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## *Price's* Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law

**ABSTRACT.** American antidiscrimination law has addressed harmful stereotypes since, at least, the Civil Rights Act of 1964. Stereotypes about the different abilities of men and women, or of black and white workers, lay underneath much of the segregation and workplace inequality that Title VII sought to correct. However, *Price Waterhouse v. Hopkins* has radically expanded our conception of stereotypes as discrimination, and in doing so has introduced revolutionary ideas to the workplace and the courts. Prior to *Price Waterhouse*, Title VII had been thought to apply only to ascriptive stereotyping—to monolithic misconceptions burdening all members of a disfavored group. *Price Waterhouse's* extension of Title VII protection to victims of prescriptive stereotype has constituted a massive, and heretofore unstudied, conceptual leap. This Note examines how *Price Waterhouse's* prohibition against stereotyping can transform American workplace law and analyzes one area where it already has—antigay discrimination. By contrasting the requirements for proving antigay discrimination under a *Price Waterhouse* sex stereotyping theory with the traditional Title VII methods that many states use to protect LGBT workers, I show both how *Price Waterhouse* can complement proposed LGBT-specific protections such as the Employment Non-Discrimination Act (ENDA), and how its normative vision is a vital addition to existing antidiscrimination law.

**AUTHOR.** Ph.D. Candidate, Columbia University; Yale Law School, J.D., 2014. As much as this Note arises from my own longstanding obsessions, it also reflects the support of wonderful friends, mentors, and colleagues. I offer sincere thanks to Bill Eskridge, Vicki Schultz, and Tom Tyler of the Yale Law School, for whose guidance I am deeply grateful. Jessie Weber graciously shared her wisdom, experience, and hospitality with me. Ida Araya-Brumskine, Geoff Mort, Alex Reed, Rachel Shalev, Julie Veroff, Kenji Yoshino, and Noah Zatz offered invaluable feedback at various stages of the editing process. My editor, Devon Porter, has been thoughtful and generous, as have her colleagues Meng Jia Yang and Rachel Bayefsky. Finally, this Note would never have existed without my parents, Robert Herz and Rosalind Fink, for the obvious reasons and also because of their tireless encouragement and support. All errors are, of course, my own.



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## INTRODUCTION

On January 31, 1968, Isabell Slack was stereotyped.<sup>1</sup> Slack, an African-American industrial worker at Havens International, was asked to spend the morning cleaning her department's workspace.<sup>2</sup> Slack's coworker, a white woman, was excused.<sup>3</sup> When Isabell Slack asked *why* she was being expected to do the work of a cleaning lady, her supervisor explained that "colored people are hired to clean *because they clean better*."<sup>4</sup> The Ninth Circuit found this to be race discrimination, with perhaps unremarkable brevity;<sup>5</sup> the court felt no need to explain how these statements were racially motivated because no other motivation existed. Ms. Slack's supervisor reduced her to her race—we know nothing about her own aptitude for cleaning, the cleanliness of her workspace, or whether she would be better or worse at such work than her colleague. All we know is that Slack is black. Her supervisor assumed that all African-American women were skilled at domestic work and ascribed that characteristic to Isabell Slack with no further thought. This sort of thinking lies at the core of what Title VII sought to prevent, and has fallen uncontroversially within its ambit since the 1960s.

On May 1, 1989, however, the Supreme Court radically expanded our conception of Title VII stereotype in *Price Waterhouse v. Hopkins*.<sup>6</sup> Ann Hopkins was repeatedly told by her employers to dress, speak, and act in a manner more appropriate to her sex.<sup>7</sup> This was stereotype, too, but of a vastly different form. Isabell Slack's employer paid no attention to her particular characteristics, while Ann Hopkins's employer obsessed over them. Havens International assumed that Isabell Slack was like other African-Americans, while Price Waterhouse saw that Ann Hopkins was not like other women and held it against her. Havens International, by assigning a characteristic to Isabell Slack without judging her as an individual, engaged in *ascriptive* stereotyping. Price Waterhouse, by correctly perceiving Ann Hopkins's individual traits but then judging them against an inappropriately gendered baseline, engaged in *prescriptive* stereotyping. While *Price Waterhouse* has been incredibly important in Title VII case law and scholarship,<sup>8</sup> this simple difference—between

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1. Slack v. Havens, 522 F.2d 1091, 1091-93 (9th Cir. 1975).

2. *Id.*

3. *Id.*

4. *Id.* at 1093 (emphasis added).

5. *Id.* at 1095 ("Based on the evidence, we think that the district court reasonably found discrimination in the terms and conditions of employment applied to the appellees.").

6. 490 U.S. 228 (1989).

7. *Id.* at 235-36.

8. However, its influence is due largely to other factors. See *infra* note 53.

assuming members of a group fit a certain stereotype, on the one hand, and demanding that they do so, on the other—is drastically understudied, and it implicates two major problems in antidiscrimination discourse today.

First, a broader application of *Price Waterhouse's* view of discrimination has the potential to resolve, or at least to ameliorate, a serious problem in American antidiscrimination law—the inability of traditional Title VII approaches to address the realities of modern workplace bias. While the Civil Rights Act of 1964 led to huge immediate gains for black<sup>9</sup> and female<sup>10</sup> workers, those gains have recently stalled. Discrimination has, to quote Zachary Kramer, “become highly individualized;”<sup>11</sup> specifically, bias is increasingly expressed as a single factor in complex and multivariate individual evaluation, and is thus increasingly difficult to fit into the specific, historically contingent model of open race and gender hierarchies that animated the Civil Rights Act of 1964. This conceptual mismatch has led to shockingly poor outcomes for employment discrimination plaintiffs and persistent workplace inequality.<sup>12</sup> Professor Kramer stands in a long tradition of theorists considering this mismatch and its possible causes. Some view the problem as institutional, arising from structural bias<sup>13</sup> or assimilationist work culture.<sup>14</sup> Other scholars consider individual decision makers’ roles in creating these structural inequalities, with some highlighting subconscious individual bias as a potential problem for Title VII law<sup>15</sup> and others considering how structural

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9. See John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1608, 1640-41 (1991) (discussing the importance of federal civil rights activity in addressing persistent racial wage and achievement gaps).
  10. See Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, BUREAU LABOR STAT. 22 tbl.4 (2002), <http://www.bls.gov/opub/mlr/2002/05/art2full.pdf> [<http://perma.cc/QH8H-QBTE>] (showing women’s labor force participation increasing by over one-third between 1960 and 1980).
  11. Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 895 (2014) (discussing the turn towards highly subjective determinations in sex discrimination jurisprudence); see also, e.g., Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811 (2013) (describing the importance of individuals’ whole, unique identities to discriminatory employers); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 736-40 (2011) (describing modern theories explaining this individualizing turn).
  12. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444, 449-52 (2004).
  13. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).
  14. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005); Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749, 1832-39 (1990).
  15. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); see also Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427

discrimination can result from conscious, if covert, biased thinking.<sup>16</sup> While these arguments describe slightly different mechanisms of employment discrimination, they all identify the same basic problem: workplace discrimination now largely arises in contexts in which plaintiffs simply cannot prove a violation of Title VII as traditionally understood.

Building on this work, Suzanne Goldberg argues that current evidentiary requirements make complex discrimination exceedingly difficult to prove; by requiring cross-status comparators to demonstrate causation,<sup>17</sup> judges implicitly demand that employers treat members of a group differently on the whole in order to generate a cognizable claim, regardless of the impact discrimination might have on the individual.<sup>18</sup> Goldberg proposes methods of proof that would permit courts to consider context, and claims that subtle discrimination instantiating group hierarchies can occur without generating the clear in-group/out-group distinctions judges currently require.<sup>19</sup> This Note elaborates on how *Price Waterhouse* doctrines respond to this pressing concern. The context that Goldberg identifies, and that traditional Title VII doctrines cannot reach, is a workplace dominated by gendered and raced prescriptions about how people should behave; *Price Waterhouse* sex stereotyping doctrine, explicitly designed to fight prescriptive stereotype, is the tool best suited to address this problem.

Furthermore, a nuanced understanding of *Price Waterhouse* can inform our current debates over how best to protect victims of antigay workplace discrimination. Although there are currently no explicit statutory protections in federal law against antigay discrimination, many courts have held that *Price Waterhouse*'s ban on "assuming or insisting that [employees] match[] the stereotype associated with their group"<sup>20</sup> forbids employers from discriminating against gender-deviant LGBT employees.<sup>21</sup> Furthermore, many

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(discussing the empirical foundations and legal implications of implicit bias); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1135-45 (1999) (providing an operational framework for courts to address subconscious discrimination under Title VII).

16. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1294-97 (2000).
17. For example, requiring a female plaintiff to show that she was treated differently from a similarly situated man, or an African-American plaintiff from her white coworkers.
18. Goldberg, *supra* note 11, at 750-51; see also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009) (discussing the importance of comparators to Title VII cases generally).
19. Goldberg, *supra* note 11, at 808-11.
20. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).
21. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290-92 (3d Cir. 2009); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); Joel Wm. Friedman, *Gender*

states (and soon, possibly the federal government) protect against antigay discrimination using language explicitly modeled on Title VII.<sup>22</sup> This division between sex-stereotyping litigation and new, sexual-orientation-specific legislation has put various scholars, lawyers, and activists at cross-purposes. While Lambda Legal and the Human Rights Campaign minimize existing protections against discrimination and urge passage of a federal ENDA,<sup>23</sup> and while President Obama has signed an executive order protecting LGBT federal employees,<sup>24</sup> the Equal Employment Opportunity Commission (EEOC) has ruled that discrimination against transgender workers categorically violates *Price Waterhouse*,<sup>25</sup> and EEOC Commissioner Chai Feldblum has publicly stated that discrimination against LGB workers does the same.<sup>26</sup> Similarly, there is a dispute on the merits of *Price Waterhouse* and ENDA within the legal academy. While recent work argues that *Price Waterhouse* protection is a flawed substitute for ENDA,<sup>27</sup> and many scholars claim that locating LGBT protections within sex stereotyping jurisprudence is theoretically and

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*Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007); *infra* notes 144-149 and accompanying text.

22. Compare, e.g., COLO. REV. STAT. ANN. § 24-34-402 (1) (West 2012), with 42 U.S.C. § 2000e-2 (2012); see *infra* notes 153-155 and accompanying text.
23. Employment Non-Discrimination Act of 2013, H.R. 1755, S. 815, 113th Cong. (2013); Jonathan Adams, *Lambda Legal Applauds Historic Senate Passage of ENDA*, LAMBDA LEGAL (Nov. 7, 2013), [http://www.lambdalegal.org/news/us\\_20131107\\_lambda-legal-applauds-historic-senate-passage-of-enda](http://www.lambdalegal.org/news/us_20131107_lambda-legal-applauds-historic-senate-passage-of-enda) [<http://perma.cc/W9JK-VZQY>]; *Pass ENDA Now*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/campaigns/employment-non-discrimination-act> [<http://perma.cc/QD96-YUD2>].
24. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).
25. *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012); see also Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 288-89 (2014) (discussing the EEOC's approach).
26. See *Equal Employment Agency No Longer Turning Away Gay Discrimination Claims*, NAT'L PUB. RADIO (Apr. 2, 2014, 11:47 AM), <http://www.npr.org/2014/04/02/298328951/equal-employment-agency-no-longer-turning-away-gay-discrimination-claims> [<http://perma.cc/DL9D-R5JG>] [hereinafter NAT'L PUB. RADIO]; see also Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 768-72 (2010) (claiming that antigay discrimination enforces a normative vision of masculinity forbidden by *Price Waterhouse*); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (claiming that sexual orientation is incorporated into gender, and discrimination against it therefore constitutes sex stereotyping).
27. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 786 (2014) (describing the *Price Waterhouse* doctrine as "an ENDA that no imaginable Congress would pass . . . [and] quite possibly an ENDA that we should not want").

practically superior to a separate statute,<sup>28</sup> a recent piece proposes abandoning traditional frameworks entirely for a theory of reasonable accommodation of gender performance.<sup>29</sup>

This Note shows that such arguments fundamentally misunderstand the nature of prescriptive sex stereotyping. The doctrine that has sprung up in *Price Waterhouse's* wake does not extend the Civil Rights Act so much as radically reimagine its scope. Sex stereotyping doctrines ask courts to examine just the sorts of subjective and individualized workplace evaluations that Title VII has historically ignored. Courts consider these cases through a two-step process, establishing the importance of a particular workplace norm to the plaintiff's firing or harassment, and then asking whether that norm reflects biased thinking about sex. The resulting doctrine is not a mere substitute for, or superior version of, protection through traditional<sup>30</sup> Title VII claims; the two approaches work very differently, and LGBT workers are best protected by having access to both.

This Note proceeds in five parts. Part I considers how American antidiscrimination law has addressed stereotype both before and after *Price Waterhouse*, and in particular how courts expect plaintiffs to show differences in treatment of in-group and out-group employees under ascriptive and

28. Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014); McGinley, *supra* note 26, at 770-72; Reed, *supra* note 25; see also Jennifer S. Hendricks, *Instead of ENDA, a Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 214 (2008) (discussing how a separate ENDA may harm intersectional plaintiffs); Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1 (2009) (specifically discussing the potential consequences of a proposed ENDA variant lacking gender-identity protections); William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining 'Because of Sex' to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 513 (2011) (discussing the greater political feasibility of addressing sexual orientation discrimination through existing Title VII provisions as opposed to passing a new statute). I should note an important recent aspect of the debate over ENDA, if only to cabin it—Case and Reed, in particular, see the religious exemptions in some versions of ENDA as a dangerous retreat from the protections available under *Price Waterhouse*, which are limited only by narrow religious exemptions to Title VII most recently delineated in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). Case, *supra*, at 1375-77; Reed, *supra* note 25, at 309-14. The debate over the normative and political desirability of these sorts of protections is a vital one, but it is one that falls beyond the scope of this Note.

29. Kramer, *supra* note 11, at 896, 935-45.

30. My use of "traditional" is not unreserved, and some clarification may be in order. I use "traditional" to refer to remedies based on the framework, laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981), that is most commonly used in Title VII litigation. Many thanks to Devon Porter, who was terrifically helpful in clarifying this language.

prescriptive theories of stereotyping. This issue of comparison is a serious hurdle facing Title VII plaintiffs, and one that the *Price Waterhouse* framework can handle more nimbly and effectively than other Title VII doctrines. Part II considers *Price Waterhouse* in the arena of LGBT workplace rights, where *Price Waterhouse* protections exist without any explicit protection based on traditional theories. This Part considers cases where *Price Waterhouse* doctrine could help LGBT workers whose claims would fail under ENDA—these claims demonstrate not only the differences in coverage between *Price Waterhouse* and ENDA, but also how the analytical moves made in sex-stereotyping jurisprudence could benefit victims of other types of workplace bias. Part III then considers how *Price Waterhouse* and ENDA can work together to combat anti-LGBT bias in the workplace. Part V offers a brief conclusion.

## I. STEREOTYPE AND ITS IMPORTANCE FOR THE WORKFORCE

*Price Waterhouse v. Hopkins*<sup>31</sup> has profoundly affected American discrimination law, but its doctrines are still misunderstood and unnecessarily cabined. When the Supreme Court decided that Ann Hopkins had faced discrimination on the basis of sex because she was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,”<sup>32</sup> the Court vastly expanded protections against sex discrimination in the context of a general case law drawing far narrower lines. The resulting doctrine, while still inconsistently applied, has the potential in its broadest form to reach plaintiffs traditionally excluded from Title VII protection. After discussing the state of Title VII sex-discrimination law prior to *Price Waterhouse*, this Part will show how *Price Waterhouse* expanded the Court’s existing doctrine on sex-based stereotypes to include prescriptive stereotypes, as opposed to the ascriptive sexism (and racism) already forbidden by Title VII; how lower courts have struggled to reconcile *Price Waterhouse* with traditional interpretations of Title VII; and how *Price Waterhouse*’s own text, as well as Congress’s later treatment of the issue in the Civil Rights Act of 1991, support a broad reading of the case.

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31. 490 U.S. 228 (1989).

32. *Id.* at 235.



*A. Before Price Waterhouse: Ascriptive Stereotyping, Sex-Plus, and Individualized Evaluation*

*Price Waterhouse v. Hopkins* is often considered the genesis of “sex stereotyping.”<sup>33</sup> As Kimberly Yuracko and others have noted, this is false.<sup>34</sup> Title VII jurisprudence has focused on stereotypes almost from the moment of the Civil Rights Act’s passage, and understanding how *Price Waterhouse* expands traditional anti-stereotyping doctrine is critical for understanding its radical implications.

One of the first cases in which the Supreme Court addressed stereotypes in Title VII is *Phillips v. Martin Marietta Corp.*<sup>35</sup> When Ida Phillips applied for a job with the Martin Marietta Corporation in September of 1966,<sup>36</sup> her prospective employer appeared friendly to women. The workforce Phillips wished to join was nearly eighty percent female.<sup>37</sup> Nevertheless, despite being fully qualified, Phillips was turned away. Martin Marietta assumed that any woman with pre-school-age children would face “domestic complication[s]”<sup>38</sup> preventing her from working effectively, and therefore turned away women (and not men) with young children.<sup>39</sup> The Fifth Circuit held that Title VII could reach only discrimination that was triggered *solely* because of sex and that, as long as women who did not have children were treated no worse than men, Phillips could not claim discrimination.<sup>40</sup> The Supreme Court reversed and remanded, holding in a brief per curiam decision that Martin Marietta could not maintain such a policy unless family obligations could be shown to be “demonstrably more relevant to job performance for a woman than for a man.”<sup>41</sup> One can view *Martin Marietta* as resolving a simple conflict about universality; the Fifth Circuit held that an employer had to discriminate against

33. See, e.g., *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) (“The role of such stereotyping has been discussed most thoroughly in that branch of disparate treatment law developed apart from the *McDonnell Douglas/Burdine* framework and known as the *Price Waterhouse* framework.”).

34. E.g., Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 763 (2013).

35. 400 U.S. 542 (1971).

36. Brief for Petitioner at 3, *Martin Marietta*, 400 U.S. 542 (No. 73).

37. In fact, if we compare Martin Marietta’s workforce to its applicant pool, women appeared to be slightly preferred; Brief for Respondent at 4, *Martin Marietta*, 400 U.S. 542 (No. 73).

38. *Id.* at 6.

39. Brief for Petitioner, *supra* note 36, at 3-4, 6.

40. See *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969) (“The evidence presented in the trial court is quite convincing that no discrimination against women as a whole . . . was practiced by Martin Marietta.”).

41. *Martin Marietta*, 400 U.S. at 544.

the entire group, whereas the Supreme Court extended Title VII to cover discrimination against discrete “subgroups.”<sup>42</sup>

But how discrete, how clearly defined, must these subgroups be? Sex-plus analysis, by definition, requires the characteristics an employer considers (say, sex and parenthood) to be sufficiently general to apply identically to multiple parties. Otherwise, there is no way for men and women to “share” the characteristic and therefore no discrimination.<sup>43</sup> In fact, a close reading of the case reveals that this very generality, and Martin Marietta’s deployment of generalizing ascriptive stereotype, lie at the heart of Phillips’s claim. Martin Marietta claimed it was using its ban on mothers of pre-school-age children to exclude employees who would be distracted, prone to absenteeism, or facing frequent emergencies at home.<sup>44</sup> By definition, this type of stereotypical assumption can work only if the category triggering the assumption is both broad and somewhat monolithic. Ascriptive stereotype consists of treating a large group of people *alike*, and erasing individual differences (for example, does this mother have an unemployed husband to take care of the children? Is this childless woman the guardian of her young niece?) in favor of applying the same rule to all members of a specific group.<sup>45</sup>

This type of stereotyping is impermissible even when it is demonstrated to be broadly accurate. Consider *Los Angeles Department of Water and Power v. Manhart*,<sup>46</sup> in which the City of Los Angeles demanded greater pension fund contributions from female employees on the grounds that women, on the whole, lived longer than men. Although the stereotype here was *generally* correct,<sup>47</sup> the Court held that any employment decision based on gender violated Title VII and suggested that any ascriptive stereotype unacceptably subordinated individual to group identity: “Practices that classify employees in

42. See Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 340 (1999).

43. See Heather M. Kolinsky, *Taking Away an Employer’s Free Pass: Making the Case for a More Sophisticated Sex-Plus Analysis in Employment Discrimination Cases*, 36 VT. L. REV. 327, 329 (2011).

44. See Brief for Respondent, *supra* note 37, at 20-21.

45. While *Martin Marietta* used ascriptive stereotype to justify its treatment of a specific subgroup of women, these sorts of stereotypes about general differences between women and men underlay much of the early litigation surrounding Title VII’s prohibitions on sex discrimination. For a discussion of the importance of stereotype and imagined sex difference in the early days of Title VII litigation, see Vicki Schultz, *Taking Sex Seriously*, 91 DENV. U. L. REV. (forthcoming 2014) (manuscript at 32-56).

46. 435 U.S. 702 (1978).

47. *Id.* at 707-08 (“[The pension plan] involves a generalization that the parties accept as unquestionably true: [w]omen, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two classes are in fact different.”).

terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.”<sup>48</sup> The *Manhart* Court read Title VII to require consideration of individuals<sup>49</sup> as opposed to *groups*—stereotypes about how one sex will react to childrearing, or how long one sex will live compared to another, violate the statute’s central aim.<sup>50</sup>

Of course, assumptions are not the only way to stereotype. The *Manhart* Court described Los Angeles’s pension plan in terms of “sex stereotypes”<sup>51</sup> years before *Price Waterhouse v. Hopkins*, but the phrase meant something very different. *Martin Marietta* and *Manhart* both concerned employers who ascribed actual characteristics to their employees based on their membership in a protected class. By contrast, *Price Waterhouse* forbade *prescriptive* stereotyping, in which an employer analyzes an employee’s individual characteristics, as *Manhart* seems to require, but in reference to an unacceptably biased norm.

*Price Waterhouse* expanded and (depending on its interpretation) radically altered Title VII stereotyping jurisprudence. Compared to the defendants in *Manhart* and *Martin Marietta*, *Price Waterhouse* assessed Ann Hopkins as an individual. While supporters and opponents of her candidacy for partnership disagreed on how to evaluate the traits they perceived, all parties agreed about her actual behavior.<sup>52</sup> There was no inaccuracy or factual assumption involved, and Hopkins did not seriously contest her employer’s factual observations.<sup>53</sup> Instead, Hopkins alleged that her employer had applied a flawed evaluative system to its correct perception of her behavior. Instead of viewing Hopkins’s aggression as a simple facet of her personality—or a desirable attribute in a *Price Waterhouse* partner—*Price Waterhouse* evaluated Hopkins on a biased

48. *Id.* at 709.

49. *Id.* at 708 (“The statute’s focus on the individual is unambiguous.”).

50. Notably, when employers ascribe characteristics to an entire class, such characteristics must inhere in “all or substantially all” *individuals* of that class. *See, e.g.,* *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) (internal quotation marks omitted).

51. *Manhart*, 435 U.S. at 707 n.13 (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

52. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989).

53. In fact, the Court’s acceptance of those factual observations, and the role they could theoretically have played in justifying a sex-neutral employment decision, led to *Price Waterhouse*’s most influential holding—the development of the “motivating factor,” or mixed-motive theory of Title VII law. *Id.* at 244–45, 249. Congress adopted a related standard—according to which a plaintiff merely has to show that a protected status served as a motivating factor in the defendant’s decisionmaking to attain certain kinds of relief—in the Civil Rights Act of 1991, which is now codified at 42 U.S.C. § 2000e-2(m) (2012).

rubric; was she behaving as a woman “should”?<sup>54</sup> This is *prescriptive* stereotyping, in which assumptions about men and women do not inform the employer’s understanding of the employee’s actual nature (that Phillips *will* be distracted by her children, or that Manhart *will* live longer than the average worker) but instead dictate their evaluation of that nature (that Ann Hopkins *should* “walk more femininely, talk more femininely, dress more femininely”).<sup>55</sup> Therefore, a Title VII that protects against prescriptive stereotyping is a subtly different beast than the one that came before.

The basic idea of *Price Waterhouse*—that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”<sup>56</sup>—is uncontroversial, but it has been applied differently by different circuits. Before considering these variant interpretations, however, it is important to understand the conceptual ramifications of a shift from ascriptive to prescriptive stereotyping in discrimination law. This dichotomy is not itself novel. The distinction between ascriptive stereotypes and prescriptive stereotypes has been present in the legal literature for decades.<sup>57</sup> However, surprisingly little attention has been paid to the impact of this difference on employment discrimination litigation.<sup>58</sup> In contrast to the stereotyping in *Martin Marietta* and *Manhart*—stereotyping that

54. 490 U.S. at 235 (describing partners’ critiques of Ann Hopkins as “macho” and as “overcompensat[ing] for being a woman”).

55. *Id.*

56. *Id.* at 251.

57. This distinction is briefly mentioned, although not interpreted, in 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, 41 (1995). The first—and to my knowledge, only—systematic consideration of descriptive versus prescriptive stereotype can be found in Diane Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCH., PUB. POL’Y & L. 665 (1999). However, Burgess and Borgida consider the two forms of stereotype in a radically different context; they attempt to determine which kind of stereotyping most frequently underlies disparate-treatment versus disparate-impact discrimination claims.

58. See, e.g., Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 721 (2013) (dismissing attempts to differentiate between descriptive and prescriptive stereotype as a “distract[ion] from the necessary and fundamental attention to harm central to the law.”). I agree with Professor Bernstein that both descriptive and prescriptive stereotypes dehumanize and damage their victims; however, as I will discuss below, the two forms of stereotype are very different in their mechanics, and that difference materially affects how Title VII plaintiffs can prove discrimination based on that stereotype. For a perspective somewhat more concerned with the specific harm to self-expression wrought by prescriptive stereotype, see Yuracko, *supra* note 34, at 802-03. The harms Yuracko identifies—subjective pain to individuals forced to perform according to prescriptions that clash with their perception of self, and potential calcification of arbitrary gender binaries—are real. But they do not obviate the difficulties that a victim of prescriptive stereotype may face in proving the biases underlying her treatment.

made factual assumptions based on membership in a protected class—prescriptive stereotyping takes a problematic evaluative mechanism and applies it to employees based on their individual characteristics.<sup>59</sup> Consequently, prescriptive stereotype cases do not fit neatly into the similarly-situated-comparator model used elsewhere in Title VII jurisprudence. As Suzanne Goldberg has noted, courts have increasingly come to view comparative evidence, or evidence showing a difference in treatment between a plaintiff and another employee who is similarly situated except for membership in a protected group, as something approaching a requirement for Title VII litigation.<sup>60</sup> Ascriptive stereotypes, which apply to all or nearly all members of the stereotyped group and only to members of the group, can be demonstrated by comparative evidence—Isabell Slack’s employer assumed she was a skilled cleaner and made no such assumption about her white coworker. Prescriptive stereotypes, on the other hand, will be applied only against employees who violate the biased norm in specific, individual ways. Because a prescriptive stereotype does not necessarily cause employers to treat all members of a group equally, and because the prescriptive stereotype will frequently apply in one form or another to employees outside of a protected status group, plaintiffs facing prescriptive sex stereotyping may be unable to prove the discrimination condemned in *Price Waterhouse* through traditional methods. Courts have generally addressed this problem in two ways, either by recasting prescriptive stereotyping as a bar to advancement for women alone<sup>61</sup>—thereby analogizing sex stereotyping to traditional forms of sex discrimination—or by adopting radically different comparative models focused on the use of sexist heuristics in evaluating employee conduct or presentation.<sup>62</sup>

### B. Which Reading of *Price Waterhouse* Is Correct?

Some courts have interpreted *Price Waterhouse* quite narrowly, requiring that prescriptive stereotypes be shown to harm members of one sex—usually women—as a class before treating them as actionable under Title VII. The facts of *Price Waterhouse* could support such a theory: Ann Hopkins was able to

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59. Of course, status-based prescriptions may be applied only to members of a specific class, or their effects may be more pernicious for members of certain groups; this is the foundation of certain theories of the *Price Waterhouse* doctrine. See *infra* Part I.B.

60. Goldberg, *supra* note 11, at 750; see also Sullivan, *supra* note 18 (discussing the importance of comparators to Title VII cases generally).

61. *But see* Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (explaining that expelling a transgender female customer could constitute sex discrimination against men); *infra* note 69 and accompanying text.

62. For the remainder of this Note, I shall refer to the former of these interpretations as the “narrow” reading of *Price Waterhouse*, and the latter as the “broad.”

show not only that she suffered due to her deviance from stereotyped gender norms, but also that women on the whole were systematically denied promotion to partner.<sup>63</sup> Between this disparity and the reluctance of many partners to promote any woman whatsoever,<sup>64</sup> Hopkins's treatment can be thought of as straightforward sex discrimination, or as a barrier to promotion affecting women on the whole. If, on the other hand, we consider Hopkins's denial of partnership as a punishment for her own, idiosyncratic gender deviance, then we must determine how an evaluation of one woman's individual traits can constitute discrimination against her as a member of a class.

Courts that have followed the narrow reading of *Price Waterhouse*, building on a long history of interpreting Title VII as equalizing opportunities for men and women,<sup>65</sup> have generally conceived of prescriptive stereotypes as leading to sex discrimination in one of two ways: either as unequally applied to men and women, or as placing women specifically in a "double bind."<sup>66</sup> The first theory makes intuitive sense; an employer who punishes women and not men for gender-nonconformity engages in straightforward "sex-plus" discrimination. Much like Martin Marietta's punishing only female applicants for having preschool-age children, employers who punish only their female employees for deviating from gender norms commit sex discrimination as traditionally understood.<sup>67</sup> At least as applied to Hopkins, however, this "sex plus deviance" theory seems problematic. In order to prove sex discrimination arising from prescriptive stereotype under such a reading of Title VII, Hopkins would have had to show that a similarly situated man—that is, one who violated prescriptive gender stereotypes in the same way she did—was treated better. Unless *Price Waterhouse* had a history of promoting docile, non-aggressive men in stereotypically feminine clothes, Hopkins would lose. Her victory casts

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63. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233 (1989).

64. *Id.* at 236.

65. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) ("[I]t is reasonable to assume . . . that one of Congress' main goals was to provide equal access to the job market for both men and women.").

66. Brief for Amicus Curiae Am. Psychological Ass'n in Support of Respondent at 19, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167); Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89, 97 (1990) ("A woman who acts womanly acts in a way that may cast doubt on her competence and effectiveness; a woman who is thought to be too masculine may be regarded as deviant."). See generally KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* (1995).

67. See Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 474-45 (1990); Regina E. Gray, Comment, *The Rise and Fall of the "Sex-Plus" Discrimination Theory: An Analysis of Fisher v. Vassar College*, 42 HOW. L.J. 71, 78 (1998).

this interpretation of the statute into serious doubt.<sup>68</sup> However, the straightforward sex-plus reading of *Price Waterhouse* has found unexpected life in some courts as a remedy for transwomen; in *Rosa v. Park West*, for example, the First Circuit held that a bank may have committed sex discrimination by refusing to serve a femininely attired man if they would have served a masculinely attired woman.<sup>69</sup> The more common narrow reading of *Price Waterhouse*, however, and one that applies more neatly to Ann Hopkins's own case, reads prescriptive stereotypes as existing in equal force for men and women but as affecting women more severely.

According to this theory—commonly known as the “double bind”—prescriptive stereotypes in employment place women, and only women, in a Catch-22. If high-status jobs are seen as requiring aggression, assertiveness, or other stereotypically masculine traits, then women may be left “out of a job if they behave aggressively and out of a job if they do not.”<sup>70</sup> Therefore, while these stereotypes may constrain men and women equally, only men are able to demonstrate their suitability for prestigious forms of employment without being seen as gender-deviant. This theory has some empirical support<sup>71</sup> and may in fact lie at the root of many persistent sex-based inequalities in the workforce.<sup>72</sup> However, as a reading of the Court's reasoning in *Price Waterhouse*, the double-bind theory has one serious flaw; it calls for a different doctrinal framework than the one actually used. If we read conformity with gender stereotype as an evaluative measure applied to men and women equally, and as one that is only pernicious inasmuch as it hurts women more than men, then prescriptive stereotype belongs to the “disparate impact” jurisprudence

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68. See Case, *supra* note 57, at 30-31 (suggesting that gender deviance may actually benefit women). I should note that I am assuming the comparator for a gender-nonconforming woman is a similarly gender-nonconforming man. This is how such cases are generally interpreted by courts. However, one can imagine—and Case herself advocates—a standard penalizing employers who consider sex at all when determining the propriety of dress or behavior. See *id.* at 67-69. For a longer treatment of the advantages and disadvantages of such an approach, see Yuracko, *supra* note 34, at 776-80; and *infra* notes 83-91 and accompanying text.

69. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that a cause of action lay if the defendant treated “a woman who dressed like a man differently than a man who dresses like a woman”); see also Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 247-48 (2007) (describing the circumstances leading to the court's adoption of this theory).

70. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

71. See generally Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCH. 1049, 1050-51, 1055 (1991); Larry Lovoy, *A Historical Survey of the Glass Ceiling and the Double Bind Faced by Women in the Workplace: Options for Avoidance*, 25 L. & PSYCH. REV. 179, 182 (2001).

72. See Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 621-22 (2007).

that originated in *Griggs v. Duke Power Company*.<sup>73</sup> The Court never even gestured at a disparate impact holding in *Price Waterhouse*; Justice Brennan in fact states the relevant standard in terms of whether or not “the employer actually relied on [Hopkins’s] gender in making its decision.”<sup>74</sup> While the problematic effects of the double bind obviously troubled Justice Brennan, the case coheres only if we begin from the theory that stereotyping is *itself* proscribed by Title VII, regardless of its impact on a protected class.

This latter theory—building largely off of *Manhart*’s holding that individuals may not be evaluated in terms of groups<sup>75</sup>—has given rise to a broader reading of the *Price Waterhouse* sex stereotyping doctrine. In circuits that have adopted the broader reading, plaintiffs need only show that they were perceived to deviate from prescriptive stereotypes based on their sex and that they were punished for that deviance. Plaintiffs in these cases still use comparative evidence, but compare themselves not to similarly situated employees of a *different* sex; instead, plaintiffs compare themselves to employees of *either* sex who are similarly situated but conform to gender stereotypes to a different extent. A difference in treatment between a plaintiff and a gender-conforming comparator shows that the sex-based stereotype played a role in an employer’s decision. A clear if somewhat summary example of this test can be found in *Myers v. Cuyahoga County*, which held that a transwoman plaintiff could meet her prima facie burden under *McDonnell Douglas* by showing “that she was replaced with a gender-conforming person.”<sup>76</sup> Susan Myers did not have to show that she was treated differently from someone without her Title VII protected status, as the analysis might proceed if Title VII covered gender identity;<sup>77</sup> alternatively, under current Title VII law, such an analysis would require that she be replaced by someone of a different *sex*. Instead, the *Myers* court asked for evidence that Myers was replaced by someone with a different gender presentation. Although the category of “gender-deviant individuals” is formally sex-blind, plaintiffs in

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73. 401 U.S. 424 (1971). According to this theory, an employee must show that a facially neutral employment practice—here, the policing of sex-based prescriptive stereotypes for both men and women—disproportionately affects members of a Title VII protected class. *Id.* at 430-31.

74. *Price Waterhouse*, 490 U.S. at 251. See also Burgess & Borgida, *supra* note 57, at 684 (discussing the rarity of disparate impact claims based on prescriptive stereotype, as opposed to descriptive stereotype).

75. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). In *Manhart*, the ascriptive stereotype used a type of thinking forbidden by Title VII’s prohibition on employment decisions “based on” sex. Applying this reasoning to *Price Waterhouse*, prescriptive stereotypes based on gender—while not factually inaccurate due to their lack of descriptive assertion—still make use of protected status in an unacceptable way.

76. 182 Fed. App’x 510, 519 (6th Cir. 2006).

77. See *infra* Part II.B.



such cases can then prevail by showing how the categorization reflects problematic *ideas* about the Title VII category of sex.<sup>78</sup> The broader theory of sex stereotyping does not require direct evidence of a difference in treatment based on sex alone; it instead inquires into the criteria employers use in comparing employees regardless of their sex, and attaches liability if those criteria themselves reflect sexist thinking.

Of course, this bifurcated inquiry—what attribute led to the plaintiff's firing, and does the employer's dislike of that attribute reflect biased thinking about sex?—raises a host of questions about how to establish the role of bias in a particular workplace prescription. These are not easy questions to answer. In fact, this need to establish bias is one reason why *Price Waterhouse* cases are more difficult and complex than cases alleging group-based discrimination under traditional Title VII doctrines. But the hurdle can be cleared. Historically, *Price Waterhouse* plaintiffs are often more successful in harassment cases where the harasser's use of gendered language clearly indicates sex stereotyping.<sup>79</sup> Alternatively, plaintiffs can use expert testimony to show the gendered nature of certain workplace demands<sup>80</sup> or even seek judicial notice when the stereotype is commonly understood as based on sexist ideas about men's and women's roles.<sup>81</sup>

In addition, Mary Anne Case has recently argued that *Price Waterhouse* sex stereotypes can be understood as stereotypes that proscribe behavior for one sex while permitting or requiring it for the other. This requirement essentially echoes the "sex plus deviance" standard described above,<sup>82</sup> but instead of similar levels of gender nonconformity, Case believes *Price Waterhouse* plaintiffs need comparators who behave similarly to the plaintiff but are viewed

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78. Cf. Yuracko, *supra* note 34, at 786-90 (noting how, particularly in cases brought by transgender plaintiffs, courts consider the burden of conforming to stereotypes).

79. In many of the cases discussed in this Note that resulted in a victory for the plaintiffs, judges relied on harassing comments to establish the sex-based nature of the stereotype at work. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 870 (9th Cir. 2001) ("Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'").

80. The plaintiff in the *Price Waterhouse* case used this strategy. See Fiske et al., *supra* note 71; see also Goldberg, *supra* note 11, at 805 (discussing the potential role of expert testimony in resolving cases that are not amenable to comparison).

81. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (holding that, in a case of ascriptive stereotyping where the female plaintiff had neglected to provide comparative evidence, the court could still take notice of the gendered nature of stereotypes about the ability or devotion of employees with children). Many thanks to Noah Zatz for bringing this case to my attention.

82. See *supra* notes 67-69 and accompanying text.

as gender-conforming because they are of a different sex. Case sees *Price Waterhouse* as requiring that any behavior acceptable for men (such as aggression, marriage to a female partner, or a short haircut) be acceptable for women, and, vice versa, that any trait accepted for women (such as docility or wearing skirts) be accepted for men as well.<sup>83</sup> Notably, under this reading of *Price Waterhouse*, such a mutuality requirement—frequently termed “trait neutrality”<sup>84</sup>—lies at the core of sex stereotyping. Case herself admits that this standard, with its attendant skepticism of gender difference in areas such as dress and grooming, has not been adopted by courts.<sup>85</sup> Nevertheless, she is clearly correct that this formal structure (if a stereotype applies differently to men and women, it must be based on sex) can be useful as one of many ways to show sex stereotyping. That said, inasmuch as one views violations of trait neutrality as *necessary* for a *Price Waterhouse* claim, and inasmuch as Case presents this test as “in general, a more effective way to achieve legal protection for the broadest possible range of sexual identities, gendered traits, and the individuals manifesting them,”<sup>86</sup> there is very real room for disagreement.

Case’s trait neutrality standard asks, as a threshold inquiry, whether the employee’s behavior would have been condoned if he or she were a different (generally the opposite) sex.<sup>87</sup> This is a straightforward question, and for those employees who can answer it affirmatively (for example, transgender plaintiffs who are being penalized for presenting according to their true sex),<sup>88</sup> it would vastly simplify the litigation process. As a sufficient condition to demonstrate the sex-based nature of a stereotype, trait neutrality is important and useful. But for effeminate men and masculine women, the “queers, sissies, dykes, and tomboys”<sup>89</sup> that populate sex-stereotyping law, this is the worst possible question to ask. Trait neutrality protects only behaviors that the employers would accept on a member of the opposite sex; in practical terms, such a rule would permit employers to maintain rigid sexed grooming and conduct

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83. See Case, *supra* note 28, at 1343-44.

84. Yuracko, *supra* note 34, at 776-80.

85. Case, *supra* note 28, at 1354-61.

86. *Id.* at 1343.

87. *Id.* at 1344.

88. See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); Case, *supra* note 28, at 1345-49. Notably, trait neutrality has been markedly more successful for transgender plaintiffs—this may be because transgender plaintiffs generally exhibit behaviors that are perfectly acceptable for members of one sex, but not of the other, as I discuss below.

89. This phrase is gratefully borrowed from Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3 (1995).

standards while simply permitting employees to choose which set of standards to follow.

An example may be useful here, taken from Case's own discussion of gender-nonconforming individuals. Case refers to a memorable episode where then-Representative Barney Frank, emerging from a conference meeting on ENDA, joked that he had engaged in "kind of a sartorial compromise" by pairing a conservative suit with a lavender tie.<sup>90</sup> It's a funny line. That said, imagine if Rep. Frank wore that tie to his job and were fired as a result. In a context where it is clear that a lavender tie represents a conscious rejection of gender commitments, and where forbidding it represents the imposition of those commitments on an employer's workforce, trait neutrality would likely offer no help. In order to prevail under a trait neutrality reading of *Price Waterhouse*, Rep. Frank would have to show that his lavender tie would be acceptable for female employees; however, a woman wearing a boldly colored tie would be, if anything, more gender deviant and therefore more likely to encounter difficulties in the workplace. Because Rep. Frank's "gender-bending" expressed itself in behavior that is stereotypically associated with neither sex, trait neutrality would allow it to be punished without legal sanction.<sup>91</sup>

To be clear, trait neutrality is an incredibly valuable tool for transgender plaintiffs and other individuals who can use it to demonstrate sex stereotyping cheaply and easily. Similarly, plaintiffs who can show that gender deviance is accepted for members of one sex and not the other in their particular workforce can succeed under the "sex plus deviance" standard adopted by some courts. However, treating a violation of these or other sex-plus readings of Title VII as a necessary condition for sex-stereotyping claims would be just as likely to narrow *Price Waterhouse* as it would be to expand it. For those who want Title VII to offer broader protections for gender-deviant workers, this is a serious concern.

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90. Case, *supra* note 28, at 1370 (quoting *The Employment Non-Discrimination Act of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 10-11 (2007) (statement of Rep. Barney Frank)).

91. Rep. Frank himself acknowledged this point. *Id.* at 1369-70. Ironically, Frank notes the requirement of a "consistent gender presentation" as a limitation on ENDA plaintiffs, and I agree that it is a potentially serious hurdle. See *infra* Part III.B. However, Case offers this as an example of trait neutrality's advantage over ENDA for gender-deviant individuals like Rep. Frank. Case, *supra* note 28, at 1370-71. In reality, because the trait in question—the lavender necktie—would be equally unacceptable for both men and women, this example also demonstrates a serious litigation hurdle for plaintiffs proceeding under both ENDA and the trait neutrality standard.

However, trait neutrality is not a major feature of the litigation landscape for *Price Waterhouse* plaintiffs.<sup>92</sup> Instead, the two readings of sex stereotyping described above largely dominate: a narrow group-based framework, which forbids stereotyping only when it leads to one sex being directly disadvantaged vis-à-vis the other, and a broader reading that prevents employers from choosing between employees based on biased heuristics. It is not clear in all circuits whether the narrow or broad reading of *Price Waterhouse* applies, which can lead to confusion over whether or not plaintiffs are entitled to relief. Consider the 1998 Second Circuit case *Galdieri-Ambrosini v. National Realty & Development Corp.* The plaintiff alleged that she had suffered discrimination relative to her more attractive, stereotypically feminine coworker,<sup>93</sup> who was given less work and more lenient treatment. Ambrosini's attorney argued that this difference was based on an "impermissible sexual stereotype":<sup>94</sup>

Dana brought Mr. Simon coffee unsolicited and she also cleaned away his coffee cup. This is something that Miss Ambrosini objected to. This is conforming to a sexual stereotype. The jurors may infer that because Dana . . . looked a certain way, acted a certain way, made Mr. Simon's life more pleasant in the workplace, even if it was something as simple as bringing him coffee, she conformed to the sexual stereotype and she did not complain about it.<sup>95</sup>

This is a clear sex-discrimination claim under the broad reading of *Price Waterhouse*. Ambrosini, a gender-nonconforming woman, was treated worse than another woman in the same position who conformed to sexual stereotypes. Ambrosini alleged that this disparity arose from a difference in the two women's gender presentation, and that National Realty, in basing employment decisions on sexed evaluative criteria, had violated Title VII. The court rejected Ambrosini's theory, reading *Price Waterhouse* to require that an employer treat one sex worse than another in order to face liability.<sup>96</sup> There was no issue of fact in *Ambrosini*—a jury had already found for the plaintiff, who was appealing the trial court's grant of judgment to the defendant as a matter of law<sup>97</sup>—and therefore the outcome of the case hinged entirely on

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92. Case, *supra* note 28, at 1356-61.

93. *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 280 (2d Cir. 1998).

94. *Id.* at 283.

95. *Id.* at 281-82.

96. *Id.* at 291 ("[A]lthough [Ambrosini] complains that she was treated less favorably than two employees who held positions comparable to her secretarial position, both of those employees were women. There was no evidence that Ambrosini was treated differently because of her gender.").

97. *Id.* at 284-85.

which reading of *Price Waterhouse* the Second Circuit adopted. The difference mattered.

However, when we consider the actual harm done to Ambrosini it becomes clear how, without the protection of a broad *Price Waterhouse* doctrine, victims of obvious discrimination can be left without a legal remedy. In essence, Ambrosini suffered the same harm as did Slack; both were punished for their inability to conform to their supervisors' raced and sexed realities. But Slack found relief where Ambrosini did not, largely due to two tangential factors: Slack had a white coworker who was not subjected to the same demands, whereas Ambrosini could not find a well-suited male comparator,<sup>98</sup> and Slack's supervisor directly mentioned race in his remarks.<sup>99</sup> Whatever harm we think Isabell Slack suffered, it did not arise from the presence of comparators, and the gendered nature of Ambrosini's treatment should be clear without an employer being foolish enough to say it out loud. A narrow reading of *Price Waterhouse*, by imposing evidentiary requirements that are unrelated to the actual harm suffered by victims of discrimination, puts real obstacles in front of victims of prescriptive stereotyping and makes it harder for them to find relief.

Of course, the difference in locating the harm of prescriptive stereotyping is not only practical – it also presents competing normative visions of the purpose of antidiscrimination law. We can think of traditional ascriptive stereotypes as wrong on three distinct grounds. First, one could say that such stereotypes generate factually inaccurate perceptions about individuals, and thus lead to decisions that are incorrect or insufficiently respectful of individual attributes.<sup>100</sup> Second, one could object to these stereotypes on anticlassification or formal-equality grounds: ascriptive stereotypes that assign attributes based on membership in certain groups will make group identity impermissibly salient in the workplace, while also leading to impermissible disparities in employment outcomes between in-group and out-group members.<sup>101</sup> Third, one could make a broader substantive-equality or antisubordination claim:

98. Compare *Slack v. Havens*, 522 F.2d 1091, 1092 (1975) (discussing the excusal of Slack's white coworker Murphy), with *Galdieri-Ambrosini*, 136 F.3d at 290-91 (discussing how the fact that Ambrosini was treated differently than men in her office simply reflected their different professional responsibilities).

99. *Slack*, 522 F.2d at 1092-93.

100. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals . . .'" (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))); Benjamin Eidelson, *Treating People as Individuals*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 203 (Deborah Hellman & Sophia Moreau eds., 2013); *supra* notes 43-44 and accompanying text.

101. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978) ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.").

regardless of the identity of those to whom a stereotype is applied, that stereotype becomes problematic when it has the effect or purpose of suppressing disfavored groups.<sup>102</sup> However, if we are to believe that the problem with stereotype extends to unfair prescription, then we must reject the first of these theories; prescriptive stereotype consists of normative judgments that, *ipso facto*, can never be factually inaccurate. Similarly, such stereotypes begin with a (theoretically) accurate view of an individual's traits and behaviors; this would seem to satisfy the autonomy interests implicated by individuality claims. So we are left with formal and substantive equality as two different bases for attacking prescriptive stereotype.

To return to *Ambrosini*, the court's holding can be seen as limiting *Price Waterhouse* to violations of formal equality; because *Ambrosini* did not show that her treatment differed from that of a man, her employer was sex-blind for purposes of the statute. The plaintiff argued in contrast that the stereotype deployed against her violated *Price Waterhouse* due to its inherently oppressive content, regardless of its sex-blind application. If we subscribe to the substantive-equality reading of sex stereotyping, then the Title VII violation is clear. A prescription that women should be servile and men dominant,<sup>103</sup> even if applied to all employees in a specific workplace, would obviously reinforce a degrading and subordinating workplace culture. The question becomes: after *Price Waterhouse*, does Title VII forbid employers from using evaluative criteria that reflect biased thinking, or merely from applying their evaluative criteria in biased ways?

It is still unsettled which version of sex stereotyping doctrine reads *Price Waterhouse* correctly. The opinion itself—or, more properly, opinions—offer some support for both interpretations, but a close reading of *Price Waterhouse* and of the Civil Rights Act of 1991 (which overrode parts of the decision) support a broad reading. While *Price Waterhouse* was a plurality opinion, Justices Brennan and O'Connor, representing five total votes, both expressed less concern with disparities in treatment between men and women than with

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102. See, e.g., Bernstein, *supra* note 58, at 665-71 (offering an account of how stereotypes are used to justify constraints on members of stereotyped classes); see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004) (explaining the practical and theoretical differences between anticlassification and antisubordination principles in the context of racial equality, and providing an extensive bibliography on the subject). Vicki Schultz, in particular, has argued for an antistereotyping principle based specifically on the power of stereotypes to create the very reality which they purport to address; because individuals feel pressure to conform to stereotype in the workforce, these stereotypes generate real and distressing differences in behavior among men and women. See Schultz, *supra* note 45 (manuscript at 123-26).

103. See *Galdieri-Ambrosini*, 136 F.3d at 283 (alleging a workplace norm benefitting women who perform menial tasks for men).

the influence of impermissible considerations in the hiring process. While the bottom-line disparities between men and women were more than sufficient to support an inference of discrimination,<sup>104</sup> Justices Brennan and O'Connor both went out of their way to frame the stereotype that affected Ann Hopkins not as a factor that caused an impermissible difference in Price Waterhouse's treatment of men and women, but as a form of impermissible treatment in and of itself.<sup>105</sup> Furthermore, while language in Justice O'Connor's concurrence expresses discomfort with using Title VII to police evaluations in the total absence of a difference in outcomes,<sup>106</sup> this part of her opinion was superseded by the Civil Rights Act of 1991.

The Civil Rights Act of 1991 was explicitly adopted in order to override problematic aspects of several then-recent Supreme Court employment decisions,<sup>107</sup> and its treatment of *Price Waterhouse* aroused far less discussion (and thus less legislative history) than other aspects of the bill.<sup>108</sup> That said, what evidence there is suggests that the Civil Rights Act's "motivating factor" provision was intended to overrule any requirement of disparity in outcome. The Civil Rights Act of 1991 established an "unlawful employment practice . . . when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating* factor for any employment practice."<sup>109</sup> Once a plaintiff has proven a discriminatory motive, liability is assigned – an employer

104. See Bernstein, *supra* note 58, at 684-85 (discussing the strength of Ann Hopkins's case).

105. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) ("Congress meant to obligate [the plaintiff] to prove that the employer relied upon sex-based considerations in coming to its decision."); *id.* at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."); *id.* at 265 (O'Connor, J., concurring) ("There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex.").

106. *Id.* at 262 (O'Connor, J., concurring) ("The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts.").

107. In addition to *Price Waterhouse*, these cases included *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). See also Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1337 (2014) (referring to the Civil Rights Act of 1991 as "the leading 'liberal' override of the last two generations").

108. Congress's response to the *Wards Cove* decision was particularly controversial, and opponents of the bill alleged that it would create informal hiring quotas. See, e.g., 137 CONG. REC. S2277-78 (daily ed. Feb. 22, 1991) (statement of Sen. Simon) (describing the state of the debate).

109. 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

who demonstrates that she would have made the same decision in the absence of the impermissible factor cannot be forced to reinstate the employee or pay damages, but the plaintiff remains entitled to declaratory relief and attorneys' fees.<sup>110</sup> By comparison, Justices Brennan and O'Connor both found that, if the employer could show that the same decision would have been made absent discrimination, then he would be absolved of all liability.<sup>111</sup> In the 1991 Civil Rights Act, Congress explicitly stated that impermissible motivations, *without impermissible differences in outcome*, suffice for Title VII liability. It is difficult to square this reading with a requirement that plaintiffs show disparate outcomes between cross-status comparators in order to merit even fees and declaratory relief. Since the cross-status comparator is most relevant to demonstrating whether or not the employer would have made the same decision absent discrimination, this requirement collapses the two prongs of the statutory test and renders the same-decision language surplusage. While comparative evidence is always useful in proving the salience of one particular factor to a decision, the actual wrong lies in the stereotype itself, and not in its operation to generate workplace disparities.<sup>112</sup>

This plain-meaning analysis is further supported by the legislative history of the Act. While earlier language had required a plaintiff to show that the discriminatory motive was a "contributing" factor, this language was specifically changed to remove any implication of an impact requirement.<sup>113</sup> Unlike "contributing," which queries the causal chain leading to an adverse decision, "motivating" suggests a specific concern with employers' reasoning; Justice O'Connor rejected this language precisely due to her discomfort with reading Title VII to require that type of analysis.<sup>114</sup> By amending the original draft to include Brennan's "motivating factor" language, Congress explicitly authorized courts to consider motivation.<sup>115</sup> While both Justices Brennan and

110. This is commonly referred to as the "same decision" test. *Id.* § 2000e-5(g)(2)(b).

111. *Price Waterhouse*, 490 U.S. at 252, 254 (establishing the motivating factor test, but making the same decision test into a full defense to liability); *id.* at 265 (O'Connor, J., concurring) (requiring the plaintiff to show "that an illegitimate criterion was a *substantial* factor in an adverse employment decision").

112. In fact, given that prescriptive stereotypes are often most visible in disparities in treatment between members of a group who conform to the stereotype and members of the same group who do not, the most relevant comparator for proving the existence of an impermissible motivating stereotype will likely be of the same status as the plaintiff. *See supra* notes 75-81 and accompanying text.

113. *See* 137 CONG. REC. H3920 (daily ed. June 5, 1991).

114. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring).

115. *See* 137 CONG. REC. 28,638 (1991) (statement of Sen. Kennedy) (clarifying that the "motivating factor" language "mak[es] it unlawful for an employer to rely on a discriminatory factor in making a job decision").



O'Connor contemplated using Title VII to query employers' evaluative methods, Congress took this process one step further by permitting liability on the basis of such methods alone, without considering the differences in treatment required by some courts. As amended in 1991, Title VII clearly allows for the "biased criteria" analysis that underlies the broad reading of *Price Waterhouse* prescriptive stereotype protection.

While this broader interpretation of *Price Waterhouse* is still not universal, its reach is expanding.<sup>116</sup> The Supreme Court itself has not clearly addressed the issue. It offered ambiguous support for the narrow reading of *Price Waterhouse* in its 1998 decision *Oncale v. Sundowner Offshore Services*,<sup>117</sup> but the decision has only generated further confusion in its progeny, and has not been clarified at the Supreme Court level. *Oncale*, a case holding that male-on-male sexual harassment was actionable under Title VII, would at first seem to be an ideal test case for disaggregating the two readings of *Price Waterhouse*.<sup>118</sup> Joseph Oncale faced adverse employment action<sup>119</sup> based on perceived deviance from gendered norms, but was harassed by members of his own sex.<sup>120</sup> Oncale

116. While the antistatutory implications of broader readings of *Price Waterhouse* have not to my knowledge been discussed elsewhere, the impact of this circuit split has—particularly in its impact on LGBT *Price Waterhouse* plaintiffs. See, e.g., Friedman, *supra* note 21. In particular, the Second Circuit's evolving views on this issue constitute a particularly well-documented example of the shift between the two readings. Compare *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276 (2d Cir. 1998), with *Miller v. City of New York*, 177 F. App'x 195 (2d Cir. 2006) (formally adopting the broadest reading of *Price Waterhouse*, but focusing on the plaintiff's disability and comparing him to nondisabled employees, as opposed to employees with a more traditionally masculine gender presentation, which was the theory put forward by the plaintiff himself); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117-22 (2d Cir. 2004) (adopting the broad reading of *Price Waterhouse*, but in the specific case where the prescriptive stereotype required women to stay out of the workforce, and where the plaintiff's lack of male comparators appeared to have been an oversight); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (signaling an openness to "relief . . . for discrimination based upon sexual stereotypes" in dicta); *Trigg v. N.Y. City Transit Auth.*, 2001 WL 868336, at \*5-6 (E.D.N.Y. July 26, 2001) (reiterating *Simonton's* use of a gender-discrimination analysis while holding it inapplicable to the present case). Cf. Plaintiff-Appellant's Brief at 18, *Miller*, 177 F. App'x 195, No. 04-5536 (referring only to the plaintiff's being "smaller-framed").

117. 523 U.S. 75 (1998).

118. David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1742 (2002) ("The facts of *Oncale* seem to call out for the invocation of a sex-stereotyping theory of sexual harassment, relying on *Price Waterhouse*.").

119. *Oncale*, 523 U.S. at 77. While the actions taken against Hopkins were more tangible, Oncale clearly alleged harassment that was "sufficiently severe or pervasive to alter the conditions of [his] employment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

120. "No women were employed by Sundowner on that rig or on any other rig." Brief for Respondent at 1, *Oncale*, 523 U.S. 75 (No. 96-568).

was victimized by prescriptive sex stereotypes in a way that clearly did not disadvantage men as a class.<sup>121</sup> The Court's decision in *Oncale*, however, punted the issue. Justice Scalia, writing for a unanimous Court, merely reaffirmed that Title VII protects against harassment "because . . . of sex."<sup>122</sup> The Court then provided a nonexhaustive list of methods by which a plaintiff could show causation, all falling under the narrow reading of *Price Waterhouse*,<sup>123</sup> before rejecting Sundowner's motion to dismiss. The Court reversed even though *Oncale* had alleged no facts that would suffice to state a claim under a narrow *Price Waterhouse* theory—*Oncale* never alleged that he would have received better treatment if he had been a woman<sup>124</sup>—which strongly suggests that the Court felt *Oncale* met his burden without having to introduce evidence showing discrimination against men. The Court never clarified further; *Oncale* settled the case days before further proceedings were to begin.<sup>125</sup>

Further confusing the matter, five days after its decision in *Oncale* the Court vacated a Seventh Circuit decision that read *Price Waterhouse* broadly "for further consideration in light of *Oncale v. Sundowner Offshore Services*."<sup>126</sup> While this decision might suggest discomfort with the broad reading of *Price Waterhouse*, later decisions in the Seventh Circuit continue to read *Price*

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121. In fact, women entering traditionally male workplaces often experience similar harassment. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1769-74 (1998); Schultz, *supra* note 14, at 1832-39.

122. *Oncale*, 523 U.S. at 79.

123. *Id.* at 80-81 ("The . . . inference [of discrimination based on sex] would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. . . . A trier of fact might [also] reasonably find such discrimination . . . if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.").

124. See Schwartz, *supra* note 118, at 1734. The circumstances clearly warranted vacatur, as *Oncale* could (and later did) make allegations more closely resembling Scalia's examples; reversal, holding that the claims *already made* by *Oncale* were sufficient to survive 12(b)(6) scrutiny, suggests greater openness to a broad reading of *Price Waterhouse* than does the case's explicit reasoning.

125. See Mary Judice, *La. Offshore Worker Settles Sex Suit, Harassment Case Made History in Supreme Court*, NEW ORLEANS TIMES-PICAYUNE, Oct. 24, 1998, at C1; *Sun Sets on Sundowner*, TEX. LAW., Nov. 2, 1998, at 3.

126. *City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998) (vacating and remanding *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997)).

*Waterhouse* broadly,<sup>127</sup> and in fact the original *Belleville* decision is still cited approvingly elsewhere.<sup>128</sup>

The ambiguity surrounding *Price Waterhouse* has created a sex-stereotyping doctrine that still varies from circuit to circuit, but the decision itself, as well as later legislative and judicial behavior, indicates that *Price Waterhouse* prohibits stereotypes that work indirectly to subordinate protected groups. Under this reading, *Price Waterhouse* is a substantial innovation in antidiscrimination law; *Price Waterhouse* breaks with the comparative, group-disparity model that governs the rest of Title VII jurisprudence and offers a more context-sensitive and nuanced way to think about workplace bias. The next Part will consider *Price Waterhouse* in the area where it has been perhaps most generative: in cases protecting gender-deviant LGBT employees. In the absence of ENDA, gay and transgender victims of discrimination have turned to *Price Waterhouse* for relief; now, as states increasingly enact more traditional protections against sexual orientation and gender identity discrimination, LGBT plaintiffs are running on parallel tracks. A close analysis of these cases makes clear not only how sex stereotyping can complement ENDA, but also how the ideas underlying sex stereotyping can complement traditional Title VII protections for all classes of plaintiffs.

## II. ANTIGAY DISCRIMINATION, OR SEX STEREOTYPING? COMPARING *PRICE WATERHOUSE* AND ENDA IN SELECTED EMPLOYMENT CONTEXTS

Employment protections for LGBT plaintiffs under current law are, to say the least, a piece of work. Courts considering claims by LGBT plaintiffs must balance prohibitions on discrimination based on ideas about how men and women should behave with a total lack of explicit federal protection against antigay discrimination. This riddle bedevils both courts, which struggle to differentiate between gender deviance and sexual orientation, and advocates, who use *Price Waterhouse* protections to the best of their ability while also fighting for LGBT protections under a different, more traditional model. These advocates have met with some success—many states and municipalities offer formal protection against sexual orientation and gender identity discrimination, creating an environment in which anti-LGBT discrimination can be fought using two vastly different theories. These fact patterns are ideal

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127. See, e.g., *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1064 (7th Cir. 2003) (holding that *Price Waterhouse* required a difference in treatment between the plaintiff and gender-conforming members of the same sex).

128. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002).

test cases for exploring just how *Price Waterhouse* differs from traditional understandings of Title VII. More importantly, these cases show how *Price Waterhouse* improves on those understandings and offers solutions to truly vexing problems in American antidiscrimination law. After briefly considering the state of current and proposed law addressing sexual orientation, gender identity, and gender deviance discrimination, this Part uses the LGBT example to show how *Price Waterhouse* can address “corner cases” in which clear discrimination cannot be fit into traditional Title VII standards of proof.

#### A. *Price Waterhouse and ENDA: The Bifurcated Landscape of Sexual Orientation Discrimination*

LGBT plaintiffs currently have two separate theories for redressing antigay discrimination, but both are limited and highly contingent. Many courts have interpreted *Price Waterhouse* to hold that discrimination against LGBT employees is based on their perceived violation of gendered prescriptions and thus constitutes sex stereotyping, but only if the discrimination arises from the plaintiff’s perceived gender deviance and not from anti-LGBT bias per se. Otherwise, a separate, older doctrine bars relief. The first case to address Title VII’s applicability to sexual minorities, *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>129</sup> used legislative history to foreclose “bootstrapping” sexual orientation protection into Title VII.<sup>130</sup> *DeSantis* has never been addressed by the Supreme Court, but it (and decisions like it in other circuits) bar relief for plaintiffs alleging sexual orientation discrimination. However, plaintiffs who allege that they were seen as violating gender stereotypes may seek relief under a *Price Waterhouse* theory, even if the harasser perceived his victim as homosexual,<sup>131</sup> and even if large parts of the harassment consisted of antigay speech.<sup>132</sup>

The *DeSantis* plaintiffs alleged that discrimination against homosexuals constituted “sex-plus” discrimination against men under *Martin Marietta*<sup>133</sup> and

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<sup>129.</sup> 608 F.2d 327 (9th Cir. 1979).

<sup>130.</sup> *Id.* at 329-30 (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977)); *see also, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (demonstrating the continued relevance of the bootstrapping doctrine).

<sup>131.</sup> *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009). *But see* *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (dismissing a defendant’s claim that the plaintiff suffered only sexual orientation discrimination on the grounds that “Centola never disclosed his sexual orientation to anyone at work” and thereby suggesting that a sex stereotyping plaintiff will have a stronger case if he does not disclose his sexual orientation at work).

<sup>132.</sup> *Prowel*, 579 F.3d at 287-88 (discussing how lubricating jelly was left in the plaintiff’s workspace, how the plaintiff was called “fag” or “faggot,” and how the plaintiff was accused of having AIDS).

<sup>133.</sup> *DeSantis*, 608 F.2d at 331.

also had a disparate impact on men due to higher incidence of homosexuality among males as opposed to females.<sup>134</sup> The *DeSantis* court first rebuffed the plaintiffs' claims of "sex-plus" discrimination by asserting that homosexual men and women were being treated equally: "[W]e note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex."<sup>135</sup> This theory—that ideas about how members of one sex should behave are acceptable as long as they are accompanied by "mirror-image"<sup>136</sup> rules for the other—no longer holds in the Ninth Circuit.<sup>137</sup> But even in circuits that require asymmetrical disparate treatment of men and women, courts have found that antigay or antitrans harassment can violate Title VII.<sup>138</sup>

The *DeSantis* court's other argument against relief—its appeal to legislative history<sup>139</sup>—is no more dispositive. *DeSantis*'s explicitly redistributive reading of Title VII as exclusively focused on "plac[ing] women on an equal footing with men"<sup>140</sup> is difficult to square with *Oncale*,<sup>141</sup> to say nothing of *Ricci v. DeStefano*.<sup>142</sup> Going forward, the fear of "bootstrap[ing]" that courts frequently invoke in denying *Price Waterhouse* protection to gender-deviant

134. *Id.* at 330. *But see* Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> [<http://perma.cc/H4E6-P5QG>] (finding that women were slightly more likely to answer "yes" to the question "Do you, personally, identify as lesbian, gay, bisexual, or transgender?").

135. *DeSantis*, 608 F.2d at 331.

136. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208-09, 214 n.64 (1994) (providing examples and a critique of such reasoning).

137. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001) ("To the extent it conflicts with *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law.").

138. Judges who have found gender-deviant men to be less successful in the workforce than gender-deviant women have premised relief on sex-plus theories. *See, e.g.*, *Martin v. New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002) (suggesting that, if pled with sufficient specificity, an allegation that masculine female prison guards are treated better than effeminate male guards could constitute a claim of sex discrimination); *see also* *Rosa v. Park West Bank & Trust Corp.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (stating that a bank's denial of a loan application from a man dressed in women's clothing may constitute illegal discrimination).

139. *DeSantis*, 608 F.2d at 329-30.

140. *Id.* at 329 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

141. 523 U.S. 75 (1998). According to the narrowest reading of *Oncale*, the plaintiff faced discrimination relative to a hypothetical female coworker. *See supra* notes 117-128 and accompanying text.

142. 557 U.S. 557, 583 (2009) (suggesting that steps taken to ensure equal footing violate Title VII except in circumstances giving rise to a "strong basis in evidence" for disparate impact liability).

homosexual plaintiffs<sup>143</sup> is likely misplaced. Nevertheless, *DeSantis* and its progeny are still widely cited for the proposition that, if Congress had intended Title VII to forbid sexual orientation discrimination, it would have said so. If this seems confusing, it is: courts that adopt the broader reading of *Price Waterhouse* have struggled to reconcile prohibiting discrimination based on gender deviance with permitting discrimination against individuals whose sexual orientation leads them to be perceived as gender deviant.

Two cases illustrating both sides of this coin are *Nichols v. Azteca Restaurant Enterprises*<sup>144</sup> and *Dawson v. Bumble & Bumble*.<sup>145</sup> Both cases involved gay employees facing adverse employment action. However, because the *Nichols* plaintiffs were able to frame their claim in formally sexual-orientation-neutral terms, they succeeded where Dawson failed. The *Nichols* court, focusing on instances in which a gay male server was referred to as “‘she’ and ‘her.’ . . . and a ‘fucking female whore,’”<sup>146</sup> found that the harassment, while consisting partly of antigay slurs, “reflected a belief that [the plaintiff] did not act as a man should act”<sup>147</sup> and thus gave rise to a colorable claim of *Price Waterhouse* sex stereotyping. By contrast, because Dawn Dawson “conflated” her claims of sex stereotyping with claims of explicit antigay discrimination,<sup>148</sup> and because “[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation,”<sup>149</sup> Dawson’s claims, according to the court, constituted impermissible bootstrapping of sexual orientation into existing protections.

As Zachary Kramer, Brian Soucek, and others have noted, this case law is both doctrinally and descriptively incoherent; Kramer decries courts’ subsuming all prescriptive sex stereotyping of gay plaintiffs into “sexual orientation *simpliciter* claims in disguise,”<sup>150</sup> whereas Soucek notes that courts attempting to separate antigay bias from ideas about gender deviance do so “solely by fiat.”<sup>151</sup> This problematic case law puts LGBT plaintiffs in a delicate position and can doom unsophisticated plaintiffs who do not carefully observe the artificial distinction between antigay bias and gender norms that courts

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143. *E.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

144. 256 F.3d 864 (9th Cir. 2001).

145. 398 F.3d. 211.

146. *Nichols*, 256 F.3d at 870.

147. *Id.* at 874.

148. *Dawson*, 398 F.3d at 217.

149. *Id.* (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).

150. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 219 (2009).

151. Soucek, *supra* note 27, at 731.

require. However, courts' insistence on this distinction arises in large part from case law holding that, by refusing to amend Title VII to explicitly protect LGBT workers, Congress has made clear its lack of intent to do so.<sup>152</sup>

LGBT rights organizations are now attempting to write explicit legal protections for LGBT workers into state and federal law. Recently, gay-rights groups have been able to pass variants of ENDA in more than twenty states and the District of Columbia,<sup>153</sup> and they hope to pass a federal version in the next few years. A federal ENDA would have far-reaching implications; in addition to providing relief in straightforward sexual-orientation-discrimination claims,<sup>154</sup> such a law would vitiate the doctrine forbidding "bootstrap[ping]"<sup>155</sup> sexual orientation claims into Title VII and would allow for a far cleaner application of sex stereotyping to cases involving gay and lesbian plaintiffs. However, the application of ENDA, and the gaps in current law that it seeks to address, are themselves subjects of debate. The EEOC recently ruled that discrimination against transgender workers already violates *Price Waterhouse*<sup>156</sup> and is bringing similar claims on behalf of victims of anti-LGB discrimination.<sup>157</sup> Meanwhile, President Obama has signed an executive order instituting protections modeled on ENDA for employees of the federal government and its contractors.<sup>158</sup> Consequently, disentangling the potential protections offered by ENDA from those found in *Price Waterhouse* is a serious challenge, and one that this Part hopes to address.

It is always difficult to interpret hypothetical legislation. However, in order to determine exactly how ENDA would differ from the protections *Price Waterhouse* provides, we must first sort out what exactly ENDA would *do*. The most recently proposed legislation states that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's actual or perceived sexual orientation or gender identity,"<sup>159</sup> mimicking the language of Title VII itself. However, it is currently unsettled whether ENDA would contain Title VII's motivating-factor

152. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

153. *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions> [<http://perma.cc/K9X4-24K3>].

154. See *infra* notes 230-232 and accompanying text.

155. *DeSantis*, 608 F.2d at 330.

156. *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

157. NAT'L PUB. RADIO, *supra* note 26. A recent opinion by the District Court for the District of Columbia endorses this view, but does so emphasizing the limited procedural requirements of 12(b)(6) for civil plaintiffs. See *Terveer v. Billington*, No. 12-1290(CKK), 2014 WL 1280301, at \*9 (D.D.C. Mar. 31, 2014).

158. Exec. Order 13, 672, 79 Fed. Reg. 42971 (July 23, 2014).

159. Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. § 4(a)(1) (2013).

language. The version of the bill introduced in the House of Representatives does not contain an equivalent to the Civil Rights Act's "motivating factor" test, and in the absence of such language, the Supreme Court has consistently interpreted "because of" as requiring strict but-for causation.<sup>160</sup> By contrast, the Senate version of the bill includes Title VII's motivating-factor and same-decision tests.<sup>161</sup> Until legislation is passed, it is impossible to know which version will be written into law. Nevertheless, while the impact of this split could be substantial for plaintiffs like Ann Hopkins, whose employers used both proper and discriminatory evaluative tools,<sup>162</sup> courts still generally read this language to require group disparities in treatment in every context but prescriptive sex stereotyping. The motivating-factor provisions of Title VII recognize discrimination without a difference in outcome at the *individual* level. However, outside of cases that challenge gender conformity demands and are thus understood as falling under *Price Waterhouse*, this form of discrimination is still defined as a preference for one *group* of workers over another, and it is still expected to be shown through comparisons between members of different groups.<sup>163</sup> Therefore, ENDA would provide a group of potential plaintiffs who currently only have *Price Waterhouse* claims with the sorts of narrow provisions found elsewhere in Title VII. This makes sexual orientation and gender identity discrimination an excellent test case for understanding how *Price Waterhouse* builds on traditional understandings of discrimination. Sex stereotyping and traditional protections address fundamentally different types of bias, and they can work together to benefit plaintiffs who have been woefully underserved thus far.

### B. *Price Waterhouse in Practice*

Instead of considering ENDA as an improvement on, or substitute for, stereotyping protections,<sup>164</sup> this section considers how one can fill gaps left behind by the other. A traditional discrimination framework can offer superior

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160. For recent cases specifically discussing the interpretation of "because of" in the employment context, see *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2532-33 (2013), which held that retaliation provisions of Title VII were not covered by 703(m)'s motivating-factor framework, and thus should be interpreted according to "traditional principles of but-for causation;" and *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009), which applied similar reasoning to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, another statute using "because of" language.

161. S. 815, 113th Cong. §§ 4(h), 10(e) (2013).

162. See S. REP. NO. 113-105, at 8 (2013) (discussing the importance of the motivating-factor language).

163. See Goldberg, *supra* note 11, at 748-51; Sullivan, *supra* note 18, at 200-02.

164. See Soucek, *supra* note 27, at 786-87.



protection in many circumstances.<sup>165</sup> However, ENDA itself would be unable to address certain kinds of antigay workplace bias, just as narrow readings of Title VII fail to address such bias in other contexts. Here, I consider two types of plaintiffs who, although suffering discrimination that is immediately cognizable as antigay, would be unable to find relief under ENDA. I then discuss how *Price Waterhouse* might offer these plaintiffs a better chance at relief. These types of plaintiffs are offered as examples. While they represent only one part of the *Price Waterhouse* litigation landscape, considering how these plaintiffs would be treated under ENDA and *Price Waterhouse* shows how the theories of discrimination accepted in sex stereotyping jurisprudence can address stubborn, broader problems in antidiscrimination law.

1. *The “Gayer” Plaintiff: Should Intragroup Differentiation Doom a Lawsuit?*

One useful example of the way in which straightforward sexual-orientation discrimination claims fail in cases where sex stereotyping would succeed is that of the “gayer” plaintiff—in other words, of an LGBT person who is treated worse than another employee of the same sexual orientation who behaves in such a way as to deflect attention from her status.<sup>166</sup> Probably the most obvious example is that of a particularly flamboyant gay male employee, or a lesbian with a short haircut, but other cases raise a broadly similar problem. Consider the case of *Shahar v. Bowers*, in which a lesbian employee of the state of Georgia had her job offer revoked after she married another woman.<sup>167</sup> In response to Shahar’s allegation that the adverse action was motivated by mere animus against homosexuals and thus violated the Equal Protection Clause under *Romer v. Evans*,<sup>168</sup> Judge Edmondson held that “[c]onsidering . . . public reaction to a future Staff Attorney’s conduct in taking part in a same-sex ‘wedding’ and subsequent ‘marriage’ is not the same kind of decision as an

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165. See *infra* notes 230-233 and accompanying text.

166. There is a long literature describing how minorities perform this sort of compensatory behavior. The seminal account is ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102-04 (1963), but the concept has been adapted in two more recent accounts that are more explicitly focused on the legal treatment of minorities. See Carbado & Gulati, *supra* note 16, at 1301-04 (discussing “comforting acts”); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 909-10 (2002) (using Goffman’s terminology of “covering”).

167. 114 F.3d 1097, 1100-01 (11th Cir. 1997).

168. *Id.* at 1110 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). Fourteenth Amendment cases involving workplace discrimination generally track Title VII, at least in the disparate treatment framework. Cf. *Washington v. Davis*, 426 U.S. 229, 246-48 (1976) (describing the specific context—disparate impact—in which Title VII and the Fourteenth Amendment differ).

across-the-board denial of legal protection to a group because of their condition, that is, sexual orientation or preference.”<sup>169</sup>

In other words, Bowers’s actions were not discriminatory because they were not “across-the-board”; since these actions only disadvantaged individual homosexuals, not homosexuals *as a class*, they could not constitute antigay discrimination.<sup>170</sup> In other words, because of intragroup differentiation,<sup>171</sup> or differences in treatment across out-group members, Shahar could not demonstrate legally cognizable discrimination. It should be clear that this problem would vanish if Shahar’s potential employer used ascriptive rather than prescriptive stereotyping to motivate his decisionmaking. If Shahar’s job offer were rescinded based on an ascriptive stereotype that all gay employees were lazy or deceitful, then there would be clear differences between the treatment of gay and straight employees generally that could support a claim. It is this difference that would doom a theoretical ENDA suit—an employer who is offended by an employee’s same-sex marriage, and fires her after the wedding, does not commit “*sexual orientation*” discrimination as traditionally understood. After all, the employee did not suddenly become a lesbian,<sup>172</sup> and the employer can point to an openly gay worker (the plaintiff herself, prior to the wedding) who did not face the same action. Generally speaking, such a comparator kills an employment claim: if similarly situated employees who share the employee’s protected status are treated better, then courts assume that the difference must be something other than status.<sup>173</sup> Courts make this assumption even though the adverse employment action reveals what would commonly be perceived as discriminatory animus towards the group generally, as well as a preference for members of that group who work to minimize their perceived affiliation therewith. Theoretically, in order for employees to claim sexual orientation discrimination in these circumstances, they would have to claim that whatever behavior led to the adverse action (flamboyance, a

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169. *Shahar*, 114 F.3d at 1110.

170. *See id.* (“*Romer* [which held that an amendment to the Colorado Constitution forbidding municipalities from offering homosexuals employment protections failed Fourteenth Amendment rational basis scrutiny] is about *people’s* condition; this case is about *a person’s* conduct.”) (emphasis added).

171. For useful elaborations of this term, see, for example, Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1135-38 (2013).

172. I am assuming that the plaintiff did not announce her sexual orientation through a public wedding—if the supervisor took these actions immediately upon learning of Shahar’s sexual orientation, her claim would almost certainly lie.

173. *See Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp.*, 136 F.3d 276, 291 (2d Cir. 1998); *supra* notes 93-97 and accompanying text.

marriage, or perhaps “gay” behavior outside of the office)<sup>174</sup> *actually constituted part of their sexual orientation.*

That said, courts have generally frowned on attempts to read conduct that is neither universal to a group nor limited to its members as functionally equivalent to a protected Title VII status—one case that sheds light on how such claims might fare under ENDA, and on the broader impact of Title VII’s discomfort with intragroup differentiation, is *Rogers v. American Airlines, Inc.*<sup>175</sup> Renee Rogers challenged “a grooming policy of the defendant American Airlines that prohibits employees in certain employment categories from wearing an all-braided hairstyle.”<sup>176</sup> Notably, Rogers did not claim that the no-braids policy had a disparate impact on African-Americans due to biological difference or even due to disparate hairstyle preferences among members of different races.<sup>177</sup> Instead, she claimed that her hairstyle was itself part of her race.<sup>178</sup> This is the same type of claim that flamboyant gay plaintiffs alleging discrimination under traditional doctrines would have to raise—that discrimination based on certain kinds of conduct is discrimination based on a protected status, even if this conduct is not universal to members of the protected status category—and it failed in *Rogers* for the same reason. Judge Sofaer critiqued Rogers’s case on several grounds, but two are relevant here: Rogers’s hairstyle was not “immutable,”<sup>179</sup> and white women could also

174. See, e.g., Patrick McCreery, *Beyond Gay: “Deviant” Sex and the Politics of the ENDA Workplace*, 61 SOC. TEXT, Winter 1999, at 39, 39.

175. 527 F. Supp. 229 (S.D.N.Y. 1981).

176. *Id.* at 231.

177. See Yoshino, *supra* note 166, at 890 (describing how Rogers could have supported a disparate impact claim); see also Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2216-17 (2003) (endorsing the use of disparate impact to address cultural discrimination). While I agree with Gonzalez that “it may be that cultural discrimination and disparate treatment are a poor fit,” *id.* at 2217, Gonzalez underestimates the evidentiary problems disparate impact would pose. In order to make out a prima facie case that American Airlines’s policy had a disparate impact on black women, Rogers would likely need to survey a large number of employees and perform a fairly sophisticated statistical analysis. Requiring that plaintiffs either do this demanding work or hire an expensive expert would discourage litigation almost as strongly as did *Rogers*’s ultimate holding, and the current incarnation of ENDA contains no disparate impact provisions under which a similar gay plaintiff could even state a claim. See Employment Non-Discrimination Act of 2013, S. 815, H.R. 1755, 113th Cong. § 4(g) (2013); Reed, *supra* note 25, at 295-300.

178. *Rogers*, 527 F. Supp. at 232 (quoting the plaintiff as arguing that braids reflect the “cultural [and] historical essence of Black women in American society” (internal quotation marks omitted)).

179. *Id.* at 232 (“[Braids are] not the product of natural hair growth but of artifice. An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application

engage in the same practice.<sup>180</sup> Both of these critiques apply to flamboyant LGBT plaintiffs; the behavior giving rise to discrimination is neither immutable (one can avoid getting married, speak with a deeper voice, or discuss different topics at work), nor coterminous with membership in the protected class.<sup>181</sup> Furthermore, both of these claims again reflect the difficulty of applying Title VII to prescriptive stereotype. Here, because the prescription against traditionally African-American hairstyles did not affect all black women, and did affect some white women, the judge's opinion did not take full account of the biased thinking it might reflect. *Rogers* is still good law, and a good normative case can be made that it should be: as Richard Ford notes in his seminal book on race and culture, a black woman who does not understand her identity as requiring braids would find that *Rogers*'s theory "not only hinders her . . . but it also adds insult to injury by proclaiming that cornrows are *her* cultural essence."<sup>182</sup> Nevertheless, from a litigation perspective, *Rogers* and the principle it stands for—that employers can punish behaviors "socioculturally associated with"<sup>183</sup> a protected status without discriminating—hamstring employees who face prescriptive workplace norms that express a clear preference for practices commonly associated with one group over those associated with another, but that nevertheless remain formally status-blind.<sup>184</sup>

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of employment practices by an employer.") (quoting *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980)); see also *Gonzalez*, *supra* note 177, at 2217-18 (discussing the interplay between immutability and the adverse effect requirements of a Title VII claim).

180. *Rogers*, 527 F. Supp. at 232; cf. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379-80 (describing the implications of treating Bo Derek's braided hairstyle in the movie *10* as an aesthetic choice devoid of racial content).
181. *Gonzalez* would suggest that a plaintiff allege that, say, disapproval of flamboyant behavior disparately impacts gay men. See *Gonzalez*, *supra* note 177, at 2221-22. That said, such a plaintiff would need to show a statistically significant disparity in specific behaviors between heterosexual and homosexual populations, which would be nearly impossible. Alternatively, a plaintiff could bring a "sexual-orientation-plus" claim, proving discrimination by showing that heterosexual employees were treated more leniently for the same behavior. This would not only present potential evidentiary difficulties (in finding a similarly flamboyant heterosexual coworker), but would likely lead to further confusion as that employee could face discrimination based on an imputation of homosexuality. See *infra* Part II.B.
182. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 25 (2005).
183. *Rogers*, 527 F. Supp. at 232.
184. Admittedly, this is subtly different from the nature of the stereotypes at work in *Price Waterhouse*. Rather than a stereotype about how different groups should behave differently, American Airlines employed a stereotype demanding that all employees follow the appearance norms of a dominant group. However, the reasoning is still the same—this sort of "enforced covering" is more easily cognizable under a prescriptive stereotyping framework than under a group disparity framework, for precisely the reasons the court describes. See *Caldwell*, *supra* note 180, at 381 ("In *Rogers*, the court clearly considered the prohibition of all-braided hairstyles to relate more to American's choice of the image it

Anecdotally, the *Rogers* principle is a frequent hurdle for plaintiffs in states that offer sexual orientation protection based on the traditional model. Jessie Weber, a civil rights attorney working in Maryland, describes how defendants accused of antigay harassment frequently show a preference for gender-conforming LGB employees, and use this difference in treatment to show that their discrimination was not based on “sexual orientation” in a legally cognizable fashion, even if the harassment itself consisted of antigay speech.<sup>185</sup> In these cases, while the discrimination clearly arises from antigay bias, the employer’s preference for gender-conforming, “less gay” coworkers makes the case unintelligible without a *Price Waterhouse* framework.

But is that such a bad thing? As long as it is possible for the victim of discrimination to conform to her employer’s expectations—as long as some gay people can function in the workplace, or black employees can succeed at the cost of a hairstyle—should we worry about these expectations?<sup>186</sup> It is clear that the current regime, which protects stereotypically “gay” conduct without protecting LGBT status, raises serious problems. Soucek is undoubtedly correct that sex stereotyping, by protecting only employees who combine LGBT status with other forms of gender-deviant flamboyance, can encourage a problematic form of “reverse covering.”<sup>187</sup> However, his proposed remedy—conceiving of antigay discrimination solely in the narrower terms found elsewhere in Title VII—leads to a different and equally problematic result. By penalizing gay employees whose gender expression subjects them to greater antigay animus than gender-conforming coworkers, traditional understandings of antidiscrimination law simply ratify the sorts of prescriptions that were condoned by the *Rogers* court and are still widely accepted in other contexts. By contrast, *Price Waterhouse* allows plaintiffs to attack these prescriptions directly. In doing so, *Price Waterhouse* doctrine responds effectively to two very different normative critiques of workplace culture.

On one hand, demands that employees act in a way that is stereotypically associated with their status (such as those made of Ann Hopkins or Isabell Slack) impose difference on workers who simply want to engage in the same behavior as everybody else, and do so in a way that obviously falls disproportionately on members of the stereotyped group.<sup>188</sup> On the other,

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would promote for its business than to plaintiff’s race, gender, or both. . . . But what is American’s conception of a business-like image?”).

185. Interview with Jessie Weber, Attorney, Brown, Goldstein & Levy LLP, in Baltimore, Md. (Mar. 22, 2014) [hereinafter Weber].

186. See Gonzalez, *supra* note 177, at 2219 (“The problem, put simply, is that mutability does not negate adversity.”).

187. Soucek, *supra* note 27, at 775 (quoting KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 23 (2006)).

188. Schultz, *supra* note 121, at 1754–55.

demands that employees not engage in behavior that they associate with their own culture (such as those made of Renee Rogers) may be a simple reflection of egalitarian professionalism demands,<sup>189</sup> but may also reflect an employer's distaste for what is perceived as minority expression,<sup>190</sup> and employees are then forced to conform their behavior to that distaste. These critiques may seem diametrically opposed, but they both arise from the same basic problem—employers are evaluating employees not according to any job-relevant criterion, but according to discriminatory ideas about how men and women should behave, or how “black” hairstyles look in an office setting. The concern here is not in how these prescriptions apply to members of different groups, but in the ideas motivating the prescriptions themselves. Regardless of whether one is worried about stereotypes creating difference, on the one hand, or erasing it, on the other, *Price Waterhouse* allows plaintiffs to question the reasoning behind policies asking them to conform their behavior to sexist or racist ideas.

These biased conformity demands themselves run deeply counter to the antisubordination norms animating American antidiscrimination law. In their seminal article about performing minority identity in the workforce, Devon Carbado and Mitu Gulati discuss some of the normative problems posed by a workplace that conditions acceptance of minority employees on their adherence to majority norms.<sup>191</sup> Carbado and Gulati note the disparate psychic harm of this adherence; minority employees may find assimilating to the norm, even if theoretically possible, to be draining or alienating in a way that nonminority employees do not.<sup>192</sup> This can either be understood as an objectively heavier burden—actions which would seem innocuous when performed by a white woman might seem more troubling when performed by a black male employee<sup>193</sup>—or, alternatively, as a neutral norm that becomes heavier on minority employees due to different norms governing off-work behavior.<sup>194</sup> Returning to the case of LGBT discrimination, although many straight

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189. See FORD, *supra* note 182, at 155 (referring to American Airlines's hairstyle policy as “consistent with other practices in an industry that was famous for its obsession with business image”).

190. Caldwell, *supra* note 180, at 381 (suggesting that courts consider whether policies like those at issue in *Rogers* are “motivated by the complex of negative associations with black womanhood”).

191. Carbado & Gulati, *supra* note 16, at 1294-98.

192. *Id.* at 1294 (“The law ignores the extra costs to people of color imposed by implicit workplace expectations that require people of color . . . [to] disidentify themselves from other people of color in order to ‘blend in.’”).

193. *Id.* at 1292; see also GOFFMAN, *supra* note 166, at 43-44.

194. See GOFFMAN, *supra* note 166, at 113-14 (discussing how stigmatized groups value and encourage the expression of stereotyped traits).

employees who engage in flamboyant behavior are simply treated as gay,<sup>195</sup> a culture of adherence to traditional heterosexual norms may be more troubling to employees who are used to different forms of interaction elsewhere in their lives, or whose deviance is more salient due to their LGBT status. Furthermore, this environment provides cover for more straightforward discrimination, and employees who attempt to conform to the prescriptions governing their workplace may find themselves powerless to attack that discrimination in court.<sup>196</sup> Punishing only employers who discriminate against an entire class, and not just against individuals who exhibit behaviors associated with that class, allows employers to continue evaluating workers according to bigoted criteria.<sup>197</sup> Given the Civil Rights Act of 1991's punishment of bigoted decisionmaking processes, even if these processes do not lead to discriminatory actions as traditionally understood,<sup>198</sup> it is difficult to see how employers who punish LGBT plaintiffs for failing to adhere to a norm that is itself based on discriminatory ideas should escape liability.<sup>199</sup>

*Price Waterhouse* can provide this sort of protection. Unlike traditional discrimination claims, which presume a plaintiff's membership in a large, undifferentiated group and a defendant's discrimination against that group,<sup>200</sup> claims of prescriptive sex stereotyping *assume* that each employee is being evaluated individually, and then assert that the criteria used in that evaluation reflect impermissible bias. The difference is subtle, but important for resolving the intragroup differentiation puzzle. Instead of having to show that *all* LGBT workers were treated poorly in comparison to heterosexuals, the plaintiff can, under a *Price Waterhouse* theory, isolate the specific conduct that she believes led to her firing and demonstrate its importance by comparing herself to other workers (homosexual or otherwise) who acted differently. If the plaintiff can successfully demonstrate that the defendant was motivated by his dislike of

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195. See *infra* Part II.B.2.

196. Carbado & Gulati, *supra* note 16, at 1295-96.

197. *Id.* at 1297-98.

198. Civil Rights Act of 1991, § 703(m), codified at 42 U.S.C. § 2000e-2(m) (2012). In other words, an employer who makes a decision that can be justified without reference to a protected status may still have to change their processes if a status served as a "motivating factor" in their decision.

199. See Schultz, *supra* note 121, at 1802 ("Regardless of whether the harassment assumes an explicitly gender-based content or more subtly attacks people because of their failure to conform to the harassers' image of proper manly behavior, the harassment is based on gender.").

200. See Carbado & Gulati, *supra* note 16, at 1298 ("[In cases where discrimination is focused upon one member of the group, rather than the group itself, [t]he court is likely to conclude that the reason for the termination was simply the employer's dislike of the individual, which does not produce an actionable discrimination case.").

these behaviors, the question then becomes whether that dislike was motivated by discriminatory ideas about how different sexes should behave. This is a hard question for plaintiffs to answer, but it is a fair question for courts to ask, and it gets at the heart of what makes sex stereotyping so pernicious. *Price Waterhouse* claims, by focusing on specific behaviors rather than group identification, allow courts to reach subtler and more individuated forms of sex, and sexual orientation, discrimination.

Furthermore, the problems *Price Waterhouse* addresses are hardly gay-specific. Inasmuch as any Title VII identity forms a mix of immutable status (I am Jewish because my parents are Jewish, my appearance is Jewish, and my genetic background is Ashkenazi) and voluntary performance (I am Jewish because I choose not to work on the Sabbath, or to fast on Yom Kippur, or even to use Yiddish expressions), *Price Waterhouse's* consideration of dislike becomes critical. A workplace where an employee can be fired for engaging in any sort of discretionary cultural performance is a workplace without real diversity, and *Price Waterhouse* offers a conceptual framework through which courts can address these coercive norms both in and out of the sexual-orientation context.

2. *The “Gayed” Plaintiff: Can Heterosexuals Be the Victim of Antigay Harassment?*

*Price Waterhouse* doctrine also improves on traditional discrimination theories in dealing with non-group-identified plaintiffs who nevertheless face harassment based on group bias. In the sex-stereotyping context, this issue is usually raised by heterosexual plaintiffs who face antigay harassment due to their perceived gender deviance. Consider the plaintiffs in *Doe by Doe v. City of Belleville*,<sup>201</sup> whose case appears tailor-made for a straightforward claim of antigay harassment. Although the plaintiffs identified as straight, one was repeatedly called “fag” and “queer,” and the defendants intimated that the plaintiffs were having a homosexual relationship and belonged in “San Francisco with the rest of the queers.”<sup>202</sup> These statements look like plain accusations of homosexuality—if ENDA protects plaintiffs on the basis of “actual or perceived” sexual orientation,<sup>203</sup> the case should lie. But here, it is not at all clear that the plaintiffs were perceived as homosexual. In one telling incident, a coworker joked that one of the plaintiffs had spread poison ivy to the other through anal sex; other coworkers responded “that if that were the case, then Dawe [the man who had made the original remark] must have

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201. 119 F.3d 563 (7th Cir. 1997).

202. *Id.* at 566-67.

203. H.R. 1755, § 4(a)(1), 113th Cong. (2013).



contracted a rash as well, since he was always taking H. ‘out to the woods.’”<sup>204</sup> Taken literally, Dawe is also being perceived as gay. Nowhere in the case does it suggest that Dawe was gay or faced homophobic harassment; on the contrary, these imputations of homosexual orientation and conduct are clearly, simply, metaphors.<sup>205</sup>

The plaintiff’s burden is thus made insurmountable. According to the traditional framework of a Title VII claim, in order to make a *prima facie* case of employment discrimination, an employee must demonstrate, among other things, that he or she is a member of a protected class.<sup>206</sup> Since these plaintiffs would be unable to prove actual homosexuality or bisexuality, they would need to show that they were perceived as homosexual or bisexual; if their harassers were accusing each other of engaging in homosexual sex without actually perceiving *themselves* to be gay, then it would be difficult for a plaintiff to prove that similar taunts reflected perceived homosexuality when aimed at them. Even if a defendant actually did view his victim as gay, it is unclear how a plaintiff could show that; jokes about a plaintiff’s homosexuality could not support an inference of perceived homosexuality if similar jokes were made about individuals who were definitely not seen as gay, and threats of homosexual sexual assault would, if anything, support a traditional sexual harassment claim.<sup>207</sup> Without *Price Waterhouse*, these employees would fall into a doctrinal black hole; even under ENDA, men who were effeminate enough to be *accused* of being gay, but who were nonetheless never *believed* to be gay, would receive no protection (absent actual or threatened sexual violence).<sup>208</sup>

204. *Belleville*, 119 F.3d at 567.

205. In fact, the other defendants even encouraged Dawe to engage in homosexual conduct with the plaintiff: “Once, in reference to Dawe’s repeated announcement that he planned to take H. ‘out to the woods’ for sexual purposes, Goodwin asked Dawe whether H. was ‘tight or loose,’ ‘would he scream or what?’” *Id.* Both the plaintiffs and defendants in *Belleville* identified as heterosexual, *see id.* at 568; it seems odd to take the defendants’ taunts as *prima facie* evidence of perceived homosexuality, when they made similar claims about each others’ behavior while still identifying as straight. *See also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1063–64 (describing imputations of homosexual conduct among coworkers as part of a broader pattern of “horseplay”). *But see* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 446–54 (2000) (arguing that distinguishing between sexual harassment and “horseplay” itself denies potential bisexuality among sexual harassment defendants).

206. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

207. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

208. They might not receive protection even in the case of such violence; although Kevin McWilliams was fondled and very nearly raped by his coworkers, the Fourth Circuit held that, because the harassers were not homosexual, this assault did not constitute harassment because of sex. *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F. 3d 1191, 1193, 1195 & n.5 (4th Cir. 1996); Yoshino, *supra* note 205, at 438–39.

In these circumstances, ENDA would offer no redress to employees who have suffered behavior that would strike the average observer as not only offensive<sup>209</sup> but discriminatory. However, the reason ENDA would fail is that the discrimination at issue is not antigay in any traditional sense. These employees are not perceived as *homosexual* men—Kevin McWilliams’s coworkers told him that “[t]he only woman you could get is one who is deaf, dumb, and blind”<sup>210</sup>—but as *failed* men; the sexual violence and taunting described in *Belleville* and *McWilliams* follow from that initial perception. In each of these cases, the plaintiffs seem to have been evaluated on their adherence to masculine prescriptive norms: one of the plaintiffs in *Belleville* wore an earring, the other was ridiculed for physical weakness, and Kevin McWilliams suffered from cognitive and behavioral disabilities.<sup>211</sup> Again, because the discrimination is focused on individuated perception and evaluation, as opposed to stereotypes about how men as a class actually behave, traditional interpretations of Title VII cannot grasp the biased heuristics that led to these plaintiffs’ harassment. The bias becomes apparent, however, upon even a cursory search. This interplay between gender deviance and presumed homosexuality is perhaps more obvious in cases involving masculine women; women who violate sex stereotypes are often accused of homosexuality, and courts understand these accusations to arise from sex rather than sexual orientation discrimination.<sup>212</sup> Gender-deviant heterosexual men, however, face a problem—if their harassment does not harm LGBT workers or male workers as a class, then how can it be legally cognized?

Courts in these cases can, and should, rely on sex-stereotyping doctrine. Assuming that the imputation of homosexuality was triggered by a perceived deviance from prescriptive sex stereotypes, plaintiffs can allege *Price Waterhouse* discrimination regardless of whether they were actually perceived as homosexual or merely accused of being so. While gay slurs could still be used to show that the harassment created “an objectively hostile or abusive

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209. See *McWilliams*, 72 F.3d at 1196 (“That this sort of conduct is utterly despicable by whomever experienced; that it may well rise to levels that adversely affect the victim’s work performance; and that no employer knowingly should tolerate it are all undeniable propositions.”).

210. *Id.* at 1193.

211. *Doe by Doe v. City of Belleville*, 119 F.3d 563, 566-67 (7th Cir. 1997); *McWilliams*, 72 F. 3d at 1193.

212. See, e.g., *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 331, 334-35 (6th Cir. 2008) (citing a supervisor’s use of the word “dyke” as part of a pattern of sex discrimination); see also Schultz, *supra* note 121, at 1785 (discussing how courts’ unwillingness to read discrimination against flamboyant gay males as sex stereotyping “exclud[es] people identified as gay from the protection from gender stereotyping extended to all other people as men and women.”).

work environment,<sup>213</sup> a sex-stereotyping claim deemphasizes the plaintiff's perceived membership in a victimized *group* and focuses on the harasser's bigoted evaluation.

Once again, case law at the state level shows the importance of sex stereotyping for plaintiffs who face the language of antigay harassment without identifying or being perceived as gay. The case that originated sex-stereotyping doctrine in New Jersey, *Zalewski v. Overlook Hospital*,<sup>214</sup> presented a male-on-male sexual harassment claim with no evidence of perceived homosexuality;<sup>215</sup> the court adopted a *Price Waterhouse* theory of sex stereotyping precisely because the remedy for sexual orientation discrimination was not available.<sup>216</sup> *DePiano v. Atlantic County*<sup>217</sup> makes the distinction between sex stereotyping and antigay harassment even more explicit, as it comes after New Jersey amended its Law Against Discrimination (LAD) to include sexual orientation. Atlantic County argued that the plaintiff, a cross-dressing heterosexual male,<sup>218</sup> could not prevail under LAD without evidence that he was actually perceived to be homosexual or bisexual.<sup>219</sup> The court, however, denied the defendant's motion for summary judgment and accepted DePiano's claim that "under the LAD's prohibition of discrimination on the basis of sex a plaintiff need not be perceived as homosexual. Rather . . . a plaintiff may bring an LAD claim for discrimination or harassment based on gender role stereotyping."<sup>220</sup> In cases where insisting on a sexual orientation discrimination theory would present an unacceptable evidentiary burden, courts accept sex-stereotyping claims instead. Were an ENDA to pass, it is easy to see how this application of the *Price Waterhouse* doctrine could – and should – survive.

213. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

214. 692 A.2d 131 (N.J. Super. Ct. Law Div. 1996).

215. *Id.* at 131-32.

216. *Id.* at 136 ("There is no rhyme or reason for allowing sexual harassment claims by men against women, women against men, and harassment because of one's sexual orientation and yet permit and condone severe sexual harassment of a person because he is perceived or presumed to be less than someone's definition of masculine.").

217. No. Civ.02-5441 RBK, 2005 WL 2143972 (D.N.J. Sept. 2, 2005). For the final disposition of this case, see No. Civ.02-5441 RBK, 2006 WL 1128710 (D.N.J. Apr. 25, 2006).

218. DePiano enjoyed cross-dressing and specifically engaged in cross-dressing with his wife. Plaintiff's Trial Brief at 4, *DePiano* 2005 WL 2143972 (No. 02-5441); *DePiano*, 2005 WL 2143972, at \*3.

219. *DePiano*, 2005 WL 2143972, at \*7. The LAD did not protect against gender identity discrimination at that time; even if it had, however, it is not at all clear whether the court would have extended these provisions to heterosexual, cisgender men who occasionally cross-dress.

220. *Id.* DePiano later lost at trial, where the judge held that he "did not establish a hostile work environment because he didn't demonstrate the motivation for the discipline was really his cross-dressing." *DePiano*, 2006 WL 3392869 (D.N.J. Oct. 6, 2006).

But what does this teach us about *Price Waterhouse's* applicability beyond sexual orientation? In some ways, not much—sexual orientation is arguably unique in how it serves as a metonym for broader gender transgressions. The problems that sex stereotyping addresses in New Jersey do not come up in other contexts. For example, an employee who does not participate in racist workplace norms will not suddenly be considered African-American. However, this point could also be framed as an argument for *Price Waterhouse's* greater relevance outside of the sexual orientation context. Workplaces that police gender norms punish outlaws using the language of antigay discrimination, leaving themselves at least somewhat vulnerable under traditional frameworks. What about, say, a white employee who is punished for supporting black civil rights?<sup>221</sup> That employee has no hope of a standard claim under *McDonnell Douglas*, but Noah Zatz's argument that employees who refuse to endorse a workplace's discriminatory action face "a form of stereotyping especially repugnant to Title VII values" seems particularly on point here.<sup>222</sup> Cross-status comparators get this employee nowhere, since this employer is unlikely to treat black employees any better and will probably be much friendlier to racist white workers. Nonetheless, if the employee can demonstrate that her support for civil rights caused the adverse employment action (quite likely through comparison to other white employees with different racial attitudes),<sup>223</sup> *Price Waterhouse* would permit relief, as long as the prescriptive stereotype that employees should not support civil rights reflected racist thought.<sup>224</sup> The question of whether a given action reflects discriminatory thought seems like the better question to ask, both analytically (since such a theory better reflects what is actually occurring) and normatively. Discursively imposing homosexuality on gender-deviant employees sends disturbing and subordinating messages: homosexuality is effeminacy,<sup>225</sup> effeminacy is

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221. Cf. *Chandler v. Fast Lane, Inc.*, 868 F. Supp. 1138, 1143 (E.D. Ark. 1994) (recognizing a Title VII claim by an employee who was forced to resign because she refused to participate in her employer's discriminatory hiring program, on retaliation and associational grounds). Employees are protected from retaliation for opposing discriminatory action, 42 U.S.C. § 2000e-3(a) (2012), but it is not at all obvious how such protection could function in the absence of actual discrimination by the employer against a member of an identifiable minority group.

222. Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 116 (2002).

223. See *supra* notes 75-81 and accompanying text.

224. See Zatz, *supra* note 222, at 114 ("In particular, such discriminatory dynamics may be premised on the organization of the workplace into agonistic groups defined along race and gender lines.").

225. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001).

failure,<sup>226</sup> and effeminacy is weakness.<sup>227</sup> The fact that these ideas are expressed through harassment of straight employees does not make them less harmful, and sex stereotyping allows us to pierce through the irrelevant distraction of perceived group membership to see the degrading force of the norms at work.

Sex stereotyping is a nimble doctrine—its ability to look past groups to find contextual bias makes it a potentially valuable tool to fight discriminatory dynamics in the modern workplace. The following Part considers in more detail how sex stereotyping can interact with federal or state ENDA to protect workers more effectively.

### III. COMPLEMENTARITY, NOT COMPETITION: HOW PRICE WATERHOUSE CAN WORK WITH TRADITIONAL PROTECTIONS

To date, the debate over how to best protect LGBT workers has been markedly zero-sum; scholars and advocates urging the passage of ENDA have treated it as either superseding a flawed substitute doctrine,<sup>228</sup> or offering protections in a field where none currently exist.<sup>229</sup> This need not be so. A federal ENDA can work with sex-stereotyping protections to fight workplace bias more effectively than either doctrine could alone, and the normative considerations underlying both theories of discrimination can function in harmony.

#### A. Using ENDA's "Because of" Provision to Fight Straightforward Antigay Harassment

To begin with the obvious point, many cases of discrimination really are so straightforward that ENDA uncontroversially applies. For example, the recent New York decision *Salemi v. Gloria's Tribeca, Inc.*<sup>230</sup> held that an employer who repeatedly referred to homosexuality as a "sin" and said that homosexuals "were going to hell"<sup>231</sup> discriminated on the basis of sexual orientation under New York City's Human Rights Law. Here, the employer's statements refer to gay people as a single undifferentiated class, and the animus they reflect applies equally to all members of that class. There is no need to interrogate the prescriptions that underlie the statements, because they so clearly harm gay

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226. See *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F. 3d 1191, 1193 (4th Cir. 1996).

227. *Miller v. City of New York*, 177 F. App'x 195, 196-97 (2d Cir. 2006).

228. Soucek, *supra* note 27, at 786.

229. See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

230. 115 A.D.3d 569 (N.Y. App. Div. 2014).

231. *Id.* at 569.

people *based solely upon their sexual orientation* and thus constitute sexual orientation discrimination under even restrictive readings of antidiscrimination law. This employer clearly harassed gay employees “because of” sexual orientation, no matter how one interprets the phrase.

While the interpretation of *Price Waterhouse* urged by the EEOC and adopted in *Terveer* could still cognize this behavior as harmful stereotyping,<sup>232</sup> it would do so using a framework that perfectly mimics traditional Title VII litigation—in order to establish what particular trait led to the adverse action, the plaintiff would still need to show the employer’s animus towards homosexuals. However, folding sexual orientation entirely into sex-stereotyping jurisprudence would interpose an extra step, requiring each plaintiff to argue, once again, that antigay bias reflects harmful ideas about how men and women should behave. Furthermore, treating all gay plaintiffs as gender-deviant imposes a real, if subtle, dignitary harm. Plaintiffs who perceive themselves as gender-conforming should be able to claim protections without using a framework many feel reifies offensive stereotypes.<sup>233</sup> Finally, and not inconsequentially, proving sex stereotyping is not cheap. *Price Waterhouse* cases often rely on expert testimony to show the gendered nature of the employer’s behavior;<sup>234</sup> by comparison, if an employer makes blatantly antigay remarks or fires a worker immediately upon their disclosure of LGBT status, then ENDA allows a far more practical route to relief. Just as *Price Waterhouse* provides a more effective tool for combating subtle, context-specific, and individual discrimination, traditional protections have real power against open, class-based animus.

One question, however, remains: if ENDA’s “because of” provisions and *Price Waterhouse* each attack different kinds of bias, then how can they interact? Paradoxically, one of ENDA’s most immediate effects would be radically strengthening sex-stereotyping protections—as discussed above, one of the biggest hurdles facing *Price Waterhouse* plaintiffs is Congress’s perceived intent not to protect against sexual orientation discrimination.<sup>235</sup> ENDA would remove this barrier and allow gender-deviant LGBT plaintiffs to bring sex stereotyping and ENDA claims concurrently. In practice, these claims are often most powerful together; defendants frequently claim that adverse actions were

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232. See *supra* notes 156–157 and accompanying text.

233. See Soucek, *supra* note 27, at 775–76; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 909–10 (2002). This phenomenon is, of course, hardly unique to sexual minorities; for a more general discussion, see GOFFMAN, *supra* note 166, at 81.

234. See Goldberg, *supra* note 11, at 797–98 (discussing the importance of experts for legitimating the contextual analysis required by sex stereotyping suits).

235. See *supra* notes 144–152 and accompanying text.

based on sexual orientation in response to a sex stereotyping claim,<sup>236</sup> or defend against a state law sexual-orientation claim by citing the employee's gender-deviant behavior or manner of dress as disruptive or upsetting to others.<sup>237</sup> As long as only one set of protections is in place, employers will claim that behavior that would violate the other constituted a legitimate, nondiscriminatory reason for the adverse action.<sup>238</sup> Both theories work in concert, however, to protect employees who suffer from antigay discrimination as it frequently appears in the modern workplace: as an inchoate mix of antigay bias and heterosexist ideas about how men and women should behave. ENDA works within a legal framework designed to equalize outcomes across easily identifiable groups, whereas sex stereotyping seeks to ensure that the workplace is free of subtler, more contextual bias. In practice, these approaches often go hand in hand. Allowing plaintiffs to present evidence of both theories of discrimination gives courts better information, allows plaintiffs the dignity of having their entire story heard in court, and prevents biased employers from hiding behind mutually exclusive defenses.

### B. Price Waterhouse Protections in ENDA Itself?

Another potential avenue for stereotyping suits is through ENDA itself, using either the motivating-factor provisions set out in the Senate version of ENDA<sup>239</sup> or the new gender-identity protections common to both.<sup>240</sup> I hope that I have shown how an LGBT plaintiff could bring a hypothetical "sexual-orientation-stereotyping" claim if that survives, but the gender-identity provisions of ENDA are novel and deserve a closer look. While ENDA's prohibition on firing or harassment "because of . . . gender identity"<sup>241</sup> is generally considered a remedy for a discrete group of plaintiffs who identify as transgender,<sup>242</sup> the statutory definition of "gender identity" is sufficiently broad to encompass something superficially very much like *Price Waterhouse*

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236. See, e.g., Appellee's Brief on Behalf of the Int'l Alliance of Theatrical Stage Emps., Local 46, Gilbert v. Country Music Ass'n, Inc., 432 F. App'x 516, No. 09-6398, at \*7-8 (6th Cir. Apr. 12, 2010); Weber, *supra* note 185.

237. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008).

238. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (describing the defendant's burden of proving a legitimate, nondiscriminatory reason for the adverse action against a plaintiff who has made a prima facie case of discrimination).

239. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§ 4(h), 10(e).

240. *Id.* at § 4(a)(1); H.R. 1755, 113th Cong. § 4(a)(1).

241. H.R. 1755 § 4(a)(1).

242. See, e.g., Hannah Moch, *In Historic Move, Senate Committee Approves Trans-Inclusive ENDA*, GLAAD (July 10, 2013), <http://www.glaad.org/blog/historic-move-senate-committee-approves-trans-inclusive-enda> [<http://perma.cc/Z56Y-LDYF>].

protection. Specifically, ENDA defines gender identity as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”<sup>243</sup> ENDA gender-identity protections could pose many of the same problems that *Price Waterhouse* was designed to address—plaintiffs who face discrimination on the basis of gender-deviant mannerisms will likely be unable to show their membership in a broad enough category to generate the sort of comparative evidence that courts typically require. Instead, they would have to show the salience of a particular mannerism in their own firing and then prove, at a second stage, that the mannerism in question formed a part of their gender identity.

Such a process seems, at first, like a perfect analogy to a *Price Waterhouse* stereotyping claim—it would certainly seem to offer relief to plaintiffs like Brian Prowel, whose behaviors were avowedly effeminate,<sup>244</sup> or even Gregory DePiano, whose deviance from the norm of his workplace had a clear gendered component.<sup>245</sup> But what about plaintiff H. in *Doe by Doe v. City of Belleville*, who may have been expressing any number of cultural commitments by wearing an earring;<sup>246</sup> or Mark McWilliams, who was harassed because of a developmental disability;<sup>247</sup> or Joseph Oncale, whose gender deviance similarly existed only in the minds of his tormentors?<sup>248</sup>

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243. S. 815 § 3(a)(7) (emphasis added); see Case, *supra* note 28, at 1366-67 (discussing the confusion surrounding ENDA’s definition of gender identity).

244. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (“Prowel identifies himself as an effeminate man and believes that his mannerisms caused him not to ‘fit in’ with the other men at Wise.”).

245. *DePiano v. Atlantic Cnty.*, No. Civ. 02-5441 RBK, 2005 WL 2143972, at \*3 (D.N.J. Sept. 2, 2005) (referring to the male plaintiff dressing in women’s clothing).

246. 119 F.3d 563, 566-67 (7th Cir. 1997).

247. *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1193 (4th Cir. 1996) (describing McWilliams’ harassment based on his disclosure of cognitive and emotional developmental disabilities).

248. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998). One important caveat to this difference is ENDA’s protection against discrimination on the basis of “real or perceived” gender identity. Unlike sexual orientation, where defendant harassers frequently used antigay slurs in contexts that made clear they did not in fact view the plaintiffs as gay, they almost certainly did view the plaintiffs as gender-deviant. See *supra* Part II.B.2. However, a showing of discrimination based on perceived gender deviance is analytically no different than the type of sex stereotyping claim I have already described—the plaintiff would have to show that his or her employer perceived a difference between the plaintiff and other coworkers, that the employer discriminated based on that difference, and that the employer read that difference as related to sex or gender. While the steps occur in a different order (unlike a sex stereotyping case, a perceived-gender-identity plaintiff would have to show the gendered nature of the evaluation at the prima facie stage), the nature of the proof is exactly the same.



This sex-stereotyping theory looks, instead, very much like the alternate proposal made recently by Zachary Kramer, who proposes a reasonable-accommodation model built on Title VII's current protections for religious practices. Under Kramer's theory, a plaintiff would be expected to show that a given mannerism or appearance reflected his or her sincere gender commitments and that a defendant was unwilling to reasonably accommodate those commitments.<sup>249</sup> The difference between Kramer's proposed solution and the one that already exists in *Price Waterhouse* is the fundamental difference between a Title VII that protects gender-deviant plaintiffs and a Title VII that prohibits gender-based evaluation. Claims proceeding under Kramer's accommodation model must begin by showing that the plaintiff's idiosyncrasy is both "sex based" and "sincerely held."<sup>250</sup> Under this approach, plaintiffs like Doe, McWilliams, and Oncale would be unable to show that they viewed the traits that led to their harassment as "sex based," and thus to make out even a *prima facie* claim.

Of course, this could be the right answer—such an approach certainly ensures that claims will only be raised by individuals whose sincere gender commitments stand sufficiently far outside the norm to require accommodation. If we read Title VII as Justice O'Connor did in *Price Waterhouse*, as concerned with the protection of out-group members and not with the tools employers use more generally, then Kramer has the right solution; Congress cares about discrimination only when it directly impacts a member of a protected group. But Congress overrode Justice O'Connor. The Civil Rights Act of 1991 reveals a broader commitment—to stamp out bias and bigotry in the workplace no matter whom it affects. Stereotypes can be deeply subordinating towards disfavored groups even when applied to group nonmembers—as long as an employee is harassed based on outdated and offensive ideas about sex, gender, race, or any other Title VII category, there is no need to bother with the secondary inquiry of the employee's own commitments.<sup>251</sup> LGBT plaintiffs may succeed under Kramer's theory—they may be able to demonstrate that their disfavored traits arise from a disfavored

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249. Kramer, *supra* note 11, at 938-40; *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71-76, 84 (1977) (articulating the test for religious accommodations under Title VII).

250. Kramer, *supra* note 11, at 947. Kramer institutes these sincerity tests as a response to the danger of what he calls "stretch"—that is, the danger of courts treating any employer preference for certain behaviors among employees as sex discrimination. *Id.* Kramer proposes distinguishing between employers' discriminatory and nondiscriminatory trait preferences by asking what the trait means to the *employee*. By contrast, *Price Waterhouse* treats this as a question, first and foremost, about *employers*; about which methods they use to choose favored and disfavored behaviors, and which ideas underlie those methods.

251. *See* Schultz, *supra* note 121, at 1786 ("It is the *accusation* rather than the *actuality* that is relevant.").

gender identity. But, as Jessie Weber put it to me, “the beauty of the sex stereotyping claim is that it applies to everyone.”<sup>252</sup>

### CONCLUSION: PRICE’S PROMISE

It is impossible to overstate the impact of *Price Waterhouse* on the American workplace, but stating it accurately isn’t much easier. Statistics on unreported discrimination suits are notoriously unreliable, to say nothing of the claims settled before an EEOC inquiry, or the changes that workplaces make in order to prevent violations from occurring. Nevertheless, the conceptual changes wrought by *Price Waterhouse* and the Civil Rights Act of 1991 are tremendous in scope, and they offer a vision of antidiscrimination law that courts still only partially recognize. Because federal antidiscrimination law is formally blind to sexual orientation and gender identity, courts have been unable to use traditional tools of group protection to justify protecting LGBT workers. Instead, *Price Waterhouse* demands that judges interrogate the cause or purpose of employers’ differentiation between their employees.<sup>253</sup> It questions whether the heuristics that employers use to evaluate their employees themselves reflect impermissible bias. This doctrine has bloomed from arid soil; both *Price Waterhouse* and its progeny dealing with anti-LGBT discrimination arose from courts seeing clear discrimination without a clear statutory solution, and the analytic moves underlying prescriptive sex stereotype show remarkable sensitivity to the nature of the modern workplace.

In particular, what *Price Waterhouse* can acknowledge, and what traditional group-based remedies do not specifically address, is the extent to which oppressive stereotypes are *mala in se*, regardless of the disparate group outcomes they might or might not create. These stereotypes hurt everybody. Irrational and degrading norms about how men and women should behave, how different races should interact, and what cultural practices are fit for professional life limit everyone’s identity, not just members of subordinated groups.<sup>254</sup> *Price Waterhouse* allows plaintiffs to focus on these harmful norms, but it is currently available only in the limited sphere of gender deviance. Sex stereotyping is a valuable part of our Title VII jurisprudence and should survive the passage of traditional sexual orientation and gender identity protections. More than that, however, the ideas that *Price Waterhouse* espouses should be better understood and embraced far, far more broadly. In an often

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<sup>252</sup>. Weber, *supra* note 185.

<sup>253</sup>. *Id.*; see also Schultz, *supra* note 121, at 1776 (“This form of [sex-stereotype-based] harassment, like harassment of women workers, perpetuates job segregation by sex.”).

<sup>254</sup>. See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 192 (2006); Schultz, *supra* note 45 (manuscript at 130); Weber, *supra* note 185.

hostile world, *Price Waterhouse* has given gender-deviant plaintiffs a strange and precious gift. Now it is time to share.

