaviors. Many employers have formal policies regarding dress, and others rigidly enforce even the more informal policies at a central level.[186] Indeed, the trend has been toward more employer control of employee appearance rather than less, particularly in the service sector.[187] Relational behaviors other than appearance, in contrast, are typically policed more subtly, through decentralized social norms and day-to-day work culture.[188] Non-appearance-based relational behaviors therefore are often both more

184. SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 149 (1993); *see also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (using Professor Bem's story to argue for the importance of taking community norms into account in Title VII analysis).

185. For a discussion of the history of dress as a tool of subordination, see Devon Carbado et al., *The Story of* Jesperson v. Harrah's*: Makeup and Women at Work, in* EMPLOYMENT DISCRIMINATION STORIES 104 (Joel Wm. Friedman ed., 2006).

186. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135 (1st Cir. 2004) (seeking to promote a "neat, clean, and professional image," defined on a case-by-case basis by the employer).

187. *See* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007) (describing the increased use of "branding" in the service sector).

188. *See* Green, *supra* note 3.

difficult to trace to the employer[189] and more difficult to identify as a causal factor in a particular employment decision.

Appearance is also easier for employers to accommodate than other relational behaviors.[190] In most cases, accommodation will require only that the employer permit the employee to look different by granting an exception to its appearance code. It is difficult to imagine, in contrast, how an employer would accommodate relational behaviors like conversation style or professed interests. A woman who does not follow sports may sincerely claim that not following sports is a signal of her membership in a socially salient group, but how would an employer accommodate her not following sports in a workplace dominated by people—mostly men—who do follow and talk about sports in the workplace?[191] The difficulty in accommodating non-appearance-based relational behavior lies both in the subtlety of the behavior and in the informal, social nature of the means of policing those behaviors.

Third, regulation of appearance demands through a legal right to accommodation is likely to disrupt workplace social relations less than the same regulation of other relational behaviors. Although appearance undoubtedly affects social interaction, people are better able to look past appearance differences than they are differences in other relational behaviors. Conversation style, professed interests, degree of self-promotion or aggression are all much more intimately engaged in the process of building social connection than is appearance. Indeed, lessons can be drawn here from the disability context. Studies consistently show that most people find it easier to connect, to cross boundaries of difference, with individuals with physical disabilities than with individuals with mental disabilities.[192]

189. In much of my work, I have strived to make clear the employer role in more subtle forms of workplace discrimination. *See* Green, *supra* note 181 (arguing for a structural account of disparate treatment theory); Green, *supra* note 69 (arguing that a structural approach to employment discrimination law imposes costs on employers tied to their own wrongs in the workplace); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003) (considering the procedural and remedial implications of recent class action litigation emphasizing the employer role in widespread workplace discrimination); Green, *supra* note 3 (discussing the employer's role in shaping work culture).

190. Language may be the exception. In cases involving English-only rules, the employer would need only to permit different languages be spoken.

191. For an argument that employers should be required to make changes in organizational context to minimize discriminatory work cultures, and identification of several non-legal-rights-based ways of triggering that obligation, see Green, *supra* note 3.

192. *See* SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 8–12 (2001).

Perhaps this is because most people understand the self to be more easily separated from appearance, or, relatedly, because most people already understand appearance as an identity signal.[193] Regardless, providing accommodation for appearance holds particular potential as a means of creating space for maintaining identity categories without disrupting the potential for intergroup connection.

Fourth, regulation of appearance demands in most cases will impose a relatively limited cost on employers: the cost associated with customer and coworker discomfort with difference.[194] Limiting the proposal to appearance thus avoids some of the more controversial questions about job requirements. In his book, for example, Professor Ford asks whether an institution must accommodate "habitual tardiness" or "insubordination" if certain racial or ethnic groups are "culturally resistant to mechanical time or 'alternative' modes of interaction with authority figures."[195] A similar question is currently playing out in the disability context as individuals with mental disabilities seek accommodation for differences in behavior.[196] By limiting the accommodation requirement to appearance, the proposal avoids these difficult questions.

3. Why So Broad? Maintaining and Contesting Categories

To illustrate the breadth of the proposal, it helps to start with some brief scenarios. Under the proposal, an employer would be required to accommodate the following:

- A Latino man with a tattoo who claims that the tattoo signals identification with his racial group.

193. In this way, the understood voluntary nature of many appearance traits ironically turns out to make appearance a better candidate for protection than traits or behaviors that are considered less voluntary. Others have argued, in contrast, that individuals with mental disabilities suffer greater discrimination than those with physical disabilities because people tend to think of physical disabilities as beyond one's control. *See id.* at 11.

194. See discussion of discomfort *infra* Part III.B.4.a.

195. FORD, *supra* note 21, at 12. Ford's choice of language here suggests his answer, but others would disagree. *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (describing courts' willingness to permit employers to define job requirements as a problem of "workplace essentialism").

196. Courts have struggled, for example, with the question of whether "interacting with others" is a major life activity and, if so, whether employers can define the essential job functions as including "not offending customers" or "getting along with others." *See generally* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 454 (2006) (describing the issue).

- A black man wearing baggy jeans who claims that the jeans signal identification with his racial group.
- A black woman with a braided hairstyle who claims that the hairstyle signals identification with her racial or gender group.
- A woman who wears makeup and who claims that wearing makeup signals identification with her gender group.

These scenarios all involve members of historically subordinated groups, but the proposal as drafted would not be limited to members of those groups. An employer would also be required to reasonably accommodate:

- A white man with a tattoo or baggy jeans who claims that the tattoo or jeans, or both, signal identification with his racial or gender group.
- A man wearing a dress or long hair who claims that the dress or hair signals identification with his gender group.

The proposal, then, is broad in two ways: (1) it provides no objective test or measure for determining the sincerity of the claim that a particular appearance trait signals membership in a racial or gender group; and (2) the person seeking accommodation under the proposal need not claim membership in a historically disadvantaged or subordinated racial or gender group; in other words, whites as well as blacks, men as well as women, must be accommodated.

The breadth of the proposal is one of its great strengths. Permitting employees to decide which of their appearance traits signals membership in a protected group avoids the essentialism concerns that have so troubled identity scholars to date.[197] Instead of establishing that a particular appearance trait is essential to the identity of members of a particular group, a legal determination that accommodation is due establishes only that the particular individual sees a certain appearance trait as a signal of membership in a socially salient (and legally relevant) group. In this way, the proposal reflects—and promotes—an understanding of race and gender as socially constructed. Scholars have long understood race and sex as largely, if not entirely, social, as a process of group identification by oneself and by others, for oneself and for others.[198] And yet the law

197. *See supra* notes 5, 78–80.

198. *See, e.g.*, K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1996) (arguing that race is a social construction); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY

(and the general public) has been slow to recognize this reality.[199] By making signals of race or gender determine the meaning of race and sex for purposes of legal accommodation, the proposal therefore pushes a more modern, accurate conception of those categories.

In addition, permitting a white man to claim that his wearing baggy jeans is a signal of his membership in a racial group tests our stereotypes and contests the meaning of race, just as permitting a man to wear long hair or a dress challenges our gender norms.[200] The proposal therefore not only recognizes and reinforces the social nature of categories like race and gender; it fosters their fluidity by allowing internal dissent.[201] Racial and gender groups are understood not as static, homogeneous "things" that determine who we are, but as ongoing social processes involving self-determination as well as external constraint.[202]

There is also a political benefit to the proposal's breadth. Extending the accommodation requirement to members of all racial or gender groups means that the legal determination of whether the employer has violated its obligation does not depend on the relative status of different groups. The underlying justification for the requirement rests on a history of group inequality and subordination, as does the justification for all antidiscrimination law, but each case does not require a determination that the individual seeking accommodation is a member of a group that has been historically

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(2d ed. 1999) (arguing that sex is a social construction); Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). For an argument that Professor Butler, in her later work, recognizes at least some biological sex difference, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 870–71 (2002) (discussing JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993)).

199. *See* Haney-López, *supra* note 198, at 16–19 (describing instances of continued reliance on skin color and blood to determine race).

200. *See* 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, 68–69 (1995) (arguing that men must be permitted femininity for femininity to be valued).

201. *See* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 495 (2001) (arguing that individuals within cultures should be permitted space "to modernize, or broaden, the traditional terms of cultural membership"); Cornel West, *The New Cultural Politics of Difference*, *in* THE IDENTITY IN QUESTION 147, 167 (John Rajchman ed., 1995) (arguing that the "most desirable option for people of color who promote the new cultural politics of difference is to be a critical organic catalyst").

202. By recognizing intragroup differences, the proposal also builds in a practical way on the insight of intersectionality theory. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) (identifying intersectionality theory as a foundational theory for recognizing intragroup differences and identity performance).

subordinated or stigmatized.[203] Nor does it require a determination that members of that group are currently underrepresented in the workplace, or that they are being adversely impacted as a group. Because the right to accommodation under the proposal is an individual one, not a group one, it fits more comfortably within the prevailing individualist conception of rights.[204]

Critics will undoubtedly express concern that the breadth of the proposal will open the floodgate for accommodation demands. There are several reasons, however, both practical and social, why the proposal is unlikely to result in a rush of demands. First, although appearance is often policed more openly and formally by employers than other relational behavior,[205] it is also policed, as is all relational behavior, through day-to-day norm enforcement. This means that an individual who attains formal accommodation will still risk adverse consequences in job success if she does not conform to day-to-day appearance expectations. The more relationally dependent and susceptible to subjective evaluation the job is—and the trend has been toward more relationally dependent, subjectively evaluated work[206]—the more likely the individual is to be penalized for her signal of group difference. And, as a number of scholars have documented, that penalty is difficult to pinpoint at a precise point in time, making it difficult to address under existing law, or under a rights-based proposal like the one submitted here.[207] As a practical matter, then, it is unlikely that many people will seek accommodation, at least if they understand the risk that they take in doing so.[208]

Second, race and gender, perhaps even more so than religion, are socially sensitive subjects. A white man is unlikely, for example, to claim that baggy jeans are a signal of membership in a racial group.

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203. For a proposal that does require such a determination, see Yuracko, *supra* note 3, at 386 (arguing that "antidiscrimination law should prohibit job irrational forms of trait discrimination whenever they harm members of traditionally protected racial or ethnic groups").

204. For a discussion of the Supreme Court's discomfort with group-based rights, in the context of vote dilution, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1689–91 (2001). *See also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 555–66 (2003) (discussing the Supreme Court's turn to individualism and the implications of that turn for disparate impact doctrine).

205. *See supra* note 187.

206. Green, *supra* note 3, at 640–43.

207. *See id.* at 655–56.

208. This may indeed be a significant limitation of the proposal. *See infra* note 232 and accompanying text.

This is so, in part, because as a white man he is likely to prefer to erase race, to subscribe to a color-blind ideal, and in part because he is unlikely to see his appearance as a signal of membership in a racial group. Critical race scholars and feminists have long emphasized that dominant social groups such as whites and men often fail to recognize the privileges of their group membership.[209] An accommodation that provides space to signal membership as a racial or gender matter might open more eyes to that reality, even if few whites or men ultimately seek accommodation.

4. Defining Accommodation and Undue Hardship

The proposal is intended to create space in the workplace for individuals to signal membership in socially salient identity categories. In most cases, accommodation will be an exception to the employer's appearance policy. Some cases, however, will require a more tailored accommodation. In this section, I anticipate three broad categories of employer objections to appearance policy exceptions, and I consider the extent to which those objections should justify a more tailored accommodation or even nonaccommodation of a particular appearance trait. As other scholars have pointed out, the analysis of any particular accommodation will necessarily be contextual; affected by the specifics of the appearance signal at issue and the employer's reason for denying accommodation,[210] but some rough boundaries can be drawn nonetheless.

a. Coworker/Customer Discomfort with Difference and Business Image

One primary reason why employers demand assimilation in the workplace is to alleviate coworker and customer discomfort with difference. As Professors Carbado and Gulati have detailed in their work, particularly their review essay, *The Law and Economics of Critical Race Theory*, social science research and theory shows that difference along socially salient lines, like race and sex, tend to engender "distrust, dislike, disconnection, disidentification, and disassociation."[211] People, in short, are most comfortable interacting

209. *See* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 1–8 (1998) (arguing that few people see the whiteness of foundational status because it is so entrenched).

210. *See* Yuracko, *supra* note 3, at 368 ("Like the problem itself, the answer must be nuanced, context specific, and narrowly drawn.").

211. Carbado & Gulati, *supra* note 1, at 1797.

with those who are visibly similar to themselves.[212] Whether an employer is trying to build trust among employees to foster employee commitment, seeking to generate short-term efficiencies in group decisionmaking, or attempting to provide its customers with the most pleasant service experience, it has an incentive to prefer assimilation over expression of difference.[213]

On the customer side, this incentive is frequently couched in terms of fostering a "professional public image."[214] The employee handbook of the national retail outlet Costco, for example, has stated that employees "must practice good grooming and personal hygiene to convey a neat, clean and professional image."[215] Courts generally have permitted employers to define what a professional appearance looks like, and have sided with employers in the face of requests for accommodation.[216] In considering a Costco employee's request for a religious accommodation to wear facial piercings, the First Circuit recently explained that "Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance"[217] and held that violating that interest by requiring accommodation would impose an undue hardship on the employer.[218]

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212. *Id.*; *see also* Yoshino, *supra* note 198, at 837 ("All covering requires is that the individual modulate her conduct to make her difference easy for those around her to disattend her *known* stigmatized trait.").

213. *See* Carbado & Gulati, *supra* note 1, at 1789–91 (discussing the importance of "trust, fairness, and loyalty" for the effectiveness of work teams); Green, *supra* note 69, at 890–92 (discussing the benefit to employers from employee affective commitment).

214. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 137 (1st Cir. 2004) (holding that exempting employee from no-facial piercing policy was an undue burden on the employer). For a representative handful of the many cases involving discrimination challenges to employers' "professional" appearance standards, see *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214 n.11 (8th Cir. 1985) (affirming that a "professional" appearance standard "consistent with community standards" is not sex discrimination), and *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (explaining that the employer had adopted a no-braids policy to promote a "conservative and business-like image").

215. *Cloutier*, 390 F.3d at 135.

216. *See, e.g.*, *id.* at 137; *Rogers*, 527 F. Supp. at 232–33.

217. *Coultier*, 390 F.3d at 135 (quoting the district court opinion).

218. *Id.*; *see also id.* at 136–37 (stating that "Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate," and concluding that "[s]uch a business determination is within its discretion" and that "[g]ranting such an exemption would be an undue hardship because it would adversely affect the employer's public image"); *cf.* Brown v. F.L. Roberts & Co., Inc., 419 F. Supp. 2d 7, 17–19 (D. Mass. 2006) (following *Cloutier* as controlling authority but expressing reservations about the breadth of the *Cloutier* court's deference to the employer's efforts to create a business image).

In theory, of course, this expectation of a professional appearance is not problematic, and courts are right to recognize it as a legitimate business interest.[219] In practice, though, conceptions of professionalism tend to overlap with white, male norms and severely restrict the extent to which individuals can signal membership in racial and gender identity categories. Imposing professionalism appearance codes becomes a way of ensuring that customers will be provided a zone of gender and racial comfort.[220] By excluding coworker and customer discomfort with difference from undue hardship, the appearance-based accommodation proposal will impose on employers any economic cost associated with that discomfort. Employers should bear this cost, as I have argued here and elsewhere, both because of their role in facilitating the biases that fuel assimilation demands along a white, male norm and because the workplace holds a unique position as a site of regulated social interaction, with real consequences for equality in relations outside of work.[221]

The proposal will also impose a cost of a sort on the coworkers and customers who experience greater racial or gender discomfort from interacting with people who do not conform to dominant appearance norms. Coworkers and customers should bear that cost, not just because the individual seeking accommodation will otherwise suffer an equality-based harm, or because the social science research on the contact hypothesis suggests a long-term social equality benefit to be attained from overcoming discomfort through interaction, but because imposing that cost is consistent with a vision of a diverse society that expects adjustment and compromise from all, rather than just from those who have been subordinated in the past or otherwise

219. Saying that the interest is legitimate, of course, is far different from saying that private entities have First Amendment rights to expression through employee appearance. *See* Fisk, *supra* note 73, at 1141–42.

220. In this way, assimilation behavior "provides employers with a way to avoid confronting their use of stereotypes," Carbado & Gulati, *supra* note 2, at 1303, and to avoid overcoming the anxieties of intergroup interaction, *id.* at 1301–04; *see also* Pettigrew & Tropp, *supra* note 87, at 767 (describing intergroup anxiety as "feelings of threat and uncertainty that people experience in intergroup contexts," and explaining that "[t]hese feelings grow out of concerns about how they should act, how they might be perceived, and whether they will be accepted"). A relatively new line of social science research stresses the importance of reducing intergroup anxiety for prejudice reduction. *See, e.g.*, Walter G. Stephan & Cookie White Stephan, *Intergroup Anxiety*, 41 J. SOC. ISSUES 157, 165–70 (1985).

221. *See supra* notes 52–55 and accompanying text; *see also* Green, *supra* note 69, at 871.

lack the social and political power to set the interactional norms.[222] Professor Cristina Rodriguez makes this point in her recent analysis of English-only rules in the workplace: "The dissonance or alienation associated with hearing an unfamiliar language is precisely the cost that the monolingual English-speaking majority should be expected to bear in a society that depends upon and encourages immigration and claims to value tolerance."[223]

At the same time, it should be clear that the proposal would not rob employers of all discretion to regulate appearance in the workplace. Indeed, employer efforts to cater to customer preference, particularly in the service sector, frequently go beyond alleviating customer discomfort with difference to creating a unique business image.[224] Employers will still be permitted to engage in these efforts under the proposal, just as they can seek to attain a "professional" image. In doing so, however, they will be required to accommodate appearance-based signals of group membership.[225]

b. Safety

In some circumstances, an exception to an employer's appearance code will not be feasible because the employer's appearance code is safety-based rather than comfort- or norm-based. Long hair, for example, may pose a hazard to the employee or to others in a kitchen with open flames, as might long necklaces pose a hazard in the operation of some equipment. When the employer raises a safety concern, it should be required to provide an empirical foundation for that concern.[226] In most of these cases, moreover, the employer should still be required to provide accommodation, albeit a more tailored accommodation. For example, the kitchen worker might be required to wear his hair covered or tied back; the equipment operator might be required to wear her jewelry

222. Moreover, imposing the cost of discomfort with difference on coworkers and customers forces us to confront the relational, emotional dimension of discriminatory impulses, making it more difficult to catalogue continued subordination and stigmatization exclusively as a product of cognitive categorization over which we have little control.

223. Cristina Rodriguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1715 (2006).

224. For a fascinating account of the rise of "branded service" and its role in reinforcing sex stereotypes, see Avery & Crain, *supra* note 187, at 85–89.

225. The same analysis should apply to uniforms, which are often used to establish a particular business image. In those cases in which the employer argues that the uniform serves a safety function, courts should consider ways in which an employer might accommodate the employee's signal without undermining safety.

226. *See, e.g.*, 29 C.F.R. § 1630.2(r) (2006) (defining direct threat under the ADA and requiring proof of substantial risk of harm).

underneath clothing while operating machinery. Only in rare cases, those cases in which no accommodation could be provided without posing a safety risk, should the employer be permitted to avoid accommodation under the undue hardship defense.

c. The Problem of Multiple Messages

Appearance signals, of course, like all signals, can send multiple messages, intended or unintended. In most cases, multiple messages alone will not rise to the level of undue hardship. That is the employer's position, after all, when it argues that braided hair does not promote a "business-like" image[227] or that baggy jeans signal "criminality" or "lack of respect for education,"[228] and I have already explained why the employer's interest should bend in those cases to accommodation.[229] In some cases, however, an appearance trait might signal group membership and at the same time signal group dominance or hostility toward others. A tattoo, for example, might signal identification with a racial group and membership in a violent gang; a t-shirt with a picture of a confederate flag might signal membership in a racial group and social dominance of other groups.[230] Because the goal of the proposal is to create space within which to signal membership in socially salient identity categories, not to foster intergroup hostility, these particular appearance signals should not be entitled to accommodation. That said, I expect that this inquiry will

227. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

228. *See* Fisk, *supra* note 73, at 1120 n.18, 1121 (describing the NBA's rationale for its adoption of an off-court dress code requiring "business or conservative attire" and an on-court dress code requiring shorts to be one inch above the knee).

229. Some readers might argue that sex or "sexy dressing" presents a special case. Indeed, several law professors during early presentations of this Article expressed concern that my proposal would lead to "bare midriffs" at work. This objection seemed to be primarily gender-focused and sex-specific: it envisioned women wearing skin-revealing clothing as a signal of identification with a gender group. But the issue is actually more complex. Not only is wearing sexy clothing gendered in ways that might lead a man to want to use it as a signal of identification with a gender group, but norms regarding sexy clothing, particularly for women, vary across ethnicities. The Latino culture, for example, encourages women to dress more provocatively than does the American white culture. When a colleague of mine asked her light-skinned Latina sister why she did not dress more conservatively for her job as a social worker, the sister responded that if she dressed conservatively she would "pass" as white.

230. *See, e.g.*, Inturri v. City of Hartford, 365 F. Supp. 2d 240, 244 (D. Conn. 2005) (involving constitutional challenge by several police officers to requirement that they cover tattoos that the police chief had learned symbolized "race hatred of non-whites and Jews"). This is also consistent with cases in the religious discrimination context. *See, e.g.*, Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000) (holding that requiring an employer permit its employee to expose a KKK tattoo, which depicted a hooded figure in front of a burning cross, would amount to undue hardship).

be one of the more difficult under the proposal, for it will require careful consideration of historical context as well as evidence of how others perceive a particular appearance signal.[231]

As these examples illustrate, undue hardship under the proposal should be construed narrowly to require in most cases an exception to the employer's appearance rules and in some exceptional, safety- or hostility-/group-dominance-related cases a more tailored accommodation. Only in very rare cases should the employer be permitted to avoid accommodation altogether by establishing undue hardship. This narrow reading of undue hardship imposes a cost on employers and on coworkers and customers, but that cost, as a practical matter, is largely limited to the cost of discomfort with difference.

5. Concerns: The Reality of Law in Action and the Potential for Backlash

In this section, I consider the reality of law in action. I raise here two principal concerns: (1) that the proposed regulation will have limited effect in practice; and (2) that the proposed regulation will result in political backlash to civil rights laws and hinder other efforts to attain group equality. At first glance, these concerns seem at odds—one suggests that the law will have no real effect, while the other suggests that the law will generate substantial backlash. Upon closer inspection, however, these concerns are related, and important. It may be that the proposed regulation will effect little meaningful change, while igniting resistance to civil rights more broadly. I acknowledge that risk, but argue that it is one worth taking and the outcome worth fighting against.

The concern about limited effect stems from the slippery nature of day-to-day perceptions and decisionmaking. It makes sense, as I have argued, to limit the accommodation requirement to appearance in part because employers tend to police appearance more openly, frequently through formal appearance codes, than they do other relational behaviors. But appearance codes are enforced informally

231. In some cases, a substantial workplace disruption that is not triggered by a perceived signal of hostility or group-based dominance, so long as it is not based on discomfort with racial or gender difference, may also amount to undue hardship. In *Wilson v. U.S. West Communications*, for example, the plaintiff employee requested to wear an anti-abortion pin with a color photograph of an eighteen- to twenty-week-old fetus as an accommodation to her religion. 58 F.3d 1337, 1339 (8th Cir. 1995). Several coworkers testified that they "found the button offensive and disturbing for 'very personal reasons,' such as infertility problems, miscarriage, and death of a premature infant, unrelated to any stance on abortion or religion." *Id.*

as well as formally. As discussed above, there is reason to believe that even those who are formally granted accommodation by an employer will suffer job consequences from signals of difference, including signals of membership in socially salient groups. This reality, together with a host of other factors identified by social scientists, suggests that it is unlikely that most members of stigmatized and subordinated groups will choose to signal identification with their group rather than to deemphasize that identification through assimilation.[232]

There is, however, another possibility. As employers are required to bend their appearance codes to provide space for signaling of group membership, they may open up rigidly enforced appearance codes and other relational norms more broadly to permit variation and difference among employees. The proposal, in fact, is consistent with the recent movement in the business literature toward valuing diversity.[233] It simply takes that movement one step further to curb the competing employer impulse to demand homogeneity. And, as individuals are permitted to signal membership in socially salient groups, it may become easier for them to engage in collective action, which social scientists agree is the best way to combat institutionalized prejudice and inequality.[234]

The more pressing concern is the risk of backlash. Even if there is a strong normative argument that the proposed accommodation requirement serves in many cases as an antidiscrimination mandate, imposing costs on employers for their wrongful treatment of individuals on the basis of protected group status or characteristics, as I have argued elsewhere,[235] and that in those cases in which it does serve as an accommodation mandate, the cost imposed is justified, there is reason to expect that the proposal will be construed by the public—including judges—as providing special treatment to members of particular groups.[236] Experience in the disability context makes

232. *See, e.g.*, Major et al., *supra* note 147, at 217–26 (describing some of the costs and benefits of the various coping strategies for targets of prejudice).

233. For a review of the business literature on diversity management and the limits of diversity management as currently conceived for reducing intergroup inequality, see Frank Linnehan & Alison M. Konrad, *Diluting Diversity: Implications for Intergroup Inequality in Organizations*, 8 J. MGMT. INQUIRY 399, 404–07 (1999).

234. *See* Major et al., *supra* note 147, at 232.

235. *See* Green, *supra* note 69.

236. *See* Arnow-Richman, *supra* note 172, at 362–73 (pointing out that accommodation requirements generally have not fared well).

clear the difficult road for laws construed in that way.[237] Although I recognize this challenge, I do not agree with those scholars who suggest that the political difficulty with accommodation requirements warrants moving away from those requirements.[238] Meaningful reform—particularly reform involving entrenched social norms—is never easy; it requires vigilant policing and clear, persuasive argument to convince people of the nature of and need for the regulation.

Nonetheless, there is a related backlash risk that is more troubling. The first case in which a white man claims that wearing a dress signals his membership in a gender group will likely be assailed as an example of the ridiculous lengths to which the law, particular civil rights law, has gone. I fear, then, that public reaction to a proposal like the one submitted here will result in backlash against civil rights more generally.[239] The challenge here, too, however, is one of framing, rather than substance. The law requires that the employer accommodate not just because the white man's interest in forming his gender identity is violated by a men-wear-pants policy, but because social equality more broadly is furthered by a law that provides space to signal membership in socially salient groups. In this way, the proposal represents a new vision of diversity—and of integration—than the one American society currently embraces. It is an important vision, and one worth fighting for. It is a vision that bridges the divide between separation and assimilation,[240] that accepts the relevance and importance of groups at the same time that it facilitates the testing of group boundaries. It is a vision that requires all of us to question our stereotypes, to confront our discomfort with intergroup interaction, and to engage constructively with difference.

237. *See* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 516 (2000) (noting that "the ADA's definition of disability has come under such powerful narrowing pressure because people do not understand that the ADA is an anti-discrimination statute rather than an entitlement program").

238. *See, e.g.*, Arnow-Richman, *supra* note 172, at 398–416; Samuel R. Bagenstos, *The Structural Turn and Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006) (arguing that a structural approach to employment discrimination law serves as an accommodation mandate and expressing skepticism that it will gain political traction); Fisk, *supra* note 73, at 1138 (explaining reasons for a privacy/autonomy approach).

239. *See generally* Krieger, *supra* note 237 (arguing that backlash occurs when the results of legislation, whether intended or not, diverge from social norms).

240. For a recent discussion of this divide, and an attempt to bridge the divide, see Adams, *supra* note 72.

CONCLUSION

The contact hypothesis research tests our assumptions about the effect of assimilation demands on social equality. Workplace assimilation demands, it turns out, do more than disadvantage members of traditionally subordinated groups by requiring that they do extra identity work; such demands hinder the ability of interaction at work to reduce prejudice and to ease intergroup anxiety and hostility. In his foundational book on the contact hypothesis, Gordon Allport argued that the most compelling approach to prejudice reduction is one in which individuals frame the world not in terms of the "good and the bad," or the "weak and the strong," but rather with a "greater mental flexibility" and tolerance toward "shades of gray."[241]

This Article pushes us in that direction by taking seriously the role that group membership plays in shaping our interactions as well as our identities. The accommodation proposal that I present here is one way to move forward on this new vision of diversity. But it should be understood as only one part of a much larger movement. Reconceptualizing discrimination to include performance is another important piece. Non-legal-rights approaches should also be explored. It may be that more progress can be made more quickly if we devise an approach that does not rely so heavily on judges to side with plaintiffs in Title VII cases.[242] The optimum legal system may require other mechanisms, including administrative obligations, process-based requirements, even tax-based incentives. It may also require efforts outside of the law, emphasizing, for example, the business-related benefits of fostering a collective work culture without demanding assimilation to a white, male norm.[243] The key to developing the various pieces to this optimum system is first opening our eyes to the importance of groups and social interaction for

241. ALLPORT, *supra* note 13, at 425–26.

242. *See* Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 698–701 (reviewing studies showing that plaintiffs fare better before juries than before judges at trial and fare dramatically worse than defendants on appeal). For a recent exploration of the ways in which gender plays a role in summary judgment, see Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* (Brooklyn Law Sch., Legal Studies Paper No. 71, 2007), *available at* http://ssrn.com/abstract=968834.

243. *See, e.g.*, Jennifer A. Chatman, *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes*, 43 ADMIN. SCI. Q., 749, 772–77 (1998) (presenting results of a study suggesting that a collectivist organizational culture may help to increase the effectiveness of diverse people working together).

reducing prejudice and for attaining the benefits of diversity in our workplaces and our society.