

## Articles

# Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes

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THERE WAS A TIME when bartending was considered men's work.<sup>1</sup> Michigan even passed a law<sup>2</sup> to ensure that the professional pouring of alcohol remained a male-only occupation. When women challenged the restriction as a violation of equal protection principles, the Supreme Court rebuffed the argument, applied the weak rational basis relationship standard of review, and pronounced the law as "not without a basis in reason."<sup>3</sup> Although the Court acknowledged a historical role for "the alewife, sprightly and ribald,"<sup>4</sup> a state's right to ensure women would not be working in bars without adequate male protection trumped even the female icons drawn from English literary classics.<sup>5</sup>

Several decades later, however, cases raising equal protection challenges successfully punctured the underlying assumption that social and moral legislation could be grounded on gender stereotypes

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1. *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) (allowing a ban on females working as bartenders as the statute was within "the allowable legislative judgment" because work as bartenders would create social and moral problems for females. In addition, "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.").

2. *See id.* at 465 (citing to Section 19a of Act 133 of the Public Acts of Michigan, 1945, Mich. Stat. Ann. § 18.990(1) (Cum. Supp. 1947)).

3. *Id.* at 467.

4. *Id.* at 465 ("We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England." (citing as an example JEAN JUSSERAND, ENGLISH WAYFARING LIFE IN THE MIDDLE AGES, 133, 134, 136–37 (Barnes & Noble 1950) (1889))).

5. *Id.* at 466.

alone.<sup>6</sup> In another case involving “the trafficking of liquor,” the Court applied the more demanding intermediate level of scrutiny to a state rule allowing women to drink 3.2 percent beer at age eighteen, while men were required to forgo such intoxicants until the more mature age of twenty-one.<sup>7</sup> Suspicious of the “archaic and overbroad” generalizations reflected in the law, this time the Court struck down the differential as gender discrimination—largely because the state could not sufficiently prove its link between young males and drunk driving.<sup>8</sup> The Court detached “male” and “female” from their stereotypical attributes—reckless and responsible—and was left with little basis for the law.<sup>9</sup> The judgment that the state could not use sex classifications as automatic proxies for the possession of certain characteristics seemed to be a signpost that we were on the road to gender equality.

Yet despite the Court’s application of a higher standard of scrutiny and the passage of statutes, notably Title VII,<sup>10</sup> to combat gender discrimination, the legal path to gender equality has been circuitous. Efforts to expand the Equal Protection Clause’s zone of legally assured gender neutrality have sparked a judicial border war where territory is claimed, only to be re-captured in a subsequent decision.<sup>11</sup>

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6. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A [gender] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to that object of legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

7. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

8. *Id.* at 204.

9. *Id.* at 203 n.14 (“The very social stereotypes that find reflection in age-differential laws . . . , are likely substantially to distort the accuracy of these comparative statistics. Hence ‘reckless’ young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home.”) (citations omitted); *see also* *L.A. Dep’t of Power & Water v. Manhart*, 435 U.S. 702, 708 (1978) (“Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”).

10. 28 U.S.C. 2000e–2000e-17 (2000).

11. *Compare* *United States v. Virginia*, 518 U.S. 515, 524 (1996) (striking down prohibition of entry of women into state’s military academy and holding that equal protection principles, as applied to gender classification, mean state actors may not rely on overbroad generalizations about men and women), *with* *Nguyen v. I.N.S.*, 533 U.S. 53, 64–65 (2001) (upholding a citizenship statute and holding that equal protection principles allow differential treatment of mothers and fathers, finding that “[i]n the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth,” but more onerous requirements were necessary for citizen fathers to “ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent”). Although the decision in *Virginia* seems to require an exceedingly persuasive justification for the government to deviate from a gender-neutral standard, the *Nguyen* decision casually accepts—as exceedingly persuasive—the generalization that a woman automatically bonds

Similarly, court decisions interpreting Title VII's gender neutralizing language—prohibiting discrimination because of sex—adopt legal constructions that sanction gender-biased practices already in place.<sup>12</sup>

For example, although no longer allowed to deny women the right to work as bartenders simply because they are women,<sup>13</sup> an employer can legally demand that a female bartender conform to gender-based appearance norms such as wearing lipstick, foundation, mascara, and blush.<sup>14</sup> Although “his” and “hers” employment advertising is illegal,<sup>15</sup> once hired, employers can require workers to look their gender roles in the course of non-gendered employment. Women may be fired, despite a stellar job performance, because they do not meet their employer's standards, which are biased in favor of a feminine appearance. The “alewife, sprightly and ribald” image of Chaucer's and Shakespeare's eras has given way to a more nuanced but still harmful stereotype.<sup>16</sup> The mystery is why this required gender role-playing is not considered discrimination on the basis of sex under Title VII. The textual force of anti-discrimination laws has curb appeal, but when subject to judicial interpretation, gender biases emerge to mar the scenery.

Recent research indicates that the task of dismantling sex and race discrimination in the workplace is more complicated than originally thought because the way we discriminate is complicated. Principles of psychology and sociology have enlightened us as to what we actually do, rather than what we think we are doing, want to do, or claim to be doing.<sup>17</sup> For example, our normal developmental exploita-

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with her child at birth, but that a man's commitment to his child is open to question until proven.

12. *But see* Robert C. Post et al., *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1, 16 (2001) (acknowledging the influence of underlying social practices on court decisions but arguing that the “dominant conception of American antidiscrimination law [which precludes acknowledging the legitimacy of gender norms], distorts and masks the actual operation of that law, and by so doing, potentially undermines the law's coherence and usefulness as a tool of transformative social policy”).

13. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

14. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

15. *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973).

16. *Goesaert*, 335 U.S. at 465.

17. *See generally* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption for Law and Economics*, 88 CAL. L. REV. 1051 (2000) [hereinafter Korobkin & Ulen, *Law and Behavioral Science*] (arguing that cognitive psychology, sociology, and behavioral sciences provide a more nuanced understanding of human behavior than the rationality assumption of law and economics); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics and Cautious Supporters*, 85 CORNELL L.

tion of categories—stereotyping people and things—is an automatically activated<sup>18</sup> survival mechanism.<sup>19</sup> Well-worn neural pathways silently control the ways we categorize, organize, and manage a continuous flow of sensory information and efficiently handle complex decisions.<sup>20</sup> Our stereotyping mechanism is not easily turned off, even when we want to pull the plug on it, as in the case of gender biases. Merely voicing support for gender equality is not transformative—our brain’s deeply-engrained habits do not respond on cue. To exacerbate the situation, we often labor under misleadingly optimistic notions of our decision-making capacity that hide these methodical mistakes.<sup>21</sup> Therefore we need to become aware of our stereotyping mechanism, be motivated to correct it, and have sufficient control over our responses to correct them.<sup>22</sup>

These automated cognitive systems can cause several types of problems in the implementation of anti-discrimination law. On one level, commentators have pointed out the shortcomings of the legal system for Title VII plaintiffs in remedying gender and race discrimi-

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REV. 739 (2000) (discussing the use of behavioral decision theory (“BDT”) by psychologists in studying jury decisions and other areas of law where recent developments by behavioral economists have developed more accurate theories on how people react to law); CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (Cass Sunstein ed. 2000) (arguing that in the past two decades, social scientists have developed an understanding of how people actually, not merely as is perceived, make decisions).

18. See TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 52–53 (2002) [hereinafter WILSON, *STRANGERS TO OURSELVES*].

19. We are cautious, for example, when confronting sharp objects and unfamiliar animals because we have learned that those categories are associated with danger. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163–64 (1995) [hereinafter Krieger, *The Content of Our Categories*].

20. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in AMOS TVERSKY ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 20 (Cambridge 1982) (describing heuristics of representativeness, availability, and anchoring that influence decision making and “are highly economical and usually effective, but they lead to systematic and predictable errors”); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 17, at 1143 (“People are boundedly rational. To save time, avoid complexity, and generally make dealing with the challenges of daily life tractable, actors often adopt decision strategies or employ heuristics that lead to decisions that fail to maximize their utility.”).

21. Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 411–412 (1992) [hereinafter Griffin & Tversky, *The Weighing of Evidence*] (“One of the major findings that has emerged from this research is that people are often more confident in their judgments than is warranted by the facts.”).

22. See generally Timothy D. Wilson, David B. Centerbar & Nancy Brekke, *Mental Contamination and the Debiasing Problem*, in THOMAS GILOVICH, DALE W. GRIFFIN & DANIEL KAHNEMAN, *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185 (2002) (discussing the difficulty of reducing bias in human judgment).

nation because discrimination is often the product of employers's embedded biases, as opposed to conscious action, leaving the pernicious effects of discrimination difficult to prove and unable to be remedied under current law.<sup>23</sup>

A similar problem exists on a larger scale, however, because the legal system depends on judicial interpretation of the laws. Judges are not immune from decision-making biases that afflict humans generally,<sup>24</sup> and cognitive biases may guide interpretations of the law.<sup>25</sup> For example, because of a predisposition toward preserving the status quo, judicial interpretations of anti-discrimination laws may keep us close to our starting positions despite legislative directives to the contrary.<sup>26</sup> Moreover, to the extent that judges might consider themselves experts in the law, they are probably more confident of their abilities to disregard biases than they should be.<sup>27</sup> Indeed, lawyers and litigants in the legal system have every incentive to prey on the biases of the judiciary to sway the decisions in their favor.<sup>28</sup> Accordingly, judicial alertness to cognitive biases, including judges's own and those of the participants in their courtroom, becomes even more important. Cognitive illusions in the gender arena are especially pernicious because,

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23. See, e.g., Krieger, *The Content of Our Categories*, *supra* note 19; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005).

24. The invisible hand of cognitive bias (in the form of anchoring, framing, egocentrism, and hindsight biases, as well as the influence of the representative heuristic) showed up in a study of one hundred and sixty-seven federal magistrates. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 50–51 (1999); see also Andrew J. Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1291 (2005) (noting that the study of judges showed influence of anchoring, but not hindsight bias, and discussing generally the influence of inadmissible evidence on judges).

25. See Guthrie et al., *supra* note 24, at 781; Viscusi, *supra* note 24, at 27 (discussing the hindsight bias effect on judges's decisions); see also Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 85–86 (2002) (“Thinking seriously about doctrinal heuristics . . . requires a new model of [judicial] adjudication that refrains from heroic assumptions about the judicial decisionmaking process.”).

26. See Krieger, *The Content of Our Categories*, *supra* note 19, at 1164–66. See generally Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) [hereinafter Blasi & Jost, *System Justification Theory and Research*] (discussing human motivation to justify the status quo even when disadvantaged by it).

27. See Griffin & Tversky, *The Weighing of Evidence*, *supra* note 21.

28. See Blasi & Jost, *System Justification Theory and Research*, *supra* note 26, at 1151–52 (“Although courts and commentators may disfavor explicit efforts to arouse group justification motives, group-based stereotypes and bias, whether implicit or explicit, are always at work in the courtroom.”).

in reinforcing the status quo, they fortify barriers to equality.<sup>29</sup> If we are to progress, we must develop reliable adaptations and limit poor choices.<sup>30</sup>

Part I briefly explores some common cognitive biases that contribute to the intractability of gender discrimination. Part II discusses those biases in the context of cases involving gender-based appearance codes. It discusses the need for increasing our understanding of the biases that affect our decision making, particularly judicial decision making. It is important to bring these processes to the surface and debate them honestly, rather than allow them to surreptitiously infiltrate the legal system.<sup>31</sup> Judges, holding the titular role as impartial arbiters in the legal system, must exercise their authority, conscious that they are subject to cognitive biases and alert to thwarting, where possible, its undermining of the goals of gender equality.

## I. Cognitive Bias

Our brain operates according to the embedded marching orders that have served it well in the past. We rely on mental short cuts, known as heuristics, to help us navigate quickly through the swamps of information we encounter in daily life.<sup>32</sup> These habitual rules guide us in decision making, privileging some information while rejecting or neglecting other information. But our internal operating systems, helpful in making quick judgments in the maze of everyday life, may not achieve rational or desired results in all situations. For example, we tend to rely on information that is available to our recall, although that information may not be representative of reality. The “availability” heuristic<sup>33</sup> may lead us to think that a terror attack is the biggest threat to our safety, when the risk of a heart attack may be far more

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29. See Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2545, 2568 (1994) (proposing standard to determine whether appearance requirements disadvantage women).

30. See, e.g., Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (Daniel Kahneman et al. eds., Cambridge Univ. Press 1982).

31. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 117–42 (1994) [hereinafter Wilson & Brekke, *Mental Contamination and Mental Correction*].

32. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in AMOS TVERSKY ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Cambridge 1982); Eldar Sharif & Robyn A. LaBouef, *Rationality*, 2002 ANN. REV. PSYCHOL., Jan. 1, 2002, available at 2002 WLNR 9106451, at 491.

33. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in AMOS TVERSKY ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 163–64 (Cambridge 1982).

likely. The former is “salient” to us (another heuristic) and vivid through news events while the latter may be hidden from attention.<sup>34</sup> Although there are a variety of cognitive biases that contribute to the entrenchment of gender discrimination, this Article will discuss three specific ones: (1) the status quo bias, (2) the representative heuristic, and (3) framing. Specifically, these biases contribute to judicial interpretations of Title VII that undermine its goal of equal employment opportunities.

### A. Status Quo Bias

When we make judgments, we tend to overvalue our present position and worry about the uncertainties and potential misfortune that might befall us if we make changes.<sup>35</sup> All things being equal, humans tend to place more value on a good they possess or the position that they presently occupy.<sup>36</sup> Known as the “endowment effect” or “status quo bias,”<sup>37</sup> this “bird in the hand” bias is closely related to humans’ loss-averse nature.<sup>38</sup> Studies confirm that, when in doubt, the brain defaults into stay-the-course mode.<sup>39</sup> Certainly, there are excellent reasons to be cautious in life when catastrophe could loom, but the disadvantage of this unconscious caution is that our brains often intuitively refuse to budge from existing coordinates when movement is necessary. Accordingly, we erroneously overvalue our present position simply because it *is* our present position and not because it is the better option.<sup>40</sup>

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34. See John B. Pryor & Mitchell Kriss, *The Cognitive Dynamics of Salience in the Attribution Process*, 35 J. PERSONALITY & SOC. PSYCHOL. 49, 49–50 (1977).

35. Daniel Kahnemann et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199–203 (1991); Russell Korobkin, *The Status Quo and Contract Default Rules*, 83 CORNELL L. REV. 608, 625–30 (1998).

36. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) [hereinafter Korobkin, *The Endowment Effect*] (explaining that the “status quo bias” refers to an individual’s tendency “to prefer the present state of the world to alternative states, all other things being equal” and citing, as an example, Williams Samuelson & Richard Zechhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988)).

37. *Id.* at 1228–29.

38. *Id.* at 1250 (“Assuming that people feel entitled to the status quo state of the world in the same way that they feel entitled to goods or rights to which they have a legally cognizable ownership interest, loss aversion is also consistent with the results of studies that show a status quo bias.”).

39. *Id.* at 1232–36 (discussing studies).

40. See, e.g., Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in THOMAS GILOVICH, DALE W. GRIFFIN & DANIEL KAHNEMAN, *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 120, 120–38 (Cambridge Univ. Press 2002) (discussing the concept of anchoring and noting that it

When courts interpret laws, the judges' status quo bias may undermine the implementation of laws dictating change. For example, Title VII powered reforms for gender equality by outlawing discrimination because of sex in employment practices.<sup>41</sup> Nevertheless, through creative rationalizations, courts treat sex specific appearance codes as a special category of workplace rules, creating a loophole for gender-based discrimination. A preference for the comfort of the familiar heavily influences a reading of the law that is at odds with its language and purpose.

### B. The Representative Heuristic—the Process of Categorization

We sort the abundance of information that we receive each day by schema and category.<sup>42</sup> Our brain receives information quickly, using a series of scripts and themes, allowing us to filter the information rapidly into “discard” and “keep” piles. We assess things based on whether they tend to be like or not like a category of items.<sup>43</sup> When one thing resembles something else in a category, we judge the possibility that the first item is a member of that category as high. If there is no resemblance to the second item, we judge the likelihood as less. This process is known as the representative heuristic.<sup>44</sup> Once our brain places an item in a category, it also attaches other known characteristics of the category to that item.<sup>45</sup> Much of this categorizing is a form of automated stereotyping and is so mechanical we do not notice it.<sup>46</sup> Efficient it may be, but flawless it is not.

Our categorization may be overbroad or inaccurate, resulting in the trashing of treasures and the treasuring of trash. For example, we may miss a good movie because we associate a particular film star with

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“appears to be both prevalent and robust[, and the] contaminating effects of irrelevant anchors can be observed in numerous real-world contexts”).

41. 42 U.S.C. § 2000(e) (2006).

42. SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOC. COGNITION* 97–99, 136–39 (2d ed. 1991).

43. Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in AMOS TVERSKY ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, 84 (Cambridge 1982).

44. See WILSON, *STRANGERS TO OURSELVES*, *supra* note 18, at 4–11.

45. This mental shortcut is known as the representative heuristic. Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in AMOS TVERSKY ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 84 (Cambridge 1982).

46. See Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION*, 27–28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) (“Since no organism can cope with infinite diversity, one of the most basic functions of all organisms is the cutting up of the environment into classifications by which nonidentical stimuli can be treated as equivalent.”).



mediocrity, ignore an excellent book or article because we do not recognize the author, or be disappointed with a five-star restaurant because the meal did not include some of our favorite foods. When books, film, and food are involved, the consequences are small. When race and gender are involved, our stereotyping has effects that are more pernicious.

Our mind works out a complex series of rules and modes of operation that elude even those in the forefront of neural research.<sup>47</sup> Because our categorization system is often broad and imprecise, it can lead us to the wrong conclusions while our categorization system's subliminal operation allows these mistakes to escape our attention.<sup>48</sup> What we can tell, however, is that our brain is surprisingly adept at making biased judgments. We learn complex rules of association both implicitly and quickly, yet we are not able to recognize that we learned the rule or even articulate the principles involved within the rule.<sup>49</sup> Even more important, these artificially induced biases take on a life of their own by repeating themselves and becoming self-perpetuating.<sup>50</sup> With regard to gender-based appearance rules, the social science evidence suggests they set us up for prejudicial judgments. Examining the social science literature, even when contested, gives courts the opportunity to test their intuitive—and unjustified—findings that gendered dress is unrelated to equal employment opportunities.

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47. See generally Colin Camerer, George Loewenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience Can Inform Economics*, 28 J. OF ECON. LITERATURE 9–64 (2005) (discussing the potential for the tool of neuroscience to inform economic models of human behavior).

48. *Id.* at 11 (“Because people have little or no introspective access to [the brain’s automatic] processes, or volitional control over them, and these processes evolved to solve problems of evolutionary importance rather than respect logical dicta, the behavior these processes generate need not follow normative axioms of inference and choice.”).

49. See WILSON, STRANGERS TO OURSELVES, *supra* note 18, at 26–27 (discussing experiment).

50. See Pawel Lewicki, Thomas Hill & Maria Czyzewska, *Nonconscious Acquisition of Information*, 47 AM. PSYCHOLOGIST 796–801 (1992). Known as the “Pygmalion effect,” the most famous studies of this phenomenon involve teacher and student expectations of student performance, finding the higher the expectation, regardless of the baseline diagnostic information, the higher the student performance. See also ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS’ INTELLECTUAL DEVELOPMENT* (1968); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997). See generally SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 234–35 (1993).

### C. Framing Answers in the Form of a Question

We are vulnerable to how our choices are described.<sup>51</sup> Studies confirm that people will view the same problem differently depending on how it is stated.<sup>52</sup> For example, people are more likely to undergo a risky medical procedure if they are told, “ninety percent [of people who undergo this procedure] are alive in five years” than if they are told, “ten percent [of people] are dead after five years.”<sup>53</sup> In the preceding example, the first choice is cast as a gain, and the second is cast as a loss, which makes all the difference in preferences. The lesson is that we may manipulate preferences based on the question we ask because we can appeal to underlying biases.

Consider the advertiser’s use of the phrase “96 [percent] fat-free.”<sup>54</sup> Designed to capitalize on the current craze for healthy foods, the advertising frame is effective but deceptive.<sup>55</sup> If the food has four percent fat, it is not fat-free, but it will trigger a “healthy” frame of reference for the potential buyer, even though the whole milk sitting on the shelf next to it with the label “contains 4 [percent] fat” will not trigger the same healthy-buyer instincts.

Although much of our thinking processes may be reflexive, the framing game is one that judges,<sup>56</sup> lawyers, politicians, businesses, advertisers, and interest groups understand.<sup>57</sup> For judges, what is important is to: (1) understand the framing bias and not be misled by it

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51. See Richard R. Lau & Mark Schlesinger, *Policy Frames, Metaphorical Reasoning, and Support for Public Policies*, 26 POL. PSYCHOL. 77, 80 (2005).

52. See, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453–58 (1981).

53. See Cass Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1590 (2004).

54. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1451 (1999) (“One way in which an adroit marketer can influence the buyer’s perception is through the use of framing effects, which refer to the tendency for information format (as opposed to content) to influence perceptions and behavior. Manufacturers of food products, for instance, have learned that labeling a food product seventy-five percent non-fat instead of twenty-five percent fat can greatly increase sales.”).

55. *Id.* See generally GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE* (2004) (discussing effective use of frames in political discourse).

56. See Guthrie et al., *supra* note 24, at 822–26 (noting that judges are generally susceptible to cognitive illusions but less susceptible to framing effects).

57. See *id.* Although judges are prone to the same cognitive biases as the general population, they seem to be less prone to the framing bias. See *id.* at 822–23. The art of framing is one that lawyers have expertise in, so this may explain the ability to recognize a frame, as well as the ability to manipulate the bias.

when lawyers present arguments, and (2) resist the use of deceptive frames to defend policies in their decisions.

Examples of the use of misleading frames in judicial decisions abound.<sup>58</sup> The Supreme Court has characterized the denial of pregnancy benefits as a policy distinguishing between pregnant and non-pregnant *persons*,<sup>59</sup> thus distracting from the gender bias inherent in a policy that denies benefits to a class composed exclusively of women. Another court claimed a lack of gender discrimination in a “no breastfeeding” policy because no one could breastfeed—male or female.<sup>60</sup> This method of framing highlights that the policy applies equally to everyone, appealing to a value in equality, while concealing the inequality that only women will be impacted by it. This frame perpetuates biased preferences by casting the question in terms that are facially gender-neutral. Similarly, when courts consider workplace dress codes, creative framing can mask inequality by emphasizing that a dress code exists for all workers, even though it differs for each sex. For example, although a particular policy split into separate and distinct male and female grooming requirements, a court emphasized that, overall, there was “an appearance policy that applied to both male and female” and “[it] was aimed at creating a professional and very similar look for all.”<sup>61</sup> Of course, the details reveal quite dissimilar requirements, just as ninety-six percent fat free milk has quite a lot of fat in it, but the bias has been cast.

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58. The framing of the substantive due process case as presenting the question of whether there is a fundamental right to commit homosexual sodomy was pivotal in *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986). The question posed in *Bowers v. Hardwick*, which considered the constitutionality of a criminal sodomy statute, was whether the nation’s history and tradition reflected a pattern of protection for the right to engage in consensual homosexual sodomy. The answer was no. *Id.* at 192. Almost twenty years later, in *Lawrence v. Texas*, the Supreme Court considered a similar statute and substantive due process challenge. 539 U.S. 558 (2003). This time, the Court focused on whether same-sex intercourse fell within that sphere of private activity that was constitutionally immune from state interference. *Id.* at 569–71. The answer was yes. *Id.* at 578.

59. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“[I]t does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .”).

60. See *Derungs v. Wal-mart Stores, Inc.*, 374 F.3d 428 (6th Cir. 2004) (holding that, under both an Ohio statute and Title VII, a store’s ban on breast-feeding in public areas is not discrimination based on sex where there is no comparable class of males treated more favorably with regard to breastfeeding).

61. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc).

## II. Cognitive Bias at Work

### A. Status Quo Bias, Title VII, and Appearance Codes

The influence of the status quo bias is evident when courts consider gender-based grooming codes in the workplace. Since Title VII's enactment, lower courts have shied away from interpretations of the statutory language that would cover general appearance policies that establish different rules for males and females.<sup>62</sup> Although the courts give lip service to Title VII's policy of equal employment opportunities, the courts artificially limit the reach of the statute.<sup>63</sup> This court-imposed limitation on Title VII is missing from both the literalism of the text and the legislative history of Title VII<sup>64</sup>; instead, it reflects a predilection to maintain the status quo.<sup>65</sup> The legislative success in accomplishing gender equality depends upon the courts's ability to read the statutory mandate free from the anchor of their own gendered pasts. The consequences of change are for the legislature to sort out.

The basic language of Title VII is straightforward. Title VII prohibits employer discrimination "against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment . . . because of such individual's . . . sex."<sup>66</sup> Title VII contains one major exception—the bona fide occupational qualification ("BFOQ"), which allows employers to prove that they must use sex as a qualification when "reasonably necessary to the normal operation of

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62. See *infra* notes 83–98.

63. See generally Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 680 (1999) (explaining that gender stereotyping has descriptive and prescriptive components, and "the prescriptive component of gender stereotypes may function to bolster or maintain the existing social structure by rewarding women who conform to traditional gender roles and sanctioning women (and men) who violate those prescriptions").

64. Of course, legislative intent related to sex discrimination is lacking because the amendment adding "sex" to Title VII was done on one day's notice, with little floor discussion. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) ("The somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment—it was included in an attempt to defeat the bill, see C. & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17* (1985)—does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination.").

65. See generally Blasi & Jost, *System Justification Theory and Research*, *supra* note 26 (discussing human motivation to justify the status quo even when disadvantaged by it).

66. 42 U.S.C. § 2000e-2(e)(1) (2006).

that particular business or enterprise.”<sup>67</sup> The statutory exception of the BFOQ defense, even if it is applicable to employer decisions beyond hiring and employment,<sup>68</sup> would seem to be the logical basis for resting gender-based business requirements, and it places an evidentiary burden on employers. One needs to prove the requirements are essential to the job and that the qualifications are sufficiently related to the essence of the business.<sup>69</sup>

The actual operation of Title VII, when filtered through the judicial system, is less than straightforward in the case of grooming and appearance standards. Consider, for example, the case of *Jespersen v. Harrah's Operating Company, Inc.*,<sup>70</sup> where the employer imposed different grooming requirements for men and women. Harrah's policy demanded that female employees: keep their hair worn down, as well as “teased, curled, or styled”<sup>71</sup>; wear particularly colored nail polish and stockings; apply face powder, as well as blush and mascara; and finally, wear “[l]ip color . . . at all times.”<sup>72</sup> The policy only required male employees to maintain short and trimmed nails and hair, and abstain from wearing nail polish or make-up.<sup>73</sup>

Jespersen, an “exemplary” bartender for twenty years at Harrah's,<sup>74</sup> claimed that requiring women bartenders to wear make-up facially violated the no discrimination “because of . . . sex” proscription of Title VII.<sup>75</sup> The text supports Jespersen's argument, and nothing in the limited legislative history refutes that interpretation of the language of the statute; nor does the BFOQ defense help in these circumstances.<sup>76</sup> In the case of sex-based grooming requirements, and

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67. *Id.* (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”). See 29 C.F.R. § 1604.2(a) (2006) (EEOC guidelines provide BFOQ cannot be established based on abilities and attributes of the sexes or preferences of coworkers or customers).

68. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 244 (2004) (arguing that the BFOQ “[b]y rather ordinary principles of statutory interpretation, this limited allowance for sex-, religion-, and national origin-based discrimination never extends to sex discriminatory dress codes”).

69. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201–02 (1991).

70. 444 F.3d 1104 (9th Cir. 2006) (en banc).

71. *Id.* at 1107.

72. *Id.*

73. *Id.*

74. *Id.* at 1106–07.

75. 42 U.S.C. § 2000e-2(a)(1) (2006).

76. The “BFOQ,” which would involve the employer showing that make-up was a necessary adjunct of the job of selling alcohol at Harrah's, never became a conscious issue in

more specifically a women only make-up policy, the primary business must be sexual titillation; the business cannot simply be using sex to sell to slip in under the BFOQ exception.<sup>77</sup> For example, a casino like Harrah's would be required to prove that wearing make-up affected the ability to serve alcoholic drinks or come out and claim that sexuality was part of what they were selling—a failed defense even in the case of the Hooters's girls.<sup>78</sup> Nonetheless, courts have rejected that defense in the case of airline employees because their primary job is

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the Jespersen's en banc opinion. Customer preference is not a valid basis for a BFOQ. Rather, a BFOQ must relate to performance of the job. It is a very narrow exception to the statute. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). Title VII suggests that "permissible distinctions based on sex must relate to ability to perform the duties of the job." *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991). Of course, if a business states that it is selling sexual entertainment, for example, a Playboy Bunny Club, it is more likely to get away with appearance requirements and gender-based ones as well. *See* *St. Cross v. Playboy Club of N.Y.*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights App. Bd. 1971) (upholding appearance requirements where the primary purpose was "to titillate and entice male customers"). The question, therefore, becomes whether the employer is willing to make that claim in some cases. Harrah's, located in the female sexualized atmosphere of Reno, was not required under the Ninth Circuit's case law to make that showing, although it did claim it was entitled to a BFOQ. *See* Appellee's Answering Brief at 33-34, *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff'd*, 444 F.3d 1104 (9th Cir. 2006).

77. *See generally* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 148, 148 (2004) (discussing courts's unwillingness to allow BFOQs when employers seek to sexualize "mainstream," as opposed to sex jobs).

78. *See generally id.* at 204 (explaining how Hooters Air's deliberate marketing may make their sexual dress code less problematic). Hooters requires that its female employees wear sexually-revealing attire. The EEOC actually did not agree with Hooters's argument that its business was sexual recreation, as opposed to serving food, and that required the hiring of "Hooters' girls." Nevertheless, a settlement allowed Hooters to continue its sexual escapades as long as it created some gender-neutral positions, presumably Hooters's persons. *Compare* Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment: Can It Support a Hostile Work Environment Claim By a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 291-96 n.122 (1998) (arguing for Title VII coverage for sexual harassment claims for persons in sex related jobs and discussing Hooters litigation), *with* Kelly Ann Cahill, *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995) (proposing assumption of the risk theory for sexual harassment claims of women who work in highly sexualized environments such as Hooters).

to transport passengers safely,<sup>79</sup> and in the case of at least one restaurant, because the job of servers is to serve food.<sup>80</sup>

The plaintiff in *Jespersen* lost, however, because judicial authority excludes gender-based appearance and grooming codes from Title VII coverage.<sup>81</sup> In the *Jespersen* en banc opinion, the Ninth Circuit noted at the beginning of its analysis “[t]he settled law in this circuit . . . does not support . . . that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.”<sup>82</sup> In other words, one needs to show more than facial, sex-based discrimination to show sex discrimination in appearance policies.

Courts have used various rationales to exclude statutory coverage for appearance codes.<sup>83</sup> The courts found that they were too trivial to employment opportunities or too important to employers for Congress to have included them under Title VII.<sup>84</sup> Despite a varied ap-

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79. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (noting that “in jobs where sex or vicarious sexual recreation is the primary service provided, e.g., a social escort or topless dancer, the job automatically calls for one sex exclusively”). See also *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (rejecting BFOQ defense for hiring only female flight attendants noting that “[w]hile a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved”); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) (rejecting the argument that a “stereotyped customer preference” fit qualified as a BFOQ).

80. *Guardian Capital Corp. v. N.Y. State Div. of Human Rights*, 360 N.Y.S.2d 937 (App. Div. 1974).

81. The highly sexualized atmosphere of the Reno casinos never officially made any legal difference to *Jespersen*’s case. See *Yuracko*, *supra* note 77, at 149 (discussing the BFOQ defense generally where employers claim a “particular type of sexual titillation for their customers”). See generally Ann McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM (2006) (discussing the application of Title VII to women working in sexualized industries, specifically as blackjack dealers, casino cocktail waitresses, exotic dancers, and brothel prostitutes).

82. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc).

83. See *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (holding Title VII does not cover separate sex hair length policies because hair length is not immutable). See also *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (“Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.”); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (dress code requiring men to wear a necktie was not gender discrimination covered by Title VII). But see *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 666 (C.D. Cal. 1972) (explaining that the EEOC’s original position was that Title VII prohibited sex specific appearance standards).

84. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1401 (1992) (“There is, on the one hand, a tendency to denigrate and demean

proach, the courts managed uniformly to place centuries of gender-based appearance rules safely outside the grasp of Title VII. Rather than seeing an anti-bias law as a tool to de-bias the law governing appearance codes, the court re-framed the codes as neutral and maintained the status quo.<sup>85</sup> What results is an unexamined activism on the part of the judiciary as judges's interpretations undermine the forward marching orders of the law.

Given the lack of text or history to support the result, the courts considering the issue rested mainly on their intuition.<sup>86</sup> For example, one court, engaging in guesswork more than a realistic assessment of the statutory language, noted, "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."<sup>87</sup> Thus, employees could be "screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance."<sup>88</sup> Gendered dressing standards, however, are not neutral, nor are community standards appropriate when they contravene them.<sup>89</sup>

The courts also emphasized a perceived lack of connection between appearance codes and employment opportunities.<sup>90</sup> Claiming that the gendered codes had a trivial effect on employment opportunities, courts found challenges to gender-based grooming standards

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appearance claims, a faint suggestion that courts have better things to do with their time than adjudicate grooming standards. Suddenly, the tone becomes somber . . . when judges get to the part of their opinion where they uphold, as they usually do, the power of employers . . . to visit severe penalties on people who wear nonconforming dress or hairstyles. . . . [J]udges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices.").

85. See Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

86. Indeed, one commentator asserts that desiring courts to pay less attention to gender norms is a lost cause. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 30 (2000) (arguing that "[w]e can be certain, however, that to the extent that gender remains a culturally inescapable fact, it also will remain inextricably present in the application of Title VII").

87. *Willingham*, 507 F.2d at 1090.

88. *Id.* at 1092.

89. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that taking into account community racial biases in making a custody decision violated equal protection guarantees because "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

90. See, e.g., *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act.").



not within the purview of Title VII.<sup>91</sup> For example, one court, considering a challenge to men's hair length requirements, opined that hair length "is related more closely to the employer's choice of how to run a business than to ensure equality of employment opportunity."<sup>92</sup> The court's statement is based on unidentified assumptions about the nature of equal employment opportunity. Thus a categorical legal rule is born of deeply engrained and unexamined belief. Yet its arrival in the form of neutral statutory interpretation obfuscates the reality of the biased decision making at work.<sup>93</sup> As noted below, the courts's intuition that the codes do not affect employment opportunities and conditions of employment is wrong.<sup>94</sup> Thus, gender-based social norms—often the cause of problems that Title VII was meant to address—were grandfathered into Title VII by a judicial reading that privileged gender-based traditions.<sup>95</sup> The courts substituted (biased) gut instinct for analysis, overly identifying with employers and the status quo. For example, one court, identifying with the employer's desire to cater to entrenched social norms, noted:

Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take *judicial notice* of the employer's proper desire to achieve favorable acceptance.<sup>96</sup>

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91. See JONATHAN BARON, THINKING AND DECIDING 195 (3d ed. 2000) ("People tend not to look for evidence against what they favor, and, when they find it anyway, they tend to ignore it.").

92. *Willingham*, 507 F.2d at 1090. See also *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) ("[D]iscrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden."); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) ("Where, as here, such [personal grooming] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities.").

93. See generally Bartlett, *supra* note 29, at 2558 ("The real problem with the assumptions courts make about the trivial impact of dress and appearance requirements on employees and their importance to employers . . . is that they rely on unexamined, culture-bound judgments that will tend to reinforce existing, hidden prejudices and stereotypes.").

94. See discussion *infra* notes 136–149. The infiltration of personal judgment into "neutral" statutory interpretation also appears when the courts begin judging whether dress requirements place an "unequal burden" on women. See discussion and notes *infra* notes 109–111.

95. See *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) ("[R]easonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought there is unlawful discrimination 'because of sex.'"). Two examples of gender-based traditions include high-heeled shoes for women and no earrings for men. *Id.*

96. *Id.* at 1124–25 (emphasis added).

Courts that tried to create a theory to justify the results distinguished “mutable” from “immutable” characteristics.<sup>97</sup> Although creating less than a wholesale exception for appearance codes from Title VII coverage, this theoretical framework was still unhooked from the language and goals of Title VII. The theory was that if the employee has the ability to change the characteristic (such as hair length), then the employer is permitted more leniency to enact policies that discriminate on the basis of this characteristic. In contrast, if the characteristic in question is immutable (such as breast size), then the employer may not discriminate on the basis of that characteristic. These decisions are misguided attempts to compromise the language of Title VII where no reference to “mutability” exists.<sup>98</sup> Nor does mutability have anything to do with Title VII’s goal of equal employment opportunities. If an employer requires women to wear long nails and men short nails, Title VII’s stated goal of prohibiting discrimination because of sex in conditions of employment is implicated whether the employer is imposing the gender-based rules on mutable or immutable body parts.

As the case law developed, courts began to awaken to some of the problems that gender-based appearance codes cause. For example, cases involving dual-weight policies for flight attendants caused stirrings of understanding of the effect of dual-appearance policies on employment and employment opportunities.<sup>99</sup> Nevertheless, having exempted all appearance and grooming standards from Title VII, the courts had to backpedal to grant relief under Title VII. Rather than recognizing that the original rule exempting appearance and grooming standards was unwarranted and unwise, courts instead jury-rigged various rules to patch the problem. In so doing, courts have only exac-

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97. *Baker v. California Land Title Co.*, 507 F.2d 895, 896–97 (9th Cir. 1974). *See also* *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Jahns v. Mo. Pac. R.R. Co.*, 391 F. Supp. 761 (D. Mo. 1975).

98. Commentators noted the weaknesses of the “mutability” distinction. *See generally* Bartlett, *supra* note 29, at 2558–61 (criticizing the failure of courts to recognize that while dress and appearance are mutable, they are still critical to self-worth and dignity); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 838–89 (1987) (arguing that mutable and immutable distinction should be “meaningless” under Title VII).

99. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) (“The uncontroverted evidence shows that United chose weight maximums for women that generally corresponded to the medium frame category of MetLife’s Height and Weight Tables. By contrast, the maximums for men generally corresponded to MetLife’s large frame category . . . . Because of this consistent difference in treatment of women and men, we conclude that United’s weight policy between 1980 and 1994 was facially discriminatory.”).

erbated the problem by starting with an approach that sanctioned gender-biased distinctions.

One example is the development of the “unequal burdens” test by the Ninth Circuit in *Gerdom v. Continental Airlines, Inc.*<sup>100</sup> *Gerdom* involved dual-weight standards for male and female employees in the airline industry.<sup>101</sup> The distinguishing factor to the court was that differential gender standards in the other cases imposed no greater burden of compliance on either sex but, with regard to the weight issue, women faced a greater burden of compliance. The Ninth Circuit therefore announced that under Title VII “[a] sex differentiated appearance standard that imposes *unequal burdens* on men and women is disparate treatment.”<sup>102</sup> Imposing appearance rules on one sex only would violate Title VII.<sup>103</sup> Striking down the airlines’s weight policy, the *Gerdom* court said that employee appearance standards must be “evenhandedly applied to employees of both sexes.”<sup>104</sup>

The new “unequal burdens” test was unsatisfactory from the start, beginning with the misleading implication that equal burdens were even achievable objectives. Apparently unfazed by the disastrous historical record of a “separate but equal” rule, the Ninth Circuit plunged gender down the road where race no longer would tread.<sup>105</sup> The unequal burdens test is problematic for three different reasons.<sup>106</sup> First, it sanctions employer-imposed gender distinctions in dress requirements in violation of the language of Title VII, thus perpetuating gender stereotyping. If employers can require an employee’s appearance to mimic gender norms, which are inherently unequal, they perpetuate discrimination.<sup>107</sup>

Second, it skews the rules to place the burden on those challenging appearance policies, contradicting Title VII’s statutory design that

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100. 692 F.2d 602 (9th Cir. 1982).

101. *Id.* at 603.

102. *Frank*, 216 F.3d at 855 (emphasis added).

103. *Gerdom*, 692 F.2d at 607.

104. *Id.* at 606.

105. *Id.* See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (striking down “separate but equal” school assignments based on race because “separate but equal is inherently unequal”); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (holding that separate but equal facilities were constitutional and if they bore “a badge of inferiority,” it was “solely because the colored race chooses to put that construction upon it”).

106. Because of these problems, attempts to shore up the test by incorporating job-relatedness will not solve the underlying problem. Cf. Megan Kelly, *Making-up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah’s Operating Co., Inc.*, 36 GOLDEN GATE U. L. REV. 45, 63–67 (2006) (stating that job-relatedness should be incorporated in the test).

107. See generally Bartlett, *supra* note 29, at 2558.

placed the burden for BFOQs on the employer, a presumption of gender neutrality unless otherwise justified by the employer. Instead of applying the BFOQ exception, the courts have created a special exemption that requires the employee to show that the appearance policy imposes an unequal burden on men and women, that the policy is motivated by discriminatory purposes, or that the policy relates to an immutable characteristic. This scheme weights the scales in favor of the employer and the status quo by allocating to the challenger the difficult burden of showing that the appearance policy is not in line with “community norms.”<sup>108</sup> For example, saddling Jespersen with this burden allowed the court to carp that Jespersen presented no evidence that “Harrah’s motivation was to stereotype the women bartenders.”<sup>109</sup> Moreover, the Ninth Circuit majority opinion claimed the need to see and hear evidence “that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short.”<sup>110</sup> Setting aside the stubborn refusal to acknowledge that putting on and maintaining make-up is more burdensome than not wearing make-up,<sup>111</sup> the larger problem is the burden shifting that

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108. See generally Blasi & Jost, *System Justification Theory and Research*, *supra* note 26 (describing the theory of “system justification” behavior or motivation of humans to justify the social status quo even when victimized by it); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1584 (1998) (discussing powerful effect of status quo bias in contract negotiations).

109. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc). The opinion faults the plaintiff for complaining that she does not like make-up without providing any proof that applying daily make-up is a more onerous burden than not applying daily make-up or complying with a monthly haircutting chore:

Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short, but these are not matters appropriate for judicial notice. Judicial notice is reserved for matters “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” . . . As a result, we would have to speculate about those issues in order to then guess whether the policy creates unequal burdens for women. This would not be appropriate.

*Id.* at 1110. Such a conclusion is especially ironic, considering the courts took judicial notice of the fact that Congress did not want appearance and dress codes to be covered under Title VII. See *supra* note 96.

110. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc).

111. Judge Kozinski’s dissent reasoned:

I find it perfectly clear that Harrah’s overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. “teased, curled, or styled”

favors the status quo. The employer is not required to justify a gender-based policy; the employee must justify a gender-neutral policy.

Third, this ill-defined test of unequal burdens requires courts to balance the costs of gender-biased rules against each other, approving gender-biased work requirements as long as they are matched against equally gender-biased requirements. Equating mascara and teased hair with short hair and short nails reinforces gender stereotyping and does not tally up to gender equity. If one does the math, one gender-based burden on females added to one gender-based burden on males equals two gender-based employment burdens.

The results of these court decisions, inconsistent though they may be in reasoning, are consistent with the status quo bias. The courts are required to trade the certainty of accepted gender standards for the uncertainty of a requirement that employers demonstrate the need for those gender discriminatory policies.<sup>112</sup> The bias may be even stronger as employers paint the alternative to gendered guidelines in horror-story terms. In *Jespersen*, for example, the vision was of bartenders “who look like Hell’s Angels, employees of the WWE, cartoon characters, and/or wizards from the middle ages.”<sup>113</sup> The status quo, no matter the statutory directive, begins to look even better when the alternative is painted as so vividly ghastly. In addition, the employers have every incentive to resist what would be a transfer of power from them to the employees.<sup>114</sup> Of course, obscured by the spectacle of counter-cultural outlaws working the counters and cubicles in workplaces across the nation is the reality that employers can establish gender-neutral dress and appearance standards. If a particular employer does not like purple hair or large bracelets, the employer could prohibit it in a gender-neutral manner. If it is not gender neutral, the employer needs to show BFOQ status, a status that will re-

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hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. [ ] The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the “overall policy” more burdensome for the former than for the latter.

*Id.* at 1117 (Kozinski, J., dissenting) (citation omitted).

112. See Korobkin, *The Endowment Effect*, *supra* note 36, at 1237–39 (discussing studies where and noting that the “more difficult it is for individuals to compare two items in a proposed trade, the larger the endowment effect tends to be”).

113. Brief for Council for Employment Law Equity et al. as Amici Curiae Supporting Defendant-Appellee at 11, *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (No. 03-15045).

114. See Korobkin, *The Endowment Effect*, *supra* note 36, at 1267 (“A corollary to the prediction that the endowment effect will entrench the regulatory status quo is that imposing new or more stringent regulations on existing entitlements will tend to be disfavored relative to regulating new entitlements.”).

quire the employer to articulate specific job needs that relate to business. Jespersen's position would not yield workplaces that look like the bar scene in *Star Wars IV*.<sup>115</sup>

These judicial interpretations display a reflexive activism that blocks implementation of the statute. The courts are willing to allow employers to force employees to conform to gender stereotypes after the initial hiring process, limiting the protection of Title VII and imposing a bundle of disadvantages that are tied to the gendered practice. Without forcing legislators to debate the exceptions, or employers to defend them, these exceptions grandfather in gender-discriminatory practices. These practices perpetuate stereotypes but are hidden from view, safe from attack, and free to wield their enormous power behind the scenes.<sup>116</sup>

## B. Categories and the Burdens of Appearance Standards

When courts claim that separate male and female dress and appearance codes have nothing to do with equal employment opportunities, they ignore the problem of stereotypes. This oversight is not

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115. Jespersen, on the other hand, is articulating a position that might not even have much traction with either employees or females given generally prevailing stereotypes. Because we are entrenched in a world wedded to the practices we adopted before we awoke to the problems of gender discrimination, many people, women included, wear make-up. They may not mind because they are themselves affected by status quo bias. Cognitive bias affects both males and females. See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Chuelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 438 (2003) [hereinafter Williams, *The Social Psychology of Stereotyping*]. The result is that Jespersen is on the field resisting the status quo with few supporters in the stadium.

116. Sometimes the facts scream so loudly that they pierce through the wall of silent stereotyping. For example, in one case the court was required to make assessments about the impact of a "color coordinated" uniform for women versus "customary business attire" for men. See *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1029 (7th Cir. 1979). Even probing a bit beneath the surface of the dual standards revealed the stereotyped reasoning of the employer, for example, to prevent "dress competition" and the fear of fad choices at the expense of work-appropriate clothing. To its credit, when directly confronted with this gender-based fear of fashion wars, the court pronounced the rule discriminatory because it subjected female employees to a lower professional status and was not justified by business necessity. *Id.* at 1032-33. Although not a very good rule, the court's creation of the exception at least exposed it to enough information to see the problem and move from the status quo. See also *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 439 n.24 (D.C. Cir. 1976) (upholding policy that did not allow female flight attendants to wear glasses); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 603-06, 611 (S.D.N.Y. 1981) (finding a Title VII violation where female employee was required to wear a skimpy "Bicentennial" costume that subjected her to lewd comments and sexual harassment because "it [was] beyond dispute that the wearing of sexually revealing garments does not constitute a [bona fide occupational qualification]").

surprising given the subtle and complicated nature of the problem. Because these stereotypes are generally reinforcements of the gender-based status quo, they are never harmless and more often than not asymmetrical in the burdens that they invoke. Yet Title VII developed before we became more aware of the bias that lurked beneath our conscious selves.<sup>117</sup> We now know that, in addition to the problem of proving conscious overt discrimination and catching the clever intentional discriminator, a large part of the problem in the area of race and sex discrimination is how the mind makes implicit associations with these categories.<sup>118</sup>

For example, in the en banc *Jespersen* opinion, the court held the requirement of make-up for women only was not gender discrimination under Title VII. Specifically, the Ninth Circuit held that Jespersen had failed to prove the make-up requirement (which men are not bound by) places unequal burdens on women.<sup>119</sup> The court also rejected Jespersen's sex-stereotyping claim because she had not provided proof of a motive to stereotype women, and there was nothing to suggest "that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear," or "the grooming standards would objectively inhibit a woman's ability to do the job."<sup>120</sup>

The quest for motivation evidence misses the point on several levels. First, the policy was intentionally discriminatory; it does not matter what the motive is. If an employer sets different dress guidelines according to race, we would not ask the challenger to show that

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117. See Krieger, *The Content of Our Categories*, *supra* note 19, at 1164–66.

118. See generally Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1072–75 (2006) (proposing affirmative programs "properly designed" to reduce implicit biases rather than to counteract the effects of past discrimination through set asides or preferences); Linda Hamilton Krieger & Susan Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006) (arguing that judges need to understand and apply accurate conceptions of social psychology in developing substantive legal theory); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious racial motivation—influenced by cultural experience—fuels racial discrimination); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 915 (1999) ("[E]mpirical psychology studies . . . show that intentional, conscious discrimination is only a small fraction of workplace discrimination and that most discriminatory acts result from unconscious stereotyping and cultural bias that never enter into the decision maker's conscious mind—hence the outrage felt by defendants when accused of intentional discrimination.").

119. See discussion *supra* notes 109–111.

120. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

the motive was to stereotype. The facial nature of the policy satisfies the intent requirement: that an employer may be oblivious to the effects is irrelevant. Second, the policy was likely the result of reflexive discrimination. In our society, women are perceived as best seen in make-up, and men are perceived as women if they wear make-up. Hence, the Harrah's policy accords perfectly with prevailing stereotypes and certainly with prevailing stereotypes in Reno, Nevada.<sup>121</sup> The court's opinion misunderstands stereotypes—they are categories that we most often form reflexively, not easily found in the course of the litigation discovery, but the result of implicit associations. Requiring proof of intentional, conscious discrimination erects an effective barrier to the claims and undermines the point of the statute.

The Supreme Court understood the concept when it held that although females as a group live longer than males, employers could not require individual females to contribute more to a pension plan.<sup>122</sup> Dismissing this statistically provable fact with almost a yawn, the Court explained “[e]ven a true generalization about the class is an insufficient reason for [discrimination].”<sup>123</sup> The Court lectured that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”<sup>124</sup> When the Supreme Court interpreted Title VII to cover same-sex sexual harassment, it was based on the principle that the statute “not only covers ‘terms’ and ‘conditions’ [of employment] in the narrow contractual sense, but ‘evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.’”<sup>125</sup>

The Supreme Court also recognized the concept of gender stereotyping and its coverage under Title VII in the early 1990s in *Price Waterhouse v. Hopkins*.<sup>126</sup> Turned down for partnership, Ann Hopkins

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121. See Appellee's Answering Brief at 26, *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff'd*, 444 F.3d 1104 (9th Cir. 2006) (“It is axiomatic that in modern society many women wear make-up, and that make-up is an accepted social norm.”). It is naïve to assume that the actually smoking gun or circumstantial evidence of the smoking gun was available to produce. A large employer like Harrah's is unlikely to make the rookie mistake of sending a memo attesting to its discriminatory motive. Attorneys and legally astute managers ensure cleansing of such evidence of discriminatory motivation if it exists.

122. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

123. *Id.* at 709.

124. *Id.* at 707.

125. *Oncale v. Sundowner Offshore Drilling Svcs, Inc.*, 523 U.S. 75, 78 (1998) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

126. 490 U.S. 228, 250–52 (1989).



produced statements laced with language that pointed out the partners' distress with her woeful failure to live up to gender norms. Feeling free to spew their honest opinions, the partners wrote that they considered her too "macho," that she needed to take a "course at charm school" and to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>127</sup> Hopkins hit the jackpot because the partners were in touch with their real feelings, and, most importantly, they put it in writing. The Supreme Court had a case where probing unconscious stereotyping was not even necessary, and the Court was quick to outlaw stereotyping that was so clearly articulated:

[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, for "[i]n 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. . . ."<sup>128</sup>

*Price Waterhouse* made the process too easy. The Court, recognizing sex stereotyping when it got up and smacked the Court in the face, exuded overconfidence: "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"<sup>129</sup> But it does take some training in cases where the stereotyping is so well accepted that it eludes notice.

Courts are reluctant to credit social science testimony for a variety of reasons.<sup>130</sup> Although in *Price Waterhouse*, the employee, Ann Hopkins, provided expert evidence on gender stereotyping, the Supreme Court seemed reluctant to credit it.<sup>131</sup> Nevertheless, the courts need to grapple with this information, if only to be cognizant of the potential of their own internal biases, and self-correct when making decisions. Moreover, the failure to consider developments in cognitive

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127. *Id.* at 234–35.

128. *Id.* at 251.

129. *Id.* at 256.

130. See *McClesky v. Kemp*, 481 U.S. 279 (1987); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); GERALD ROSENBERG, *THE HOLLOW HOPE* (1991); ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* 17 (1998); Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 *AM. PSYCHOLOGIST* 52 (1987); D.L. Faigman & J. Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, 56 *ANN. REV. OF PSYCHOL.* 631, 640 (2005); David L. Faigman, *To Have and Not Have: Assessing the Value of Social Science to the Law as Science and Policy*, 38 *EMORY L.J.* 1005 (1989); Constance R. Lindman, *Sources of Judicial Mistrust of Social Science Evidence: A Comparison of Social Science and Jurisprudence*, 64 *IND. L.J.* 755 (1989); J. Alexander Tanford, *The Supreme Court and Psychology*, 66 *IND. L.J.* 137 (1990).

131. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989).

science leaves us ignorant of the way stereotyping may silently saturate our thinking, therefore leading to decisions that reinforce a gendered status quo.<sup>132</sup> The *Price Waterhouse* court applied gender stereotyping analysis in an easy case. It is up to all courts to explore the intricacies of stereotyping beyond the obvious example in *Price Waterhouse* and to apply the *Price Waterhouse* concept in cases where the stereotyping is embedded in culturally accepted practices, as is the case in *Jespersen* and other appearance cases.

In *Price Waterhouse*, the Supreme Court dealt with a situation where the employer obviously spoke disparagingly of a female employee who failed to conform to gender stereotypes. According to the *Jespersen* en banc majority, “[i]mpermissible sex stereotyping was clear [in *Price Waterhouse*] because the very traits that she was asked to hide were the same traits considered praiseworthy in men.”<sup>133</sup> Of course, *Jespersen* was asked to hide her face behind make-up, while lack of make-up was considered the preferred attribute of men. If cosmetics make the female bartender, perhaps the problem is sex stereotyping.<sup>134</sup> In the en banc *Jespersen* opinion, the court clearly carved out an appearance and grooming policy exception to the *Price Waterhouse* rule. The *Jespersen* court thus comes to the odd conclusion that if *Price Waterhouse* had a formal written policy requiring its female employees to wear make-up, it would not have been evidence of sex discrimination actionable under Title VII.

The *Price Waterhouse* and *Jespersen* cases both involved female plaintiffs who were required to conform to gender norms or they would be forced to lose their jobs. Harrah’s requirements—that *Jespersen*’s lips be made redder with lipstick, her cheekbones higher with blush, and her eyelashes longer with mascara—are consistent with gender-based customs. Make-up is intimately associated with the female quest to be considered attractive. With some exceptions involv-

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132. See generally Eugene Borgida, Corrie Hunt & Anita Kim, *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 J.L. POL’Y 613, 617 (2005) (“Gender is a fundamental dimension of categorization. Once an individual is categorized as belonging to a gender, the stereotypes of that gender may quickly come to the perceiver’s mind, a process known as stereotype activation. Once stereotypes are activated, they are then available for the perceiver to apply in her thinking about and evaluation of the target person. It is important to note that categorization, stereotype activation, and stereotype application can all occur outside of the perceiver’s awareness.”).

133. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1111 (9th Cir. 2006) (en banc).

134. See *Price Waterhouse*, 490 U.S. at 256 (“[I]f an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”).

ing the stage and screen, make-up is negatively associated with males. Natural faces are the norm. Wearing it is often expected of women and taboo for men. These rules are born of a time when women were not entitled to equal rights under the law and they occupied a lower social status, where their role was viewed in part as ornamental and their worth often judged by their appearance. Appearance matters because it is a vivid signaling device for our brains and serves as a basis for the opinions we hold—opinions that are often based on stereotyped viewpoints.<sup>135</sup>

The claim that Harrah's is trying to project a "professional" appearance indicates that Harrah's wants to project an appearance that a customer—well schooled in gender biases—will find comfortable. Gender-neutral "professional" guidelines are fine, but gender-based ones ignore the downsides of the automatic connections made and require (at a minimum) a BFOQ justification.<sup>136</sup> Studies indicate that the brain does not process gender in isolation but associates it with a myriad of cross-references that reflect stereotyped views of women.<sup>137</sup> When someone wears make-up, our minds do not compartmentalize that fact and note it with detachment. Once tagged male or female, the synapses begin snapping in our brain and a flood of implicit as-

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135. See generally Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509–10 (1991). The danger inherent in gendered stereotypes is ironically revealed in Judge Posner's assertions that Title VII could not include appearance codes. Such a reading of Title VII, he offered, would be a "strange extension" potentially requiring male workers to "wear nail polish and dresses and speak in falsetto and mince about in high heels." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003). Interestingly, Posner's description of classically gendered notions of female attire contains within it a disparaging account of those who typically inhabit such garb. Wearers of high heels "mince"—a manner of walking defined by Webster's as "to walk with short steps in a prim affected manner." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 790 (11th ed. 2003). Vain, shallow, and "affected" people mince. Purposeful, thoughtful, and authoritative people stride, hasten, or proceed. Mincing is not a respected way to move. If, as Posner suggests, people wearing high heels mince, and, in the natural order of things, women wear high heels (while men wear low), then the clothes—and the stereotypes they conjure—are indeed "making" the man, and "unmaking" the woman.

136. Ironically, the casinos, other employers, and even the courts, understand the stereotyping function of dress and appearance. See Kathryn Hausbeck, *Who Puts the "Sin" in "Sin City" Stories? Girls of Grit and Glitter in the City of Women*, in *THE GRIT BENEATH THE GLITTER: TALES FROM THE REAL LAS VEGAS* 233, 345–46 (2002) ("Sin City [Las Vegas] is not a town rife with sex, but it is a city that systemically uses women's bodies to sell everything other than sex.").

137. See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 196–97 (1995).

sociations pour out extinguishing any gender neutrality<sup>138</sup> and influencing our evaluations of persons and groups.<sup>139</sup> As others have pointed out, seeing someone with make-up calls up a catalog of other characteristics associated with females.<sup>140</sup> It permeates our thinking. In addition to restricting women to narrow roles,<sup>141</sup> merely dressing as a stereotypical female may create an impression of less competence, or at best it creates benevolent stereotypes that provide support for a system of gender inequality.<sup>142</sup> Studies suggest that stereotypes may

138. See *id.* at 196–97; T. Andrew Poelhman et al., *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Value* (2005) (finding that implicit biases correlate with actual behaviors). See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing implicit attitudes and stereotypes); Williams, *The Social Psychology of Stereotyping*, *supra* note 115 (discussing studies).

139. See Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 364 (D.T. Gilbert, S.T. Fiske & G. Lindzey eds., 1998); Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493, 511–13 (1995); Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 6 PSYCHOL. SCI. 136, 140–41 (1996).

140. See also Anke Rennekampff, *You Look So Feminine! When Did You Fail the Last Time? Social Interaction Following The Think Manager—Think Male Stereotype*, BRANDEIS GRAD. J. (2004), available at <http://www.brandeis.edu/gradjournal/2004/v.rennenkampff2004.pdf> (study results “show that applicants with a masculine physical appearance were promoted more often and were perceived to have higher leadership competence than applicants with a feminine physical appearance.”). See generally Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037, 1045 (1999) (“Experimental data demonstrate that we do not see other people simply as people; we see them as males or females.”).

141. Williams, *The Social Psychology of Stereotyping*, *supra* note 115, at 409 (“People and jobs both are gendered, which gives stereotypes a profound effect on everyday interactions in the workplace.”).

142. For example, seeing women as warm and empathetic, good qualities, “may actually undercut perceptions of their competence.” See John T. Jost & Aaron C. Kay, *Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification*, 88 J. OF PERSONALITY & SOC. PSYCHOL. 498 (2005) (discussing the role of stereotyping in maintaining support for the status quo and finding that “[t]emporary activation of culturally available gender stereotypes does lead women—and in some circumstances men—to embrace the system (with its attendant degree of inequality) more enthusiastically than they otherwise would.” *Id.* at 508); see also Sandra Monk Forsythe et al., *Dress as an Influence on the Perceptions of Management Characteristics in Women*, 13 HOME ECON. RES. J. 112 (1984); Barbara L. Frederickson & Tomi-Ann Roberts, *Objectification Theory: Toward Understanding Women’s Lived Experiences and Mental Health Risks*, 21 PSYCHOL. WOMEN Q. 173, 179 (1997) (“Theories of socialization would predict that with repeated exposure to the array of subtle external pressures to enhance physical beauty, girls and women come to experience their efforts to improve their appearance as freely chosen or even natural.”); Joan Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 6 (2003) (noting problems of employer “benevolent” stereotyping—“the employer policies men and women into traditionalist bread-winner/housewife roles—clearly an inappropriate role for an employer to play”).

harm our performance by just being “in the air,”<sup>143</sup> as part of our environment. Such stereotypes shape our actions, cabin our ability to make counter associations, and contribute to prejudicial attitudes.<sup>144</sup> Gender stereotypes are a bundle of favorable and unfavorable qualities.<sup>145</sup> Although a woman in make-up might evoke an initial flattering stereotype, the complementary stereotype might be one undercutting a perception of job competence.<sup>146</sup> Moreover, once the courts allow gender-based policies to go unexamined, the burden of biases is reinforced,<sup>147</sup> and as a result, there is a tendency to ignore information that is inconsistent with the stereotypes.<sup>148</sup> Significantly, most of this processing goes on behind the scenes in our minds and there are no observable symptoms, unlike those produced by viruses or spoiled food.<sup>149</sup>

### C. Playing the Frame Game—the Make-up Edition

How we ask a question can determine the answer.<sup>150</sup> Remember, that in considering a risky medical procedure, how your doctor phrases the five year survival statistics—whether she notes that ten percent are dead or says that ninety percent are alive—makes a difference in the answers given.<sup>151</sup> The frame affects the answer because it provides the mental structure that our brain uses to connect to other ideas. In the first example, our brain connects to the risk of death, not a positive frame when you undergo a medical procedure. In the second example, our brain connects to the idea of survival, which is far more appealing. Once the brain has the frame highlighted, it is hard

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143. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997); see also Jost & Kay, *supra* note 142, at 498 (“Social stereotypes are indeed powerful environmental stimuli that do not depend on conscious, personal endorsement for their effects to be palpable.”).

144. Ad van Kippenberg & Ap Dijksterhuis, *A Posteriori Stereotype Activation: The Preservation of Stereotypes Through Memory Distortion*, 14 SOC. COGNITION 21, 46–48 (1996).

145. See Jost & Kay, *supra* note 142, at 499.

146. *Id.* at 498.

147. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 926–37 (1999).

148. *Id.*

149. See Wilson & Brekke, *Mental Contamination and Mental Correction*, *supra* note 31, at 116, 121 (“Although people cannot observe rhinoviruses, a stuffed-up nose tells them they have a cold. If one is wondering whether a gallon of milk is fresh or spoiled, a quick whiff will reveal the answer. There are seldom such observable symptoms, such as smell, temperature, or physical appearance, indicating that a human judgment is contaminated. As a result, people are often unaware that their judgment is ‘spoiled,’ in Jacoby and Kelley’s (1987) terms. Human judgments—even very bad ones—do not smell.”).

150. See discussion *supra* Part I.C.

151. See *supra* note 53 and accompanying text.

for our mind to rid itself of the image; it infects your thinking about the whole issue. Whether you have that operation may depend on how the doctor asked the question more than the cold hard statistics of survival and death rates.

Framing plays a role in judicial decisions because lawyers understand the value of framing. In *Jespersen*, for example, Harrah's, wise to the value of framing its appearance policies in a neutral manner, developed a "Personal Best" policy.<sup>152</sup> Stated in impartial terms, the idea is that a good employee is an employee with good grooming. Having hooked into this clean and wholesomely neutral idea, the policy then diverges into two standards of Barbie and Ken grooming.<sup>153</sup> Women must engage in daily application of foundation, blush, mascara, and lipstick in accord with a specially created face template, keeping their hair "teased, curled, or styled" while men are tasked with the monthly chore of keeping their hair and nails short.<sup>154</sup>

Here, the frame is critical to the court's opinion because the frame sets the stage for the result. Now, the court could have reacted to the "Personal Best" policy in at least two ways. It could use a frame that highlighted: (1) the different male and female grooming standards that reflected gender stereotypes; or (2) the "equality" of just having grooming standards generally for males and females. The problem with the second frame is that it avoids addressing the inequality of the individual standards. The Ninth Circuit bought Harrah's frame, claiming that equality triumphed by highlighting that grooming standards existed for both males and females.<sup>155</sup> Pulling

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152. See *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987) (men jogging shirtless); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977) (requiring men to wear ties); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (men forbidden from having long hair, but not women); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973) (marine reservists wearing wigs); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972) (short hair on men); *State v. Vogt*, 342 N.J. Super. 368 (N.J. Super. Ct. App. Div. 2001) (men may appear topless, women not so much).

153. A previous challenge to a casino requirement of a Barbie doll image was rejected under Title VII. *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 913-14 (D. Nev. 1993).

154. All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hairstyles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

*Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

155. *Id.* at 1106.

back the camera to this wide-angle shot obscures and minimizes the inequities.

Consider the following statements from the majority en banc opinion, which served to frame the case. Each focuses on the policy as fair and balanced, while ignoring the policy's distinct dissimilar and lopsided gender-based requirements:

In contrast [to a case involving different weight requirements for men and women], this case involves *an appearance policy that applied to both male and female bartenders*, and was aimed at creating a professional and *very similar look* for all of them. *All bartenders wore the same uniform*. The policy only differentiated as to grooming standards. . . .<sup>156</sup>

This case stands in marked contrast [to the case applying different weight policies to male and female employees], for here we deal with requirements that, on their face, *are not more onerous for one gender than the other*. . . .<sup>157</sup>

While [Harrah's] individual requirements differ according to gender, *none on its face places a greater burden on one gender than the other*. . . .<sup>158</sup>

Harrah's "Personal Best" policy is very different [from Price Waterhouse]. The policy does not single out Jespersen. *It applies to all bartenders, male and female*. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. *It is for the most part unisex*, from the black tie to the non-skid shoes. . . .<sup>159</sup>

This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy *that applies largely the same requirements to both men and women*.<sup>160</sup>

All these frames have the ninety-six percent fat-free problem. They focus on the equality of the standards when they differ by four percent. Despite creative framing, the bartenders, although performing the exact same job, were not required to wear the same uniform. Female bartenders were required specifically to conform to feminine appearance stereotypes by wearing make-up and male bartenders were required to conform to male appearance stereotypes by not wearing make-up. These rules did not level the playing field, as the court's language attempts to imply, but transformed a job that has no specific gender requirements (pouring drinks and dealing with customers) by adding a requirement that the employee conform to gen-

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156. *Id.* at 1109 (emphasis added).

157. *Id.* (emphasis added).

158. *Id.* (emphasis added).

159. *Id.* at 1111–12 (emphasis added).

160. *Id.* at 1109–13 (emphasis added).

der norms. Two equally adept bartenders, one male and one female, will sink or swim solely upon their ability to conform to the make-up requirement.

The framing game is easy to play, of course, and certainly the clever understand and play the game. Ultimately, it is a word game that preys on cognitive biases, rather than analytical clarity. At the end of the day, if equality is simply a matter of creative framing, for example, “separate but equal,” sloganeering replaces analysis, and arbitrary results become the rule.<sup>161</sup>

Judges should take care to avoid deceptive framing, concentrating more on logic and reasoning and less on selling the result through creative word play that does not further the intellectual enterprise.<sup>162</sup> When crafting the question becomes the real work—so the desired results automatically follow—it can lead to opinions that are intellectually hollow and easily manipulated. In the appearance cases, troubled by upsetting the gendered status quo, the courts have struggled to come to the desired result through a variety of methods. Framing inequality as a case of “unequal burdens” is one tack, but it is more gimmick than sophisticated analysis and thus more disheartening than convincing.

## Conclusion

The courts, cemented to a status quo of gendered appearances, have creatively devised theories to sidestep Title VII’s anti-discrimination directive. When interpreting anti-discrimination legislation such as Title VII, courts must be conscious of the reflexive drive to resist the changes demanded by the legislation. The inequities in appear-

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161. The federal district court in *Jespersen* played the game as well, noting that the requirement that women only wear make-up was as much of a burden on men who could not wear make-up. *Jespersen v. Harrah’s Operating Co., Inc.*, 280 F. Supp. 2d 1189, 1193 (D. Nev. 2002), 392 F.3d 1076 (9th Cir. 2004), *reh’g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff’d*, 444 F.3d 1104 (9th Cir. 2006). At one level, there is the perfect symmetry that her male counterpart cannot wear make-up, and would lose if they chose to challenge that requirement. This “separate but equal” concept is rejected in race cases, but still popular in gender and sexual orientation cases, and builds on the notion that the inherent biological differences between male and female must find accommodation in the law. One problem, of course, is that the limited exception swallows the rule, as the courts see cultural expressions as biological imperatives. Moreover, framing skills allow equality to be spun out of inequality—the majority of men do not in fact long to wear lipstick, high heels, or skimpy uniforms and the courts are disingenuous for suggesting to the contrary.

162. See *supra* text accompanying notes 57–59. See also Marybeth Herald, *A Bedroom of One’s Own*, 16 YALE J.L. & FEMINISM 1, 8–11 (2004) (noting the framing issue in the area of substantive due process claims).



ance policies are not trivial, but rather reinforce stereotypes that magnify the distinctions between genders. Requiring employees to dress and play their respective gender roles, without employer justification, sets in motion deliberate and repetitive reinforcement of biased gender roles. These small biases trigger larger ones, and added to their self-perpetuating nature, help grind out the substantial distinctions between genders over time. Artfully selling the status quo in judicial opinions through framing strategies is a poor substitute for a thoughtful analysis of the complex issues raised by Title VII specifically and gender inequality generally.

When trying to change the rules of the gender game, our own minds are our most elusive and hardy opponents. Generally, courts must become more attuned to issues of cognitive bias. Our decision-making processes are flawed, but awareness of the problem and corrective action will increase our chances of succeeding in the quest for implementing gender equality.

