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The Antidiscrimination Paradox: Why Sex Before Race?

Kimberly A. Yuracko
Northwestern University School of Law, k-yuracko@law.northwestern.edu

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Kimberly A. Yuracko*

* Professor, Northwestern University School of Law. I am grateful for comments and suggestions on earlier drafts from Al Alschuler, Michael Barsa, David Dana, Mark Kelman and Andy Koppelman. I am also grateful for thoughtful questions and encouragement from Liz Emens, Suzanne Goldberg, Katherine Franke, Susan Sturm and the participants of the Legal Theory Workshop at Columbia Law School. Finally, I would like to thank my library liaison, Marcia Lehr, and my research assistant, Elizabeth Mooney for their invaluable contributions.

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This paper seeks to explain a paradox: Why does Title VII's prohibition on sex discrimination currently look so much more expansive than its prohibition on race discrimination? Why in particular, do workers appear to be receiving greater protection for expressions of gender identity than for expressions of racial identity? I argue that as a doctrinal matter, the paradox is illusory—the product of a fundamental misinterpretation of recent sex discrimination case law by scholars. Rather than reflecting fundamentally distinct antidiscrimination principles, the race and sex cases in fact reflect the same traditional commitments to ending status discrimination and undermining group-based subordination. Nonetheless, as a practical matter, the paradox is real. Courts are more likely to protect workplace expressions of gender identity than racial identity. The divergence, I contend, flows not from law, but from culture--in particular society's ongoing commitment to racial transcendence and gender essentialism.

TABLE OF CONTENTS

INTRODUCTION

In 1964, when Title VII[1] was passed, its target was clear. At the time, African Americans were routinely excluded from jobs and even from whole industries.[2] Women too were confined to "pink collar" jobs and often barred from the more prestigious and profitable positions reserved for men.[3] Title VII sought to end this kind of categorical status-based discrimination.

In the ensuing years, a great deal has changed. No longer do women and minorities face categorical barriers to entry into the work world. Employers seek workers who possess technical job qualifications and who project the right corporate image. Those women and minorities who have the right qualifications and "fit" the corporate mold are readily included.[4]

But "fitting the corporate mold" has race- and sex- based implications, and one of the great insights of recent employment law scholarship has been the recognition of those implications. Workplace conformity demands are raced, scholars argue, in that they often require employees to match white middle class

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[1] 42 U.S.C. § 2000e-2(a) (1) (2000).

[2] *See, e.g.,* Albermarle Paper Co. v. Moody, 422 U.S. 405, 409 (1975) (employer operated a racially segregated plant reserving high pay and high skill jobs for whites); Griggs v. Duke Power Co., 401 U.S. 424, 426-28 (1971) (employer refused to hire blacks to any but its lowest paying jobs).

[3] Diane Bridge describes, for example, a Westinghouse manual from the early 1900's which provided that: "the lowest paid male job was not [to] [sic] be paid a wage below that of the highest paid female job, regardless of the job content and value to the firm." She also quotes the International Ladies' Garment Workers' Union contract from 1913 which limited women to the less skilled jobs and provided that "the highest paid female could not earn more than the lowest paid male." *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 599 (1997).

[4] This is not to suggest that status-based discrimination no longer exists, only that it has diminished and rarely takes the open and explicit forms of the past.

norms of dress, speech, appearance and behavior.[5] Workplace conformity demands are gendered in that they require employees to embrace traditional conceptions of masculinity and femininity.[6] Title VII, these scholars argue, should protect workers from such assimilationist conformity demands.

Certainly not all scholars agree. Richard Ford, most notably, has objected to protecting employees from conformity demands with which they can choose to comply.[7] He worries that protecting workers' expressions of racial or gender identity will essentialize groups based on traits and attributes that may be both contested and harmful.[8] Nonetheless, the critical debate in employment law in

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[5] *See generally* Tristin K. Green, *Work Culture and Discrimination*, 93 CAL . L. REV. 623, 646 (2005) (arguing that workplace cultures "define acceptable and favored behavior along a white, male norm"); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2029 (2005) (describing as "transparently white decisionmaking" the process by which employers define workplace rules and expectations according to white cultural norms); KENJI YOSHINO, COVERING 131 (describing the racial covering demands imposed on minority workers in order to conform to white assimilationist workplace demands); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1294 (2000) (describing the "identity work" minority employees must do to comply with white cultural workplace norms); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 NYU L. REV. 1134, 1194-95 (2004) (describing employers' shift from facially discriminatory policies to facially neutral ones that prohibit racially associated behaviors and attributes).

[6] *See generally* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provisions to Redeem Title VII*, 76 TEX. L. REV. 317, 340-41 (1997) (explaining that "courts have found that it is legal for employers to rely on what they see as dominant societal rules about how men and women should dress. Although courts have long held that Title VII prohibits employers from relying on stereotypes about men and women, courts in these cases overtly and unapologetically have allowed them to do just that."); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 66-68 (1995) (arguing that sex-specific dress codes constitute sex discrimination under Title VII); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2543-44 (1994) (describing and explaining courts' allowance of substantially different dress and appearance standards for female and male employees).

[7] *See* RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 188-190 (2005).

[8] *See* Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics, in* LEFT LEGALISM/ LEFT CRITIQUE 38, 55 (Wendy Brown & Janet Halley eds., 2002) (discussing the dangers of essentializing groups by defining them in terms of the traits they have historically

recent years has been over the appropriate degree of judicial deference to workplace assimilation demands.

In the sex context, many scholars argue that courts have already adopted a new anti-assimilationist antidiscrimination principle—one that protects workers from demands that they perform their gender in sex stereotyped ways.[9] Scholars point for support to *Price Waterhouse v. Hopkins,* in which the Supreme Court held that an employer's refusal to promote a female employee because she was deemed overly masculine was a form of sex discrimination.[10] They also point to the widespread circuit court protection of male employees harassed because they are deemed overly feminine,[11] and the Sixth Circuit's protection of pre-operative male-to-female transsexuals disciplined for cross-dressing.[12]

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been permitted to have); Richard T. Ford, *Race as Culture? Why Not?* 47 UCLA L. REV. 1803, 1804-06 (2000) (questioning whether the rights-to-difference approach is the best mechanism for challenging status group oppression).

[9] *See* Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205, 219 (2007) (contending that *Price Waterhouse* articulated the principle that "nonconformity to gendered expectations can constitute a form of statutorily proscribed sex-discrimination."); Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins, in* EMPLOYMENT DISCRIMINATION STORIES 65, 66 (Joel Wm. Friedman ed., 2006) (arguing that Price Waterhouse should be read as a case that would "condemn decision making that is tainted by group stereotypes" and noting that this "broader reading has been a linchpin of a generation-long effort to find in Title VII's ban on sex discrimination some basis for the protection of gender nonconformists—gay men and lesbians, 'effeminate' men and 'masculine' women, transsexuals, and others whose sexual preferences and outward behavior defy conventional gender stereotypes"); Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work, in* EMPLOYMENT DISCRIMINATION STORIES 105, 135 (Joel Wm. Friedman ed., 2006) (arguing that "a number of recent judicial opinions" reflect an understanding of *Price Waterhouse* as being "fundamentally about gender nonconformity and sex stereotyping"); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L. J. (forthcoming, 2008), available at: http://ssrn.com/abstract=1015548 (contending that in *Price Waterhouse* "[t]he Supreme Court . . . modified . . . the traditional definition of 'sex' through judicial interpretation to include gender nonconforming behavior").

[10] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[11] *See* Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001); Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).

In the race context, however, scholars note that no similar principle has taken hold. Courts uniformly and explicitly refuse to protect minority workers from demands that they assimilate to culturally white dress, behavior and appearance norms. Courts refuse, for example, to protect African American women from workplace grooming codes barring cornrows[13] or to protect non native English speakers from English-Only workplace rules.[14]

These cases suggest a paradox. Although Title VII prohibits employment discrimination based on both race and sex, race was its primary target.[15] The

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Several other circuits have endorsed similar protection in principle. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (noting that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (stating that "[t]he Court in Price Waterhouse implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n. 4 (1st Cir. 1999) (explaining that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity") (citation omitted). Female workers harassed for their perceived masculinity have also received protection. *See, e.g.*, Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (denying employer's motion for summary judgment because plaintiff had presented evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance).

[12] *See* Barnes v. City of Cincinnati, 401 F.3d 729, 733-38 (6th Cir. 2005) (upholding a sex discrimination jury verdict in favor of a male-to-female preoperative transsexual denied a promotion to police sergeant for failure to conform to masculine sex stereotypes, including coming to work wearing makeup and a French manicure); Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a preoperative male-to-female transsexual diagnosed with Gender Identity Disorder who was discriminated against after he began "to express a more feminine appearance and manner on a regular basis, including at work" could state a claim for sex discrimination).

[13] *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224 (N.D. Ga. May 26, 1981); McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779 (N.D. Ga. Sept., 19, 1996).

[14] *See* Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).

[15] Section 703(a)(1) of Title VII makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

addition of sex was an afterthought, one commonly interpreted as an act of sabotage.[16] Moreover, sex received weaker protection than race under Title VII, just as it does under the equal protection clause.[17] Why then are courts currently interpreting Title VII so as to provide workers with more expansive protection from assimilationist demands under its sex discrimination prohibition than under its race discrimination prohibition? More specifically, why do courts appear to be adopting a new anti-assimilationist antidiscrimination principle in sex cases while rejecting such a principle in race cases?

In this paper I do not seek to join the normative debate over the extent to which antidiscrimination doctrine should protect anti-assimilationist conduct by workers.[18] I seek instead to make sense of the case law. My goals are two fold: first to explain when and why courts protect employees from workplace conformity demands that constrain expressions of racial or gender identity; second to explain why this protection looks more expansive in sex cases than race cases.

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terms, conditions or privileges o employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000).

[16] *See* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 168-69 (2004) (describing the process leading to the inclusion of sex in the Civil Rights Act of 1964).

[17] Title VII includes an exception to its general antidiscrimination mandate which permits discrimination on the basis of religion, sex, or national origin in "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." 42 U.S.C. § 2000e-2(e)(1) (1998). Title VII does not include a BFOQ exception for race. Moreover, while race receives strict scrutiny under the equal protection clause, sex receives the lower intermediate level scrutiny. *See* U.S. v. Virginia, 518 U.S. 515, 533 (1996) (noting that strict scrutiny has not been extended to classifications other than race or national origin).

[18] I have joined the normative debate in other articles. *See* Yuracko, *Trait Discrimination as Sex Discrimination*, *supra* note 16; Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

I begin in Part I by examining whether courts are in fact adopting a new anti-assimilationist antidiscrimination principle in sex discrimination cases. I conclude that they are not. Indeed, I argue that courts' rejection of such a principle in sex discrimination cases parallels their more explicit rejection of such a principle in race discrimination cases. In Parts II and III, I consider the explanatory power of two more traditional antidiscrimination principles. Part II examines the extent to which courts' decisions can be explained by an antisubordination principle prohibiting conformity demands that reinforce race and sex hierarchies. Part III examines the extent to which courts' decisions can be explained by a status-based antidiscrimination principle prohibiting conformity demands that penalize traits that are more status-like than conduct-like. I conclude that courts' protection of nonconformists in both sex and race cases is best explained by these traditional antidiscrimination principles. The seeming divergence between race discrimination and sex discrimination jurisprudence is due not to doctrinal differences but to differences in the ways conformity demands operate in the two contexts.

I. AN ANTIASSIMILATION PRINCIPLE

In recent years, scholars have increasingly urged upon courts a new anti-assimilationist antidiscrimination principle. Title VII, they argue, should protect employees from demands that they "perform" their gender or race in accordance

with mainstream social norms.[19] In sex discrimination cases, courts have sometimes seemed to agree, while in race discrimination cases, courts' rejection of such arguments have been unwavering. In this Part I, argue that, contrary to initial appearances, the race and sex cases are in fact doctrinally parallel with both rejecting claims for anti-assimilationist protection under Title VII.

A. Gender Nonconformity

It is easy to understand why many recent scholars have read contemporary sex discrimination jurisprudence as incorporating a new anti-assimilationist antidiscrimination principle.[20] The Supreme Court's 1988 ruling in *Price Waterhouse v. Hopkins,* as well as numerous subsequent circuit court opinions, have encouraged such a conclusion.[21] Such a reading is, however, mistaken.

Price Waterhouse involved a claim of sex discrimination brought by a woman deemed insufficiently feminine by her employer. Ann Hopkins had worked at Price Waterhouse for five years when, in 1982, she was proposed as a candidate for partnership. At the time, the firm had 662 partners of whom seven were women. Of the 88 people proposed for partnership that year, Hopkins was the only woman.[22] Despite the fact that the district judge found that "[n]one of

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[19] *See* Carbado & Gulati, *supra* note 5 (criticizing demands that workers "perform" their racial or gender identity in particular ways); Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 887 (2002) describing covering demands as requiring that individuals "perform" their identities in particular ways).

[20] *See supra* note 9.

[21] 490 U.S. 228 (1989).

[22] *Price Waterhouse*, 490 U.S. at 233. Forty-seven of the candidates were admitted to the partnership, 21 were rejected, and 20 including Hopkins were held for reconsideration the following year. *Id.*

the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership,"[23] Hopkins was denied promotion.[24] The partner who was responsible for explaining to Hopkins the reasons for the company's decision advised that in order to improve her chances the following year, Hopkins should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[25] Hopkins sued alleging she had been the victim of sex discrimination.

The Supreme Court agreed, relying on an argument against sex stereotyping. "We are beyond the day," the Court explained, "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 resulting from sex stereotypes.'"[26]

The Court's language, prohibiting an employer from "assuming or insisting" that an employee conform to group stereotypes, distinguishes two types of workplace stereotyping: ascriptive stereotyping and prescriptive stereotyping. Ascriptive stereotyping occurs when an employer assumes that an

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[23] Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.C. D.C. 1985).
[24] *Price Waterhouse*, 490 U.S. at 233.
[25] *Id*. at 235 (quoting district court opinion at 618 F. Supp. at 1117). Before the time for reconsideration came, the partners in Hopkins's office withdrew their support of her and told her she would not be reconsidered for partnership. *Id*. at 233, n. 1.
[26] *Id*. at 251 (internal quotation marks omitted).

individual possesses certain traits and attributes because of her group membership. Prescriptive stereotyping occurs when an employer insists that an individual possess certain traits and attributes because of her group membership.

Ascriptive sex stereotyping had been illegal well before *Price Waterhouse*[27] and was not what Hopkins faced. She was not denied a promotion because her employer believed that she possessed stereotypically feminine traits and attributes. Hopkins was denied a promotion because she did not possess the stereotypically feminine attributes her employer thought appropriate and desirable for a woman. It was the Court's prohibition on prescriptive stereotyping that was critical to Hopkins' victory.[28]

Both the Court's ruling and its language in *Price Waterhouse* suggested then a broad new anti-assimilationist antidiscrimination principle--one protecting workers from prescriptive stereotypes demanding that they conform

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[27] *See e.g.,* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (striking down a federal statute providing dependent benefits for spouses of male service members but providing the same benefits to the spouses of female service members only upon their showing actual dependence for over one half of their support); Sprogis v. United Air Lines, Inc., 44 F.2d 1194, 1198-99 (7th Cir. 1971) (striking down the employer's no marriage rule, which applied only to female flight personnel because it was based on sex stereotypes about women's domestic role). *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544-45 (1971) (Marshall concurring) (arguing that an employer may not discriminate against female employees with young children based on evidence that women generally have more child-care responsibilities than men).

[28] It is not clear that the Court fully grasped how different these two forms of sex stereotyping were when it placed them quickly under the same label. Ascriptive stereotyping involves predictive judgments about what characteristics are possessed by persons of different sexes and typically affects employees at the hiring stage. Prescriptive stereotyping involves normative judgments about how people of different sexes should behave and constrains employees throughout their employment. Nonetheless, the Court's language in the case does make explicit reference to both types of stereotyping. See *id*. at 250 (asserting that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

to sex-appropriate gender norms. [29] Gender nonconformists, it seemed, were entitled to antidiscrimination protection. [30]

Plaintiffs wasted no time in seeking to take advantage of such protection. Male employees harassed because of their perceived effeminacy have been particularly successful. In *Doe by Doe v. City of Belleville*, for example, the Seventh Circuit ruled that the harassment of two boys who were perceived by their male co-workers to be insufficiently masculine constituted sex discrimination under Title VII.[31] In concluding that the plaintiffs had presented evidence sufficient to show that they had been harassed because of sex, the Seventh Circuit relied on the Supreme Court's anti sex stereotyping language from *Price Waterhouse*. The Seventh Circuit explained that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he

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[29] There is still a broader version of the antiassimilation principle calling for the protection of all expressions of personal identity, whether connected to one's gender identity or not, but since such a version is not grounded in antidiscrimination doctrine and is not a plausible account of courts' current antidiscrimination jurisprudence, I do not discuss it here.

[30] As the Court memorably explained: "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as a requiring 'a course at charm school.' Nor, . . . does it require expertise in psychology to know that, if 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." *Price Waterhouse*, 490 U.S. at 256.

[31] 119 F.3d 563 (7th Cir. 1997). *Belleville* involved the harassment of two sixteen-year-old brothers working for the city as summer groundskeepers. Both brothers were subject to taunts and abuse by their male coworkers, but one of the brothers, H. Doe, was the main target. The harassment of H. focused on the fact that he wore an earring and was perceived as overly feminine. *Id.* at 567. The Seventh Circuit's opinion in *Belleville* was vacated by the Supreme Court for further consideration in light of its decision in *Oncale*. City of Belleville v. Doe by Doe, 523 U.S. 1001, 1001 (1998). The case then settled before there was a decision on remand. The Supreme Court's decision in *Oncale* did not, however, directly challenge or retract the gender stereotyping logic set forth in *Price Waterhouse* on which the *Belleville* decision relied. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n. 5 (3d Cir. 2001) (opining that "there was nothing in *Oncale* . . . that would call into question" the holding in *Belleville* that harassment based on failure to live up to gender stereotypes was sex discrimination).

exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."[32]

The Ninth Circuit provided similar protection to the plaintiff in *Nichols v. Azteca Restaurant Enterprises, Inc.*[33] Antonio Sanchez worked as a host and then a food server at Azteca restaurants in Washington State.[34] During his four-year tenure at Azteca, Sanchez was subjected to a steady stream of taunts and insults focusing on his perceived effeminacy.[35] Relying on the Supreme Court's prohibition of sex stereotypes in *Price Waterhouse*, the Ninth Circuit held that Sanchez had suffered actionable sex discrimination.[36] "At its essence," the court explained, "the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. . . . *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here."[37]

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[32] *Id*. at 581.

[33] 256 F.3d 864, 875 (9th Cir. 2001).

[34] *Id*. at 870.

[35] According to the court, "Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'" *Id*. at 870.

[36] The Ninth Circuit concluded that the harassment was sufficiently severe to violate Title VII, that it was because of sex, and that the employer was liable for the harassment for failing to take adequate steps to stop it. *See id*. at 873, 874-75, 877.

[37] *Id*. at 874-75. The Ninth Circuit faced a similar case one year later in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc). Medina Rene worked as a butler on an exclusive floor of the MGM Grand Hotel reserved for wealthy and famous guests. *Id*. at 1064. All of the other butlers on the floor were male. *Id*. Rene was subjected to a constant stream of abuse from his supervisor and fellow butlers. *Id*. The conduct included "whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muneca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex." *Id*. In an en banc decision, a majority of the panel held that Rene had stated a claim for sexual harassment in violation of Title VII. *Id*. at 1068. In a plurality opinion of the court, Judge William Fletcher

In recent years, the Sixth Circuit has relied on *Price Waterhouse* to provide similar protection from gender conformity demands to transsexual cross-dressing men.[38] In *Smith v. City of Salem*, the Sixth Circuit held that the plaintiff had successfully pleaded sex discrimination based on his allegations that he was suspended because of his failure to meet stereotypically masculine behavior and appearance norms.[39] The plaintiff, Jimmie Smith, worked as a lieutenant in the Salem Fire Department in Salem, Ohio.[40] He was a biologically male pre-operative transsexual who had been diagnosed with Gender Identity Disorder (GID).[41] After Smith began presenting a more feminine appearance at work his

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(joined by Judges Trott, Thomas, Graber and Fisher) concluded that the alleged harassment was 'because of' sex because of the sexual nature of the abuse. *Id*. at 1066-68. In a concurring opinion, Judge Pregerson (joined by Judges Trott and Berzon) argued the case was better understood as a gender stereotyping case in which Rene was harassed because he had traits that were deemed inappropriately feminine. *Id*. at 1068-69 (Pregerson, J., concurring).

[38] *See* Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004). While the Sixth Circuit was the first circuit court to provide such protection, a few district courts had previously, and have subsequently, recognized similar antidiscrimination protection for transsexual individuals from gender conformity demands. *See* Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006) (holding that male to female transsexual could state actionable sex discrimination claim when employer rescinded job offer after learning that plaintiff had gender dysphoria and would be presenting a female appearance at work); Mitchell v. Axcan Scandipharm, Inc., No. Civ. A 05-243 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (holding that a pre-operative male-to-female transsexual who alleged harassment and termination based on failure to conform to gender stereotypes could state a claim for sex discrimination); Kash v. Maricopa Cty. Community College Dist., No. 02-1531-PHX-SRB, 2004 WL 2008954 at *2 (D. Ariz. June 3, 2004) (holding that plaintiff—a transitioning male-to-female transsexual—could state a claim for sex discrimination based on allegation that she was required to use the men's bathroom); Tronetti v. TLC Health Net Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 at *4 (W.D. NY, Sept., 26, 2003) (transitioning male-to-female transsexual alleging harassment and discrimination because she failed to "act like a man" could state claim for sex discrimination); Doe v. United Consumer Financial Servs., 2001 WL 34350174 (N.D. Ohio, Nov. 9, 2001) (holding that transsexual male-to-female alleging she was terminated because her appearance did not match gender expectation could state a claim for sex discrimination).

[39] 378 F.3d 566, 572 (6th Cir. 2004).

[40] *Id*. at 568.

[41] The court explained that according to the American Psychiatric Association, GID is "a disjunction between an individual's sexual organs and sexual identity." *Id.* at 568.

co-workers began to comment on his appearance and inadequate masculinity.[42] Upon learning about Smith's GID, the Chief of the Fire Department held a meeting to find a basis for terminating his employment.[43] Shortly thereafter, Smith was suspended for an alleged infraction of department policy.[44] Smith sued for sex discrimination. In reversing the district court's grant of judgment on the pleadings for the City, the Sixth Circuit held that Title VII protected transgendered workers from demands that their expressions of gender identity conform to their biological sex. Relying on *Price Waterhouse* for support, the court explained:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses or makeup, or otherwise act femininely, are also engaging in sex discrimination because the discrimination would not occur but for the victim's sex.[45]

The Sixth Circuit affirmed a jury finding of such discrimination one year later in *Barnes v. City of Cincinnati*.[46] Barnes was a pre-operative male to female transsexual who worked as a police officer in the Cincinnati Police Department.[47] He presented evidence at trial showing that he was denied a promotion to

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[42] *Id*. at 568.
[43] The court noted that the Chief of the Fire Department "arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment." *Id*. at 568.
[44] *Id*. at 569.
[45] *Id*. at 574.
[46] 401 F.3d 729 (6th Cir. 2005).
[47] *Id*. at 733.

sergeant because he violated masculine stereotypes.[48] The jury ruled in Barnes' favor on his sex discrimination claim.[49] Relying on its prior ruling in *Smith* for support, the court explained that a jury could have reasonably concluded that Barnes was discriminated against because of his failure to conform to masculine gender norms.[50]

Nonetheless, and despite the judicial rhetoric, there is reason to doubt that a broad anti-assimilationist antidiscrimination principle is really motivating these decisions.[51] Courts' regular denial of protection to gender nonconformists challenging sex-based grooming codes belies such a principle. After *Price Waterhouse* as before, courts routinely permit sex-based grooming requirements that prescribe how employees may express their gender. Courts uphold workplace grooming codes requiring that male, but not female, workers keep

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[48] Barnes, for example, was told by a supervisor that he was not masculine enough and was told by another superior officer that he was going to fail probation because he was not acting masculine enough. *Id*. at 738.

[49] *Id*. at 733.

[50] *Id*. at 737-38. See also Schroer v. Billington, 2008 WL 4287388 (D.D.C., Sept. 19, 2008) (bench trial verdict for male-to-female transsexual using sex stereotyping theory).

[51] It is worth noting that not all scholars have interpreted *Price Waterhouse* as articulating an anti-assimilationist principle of the sort described here. Mary Anne Case, for example, has interpreted *Price Waterhouse* as requiring a kind of formal equality between the sexes whereby any gendered traits or behavior deemed appropriate for individuals of one sex must also be permitted to individuals of the other sex. *See* Case, *supra* note 6. Case contends: "[Effeminate men] as well as . . . men who violate sex-specific grooming codes by wearing feminine attire to work . . . are clearly protected by both the plain language of Title VII and the holding in *Hopkins*. If their employer tolerates feminine behavior or attire in women but not in them, the employer is subjecting them to disparate treatment in violation of Title VII." *Id*. at 7. I have argued previously that this formal "trait equality approach" is both conceptually vague—because true cross-sex trait equality can never exist—and normatively unappealing—equating nondiscrimination with rigid gender-blind neutrality may do as much to harm women as to help them. Moreover, this is not the interpretation of *Price Waterhouse* that has been adopted by the lower courts. *See*. Yuracko, *Trait Discrimination as Sex Discrimination, supra* note 16, at 185-204.

their hair short.[52] Similarly, courts uphold grooming requirements prohibiting male, but not female, employees from wearing earrings.[53] Indeed, courts reaffirm such requirements even in cases in which they rely on sex stereotyping rhetoric to check other kinds of conformity demands. In *Nichols v. Azteca*, for example the Ninth Circuit used the sex stereotyping rhetoric of *Price Waterhouse* to hold that discrimination against a male worker because of perceived effeminacy was a form of sex discrimination. Nonetheless the court emphasized that its "decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."[54] Similarly, in *Smith*, the Sixth Circuit distanced itself from prior case law denying antidiscrimination

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[52] *See, e.g.,* Tavora v. New York Mercantile Exchange, 101 F.3d 907 (2d Cir. 1996) (holding that male employee fired for not complying with employer's short hair requirement for men could not state a claim for sex discrimination); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (holding that "requiring short hair on men and not on women does not violate Title VII"); Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Missouri Pacific Railway Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Telegraph Publ. Co., 507 F.2d 1084, 1092 (5th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

[53] *See, e.g.,* Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 804 (Iowa, 2003) (holding in response to sex discrimination claim brought by male employee fired for refusing to stop wearing an earring that "personal grooming codes that reflect customary modes" of distinctly gendered grooming do not constitute sex discrimination); Macissac v. Remington Hospitality, Inc., 811 N.E.2d 524 (Mass. App. Ct. 2004) (enforcement of grooming code prohibiting male but not female employees from wearing earrings did not constitute sex discrimination); Kleinsorge v. Eyeland Corp., 2000 WL 124559 (E.D. Pa. 2000) (grooming code allowing female but not male employees to wear earrings did not violate Title VII); Lockhart v. La-Pac. Corp., 795 P.2d 602 (Or. Ct. App. 1990) (holding that grooming code prohibiting male but not female employees from wearing facial jewelry did not constitute sex discrimination); Capaldo v. Pan Am. Federal Credit Union, 1987 WL 9687 (E.D.N.Y. March 30, 1987) (grooming code prohibiting men but not women from wearing earrings did not constitute sex discrimination).

[54] *Nichols*, 256 F.3d at 875 n. 7.

protection to transsexuals,[55] but it did not disavow or reject prior case law enforcing sex-specific grooming codes generally. [56] These cases undermine the plausibility of a broad judicial commitment to protecting gender nonconformity as such.

A broad anti-assimilationist principle is also incompatible with the en banc Ninth Circuit's ruling in *Jespersen v. Harrah's Operating Co.* allowing an employer to require that female, but not male, bartenders wear makeup.[57] Darlene Jespersen had worked as a bartender at Harrah's for twenty years when she was terminated for refusing to comply with the company's sex-specific makeup requirement.[58] The makeup requirement was part of a new "Personal Best" program imposing grooming and appearance requirements on all bartenders.[59] While the program dressed bartenders of both sexes in the same uniform of black pants, white shirt, black vest and black bow tie, the program also required female bartenders to wear makeup while prohibiting male bartenders from doing so.[60] Specifically, female bartenders were required to wear "facial powder, blush, and mascara . . . applied neatly in complementary

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[55] The *Smith* Court explains that the logic of these "pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection" have been "eviscerated." *Id*. at 572-73.

[56] The *Smith* court did not, for example, mention its holding in *Barker v. Taft Broadcasting Company*, 549 F.2d 400 (6th Cir. 1977), upholding a hair length restriction on male but not female employees against a claim of sex discrimination.

[57] 444 F.3d 1104 (2006) (en banc).

[58] *Id*. at 1105. For a more extensive description of the events leading up to Jespersen's lawsuit see Carbado, Gulati & Ramachandran, *supra* note 9, at 120.

[59] 444 F.3d at 1107.

[60] *Id*. at 1107.

colors" with "[l]ip color . . . worn at all times."[61] Jespersen challenged the makeup requirement as a form of illegal sex discrimination. She relied, in part, on the Supreme Court's rhetoric against sex stereotyping from *Price Waterhouse*.[62] The makeup requirement discriminated against her, she argued, by "requiring [her to] . . . conform to sex based stereotypes as a term and condition of employment."[63]

The Ninth Circuit rejected Jespersen's claim and affirmed summary judgment for Harrah's. With bald implausibility, the Ninth Circuit proclaimed: "There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."[64] More revealingly, the court expressed its concern that if it were to protect Jespersen from having to comply with the makeup requirement "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds

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[61] *Id*. at 1107. Female bartenders were also required to have their hair "teased, curled or styled every day." Male bartenders were required to keep their hair short, their fingernails trimmed, and wear no facial makeup. *Id*. at 1107.

[62] Jespersen also raised an unequal burdens argument. *See id*. at 1108.

[63] *Id*. at 1108.

[64] *Id*. at 1112. As Judge Pregerson argued in dissent, it is difficult to see what a requirement that women must wear makeup and men must not could be based on other than a sex stereotype. According to Judge Pregerson:

> The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive . . . to conclude that requiring female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex.

Id. at 1116.

personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."[65]

Therefore, although the Ninth Circuit seemed puzzled by the logic and scope of both *Price Waterhouse* and the effeminate men harassment cases, it was clear in its conviction that Title VII did not protect all gender nonconformists. About this, there seems to be judicial agreement.

There is, however, a narrower anti-assimilationist principle that courts might be adopting. Yet, as I will suggest, it too fails to fit the cases. This narrower principle would protect not all personal and idiosyncratic expressions of gender identity, but only those that are culturally associated with the group in some way.[66] The principle would, for example, protect female workers who choose to wear traditionally feminine attire to work, such as skirts or frilly blouses, from being forced to dress in more masculine attire—at least without proof from their employer that such attire directly impaired job performance. More significantly, the principle would call for a reconceptualization of traditionally male jobs so as to protect and accommodate traditionally feminine attributes like empathy and relationship building. A law firm accustomed to hiring only highly aggressive and competitive individuals as litigators would, for example, be forced to consider whether individuals who were cooperative

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[65] *Id*. at 1112.

[66] The association may be due either to prevalence, history or cultural meaning but what is important is that the trait being penalized is one that is not only important to the employee's individual sense of group identity, but is one that is recognized as important to some broader cultural conception of the group.

problem solvers might be in fact be equally effective. Unlike the broad antiassimilation principle, the narrower principle is aimed at preserving group culture not at protecting individual identity.

Feminists have argued for antidiscrimination protection of this sort for decades, both as a way to elevate the feminine and as a way to improve the status of women.[67] Kathryn Abrams and Laura Kessler, for example, have sought greater protection for a culturally feminine caregiving norm.[68] Both have argued that employers should be obligated to restructure jobs and workplaces so as to accommodate women's caregiving work toward others.[69] Mary Anne Case has argued for the protection of feminine clothing styles in the workplace whether worn by female or male workers[70] "Discrimination against the feminine" she notes "is likely to have a disparate impact on women" and, as a

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[67] As Lucinda Finley asked over 20 years ago: "[R]ather than blaming women and their nature for their underrepresentation in the high paying jobs, why not reexamine the jobs and their values?" Luncinda M. Finley, Choice and Freedom: Elusive Issues in the Search for Gender Justice, 96 Yale L.J. 914, 939 (1987).

[68] *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAN. L. REV. 1183 (1989); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REF. 371 (2001).

[69] See Abrams, *supra* note 68, at 1224-25 ("If women with children are to attain equality in the workplace, then we must challenge the notion of a natural or pre-ordained line dividing work and family. . . . Employers will have to determine which jobs or tasks can be shred or accomplished through flexible scheduling, grant fringe benefits to part-time workers, and re-educate clients to greater confidence in the new arrangements"); Kessler, supra note 68, at 372-73 ("women, more so than men, perform the unpaid family caregiving work within our society. . . . "The American workplace and discrimination laws governing employment have yet to address seriously this profound existential difference between men and women with regard to caregiving, despite women's substantial presence in the paid labor force for more than two decades.").

[70] Case, in fact, argues strongly that feminine styles must be protected whether worn by female or male workers. *See* Case, *supra* note 6, at 7 ("It is my contention that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.").

result, "should be permitted only if job-related and justified by business necessity."[71]

Despite Case's argument that the feminine should be protected regardless of whether it is expressed by women or men, one could argue that culturally associated traits should be protected only when performed by in-group members—outsider performance may represent only an imitation and inauthentic version of the trait. Interpreted in this way, the narrow antiassimilation principle is consistent with courts' refusal to protect men wishing to express traditionally feminine traits at work--such as earrings and long hair. It is likewise consistent with the Ninth Circuit's refusal to protect Darlene Jespersen's desire to express a traditionally male attribute at work—an unmade-up face.

The narrow antiassimilation principle is, however, wholly inconsistent and incompatible with courts' ready deference to employer demands that women leave their cultural femininity at the workplace door. In *Wislocki-Goin v. Mears*, for example, the plaintiff, who worked at a juvenile detention center, was fired for wearing her hair down and wearing excessive makeup to work in violation of her employer's unofficial dress code demanding the "'Brooks Brothers look.'"[72] The plaintiff sued for sex discrimination. The Seventh Circuit affirmed the district court's judgment in favor of the employer and echoed the

[71] Case, *supra* note 6, at 4.
[72] 831 F.2d 1374, 1376-77.

lower court's deferential acceptance of the employer's grooming requirements. Rather than requiring the employer to show that the plaintiff's feminine style actually impeded her job performance, the court simply presumed the reasonableness of the employer's grooming requirements.[73]

The court was similarly deferential to male workplace norms in *Chi v. Age Group, Ltd*.[74] The plaintiff, Theresa Chi, had worked long hours coordinating imports for her employer before taking maternity leave for the birth of her second child.[75] At the end of her leave, Chi told her employer that she would like to return to work on a part-time basis and would no longer be able to work overtime.[76] The employer denied Chi's requests saying that full-time work with regular overtime was required.[77] It subsequently deemed her unqualified for her position and fired her.[78] Chi sued for sex discrimination. In ruling for her employer on summary judgment, the court concluded that Chi had not even made out a prima facie case of discrimination because she could not show she was "qualified for her position."[79] As Kessler notes in her discussion of the case, "[t]he court did not consider the possibility that Age Group might work out a flexible schedule with Chi . . ." so that she might be "qualified" if only her job

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[73] 831 F.2d 1374, 1380 ("We cannot say that these requirements were not reasonably related to [the employer's] 'legitimate interest[s]'") .
[74] Chi v. Age Group, Ltd., No. 94 Civ. 5253 (AGS), 1996 WL 627580 (S.D. N.Y., Oct. 29, 1996).
[75] *Id*. at *1-2.
[76] *Id*. at *2.
[77] *Id*. at *2.
[78] *Id*. at *2.
[79] *Id*. at *5. As the court itself notes, such a conclusion is "unusual" given that the burden on the plaintiff to establish a prima facie case is "'not onerous.'" *Id*. at *5-6.

were reconceptualized.[80] Rather than protecting culturally feminine caregiving norms, the court uncritically accepted the employer's male normative workplace demands.

The court's approach was the same in the well known case of *EEOC v. Sears, Roebuck & Co.*, in which the EEOC alleged that Sears had engaged in a pattern or practice of excluding women from commission sales positions.[81] The EEOC presented evidence showing that women were significantly underrepresented in commission sales jobs.[82] Sears defended by arguing that lack of interest rather than discrimination was responsible for women's underrepresentation.[83] Commission sales jobs, according to Sears' Retail Testing Manual required a "'special breed of cat,'" someone who "possesses a lot of drive and physical vigor, is socially dominant, and has an outgoing personality . . . ."[84] Sears looked for candidates who were "aggressive[ ]," "assertive[ ]," "competitive[ ]" and with a "social or extraverted personality."[85] Women, Sears, argued were simply less interested in the positions than men. In concluding that women's lack of interest, rather than Sears' discrimination, was to blame, the court did not pause to consider whether Sears' masculine job description and hiring criteria may have affected women's interest in the

[80] Kessler, *supra* note 68, at 371.
[81] Equal Employment Opportunity Commission v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1295 (N.D. Ill. 1986).
[82] *Id*. at 1295.
[83] *Id*. at 1305.
[84] *Id*. at 1290.
[85] *Id*. at 1290. In addition, Sears gave most candidates a test which asked such questions as "do you have a low pitched voice?" "Do you swear often"" "Have you played on a football team?" *Id.* at 1300 n. 29.

positions. Nor did it require Sears to demonstrate that such masculine attributes were in fact necessary for successful job performance. Far from protecting culturally feminine traits and attributes, the court used them to justify women's exclusion.

In short, the dominant interpretation of recent sex discrimination case law as incorporating a new antiassimilation principle is mistaken. Neither a broad principle encompassing all individual expressions of gender identity, nor a narrow principle protecting culturally recognized expressions of gender identity inheres in the case law.

B. Racial Nonconformity

In the race context too scholars have urged courts to adopt an anti-assimilationist antidiscrimination principle—one protecting minority workers from demands that they conform to white middle class norms. In race as in sex cases, however, courts refuse to interpret and apply Title VII in this way.

Most often the scholarly arguments for protection in race cases are based on narrow antiassimilation grounds--regarding the need to protect group culture—rather than broad antiassimilation grounds—regarding the importance of individual expression. Barbara Flagg, for example, has argued that antidiscrimination law should protect racial minorities from being required by employers to adopt "behaviors and characteristics associated with whites."[86]

[86] Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013-15 (1995).

Such "transparently white decisionmaking" should be treated as discriminatory because it forces blacks to "shed or disavow crucial facets of blackness" in order to get ahead in the work world.[87] Juan Perea makes a similar argument with respect to culturally associated traits and Title VII's prohibition on national origin discrimination.[88] Perea contends that most of the discrimination faced by ethnic minorities results from their possession of certain traits, not from the fact of their national origin or place of birth.[89] As a result, he argues, Title VII should protect against discrimination based on "physical and cultural characteristics that make a social group distinctive in group members' eyes or in the view of outsiders."[90]

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[87] *Id*. at 2034. Paulette Caldwell too has argued for antidiscrimination protection for workplace expressions of racial identity and from employer demands of white cultural normativity. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (1991) (contending that "[a]ntidiscrimination law should be, and at its best is, directed toward the behavioral manifestations of such negative associations" with racially identified traits). *See also* Gear Rich, *supra* note 5, at 1139 (arguing that "courts should abandon the current definitions of race and ethnicity under Title VII that exempt from protection 'voluntary' aspects of racial and ethnic identity—what I call 'race/ethnicity performance'"); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379 (2008) (explaining that "[a]ssimilation demands have surfaced as one of the most important—and controversial—issues facing employment discrimination today. . . . The issue is important because assimilation demands represent one of the more subtle and common ways in which discriminatory biases can translate into subordination and exclusion of women and people of color from the modern workplace").

[88] Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833, 839 (1994).

[89] *Id*. at 839.

[90] *Id*. at 833. Perea describes such characteristics as including, but not limited to, "race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group." *Id.* at 833. *See also* Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. L. REV. 1689, 1694 (2006) (arguing for a presumption of invalidity of English-only rules in the workplace); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 604 (1999) (arguing that Title VII should be extended to prohibit workplace rules that penalize employees for speaking a language other than English because "the legal system should treat language as a fundamental identification encompassed by each person's right of personhood"); Christopher David Ruiz Cameron, *How the*

Courts' rejection of such arguments has been explicit and unequivocal. In *Rogers v. American Airlines*, for example, the plaintiff argued that she should be protected from American Airlines' no cornrows rule because cornrows were an integral part of her identity as a black woman.[91] "'[T]he completely braided hair style" she asserted "has been and continues to be part of the cultural and historical essence of Black American women.'"[92] The court, however, denied her protection. Indeed, the district court made clear that Title VII did not protect employee expressions of racial identity or prohibit assimilationist workplace demands. Mincing no words, the court explained that "an all-braided hair style . . . even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."[93] Expressions of racial identity as such were not entitled to antidiscrimination protection.[94]

Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Rational Dualism, Latino Invisibility, and Legal Indeterminacy, 85 CAL. L. REV. 1347, 1367-72 (1997) (arguing that courts fail to treat Spanish language discrimination as national origin discrimination because they do not appreciate the centrality of Spanish language in constructing a Latino/a identity).

[91] Rogers v. American Airlines, Inc., 527 F. Supp. 229, 232 (S.D. N.Y. 1981) (Rogers argued that "'the completely braided hair style, sometimes referred to as corn rows, has been and continues to be part of the cultural and historical essence of Black American women'").

[92] *Id*.

[93] *Id*. at 232. *See also* Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981) (holding that employer did not engage in race discrimination when it terminated plaintiff for wearing her hair in braids to work with beads at the end of each braid); McBride v. Lawstaf, Inc., No. 1:96-cb-0196-cc, 1996 WL 755779, at *1-2 (N.D. Ga. Sept. 19, 1996) (holding that "[a]s a matter of law, an employer's grooming policy prohibiting a braided hair style is not 'an unlawful employment practice' as defined by 42 U.S.C. 2000e-2").

[94] *See, e.g.*, Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 469 (N.D. Ca. 1978) (dismissing race discrimination claim of male employee who refused to shave claiming beard was part of his racial identity explaining that "[w]here easily changed physical characteristics are made the basis for an individual's racial identity, it is simply not the law that 'an asserted racial or cultural

Similarly, in *Garcia v. Spun Steak Company* Hispanic workers who were bilingual challenged their employer's English only workplace rule as a form of national origin discrimination.[95] The policy they argued should be invalidated because "it denies them the ability to express their cultural heritage on the job."[96] The court rejected the plaintiffs' group culture claim in no uncertain terms. "Title VII . . . does not," the court explained, "protect the ability of workers to express their cultural heritage at the workplace."[97]

Close inspection of the case law reveals then that courts have not adopted an anti-assimilationist antidiscrimination principle in either their Title VII sex or race jurisprudence. Quietly in sex cases, and more loudly in race cases, courts have rejected claims that Title VII protects individuals as a matter of principle from workplace demands that they perform their race or gender in accordance with dominant social norms.[98]

Nonetheless, employees do at times receive protection from such demands. I turn in the next Parts to consider what alternative antidiscrimination principles may explain such protection.

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identity cannot legally be the basis for denial of employment.'"); Keys v. Continental Illinois Nat'l Bank, 357 F. Supp. 376 (N.D. Il. 1973) (denying Title VII protection to plaintiff challenging employer's no beard rule arguing that beards and long sideburns were critical to his racial identity).

[95] Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993).

[96] *Id*. at 1486-87.

[97] *Id*. at 1487.

[98] As this Part has sought to emphasize, these norms are similar across race and sex cases in that they constrain how individuals may express their racial or gender identity, yet they are importantly different across race and sex cases in that they hold individuals of all races to a uniform cultural code while holding women and men to explicitly divergent codes.

II. AN ANTISUBORDINATION PRINCIPLE

The Supreme Court has long been explicit about Title VII's antisubordination project. The Act's objective, the Court made clear in *Griggs v. Duke Power Co.*,[99] was not only to remove formal barriers to entry, but to challenge the social norms and practices that reinforced race and sex based social hierarchies.[100] In this Part I, consider whether courts' response to workplace conformity demands may reflect this longstanding project. I consider, in other words, whether courts invalidate those workplace conformity demands that reinforce the very status-group hierarchies at which Title VII took aim.

A. Gender Nonconformity

Courts themselves have identified two distinct antisubordination-oriented tests for assessing the validity of gender conformity demands. The first is the unequal burdens test, which calls upon courts to strike down gender conformity demands that disproportionately burden one sex more than the other. The

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[99] 401 U.S. 424 (1971).

[100] *Id*. at 429 (explaining that under Title VII "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"). *See also* Reva B. Siegel, *Discrimination in the Eyes of the Law: How Color Blindness Discourse Disrupts and Rationalizes Social Stratification, in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 99, 138 (2001) (explaining that "[w]hen we consider how tropes of blindness have been deployed from a sociohistoric vantage point we can see that a commitment to alleviating stratification is and has been central to the project of antidiscrimination law since the beginning of the Second Reconstruction."); Thomas C. Grey, *Cover Blindness, in* PREJUDICIAL APPEARANCES 85, 89 (explaining that "modern antidiscrimination law requires identifying those social practices that operate as functional equivalents of the old formal restrictions"); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 1012 (1986) (noting that "[a]lthough much of the scholarship on equal protection doctrine assumes that the anti-differentiation principle is justifiably the dominant perspective, a comparison of race and sex cases, as well as of constitutional and statutory cases, reveals that the anti-subordination principle better explains both much of the law and the aversion we feel to race and sex discrimination").

second is the double-bind test, which calls upon courts to reject gender conformity demands that make it more difficult for workers of one sex to succeed professionally. In this section I consider how well each principle actually explains courts' sex discrimination jurisprudence.

1. Unequal Burdens

Well before *Price Waterhouse* and its rhetorical ban on sex stereotyping, courts relied on an "unequal burdens" test to distinguish acceptable from unacceptable gender conformity demands.[101] Sex-based dress and appearance codes were permissible as long as they did not disproportionately burden workers of one sex.

In *Laffey v. Northwest Airlines*, for example, the district court struck down as discriminatory the airline's requirement that female flight attendants wear only contact lenses while male flight attendants could wear eyeglasses or contacts.[102] In *Gerdom v. Continental Airlines*, the Ninth Circuit struck down as discriminatory Continental Airlines' imposition of weight requirements on

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[101] As commonly stated, the unequal burdens test finds discriminatory only those sex-specific workplace requirements that impose an unequal burden on female or male workers because of their sex. *See, e.g.*, Michael Selmi, *The Many Faces of Darlene Jespersen,* 14 DUKE J. OF GENDER L. & POL'Y 467, 470 (2007) (explaining that "[s]ince the 1970's courts have permitted employers to require different uniforms for men and women, so long as those uniforms do not impose an unequal burden on one sex or the other"); Dianne Avery & Marion Crane, *Branded: corporate Image, Sexual Stereotyping, and the New Face of Capitalism,* 14 DUKE J. OF GENDER L. & POL'Y 13, 42-43 (2007) (noting that "recently, several federal courts have ruled that sex-specific appearance codes are discriminatory only if they impose 'unequal burdens' on women and men"). *See also Jespersen*, 444 F.3d at 1110 (explaining that "[u]nder established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII"); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000) (asserting that "[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a bona fide occupational qualification").

[102] 366 F. Supp. 763, 790 (D.D.C. 1973).

female "flight hostesses" but not on male employees in comparable positions.[103] Likewise, in *Frank v. United Airlines*, the Ninth Circuit struck down United Airlines' sex-based weight requirements limiting male flight attendants to maximum weights that corresponded to large body frames but limiting female flight attendants to maximum weights that corresponded to medium body frames.[104] In all three cases, the courts emphasized that the burdens imposed on female workers were disproportionate and unequal to those imposed on male workers.[105]

A *per se* unequal burdens test would demand the elimination of any and all gender conformity demands that burden one sex more than the other. In order to assess burdens, courts have suggested that grooming requirements should be looked at in total rather than item by item,[106] and that

[103] 692 F.2d 602, 603, 610 (9th Cir. 1982) (holding that "Continental's policy of requiring an exclusively female category of flight attendants, and not other employees, to adhere to the weight restrictions at issue here constitutes discriminatory treatment on the basis of sex").
[104] 216 F.3d 845 (9th Cir. 2000).
[105] *See Laffey*, 366 F. Supp. at 774 (emphasizing that the contact lenses which female flight attendants were required to wear were more expensive than the eyeglasses which male flight attendants were permitted to wear); *Gerdom*, 692 F.2d at 136 (concluding that the female only weight requirement imposed a significantly greater burden on women than men); *Frank*, 216 F.3d at 137 (noting that "[e]ven if United's weight rules constituted an appearance standard, they would still be invalid" because they impose unequal burdens on women and men).
[106] This was in fact a source of contention for the Ninth Circuit panel which first ruled on Jespersen's case. Compare *Jespersen*, 392 F.3d at 1081 (majority decision) (applying the unequal burdens test by comparing the complete set of appearance requirements for women to the complete set of requirements for men); with *Jespersen*, 392 F.3d at 1085-86 (Thomas dissent) (arguing that the unequal burdens test should be applied by comparing only the requirement that female employees wear makeup against the requirement that male employees do not).

burdensomeness should be assessed in terms of the time and money required for women and men to comply with their respective requirements.[107]

Conceived of in this way, the unequal burdens test cannot explain courts' responses to gendered conformity demands. Courts regularly fail to find sex-specific grooming requirements discriminatory even when their burdens are unequal in the courts' own terms. For example, courts uphold employer grooming codes that require men to keep their hair short while imposing no hair length or style requirement on women, though it is difficult to believe that a short hair requirement for men, matched by no hair length requirement, or any other sex-specific grooming requirement, for women, does not impose an unequal burden on male employees. Similarly, it is difficult to believe that a no beard requirement for men, when not matched by any kind of general shaving or facial grooming requirement for women, does not impose an unequal burden on male employees. Nonetheless courts uphold such sex-specific conformity demands against claims of discrimination.[108]

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[107] *Jespersen*, 444 F.3d at 1110 (in ruling against Jespersen on her claim that Harrah's sex-specific grooming requirements imposed on unequal burden on women the court explained that "Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women"). *See also* Selmi, *supra* note 101, at 470 (explaining that an unequal burden "might be in the form of differential costs, or even the time that was required to comply with the policy; it might also arise if women were required to wear an excessively suggestive outfit.").

[108] *See, e.g.*, Fagan v. National Cash Register, 481 F. 1115, 1121 (upholding male only short hair requirement); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974) (same); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (same); Knott v. Missouri Pacific Railroad Co., 527 F.2d 1249 (8th Cir. 1975) (same); Thomas v. Firestone Tire and Rubber Co., 392 F. Supp. 373, 374 (upholding employer's no beard policy against sex discrimination challenge); Rafford v. Randle Eastern Ambulance Serv., 348 F. Supp. 316 (S.D. Fla. 1972) (same).

Indeed, courts regularly uphold conformity demands that impose unequal burdens on male and female workers as long as the demands mimic conventional, and role appropriate, gender norms. [109] In *Craft v. Metromedia,*[110] for example, Christine Craft worked as a co-anchor for a television news program. Because of poor ratings and a concern that Craft's appearance was at least partly to blame, Craft was subjected to intensive makeup and wardrobe oversight. At one point, Craft was required to use a "clothing calendar" showing in detail what she was to wear for each day.[111] Craft sued for sex discrimination and raised an unequal burdens argument. She argued that the grooming requirements imposed on her by her employer were discriminatory because the standards were more onerous and more strictly enforced on women than men.[112] In support of her argument, Craft presented evidence showing that "only females were subject to daily scrutiny of their appearance or were ever required to change clothes at the station before going on the air.[113] Moreover, the image consultant that the station had hired to work with Craft on her appearance testified that "she had told Craft not to wear the same outfit more than once every three to four weeks because people would start calling in about it; males,

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[109] *See* ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 38 (2001) (noting that "Title VII decisions distinguish between grooming and dress codes that track 'generally accepted community standards of dress and appearance' and those that do not. The former are regarded as enforcing a 'neutral' baseline that negates any inference of sex discrimination").

[110] Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985).

[111] *Id.* at 1209.

[112] *Id.* at 1212-13.

[113] *Id*. at 1212-13.

however . . . could wear an outfit every week and a suit even twice in the same week if combined with a different tie." [114]

Nonetheless, the *Craft* court found that the television station's clothing and grooming requirements for anchors did not discriminate on the basis of sex. In reaching this conclusion, the court emphasized that the television station was simply enforcing the appropriate gender norms for television news anchors.[115]

Likewise in *Jespersen*, Darlene Jespersen argued that Harrah's Personal Best standard was discriminatory because it imposed a makeup requirement on women but not men. Although the Ninth Circuit emphasized that Jespersen had not presented evidence to the court below showing that Harrah's sex-based grooming requirements imposed an unequal burden on female and male bartenders,[116] the court seemed predisposed to reject the argument regardless of the evidence. The Personal Best requirements, the court emphasized, simply matched conventionally gendered grooming requirements for bartenders and hence seemed definitionally to not "unreasonably burden one gender more than the other."[117]

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[114] *Id*. at 1214.

[115] As the Court of Appeals noted: "Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being." *Id*. at 1215. The Court continued that the district court did not err "when it concluded that KMBC's appearance standards were shaped only by neutral professional and technical considerations . . . ." *Id*. at 1215-16.

[116] *Jespersen*, 444 F.3d at 1111 ("Having failed to create a record establishing that the 'Personal Best' policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact.").

[117] *Id*. at 1110. As the court explained:

> '[w]here, as here, such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the

These cases suggest, however, a narrower more restrictive version of the unequal burdens test that may be at work. It may be that courts care about unequal burdens imposed by gender conformity demands only when the demands are not justified by conventional, role-appropriate, gender norms.

This narrower test would explain why courts were unwilling to strike down short hair and no beard requirements for men despite the seemingly disproportionate burdens they imposed on men. Such requirements were viewed by courts as simply enforcing conventional professional gender norms.[118] It would also explain why courts were willing to strike down the sex-specific weight and eyeglass rules imposed on flight attendants by airlines. The rules requiring female flight attendants to be relatively thinner than male attendants and to refrain from wearing glasses went beyond both conventional gender

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> appearance requirements for males and females have only a negligible effect on employment opportunities.' Under established equal protection burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.

Id.

[118] *See, e.g.*, Fagan v. National Cash Register in which the D.C. Court of Appeals upheld a short hair requirement for male employees explaining :

> 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 an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment.

481 F.2d 1115, 1124-25 (D.C. Cir. 1973).

norms and the more professional, less sexualized, role norms for flight attendants being imposed on airlines by the courts.[119]

The narrower test also helps make sense of *Carroll v. Talman Federal Savings & Loan Association of Chicago*[120] and *O'Donnell v. Burlington Coat Factory,*[121] two cases often referred to as exemplars of the unequal burden test.[122] In both cases employers differentiated between female and male employees through sex-specific uniform requirements. In *Carroll*, female employees of the defendant savings and loan association were required to wear a uniform that consisted of five basic items: "a color-coordinated skirt or slacks and a choice of a jacket, tunic or vest."[123] Male employees were not required to wear a formal uniform but were required to wear "customary business attire" consisting of a "suit, a sport jacket and pants, or even a leisure suit as long as it is worn with a shirt and

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[119] *See* Diaz v. Pan Am. World Airways Inc., 442 F.2d 385, 388 (5th Cir. 1971) (holding that "a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide" is "tangential to the essence of the business involved").

[120] 604 F.2d 1030 (7th Cir. 1979).

[121] 656 F. Supp. 263 (S.D. Ohio 1987).

[122] *See* Frank v. United Airlines, 216 F.3d 845 at 855 (citing Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago as an example of a case applying the unequal burdens test). *See also* Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535 at 540 n. 28 (2007) (citing Carroll v. Talman and O'Donnell v. Burlington Coat Factory as cases involving conformity requirements struck down under the unequal burdens test); Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATHOLIC U. L. REV. 261, 279 n. 137 (2006) (citing O'Donnell v. Burlington Coat Factory as a case decided using the unequal burdens case); Hilary J. Bouchard, *Jespersen v. Harrah's Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203, 209 (2006) (citing Carroll v. Talman as a case decided using the unequal burdens test); Avery & Crane, *supra* note 101, at 53 (referring to the "'unequal burdens' test as articulated in Carroll v. Talman Federal Savings and Loan Ass'n of Chicago"); Selmi, *supra* note 101, at 470-71 n. 10 (citing Carroll v. Talman as cases decided using the unequal burden test).

[123] *Talman*, 604 F.2d at 1028.

tie."[124] In *O'Donnell v. Burlington Coat Factory*, female sales clerks were required to wear smocks while male sales clerks were required to wear a shirt and tie.[125]

The plaintiffs' challenge, in both cases, was not to the employers' enforcement of conventional gender norms, but to the employers' different treatment of female and male employees in ways that were not demanded by these norms. The female employees in *Carroll*, for example, did not object to wearing female clothing, they objected to being constrained in their choices within this category in a way that male employees were not. Similarly, the female employees in *O'Donnell* did not object to dressing like women, they objected to wearing a nongendered smock when their male colleagues were not similarly burdened.[126]

On one level, these cases look like simple anticlassification cases having nothing to do with comparative burdens on female and male employees. The problem was that the employers marked female employees as different, not that

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[124] *Id*. at 1029.

[125] *Burlington*, 656 F. Supp. at 263.

[126] Indeed the courts in both cases made clear that they did not view the challenged grooming codes as simply enforcing traditional gender cultural norms. In *Talman*, for example, the court explained:

> So long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women. However, the situation is different where, as here, two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes one including a variety of normal business attire and the other requiring a clearly identifiable uniform. This different treatment in the conditions of employment for female employees cannot be justified by business necessity . . . . Moreover, the disparate treatment is demeaning to women.

604 F.2d at 1032-33. In *Burlington*, the court emphasized that, unlike sex-based hair length requirements, the sex-specific smock requirement "finds no justification in accepted social norms." 56 F. Supp. at 266.

they imposed disproportionate burdens on them. Indeed, although the court in *Carroll* did note that the uniform requirement subjected female employees to additional costs not born by male employees,[127] the *O'Donnell* court stated explicitly that no similar cost disparity existed in that case.[128]

Nonetheless, in both cases the courts associated differentiation itself, when not rendered invisible by conventional gender norms, with stigmatization of women workers. It was this stigma—rather than time or money--that constituted women's unequal burden.

In *Caroll*, for example, the court explained, "when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues, attired in normal business clothes." [129] Similarly, in *O'Donnell*, the court explained: "[I]t is demeaning for one sex to wear a uniform when members of the other sex holding the same positions are allowed to wear professional business attire." [130] In fact, it probably would not have mattered to the courts in *Carroll* and *O'Donnell* had it been the male employees who were required to wear uniforms and smocks instead of the female workers. Sex differentiation, not

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[127] *See Talman*, 604 F.2d at 1030 (explaining that "[t]he written dress code for female employees even discriminates with respect to their compensation, for defendant treats the cost of the two-piece uniform which it furnishes as income to women employees, withholding income tax on that amount from their wages").

[128] *See Burlington*, 656 F. Supp. at 266 (stating that "[u]nlike the case at bar, the female employees in *Talman* incurred the initial cost of their uniforms as well as subsequent cleaning and maintenance expenses").

[129] *Carroll*, 604 F.2d at 1033.

[130] 656 F. Supp. at 266.

justified by conventional gender norms stigmatizes female workers, regardless of how the actual requirements go.

One would expect a similar finding of discrimination had Christine Craft been required to read the news off pink paper while her male co-anchor read off blue paper, or had Darlene Jespersen been required to serve her drinks in pink glasses while male bartenders served theirs in blue glasses. The compliance costs for female workers would not be any higher than for male workers. Nonetheless, the differentiation itself, unjustified by conventional gender norms, would stigmatize and thereby burden female workers.[131]

It seems then that while courts are not subjecting gender conformity demands to a *per se* unequal burdens test, they are prohibiting sex-based differentiations not justified by conventional gender norms. This narrower unequal burdens test is not, however, the only antisubordination test at work.

2. Double-Bind

In *Price Waterhouse,* the Supreme Court did not rely solely on its broad rhetoric about sex stereotyping to explain its conclusion that Ann Hopkins was the victim of sex discrimination. The Court also articulated a double-bind principle. An employer could not, the Court made clear, require employees of one sex or the other to satisfy gender conformity demands that conflicted with professional role demands.

[131] Conversely, if the differentiation had been between people born in Idaho and those born in Oregon, it would probably not have stigmatized either group. The stigma seems to come from making group identity salient in a context where one group is already assumed to be inferior.

Price Waterhouse had created such a double-bind by demanding that Hopkins be demure and ladylike when her job required more traditionally male attributes. By refusing to allow Price Waterhouse to punish Hopkins for deviating from its feminine ideal, the Supreme Court shielded Hopkins from this double bind and facilitated her move up the corporate ladder.[132] As the Court explained: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[133]

Reading *Price Waterhouse* as articulating a double-bind principle, rather than an anti-assimilation principle, eliminates much of the apparent inconsistency in the case law. Courts upheld short hair and no earring requirements for male employees, both before and after *Price Waterhouse*, because they viewed these gender conformity demands as not hindering men's (or women's) ability to succeed in the workplace.[134] The Ninth Circuit refused to

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[132] *See* Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?* 7 S. CAL. REV. L. & WOMEN'S STUD. 63, 80 n. 40 (explaining that in defining "impermissible discrimination . . . we focus on the degree to which a particular social practice . . . instantiates and thus reinforces a cultural practice that we deem not just detrimental to the historically subordinated group, but significantly 'definitional' of the group's second-class status").

[133] 490 U.S. at 251. *See also* Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (Table text in Westlaw) (adopting a double-bind, rather than a broader anti-sex-stereotyping interpretation of Price Waterhouse).

[134] *See, e.g.,* Pecenka v. Fareway Stores, 672 N.W.2d 800, 804 (Iowa, 2003); (upholding employer's no earring rule for men and explaining that "Title VII . . . [was] not meant to prohibit employers from instituting personal grooming codes which have a *de minimis* effect on employment"); Tavora v. New York Mercantile Exchange, 101 F.3d 907, 908 (2d Cir. 1996) (explaining that grooming codes requiring that men but not women have short hair have been held not to violate Title VII because "such employment policies have only a *de minimis* effect"); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that employer's

protect Darlene Jespersen from a requirement that she wear makeup—despite the Supreme Court's decision to protect Ann Hopkins from requirements that she "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'"[135]--because it concluded that the demand did not undermine Jespersen's success as a bartender.[136] "The record contains nothing," the court explained, "to suggest the grooming standards would objectively inhibit a woman's ability to do the job."[137]

Although the Ninth Circuit did not explain why it found no double-bind in the Jespersen case, the conclusion likely flowed from a tacit acceptance of the contemporary performance and display aspects of bartending. As Dianne Avery and Marion Crain have documented, although bartending in the United States was an almost exclusively male profession until the 1970s, "within less than two decades, bartending was feminized more rapidly and extensively than any other predominantly male profession."[138] By 2004, women dominated the profession. Along with feminization, came sexualization of the job.[139] Increasingly, Crane and Avery explain, bartending is dominated by sexy young women for whom acting as eye-candy for male customers is as integral to the job as pouring

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short hair requirement only for male workers did not violate Title VII and explaining that the intent of Congress in passing Title VIII was "the guarantee of equal job opportunity for males and females" but that a grooming code imposing sex specific hair length requirements "is related more closely to the employer's choice of how to run his business than to equality of employment opportunity").

135 *Hopkins*, 490 U.S. at 235 (quoting 618 F. Supp. at 1117).

136 *Jespersen*, 444 F.3d at 1112.

137 *Id*.

138 Avery & Crain, *supra* note 101, at 92.

139 *Id*. at 95 (noting that "[o]f all full-time bartenders in 2004, 95,000 were men and 102,000 were women").

drinks.[140] Given this recent feminization of bartending, the court might have believed that a makeup requirement would actually enhance, rather than impede women's professional success.

Indeed, a recent study by psychologist Peter Glick and his colleagues suggests that the Ninth Circuit might even have been correct.[141] Glick tested the effect sexy self-presentations had on perceptions of competence of female workers in high-status traditionally male occupations and low-status traditionally female occupations. They had participants rate the competence of a woman in a video who they were told was either a receptionist or a manager. The woman in the video was dressed in either a deliberately sexy or a neutral manner.[142] Glick found that sexy dressing resulted in diminished ratings of competence for the female manager but not for the receptionist.[143] Sexy dressing, in other words, undermined perceptions of competence only for women in high-status occupations.

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[140] *See id.* at 97 (describing the sexing up of bartenders); *see also* Linda A. Detman, *Women Behind Bars: The Feminization of Bartending, in* JOB QUEUES, GENDER QUEUES: EXPLAINING INROADS INTO MALE OCCUPATIONS 252 (Barbara F. Reskin & Patricia A. Roos, eds., 1990) (describing the growth of "sex specific demand for female bartenders").

[141] *See* Peter Glick, et al., *Evaluations of Sexy Women in Low- And High-Status Jobs*, 29 PSYCHOLOGY OF WOMEN QUARTERLY 389 (2005).

[142] According to the study, "For the neutral condition, the woman wore little makeup, black slacks, a turtleneck, a business jacket, and flat shoes. In the sexy condition, the same woman wore more makeup and her hair was tousled. She wore a tight, knee-length skirt, a low-cut shirt with a cardigan over it, and high-heeled shoes." *Id*. at 391.

[143] Glick and his co-authors found that "participants rated the receptionist as equally competent whether she was dressed in a sexy or a neutral manner. In contrast, participants rated the manager as less competent when she dressed in a sexy manner than when she dressed in a conservative manner." *Id*. at 393.

In its narrowest form the double-bind principle would strike down only those gender conformity demands that directly conflict with an employee's professional demands. Only conformity demands that make it impossible for a worker to satisfy her professional demands would be illegal. Imagine, for example, a construction worker required to perform her job duties while satisfying a grooming code like that imposed on Jespersen by Harrah's.

The double-bind faced by Hopkins in *Price Waterhouse* approached, but did not quite reach, this *per se* level.[144] The requirement that Hopkins behave in a traditionally feminine manner directly conflicted with role demands calling for aggressive and competitive behavior. Moreover, the equation of aggressiveness with bitchiness for women made it virtually impossible for Hopkins to be viewed as both competent and collegial.

The double-bind principle may also, however, be conceived more broadly. Rather than requiring a direct conflict between gender conformity demands and professional role demands, the double-bind principle may require only a tension between the two. This broader conception would call upon courts to strike down conformity demands that make it more difficult, even if not impossible, for workers of one sex to also satisfy professional role demands. [145]

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[144] It did not reach the per se level because seven women had been able to satisfy both sets of demands and become partners at Price Waterhouse. *Price Waterhouse*, 490 U.S. at 233.

[145] In its broad form the double-bind principle resembles and blends with the broad unequal burdens test. This is not surprising since both principles reflect the same core antisubordination concerns.

It is this broader double-bind principle that seems to explain courts' particular willingness to check gender conformity demands that sexually objectify female workers. Courts check such demands in a range of cases but their reasons for doing so are poorly theorized. A broad double-bind principle provides a unifying thread.

Courts check female sexual objectification demands in instances in which such demands are used to justify sex-based hiring. In *Wilson v. Southwest*, for example, the court held that female sexual objectification was not a legitimate job requirement for Southwest flight attendants.[146] As a result, the court forced Southwest to hire men as well as women to the newly desexualized positions.[147] Similarly, in *Guardian Capital v. N.Y. State Division of Human Rights*, the court refused to allow the defendant restaurant to sex-up its business by firing its male waiters and replacing them with sexy female waitresses dressed in "alluring costumes."[148]

Courts check such demands in cases in which women are harassed as a result of their objectification. Rather than simply hold employers liable for the harassment, courts routinely deny employers the power to objectify their female

[146] 517 F. Supp. 292, 302 (N.D. Tex. 1981) (explaining with respect to flight attendants and ticket agents that "[m]echanical, non-sex-linked duties dominate both these occupations").
[147] *Id*. at 304. *See* Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 311 (1997) (noting that Southwest got rid of its "high boots and hot pants" requirement for flight attendants in 1982).
[148] 360 N.Y.S.2d 937, 938 (N.Y. App. Div. 1974).

employees in the first place. In *EEOC v. Sage Realty*,[149] for example, Margaret Hasselman worked as a lobby attendant in an office building in New York City. As part of her job, Hasselman was required to wear a bicentennial uniform, which was a red, white and blue poncho-like outfit. The uniform was largely open on the sides, but Hasselman was not permitted to wear a shirt under the uniform and could only wear blue dance pants on her legs.[150] The uniform revealed Hasselman's thighs, portions of her buttocks, and both sides of her body.[151] When wearing the uniform, Hasselman was subjected to a steady stream of sexual comments and gestures by people entering and leaving the building.[152] Hasselman sued her employer for sexual harassment and won.[153] Yet the court not only found Sage liable for failing to stop the harassment, it also ruled that Sage could not require Hasselman to wear a sexually revealing uniform.[154] The court would not, in effect, permit Sage to explicitly sexualize the position of lobby hostess. [155]

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[149] 507 F. Supp. 599 (S.D.N.Y. 1981).
[150] *Id*. at 605.
[151] *Id*.
[152] *Id*.
[153] *Id*. at 609-610 ("In requiring Hasselman to wear the revealing Bicentennial uniform in the lobby of 711 Third Avenue, defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant").
[154] According to the court, Sage was not justified in putting Hasselman in a sexually revealing uniform because sexual titillation was not a BFOQ of the position. The court explained: "While it may well be a [BFOQ] for Sage to require female lobby attendants in its buildings to wear certain uniforms designed to present a unique image, in accordance with its philosophy or urban design, it is beyond dispute that the wearing of sexually revealing garments does not constitute a [BFOQ]." *Id*. at 611.
[155] *See also* Priest v. Rotary, 634 F. Supp. 571, 581 (holding that "Title VII is also violated when an employer requires a female employee to wear sexually suggestive attire as a condition of employment"); EEOC Decision 81-17, 27 Fair Empl. Prac. Cas. (BNA) 1791, EEOC Dec. P6757, 1981 WL 40388 at *2-3 (holding discriminatory an employer's requirement that a receptionist

Finally, courts check such demands in cases in which only female workers are held to a sexualized ideal. Consider again the airline cases in which courts struck down dress and appearance requirements for female flight attendants. In *Gerdom*, *Frank* and *Laffey* the challenged grooming codes were part of a larger effort by the airlines to make women's bodies and sexuality part of the good for sale. In *Gerdom*, for example, Continental openly asserted that it implemented the weight program for female flight attendants "to enhance its business image by assuring that passengers were served by attractive women."[156] "The purpose of the program was . . . to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'"[157] The weight requirements at issue in *Frank* were a holdover from earlier days when United employed only women as flight attendants and required them, in addition to being slim, to remain unmarried, to refrain from having children, to satisfy general appearance criteria, and to retire by the age of 35.[158] Similarly, the no eyeglasses rule at issue in *Laffey* had been part of a larger grooming and behavior code at Northwest that required female

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wear a special sexually revealing costume consisting "of a halter-bra top and a mini-skirt with a slit running up to [plaintiff's] thighs" in order to entertain visiting VIPs).

[156] 692 F.2d at 603.

[157] *Id*. at 604.

[158] 216 F.3d at 848. United began hiring male flight attendants after the Fifth Circuit's decision in *Diaz v. Pan Am. World Airways, Inc*, 442 F.2d 385 (5th Cir. 1971), in which the Fifth Circuit held that sex was not a bona fide occupational qualification for the position of flight attendant.

flight attendants to meet restrictive height and weight requirements, to remain unmarried, and to retire from service at age 32.[159]

Certainly a *per se* double bind principle cannot explain these cases. It is not impossible for female flight attendants, waitresses and lobby attendants to perform the technical functions of their jobs while looking sexy—particularly if the employer prevents actual harassment.

A broader and more expansive double bind principle, however, can help explain them. Satisfying sexual objectification demands may make satisfying nonsexualized job demands more difficult for female workers in two ways. First, sexualization demands may distract women from the nonsexualized aspects of their jobs and diminish the energy they have left to devote to them.[160] Second, sexualization demands may distract customers and coworkers and diminish their perceptions of the competence of female workers.[161] Courts may protect female workers from sexualization demands precisely because they make it more difficult for women to satisfy the other demands of their jobs.

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[159] 366 F. Supp. at 773-75. Although these cases are regularly cited as exemplars of the unequal burdens test, I believe the cases are better understood as reflecting a broad double bind prohibition.

[160] *See* Barbara Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 269 (1998) (finding that women wearing a swimsuit while taking a challenging math test performed worse than those wearing a sweater while taking the test).

[161] *See* Glick, *supra* note 141 (finding that sexy dressing diminished perceptions of competence of female manager); Brad J. Bushman & Angelica M. Bonacci, *Violence and Sex Impair Memory for Television Ads*, 87 J. APPLIED PSYCHOL. 557 (2002) (finding that after viewing sexual images on television, people of both sexes had impaired memory for the substance of whatever came next); Sandra Forsythe et al., *Influence of Applicant's Dress on Interviewer's Selection Decisions*, 70 J. APPLIED PSYCHOL. 374 (1985) (finding that dressing female managerial job candidates in feminine clothing caused them to be perceived as less competent for managerial positions).

Certainly, courts do not seek to eliminate female sexuality or the female body as gaze object from all jobs. They recognize that women's bodies and appearance may be an important part of the experience being sold in many service sector jobs.[162] Nonetheless, broad double-bind concerns may help explain why courts are particularly suspicious of sexual objectification demands for female employees and why they use Title VII to keep sex out of many jobs and minimized in others.

Antisubordination concerns, as expressed through the unequal burden or double bind test can, then, help explain when and why courts protect workers from gender conformity demands. Courts invalidate those gender conformity demands that reinforce sex inequality in particular ways.

B. Racial Nonconformity

Antisubordination concerns have not, however, resulted in protection of racial minorities from culturally white workplace norms. In this section, I examine why.

1. Unequal Burdens

In the race context, as in the sex context, scholars have challenged workplace conformity demands by arguing that they impose an unequal burden on minority workers. Devon Carbado and Mitu Gulati, most notably, argue that many workplace conformity demands impose unequal burdens on minority

[162] *See, e.g., Craft*, 766 F.2d at 1214 (noting that some focus on appearance for new anchors was unavoidable "[s]ince television is a visual medium"); *Jespersen*, 444 F.3d at 1111-12 (noting that bartenders' appearance was important because Harrah's was part of the "entertainment industry").

workers because the demands are coded white and minority workers must do extra work to comply with them.[163] Yet this is precisely the kind of unequal burden that courts did not care about in the sex context. It is not surprising then that they also do not care about it the race context.

Courts deciding racial discrimination cases, like those deciding sex discrimination cases, refuse to adopt a *per se* unequal burdens test for conformity demands. Courts do not care about conformity demands that disproportionately burden members of one group in terms of the time, money, and energy costs of compliance as long as the demands match conventional professional norms. White middle class dress and behavior norms define professional norms. This is precisely the problem according to many race discrimination scholars. Nonetheless, it is also what renders any disparity in the compliance costs for white and minority workers both invisible and immaterial to courts.

Meanwhile, the narrower unequal burdens test, which courts did use to strike gender conformity demands in sex cases, simply generates no comparable protection in race cases. In the sex context, courts were willing to strike down conformity demands that distinguished between the sexes in ways not justified by conventional gender norms, regardless of whether the burdens imposed were equal or unequal. In the race context, however, conformity demands never distinguish between the races in this way. Conformity demands are always

[163] Carbado & Gulati, *Working Identity, supra* note 5, at 1269 (explaining that minority workers must do extra work to overcome expectations of poor fit); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 717-18 (2001) (describing how racially loaded workplace norms may disadvantage minority employees).

uniform. In race cases, in other words, the burdens that exist are not ones that courts recognize, and the burdens courts recognize are not ones that exist. As a result, the unequal burdens test imposes no check on racial conformity demands.

2. Double Bind

The double-bind principle is similarly impotent against racial conformity demands. As an initial matter, racial conformity demands do not place workers in the kind of narrow double-bind at issue in *Price Waterhouse*. This difference is due to the different ways in which assimilation demands constrain female and minority workers.

Gendered assimilation demands require female workers to play to a distinctly feminine code. Women are expected to look and act like women, men are required to look and act like men, and these are not the same. Racially loaded conformity demands, in contrast, require minority workers to play to a unitary code—one that is applied to all workers regardless of race. The effect of this formal neutrality is that minority workers never face the kind of direct conflict between cultural conformity demands and professional demands that female workers sometimes do.

Consider, for example, a black man facing the same partnership hurdle as Ann Hopkins. He is an associate at a large accounting firm being considered for partnership. He is evaluated, as Hopkins was, based in part on his compliance with cultural conventions and with more role-specific demands. In accord with cultural conventions, he is expected to speak standard grammatically correct

English, wear relatively expensive but understated clothes, and keep his hair and beard short and clean cut. In accord with professional role expectations, he is expected to project strength, authority, and competence. The cultural conformity demands, rather than being in conflict with role demands, as they were for Hopkins, work in concert with them. Indeed, satisfying cultural assimilation demands actually increases the likelihood that the minority candidate will also be viewed as satisfying role demands.

Certainly one could conceive of a double-bind scenario in the race context that parallels that faced by Ann Hopkins in the sex context. Imagine a world, perhaps in the not too distant past, in which cultural conformity demands for blacks and whites, just as for women and men, were explicitly different. Blacks were expected to be deferential, referential and subservient to whites. Whites, at least white men, were expected to be confident and assertive. Consider now the black applicant for partnership. In order to satisfy the role demands of a successful accountant, the candidate must project strength, authority and competence. Now, however, the applicant's cultural conformity demands are in direct conflict with professional role demands. If the black man satisfies role demands, he fails his cultural conformity demands and is likely to be viewed as an uppity and arrogant black man—much as Ann Hopkins was viewed as a bitchy woman. If he satisfies the cultural conformity demands, he almost certainly fails his role demands. Double-binding assimilation demands of this

sort would constitute actionable race discrimination.[164] In practice, however, this is not how assimilationist demands operate on racial minorities.

Another way to see the sex-race difference with respect to a narrow double-bind prohibition is to focus on the market consequences for women and minorities of assimilation demands. While assimilation demands tend to help women in low level jobs, they tend to hurt women in high level jobs.[165] Women in high-level jobs receive market rewards by resisting traditionally female assimilation demands. The demands double-bind them. In contrast, assimilation demands always and only help minority workers satisfy professional role demands. There is no professional or market penalty for minority workers for abiding by such demands and no market reward for minorities who resist assimilationist demands.

The broad double-bind principle may seem to hold more promise for checking racial conformity demands. One could argue that just as sexualized conformity demands double-bind female workers by distracting their attention from the nonsexualized aspects of their jobs, so too do culturally white

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[164] They would be actionable not only because of their subordinating effect, but also because race-specific demands, unlike sex-specific demands, are always illegal.

[165] *See, e.g.*, Glick, *supra* note 141 (finding that sexy dressing diminished perceptions of competence for women in traditionally male but not traditionally female occupations); JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS 114 (1995) (noting that "women lawyers are placed in a constant double bind between the requirements of the role of the 'good woman' and the role of the adversary"); ROSEMARY PRINGLE, *Male Secretaries, in* DOING "WOMEN'S WORK": MEN IN NONTRADITIONAL OCCUPATIONS 133 (Christine L. Williams, ed., 1993) (describing how secretaries came to be defined in the twentieth century in "family and sexual terms"); ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING (1983) (explaining that "[f]or the flight attendant, the smiles are a *part of her work*").

conformity demands double-bind racial minorities by diminishing the attention such workers have left to expend on other aspects of their jobs.

The fact that courts have not used Title VII to protect minority workers from racially loaded conformity demands may mean that courts are simply unwilling to adopt as broad a double-bind principle in the race context as they do in the sex context. The difference in coverage may, in other words, be due to doctrinal differences in the two contexts.

Alternatively, however, it may be that I have not yet fully specified the broad double-bind principle at work in the sex cases. It may be that courts care about the double-bind created by sexualization demands because the double-bind is structural rather than personal. Sexualization demands undermine all female workers both by taking their attention away from nonsexualized skill development and by diminishing how seriously they are taken by others. The double-bind does not depend on the specific subjectivity of any particular female worker.

The double-bind imposed on racial minorities by normatively white conformity demands is different. The extent to which a minority worker is distracted and disadvantaged at work by having to conform to culturally white norms depends on the subjectivity of the particular employee. It depends in particular on the degree to which the minority employee is already comfortable or identified with white norms. For a minority worker who is fully acculturated to white middle class norms, such conformity demands would not impose a

double-bind. Courts may not then be rejecting the broad double-bind antidiscrimination principle in race cases, but simply not finding conformity demands that double-bind.

In sum, antisubordination concerns inhere both in courts' sex and race discrimination jurisprudence. Yet racial conformity demands do not subordinate minority workers in the same ways that gender conformity demands subordinate women. As a result, the antisubordination principles that have resulted in some protections from conformity demands in sex cases yield no comparable protection in race cases.

Nonetheless, neither an unequal burden nor a double-bind test fully explains courts' response to workplace conformity demands. I turn in the next Part to a third antidiscrimination theory that may be doing the additional work.

III. A STATUS PRINCIPLE

Courts and scholars often emphasize that Title VII prohibits discrimination based on status not conduct.[166] In this Part, I examine whether this distinction between protected status and unprotected conduct can further explain courts' conformity decisions. I consider, in other words, whether courts

[166] *See* Charity Williams, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 360 ("Immutable traits are characteristics of status whereas mutable traits are considered conduct, and 'only discrimination based on status is forbidden'"); Gear Rich, *supra* note 5, at 1200-01 (describing the "involuntary/voluntary or status/conduct distinction in Title VII cases"); Engle, *supra* note 6, at 353 ("for the most part . . . a line between status and volitional conduct separated employer actions that are prohibited by Title VII from those that fall under the discretion of the employer, outside of Title VII's scope").

prohibit conformity demands that penalize traits that they consider to be more status-like than conduct-like.

A. Gender Nonconformity

The traditional and most narrow definition of status is ascriptive status. Ascriptive status is determined at birth, is not easily changed, and does not depend on individual conduct.[167] Sex and race are paradigmatic types of ascriptive status. Both are assigned at birth based on legal and medical criteria, are highly stable, and are determined independent of any conduct on the part of the individual. Indeed, it is to their ascriptive status that courts generally point in explaining why discrimination based on race and sex is prohibited.[168]

A prohibition on discrimination based on ascriptive status cannot help explain when courts are willing to check gender conformity demands. This is because none of the gender conformity demands employers impose on employees penalize status of this kind. For example, when employers discriminate against men with effeminate mannerisms, they do so because of the

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[167] Manfred Rohbinder, *Status, Contract & the Welfare State*, 23 STAN. L. REV. 941, 954 (1971) ("The development from status to contract is more accurately 'a movement from 'ascriptive' status, fixed by birth and family rights, to status acquired on the basis of individual achievement'"); Douglas Dribben, *Homosexuals and the Military: Strange Bedfellows*, 57 UMKC L. REV. 123, 125 (1988) ("The current suspect classes recognized by the Supreme Court are race and national origin, are defined by genetics and do not share any conduct or desire for a particular conduct peculiar to the class. It is because of the very nature of their trait-immutable, unchosen, and unrelated to any action on their part—that they have received suspect class status.").

[168] Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 176 (1972) (suggesting heightened scrutiny is triggered by discrimination based on "status of birth"); Mathews v. Lucas, 427 U.S. 495, 505 (1976) ("the legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual"). *See also* FORD, RACIAL CULTURE, *supra* note 7, at 2 (arguing that civil rights law "properly focuses on ascriptive racial status, not on a metaphysics of ancestry or the unplumbed depth of subjective identity.").

employee's actual conduct, not because of their condition at birth. Indeed, even Gender Identity Disorder does not look like a purely ascriptive status. Although there are theories that GID may have its origin in pre-natal brain development,[169] the condition cannot be identified at birth—for reasons that probably go beyond the inadequacy of current medical technology—but requires examination of the person's behavior.[170] Individuals are not diagnosed with GID, and certainly are not discriminated against because of it, without regard to conduct. A narrow focus on protecting ascriptive status cannot then explain why courts protect men who are effeminate and those diagnosed with GID from being penalized for violating masculine conformity demands.[171]

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[169] *See* J. MICHAEL BAILEY, THE MAN WHO WOULD BE QUEEN: THE SCIENCE OF GENDER-BENDING AND TRANSSEXUALISM 169 (2003) (explaining that "femininity in boys and homosexuality in men are probably caused by incomplete masculinization of the brain during sexual differentiation"); Leslie M. Lothstein, *The Scientific Foundations of Gender Identity Disorders, in* MENTAL DISORDERS IN THE NEW MILLENIUM: BIOLOGY AND FUNCTION 246 (Thomas Plante, ed., 2006) ("Newer findings . . . suggest that brain circuitry and specific brain nuclei may be responsible for organization and arousal, gender identity, sexual orientation, and love relationships").

[170] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS- IV (2000) (DSM-IV) defines GID as follows:

"I. Having a strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex.

II. Having persistent discomfort with his or her sex or sense of appropriateness in the gender role of that sex.

III. The disturbance is not concurrent with a physical intersex condition.

IV. The disturbance causes clinically significant distress or impairments in social, occupational, or other important areas of functioning."

See also, Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM HUM. RTS. L. REV. 713, 731 (2005) (arguing that in order to get a medical diagnosis of GID, and access to a sex change operation, individuals are required to possess the conventional gender attributes of their psychological gender).

[171] Indeed, it is courts' allegiance to an ascriptive notion of status that helps explain courts' previous unwillingness to protect transsexuals from discrimination. *See* Holloway v. Arthur Andersen, 566 F.2d 659, 664 (9th Cir. 1977) ("Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex").

Ascriptive status is not, however, the only definition of status that courts have used to justify protecting individuals from discrimination. In *Robinson v. California*,[172] for example, the Supreme Court held that the state of California could not criminalize the status of being a drug addict.[173] Status in this case did not mean ascriptive status. Although individuals are sometimes born addicted to drugs, the status of drug addiction is more often the result of future conduct by the individual.

The Supreme Court's decision in *Robinson* suggests then a broader definition of the kind of status that may be deserving of protection. In *Robinson*, the Court emphasized that addiction was a condition over which an individual had little control. More precisely, the Court focused on two types of lack of control—lack responsibility for acquiring the condition, and lack of ability to change the condition.

The Court suggested the importance of lack of control of the first type when it noted that addiction is "an illness which may be contracted innocently or involuntarily."[174] An addict, the Court suggests, is not responsible for and could not control the condition of being addicted. As Larry Alexander explains: "The Court's rationale was that 'being' addicted was not a voluntary act, and that the

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[172] Robinson v. Cal., 370 U.S. 660 (1962).
[173] Robinson, 370 U.S. at 666-67 (explaining that "we deal with a statute which makes the 'status' of narcotic addiction a criminal offense" and holding that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment").
[174] 370 U.S. at 667.

Eighth Amendment required that punishment not be based on a status that could be acquired involuntarily"[175] Of course, as Mark Kelman has argued, a finding of lack of responsibility for one's condition is often a function of the time frame one examines.[176] One may not be able to control the fact that one becomes addicted to narcotics, but often one can control whether one takes such narcotics in the first place. Or, to use Kelman's own example:

> Even if we should not blame people for being sick, we may well blame them for becoming sick. The addict may seem blameless in the narrow time frame, but in a broader time frame he may well be blameworthy. Certainly, it is not at all uncommon or bizarre for a parent to blame (and punish) a child who goes out of the house in a storm without adequate raingear for *getting* a cold, even though the same parent would not punish the child for the 'status' of *being* ill.[177]

Nonetheless, important to the Court's conception of status seems to be a sense that, at least in a narrow time frame, the individual is not responsible for the condition that defines their status.

The court suggested the importance the second type of lack of control when it compared persecution of a person for being a drug addict with persecution of a person for being "mentally ill, or a leper, or . . . afflicted by a

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[175] *See* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 S.CT. REV. 191, 197 n. 76 ("In Robinson the Court held that the Eighth Amendment barred California's making addiction to narcotics a crime. The Court's rationale was that 'being' addicted was not a voluntary act, and that the Eighth Amendment required that punishment not be based on a status that could be acquired involuntarily");

[176] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600 (1981) (noting that "[t]he tensions of time-framing are evident in the status versus conduct distinction" and

[177] *Id*. at 601-02.

venereal disease"[178] What was unfair about persecution in all cases, it seemed, was that the conditions were not ones which the individual could readily change or eliminate.

This broad conception of status, defined by a lack of individual control rather than an absence of relevant conduct, does help to explain courts' emerging protection of transsexual crossdressers from requirements that they satisfy the grooming code of their biological sex. Indeed, such protection followed, and seemed dependent upon, the medicalization of gender identity disorders.[179] In *Smith v. City of Salem, Ohio*, for example, the first circuit court case to protect a transsexual crossdresser, the court emphasized that Smith had been diagnosed with "Gender Identity Disorder" which, the court noted, "the American Psychiatric Association characterizes as a disjunction between an individual's

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[178] 370 U.S. at 666.

[179] As Michael Selmi has noted "it is now possible that within the Sixth Circuit only transsexuals are protected under the sex stereotyping theory." Selmi, *supra* note 101, at 477. The Sixth Circuit has not been alone in expanding protection for transsexuals. *See* Schroer v. Billington, 424 F. Supp.2d 203 (D.D.C. 2006); Schwenck v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Mitchell v. Axcan Scandipharm, Inc., No. Civ. A 05-243 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Kash v. Maricopa Cty. Community College Dist., No. 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004); Tronetti v. TLC Health Net Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D. NY, Sept., 26, 2003); Doe, 2001 WL 34350174, at *2. *Cf.* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977); Doe v. U.S. Postal Service, 1985 WL 9446, at *2 (D.D.C. 1985); Etsitty v. Utah Transit Auth., 2005 WL 150561 (D. Utah, June 24, 2005); Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541 (E.D. La. 2002); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); Cox v. Denny's Inc., 1994 WL 1317785 (M.D. Fla., Dec. 22, 1999); Underwood v. Archer Management Services, Inc., 857 F. Supp. 96, 98 (D.D.C. 1994); Doe v. United Consumer Fin. Serv., No. 1:01-CV-1112, 2001 WL 34350174, at *2 (N.D. Ohio, Nov. 9, 2001); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg, Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977); Doe v. U.S. Postal Service, 1985 WL 9446, at *2 (D.D.C. 1985). Antidiscrimination protection for transsexual and transgender employees continues to vary widely. *See* Koch & Bales, *supra* note 9.

sexual organs and sexual identity."[180] The court went on to explain that Smith's decision to "express a more feminine appearance on a full-time basis" was "in accordance with international medical protocols for treating GID."[181] The court's medicalization of GID rendered it, like addiction, a status beyond individual control and worthy of protection. [182]

The broad conception of status also helps explain courts' protection of effeminate men (and masculine women) from harassment stemming from their gender nonconformity. In the effeminate men cases the plaintiffs are being harassed not (at least not wholly) because of some discrete characteristic over which they have easy control--like what they wear-- but because of the complex and highly personal way in which they inhabit their body. They are being harassed because of a combination of intangible factors--how they walk, talk, stand and move--which determine their self presentation and the reactions they receive from others. For most people the manner in which they engage in this conduct is unconscious, the product of natural inclinations rather than conscious practice. Even for those who do practice a particular mode of talking, standing,

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[180] 378 F.3d 566, 568 (6th Cir. 2004).

[181] *Id*. at 568. Likewise, in Barnes v. City of Cincinnati, the Sixth Circuit emphasized that Barnes was a pre-operative transsexual who, by the time his case was decided, had transitioned from male to female. 401 F.3d 729, 733 (6th Cir. 2005).

[182] Indeed, although the *Smith* court relied on the broad anti sex stereotyping rhetoric of *Price Waterhouse* to explain its protection of transsexual crossdressers, the court neither disavows nor even addresses its own prior case law denying protection to nontranssexual workers challenging sex-based clothing and grooming requirements. See, e.g., *Barker v. Taft Broadcasting Company,* 549 F.2d 400 (6th Cir. 1977), upholding a hair length restriction on male but not female employees against a claim of sex discrimination. It distances itself only from pre-*Price Waterhouse* cases denying such protection to transsexuals. 378 F.3d. at 572-73 (explaining that the logic of these "pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection" have been "eviscerated").

and moving, such conduct eventually becomes automatic and involuntary--and difficult to alter.

Consider, for example, the harassment suffered by Antonio Sanchez in *Nichols v. Azteca Restaurant Enterprises*.[183] Sanchez, a food server, was harassed for "walking and carrying his serving tray 'like a woman.'"[184] Whatever it was about Sanchez's movement that made Sanchez's co-workers refer to him as "she" and "her"[185] was not susceptible to easy identification or quick fix. Indeed, the harassers themselves would probably have struggled to describe precisely what about Sanchez's movements they found objectionable. Even if they could, it would have been extremely difficult for Sanchez to alter his walk and movements so as to eliminate the offending affect. Doing so is not like changing one's shirt. It is more like changing one's way of being in the world.

Consider also the harassment faced by sixteen year old H. Doe in *Doe v. City of Belleville, Illinois*.[186] H. was subjected to repeated physical and verbal harassment focused on his inadequate masculinity.[187] Certainly, H.'s earring was a focal point of harassment.[188] Yet it is unlikely that the harassment would have ceased, or never started, if H. had simply removed the earring.[189] The

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183 256 F.3d 864 (9th Cir. 2001).
184 *Id*. at 870.
185 *Id*. at 870.
186 119 F.3d 563 (7th Cir. 1996).
187 In addition to other incidents of physical and verbal harassment, H. Doe was regularly called "queer" and "fag," was asked "Are you a boy or a girl?" and was referred to by his primary harasser as his "bitch." *Id*. at 566-67.
188 *Id.* at 567.
189 Indeed, H.'s brother J. was also harassed, albeit less severely, despite not wearing an earring. *Id*. at 566.

harassment was prompted not by a discrete easily identifiable action on H.'s part. It was prompted and driven by the gestalt of how H. presented himself--the way in which he occupied and moved his body.[190] As was the case for Sanchez, identifying what exactly it was about H.'s self-presentation, much less getting H. to change it, would likely be impossible. The harassment looks, as a result, distinctly status-like.[191]

A broad status-based antidiscrimination principle not only explains why courts provide protection to transsexual crossdressers and effeminate men, but it also explains why courts continue to deny protection to nontranssexual gender benders who violate specific dress and grooming requirements. In such cases, which involve clearly defined requirements and no medical illnesses, courts view compliance as a matter of personal preference. Indeed, it is this choice and control, in addition to the lack of subordinating effect discussed previously, that courts repeatedly stress in cases upholding sex-specific grooming codes.

In *Pecenka v. Fareway Stores, Inc.*,[192] for example, the Iowa Supreme Court upheld an employer's right to terminate a male employee for refusing to remove his ear stud emphasizing that the requirement was one with which Pecenka

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[190] As the court explained: "H. Doe [did] not su[e][ ] Belleville in order to challenge a workplace rule that forbade him from wearing an earring," he sued because "his gender had something to do with the harassment heaped upon him." *Id*. at 582.

[191] Devon Carbado, Mitu Gulati and Gowri Ramachandran have offered a slightly different status-oriented reading of the effeminate men harassment cases, one focused on the status of homosexuality rather than gender. They contend that by using the sex stereotyping rhetoric of *Price Waterhouse* to protect effeminate men from harassment, courts "quite possibly, [ ] were engaging in subversive judging—namely, enacting a minor rebellion against the Constitutional refusal to provide any protection against sexual orientation discrimination." Carbado, Gulati & Ramachandran, *supra* note 9, at 137.

[192] Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800 (Iowa, 2003).

could easily comply. "Wearing an ear stud is not an immutable characteristic," the court noted.[193] "Pecenka can remove his ear stud or cover it with a bandage."[194] Similarly, in *Austin v. Wal-Mart Stores, Inc*, the district court upheld an employer's sex-specific requirement that male employees keep their hair above the collar emphasizing that "hair length is not an immutable characteristic, for it may be changed at will."[195] "Discrimination based on factors of personal preference" the court explained, "do not necessarily restrict employment opportunities and are thus not forbidden."[196]

Similarly, in *Jespersen* the court emphasized the personal choice involved in Jespersen's refusal to wear makeup. The court explained: "We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII."[197] Sex-specific grooming requirements, the court emphasized,

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[193] *Id.* at 805.

[194] *Id*. at 805. The court also emphasized that the no earring for men rule did not reinforce women's or men's subordination in the workplace. The court noted, "Nor does [plaintiff] contend that the unwritten personal grooming code perpetuates a sexist or chauvinistic attitude in employment that significantly affects his employment opportunities." *Id*. at 805. *See also* Lockhart v. La.-Pac. Corp., 795 P.2d 602, 603 (Or. 1990) (upholding no facial jewelry rule for male but not female employees explaining that "[o]nly those distinctions between the sexes which are based on immutable, unalterable, or constitutionally protected personal characteristics are forbidden").

[195] 20 F. Supp.2d 1254, 1258 (N.D. Ind. 1998).

[196] *Id*. at 1256. Like the court in *Pecenka*, the *Austin* court also emphasized that the sex-specific grooming requirement at issue did not raise antisubordination-oriented concerns. As the court explained: "The objective of Title VII is to equalize employment opportunities. Consequently, discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate Title VII because they present obstacles to the employment of one sex that cannot be overcome . . . ." *Id*. at 1256.

[197] *Jespersen*, 444 F.3d at 1112.

did not become illegal simply because they were "personally offensive" to the plaintiff.[198]

For Darlene Jespersen, Michael Pecenka and James Austin, compliance with their employer's conformity demands was physically easy and relatively uncomplicated. Noncompliance was, as the courts suggested, largely a matter of choice and personal preference, and did not, as a result look status-like.

Courts' protection of gender nonconforming behavior that looks status-like helps complete the picture of courts' Title VII sex discrimination jurisprudence. Such jurisprudence does not reflect a right to engage in gender nonconformity as such. It does, however, reflect courts' commitments to ending status discrimination and group subordination which do sometimes themselves require protection of gender nonconforming conduct.

B. Racial Nonconformity

In the race context, the same broad status-based antidiscrimination principle helps to explain one of the few types of conformity demands that courts readily treat as racially discriminatory. These are demands that black men with Psuedofolliculitis barbae (PFB) comply with no-beard requirements.[199]

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[198] *Id.* at 112.

[199] PFB is a skin condition that makes shaving painful. As the court explained in *Richardson v. Quik Trip Corp.*:

> Psuedofolliculitis barbae . . . is a facial skin condition that afflicts certain persons with curly or kinky hair follicles. After shaving, the curved hair follicles cause the already curly hair to curve back into contact with the skin surface, and pierce and re-enter the skin, forming a pseudofollicle. The pseudofollicle becomes inflamed, and painful papules and pustules result around the pseudofollicles and, if untreated, cause scarring, hyperpigmentation, and disfigurement.

The medical diagnosis of PFB as a disease makes it look a lot like GID—a condition for which the individual is blameless and over which he lacks easy control. Indeed, critical to plaintiffs' success in such cases has been their ability to convince a court of the physical pain and hardship associated with shaving because of this racially correlated condition.[200]

In *Richardson v. Quik Trip*, for example, the plaintiff was fired for refusing to shave his beard in violation of the company's grooming code.[201] The plaintiff sued alleging that enforcement of the policy against black men like him who suffered from PFB constituted race discrimination. The court agreed emphasizing that for PFB sufferers like the plaintiff shaving was "insufferable."[202] Similarly, in *University of Maryland at Baltimore v. Boyd*, the plaintiff, a black man with PFB, claimed that, as applied to him, a no-beard

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591 F. Supp. 1151, 1153-54 (D.C. Iowa, 1984). *See also* Univ. of Md. v. Boyd, 612 A.2d 305, 314-15 (Md. 1992) (referring to expert testimony in the record that PFB makes shaving very uncomfortable).

PFB affects a significant proportion of black men and affects almost exclusively black men. *See Quik Trip*, 591 F. Supp. at 1154 ("PFB is an immutable condition that, with few exceptions, afflicts only male blacks"); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 56 (D. Colo. 1981) ("[O]f the total black male population, 25% are unable to shave regularly without serious, painful disorders of the skin of the face"); *Boyd*, 619 A.2d at 316 (explaining that "PFB is predominantly found in the African American male population and that the wearing of a beard is the most common cure").

[200] The fact that the burden imposed is both physical and race related is critical to the success of these claims. *See* Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 43 (D.C. Va. 1976) (noting that "[t]he evidence adduced in the instant case does establish that the 'no beard' policy can act to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race").

[201] 591 F. Supp. 1151 (S.D. Iowa 1984).

[202] *Id*. at 1155.

requirement for university police officers was racially discriminatory.[203] The Maryland Court of Special Appeals agreed.[204] In reaching its conclusion, the court emphasized the pain associated with shaving for PFB sufferers and the particular severity of the plaintiff's own case.[205]

In contrast, when compliance costs are low, courts refuse to use antidiscrimination law to protect workers from no-beard requirements. In such cases, nonconformity looks less like a matter of racial status and more like a matter of personal choice. Consider, for example, the Eighth Circuit's ruling in *Bradley v. Pizzaco of Nebraska*.[206] *Bradley* involved a case brought by the EEOC on behalf of Langston Bradley, an African American man who suffered from PFB.[207] Bradley had worked as a delivery man for Domino's Pizza until he was fired for failing to comply with the company's no-beard policy.[208] The EEOC sought an injunction requiring Domino's to recognize an exception to its no-beard policy

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[203] 612 A.2d 305 (Md. 1992). The plaintiff in Boyd filed his claim under Maryland state law, though, as the court notes, Maryland's relevant antidiscrimination statute "'is modeled on Title VII of the Civil Rights Act of 1964.'" *Id*. at 314 (citation omitted).

[204] *Id*. at 316 ("we find the hearing examiner's conclusion, that the University's policy adversely affects the African American male population afflicted with PFB, is supported by substantial evidence in the record.").

[205] *Id*. at 314 (noting that "[e]xpert witnesses testified that the symptoms of PFB, skin irritation, pus and blood filled sores, and scarring, are brought on by shaving and that some sufferers of PFB must abstain from shaving"). The Court further noted that the Maryland Commission on Human Relations found that "Mr. Boyd's 'PFB condition impaired his appearance, scarred his face and created an externally visible disfigurement unless he wore a beard . . . ." *Id* at 317. Moreover, the court concluded that "[t]here is substantial evidence to prove that the severity of Mr. Boyd's PFB condition significantly impairs his ability to socialize, considered to be a major life activity, and, therefore, is physically handicapping to him." *Id*. at 318. Although the court discussed this particular evidence in the part of the case addressing plaintiff's disability discrimination claim rather than his race discrimination claim it seems likely that the evidence also influenced the court's analysis of plaintiff's race discrimination claim.

[206] 7 F.3d 795 (8th Cir. 1993).

[207] *Id*. at 796.

[208] *Id*.

for PFB sufferers.[209] Although the court ultimately ruled that Domino's was required to recognize such an exception to its no beard policy, [210] the court denied Bradley protection under the exception.[211] The court found that Bradley suffered from only a mild case of PFB and hence was able to shave.[212] In other words, although the no beard requirement did constitute impermissible race discrimination as applied to those PFB sufferers for whom shaving was really painful, as to Bradley, the no beard requirement was a legitimate workplace conformity demand.[213]

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[209] *Id*.

[210] The court "remand[ed] to the District Court for entry of an injunction granting the EEOC the narrow prospective relief it seeks. The injunction shall be carefully tailored to place Domino's under the minimal burden of recognizing a limited exception to its no-beard policy for African American males who suffer from PFB and as a result of this medical condition are unable to shave." *Id*. at 799.

[211] *Id*. at 796. The court "affirmed the District Court's finding that Bradley suffers only a mild case of PFB and can appear clean-shaven as not clearly erroneous. Bradley thus was not entitled to relief and is no longer a party to the litigation." *Id*. at 796.

[212] Not surprisingly, courts also view compliance costs as low when noncompliance is due to a sense of racial or personal identity rather than physical pain. Employees do not have success challenging employers' no beard policies when the challenge is grounded in a personal preference rather than a physical need. *See, e.g*., Wofford v. Safeway Stores, Inc., 78 F.R.D. 460 (N.D. Ca. 1978) (holding no beard policy was not racially discriminatory when applied to employee whose beard was an important part of his racial identity); Keys v. Continental Illinois National Bank, 357 F. Supp. 376 (N.D. Il. 1973) (same); In Re Pacific Southwest Airlines, 77 LA (BNA) 320 (1981) (holding that employer could enforce its no beard policy against a pilot who "had become rather attached to [his] beard" and did not want to shave it").

[213] As a doctrinal matter, courts ground their protection for PFB plaintiffs in a disparate impact framework rather than in the disparate treatment framework used to protect effeminate men and transsexuals in the sex context. It would be a mistake, however, to conclude that this different doctrinal framework, rather than the same substantive concern with status discrimination, is driving the results. In fact, courts stretch disparate impact doctrine considerably in order to find for plaintiffs in these cases. First, courts allow plaintiffs to establish their prima facie case by pointing to general population data rather than to qualified labor pool data. In other words, instead of showing the proportion of blacks and whites in the relevant qualified labor pool who are harmed by the hiring requirement, plaintiffs present only the more general evidence of the proportion of blacks and whites in the population at large who would be harmed by the hiring requirement. *Se*e EEOC v. Trailways, Inc., 530 F. Supp. 54, 56-59 (D.C. Colo. 1981) (finding prima facie case of disparate impact by looking at general population data and noting that "it is scientifically proven that PFB is a disease unique or at least almost unique to blacks"); Johnson v.

The broad status-based antidiscrimination principle also helps explain why such protection is so rare in race cases. Unlike the PFB cases, the vast majority of racial conformity cases involve demands whose satisfaction is, at least perceived by courts to be, well within minority workers' control. Indeed, it is employees' ready control over the traits at issue that courts emphasize in denying antidiscrimination protection. In *Rogers*, for example, the court emphasized that Rogers could easily comply physically with the no cornrows rule by covering her hair or wearing it in a bun. Similarly, in *Spun Steak*, the court emphasized that the bilingual plaintiffs could simply choose to speak English in compliance with the English-only rule. Because the prohibited traits have not been medicalized, as they have in GID cases, courts discount and ignore both the physical and psychic harm that would result from their abandonment. Because the demanded traits are discrete and clearly defined, as they are not in the effeminate men cases, courts view compliance as easily attainable. Minority

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Memphis Police Dept., 713 F. Supp. 244, 247-48 (W.D. Tenn. 1989) (finding disparate impact based on general population data of race-based impact of PFB and noting that "there is no way of determining how many, if any, black officers failed to apply or left the Department because they had folliculitis"); *Boyd*, 619 A.2d at 315 (finding disparate impact from no beard policy by looking at general population data regarding PFB). Second, and more importantly, courts allow plaintiffs to establish a disparate impact without any evidence, and indeed despite contrary evidence, that the hiring requirement is leading to a lower proportion of blacks in the relevant position than would be expected absent the challenged criteria. *See Trailways*, 530 F. Supp. at 56 (rejecting defendant's argument that plaintiff failed to make a prima facie case of disparate impact because the defendant's "employment of black drivers and other public contact employees exceeds percentagewise the overall Denver or Colorado percentage of blacks"); *Boyd*, 619 A.2d at 315 (finding disparate impact despite defendant's argument that "the evidence did not prove that the University's policy has affected any African American male other than Mr. Boyd" and defendant's argument that "the University employment statistics show that the University employs a higher percentage of African Americans than is found in the labor pool or in other similar agency positions").

workers' nonconformity with racially dominant workplace norms is seen as a form of conduct rather than as a reflection of status.

It is likely, though perhaps counterintuitive, that courts' refusal to treat virtually any expressions of racial identity as status-like is, at least in part, a legacy of the civil rights movement. As civil rights activists struggled to define and promote a conception of racial justice and equality, two competing positions fought for prominence—integrationism and nationalism.[214] Integrationists responded to the country's racist legacy of essentializing blacks as different and inferior to whites by denying the significance of race altogether. Integrationists equated racial justice with racial transcendence whereby individuals interacted and competed with each other in a color-blind world.[215] Black nationalists, in contrast, argued that race did matter. They argued that blacks and whites had distinct communities, histories and traditions.[216] They argued not for racial transcendence but for the distribution and equalization of power across races.[217] Integrationism, they contended, did not involve a move to

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[214] *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 823 (explaining that "[t]he clash between nationalism and integrationism extended from the period starting in 1966—when the 'Black Power' slogan first gained national prominence—and lasted until the marginalization of black nationalists was complete in the mid-1970s").

[215] *Id*. at 771.

[216] *Id.* at 792 (explaining that "the idea of race as an organizing basis for group consciousness asserts that blacks and whites are different, in the sense of coming from different communities, neighborhoods, churches, families, and histories, and of being in various ways foreigners to each other").

[217] *Id*. at 789.

some new neutrally color-blind society but assimilation to white norms and the abandonment of black culture.[218]

To integrationists, black nationalism smacked of the same kind of essentialism as white supremacy.[219] They believed that both ideologies needed to be suppressed and surpassed in the interests of racial justice. Indeed, Gary Peller has argued that this equation of black nationalism with white supremacy, and the subsequent marginalization of both, was the compromise required to incorporate civil rights into the mainstream. He explains:

> Along with the suppression of white racism that was the widely celebrated aim of civil rights reform, the dominant conception of racial justice was framed to require that black nationalists be equated with white supremacists, and that race consciousness on the part of either whites or blacks be marginalized as beyond the good sense of enlightened American culture.[220]

Integrationism did become mainstream, and a commitment to color blindness became the dominant social and legal conception of racial equality.[221] It is this

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[218] *Id*. at 791, 797.

[219] *See* FORD, RACIAL CULTURE, *supra* note 7, at 33 ("Opposition to integration in the name of tradition and racial difference, while a competing position of the 'nationalist' left, was also and most notably the position of the racist right'); Peller, *supra* note 214, at 761 (explaining that "most white liberals and progressives, protecting themselves as the enlightened avante garde of the white community, automatically associated race nationalism with the repressive history of white supremacy").

[220] Peller, *supra* note 214, at 760.

[221] *See* FORD, RACIAL CULTURE, *supra* note 7, at 33 ("Integration (especially colorblindness and assimilation) became the ideals of the mainstream in the 1960s and 1970s"); Peller, *supra* note 214, at 790 (describing the "centering of integrationism as the mainstream ideology of American good sense" and the marginalization of nationalism). Certainly the split between integrationist and nationalist ideology was not as simple or stark as my description suggests, nor was the victory of integration over nationalism as complete. A number of policies begun in the civil rights era refute any rigid commitment to colorblindness and reflect the country's continued race consciousness. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 190 (1992) (describing race balancing of public schools, affirmative action policies in business and race-based voting rights legislation).

commitment to racial transcendence and aversion to racial essentialism that helps ensure that courts virtually never view expressions of racial identity by minority workers as a function of their racial status as such.

CONCLUSION

I have sought in this paper to both explain a body of case law and in the process to make sense of a paradox: why does Title VII's prohibition on sex discrimination look so much more expansive than its prohibition on race discrimination? Why, in particular, do workers appear to be receiving greater protection for expressions of gender identity than for expressions of racial identity?

I have argued that, in one sense, the paradox is illusory. Courts are not interpreting Title VII's prohibition on sex discrimination in a different and more expansive way than its prohibition on race discrimination. I have argued, in particular, that there is no special antiassimilation-oriented antidiscrimination principle taking root in the sex context. Instead courts are interpreting Title VII's prohibitions on race and sex discrimination according to the same set of rather traditional antidiscrimination principles. Courts check only those conformity demands that penalize status or reinforce protected group subordination.

In another sense, however, the paradox is real. Employees are more likely to find their workplace expressions of gender identity protected than their expressions of racial identity. The difference, however, has more to do with

culture, and, perhaps, biology than with law. Sex is treated as rich and complex in ways that race is not. Indeed, individuals are viewed as having not only a sex but also a gender. While the two are no longer seen as invariably aligned, both are viewed as meaningful. Both are treated as biologically or physiologically based and as having some recognizable external manifestations. Race, in contrast, is viewed as a mere technical difference of skin tone unassociated with meaningful differences in behavior or self-presentation. In short, race is empty while sex is loaded.

These differences explain why similar legal principles lead to such very different results. Because some gendered behaviors seem "natural" and immutable, they receive protection from workplace discipline. Because no racial expressions are viewed the same way, they do not.

Moreover, because gender is dichotomous—people are either gender female or gender male--gendered conformity demands impact the workplace success of women and men differently. Again, the same is not true for race. Racially loaded conformity demands are unitary and do not impose different obligations or impediments on different racial groups. As a result, only the former trigger Title VII's antisubordination-oriented protection.

As I said at the outset, my goal in this project has been to explain a body of case law, not to join the current normative debate over it. Nonetheless, what the present analysis reveals is that arguments to expand (or shrink) Title VII's protection of nonconformists must operate not only at the level of legal doctrine

but also at the level of culture. Antidiscrimination scholars must recognize how fundamentally different social conceptions of race and sex are affecting the impact of law in unexpected, and seemingly ahistorical, ways.