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Misapplying Equity Theories: Dress Codes at Work

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ABSTRACT: This article provides a new perspective on Title VII caselaw concerning employer-mandated, sex-specific dress codes. With few exceptions, courts have held that employer dress codes do not constitute sex discrimination even when they expressly differentiate based solely on an employee's sex. In other contexts, courts readily acknowledge that facially sex-based practices and policies are presumptively unlawful under Title VII. When it comes to dress codes, however, nearly the opposite is true. Courts generally presume a sex-based dress code to be permissible, and the burden falls heavily on the employee to show, beyond the mere fact of differential treatment, some additional disparity or harm, such as that the particular requirements at issue are more burdensome for women than for men or that they perpetuate stereotyped views of women as inferior or as sexual objects. This pervasive attitude of judicial laissez-faire toward sex-based dress codes is increasingly anomalous in the wider context of sex discrimination caselaw, and yet shows no signs of abating. This Article argues that this doctrinal blind spot is an unintended—and unfortunate—by-product of "second generation" equality theory, which downplays formal equality and focuses on anti-subordination principles as the purpose of equality law. While affirming the continuing importance and viability of second generation equality theory in the areas of affirmative action and disparate impact, I argue that an over-emphasis on anti-subordination theories has skewed dress code caselaw and prevented courts from seeing the discriminatory harms caused by sex-specific dress requirements. Prescriptively, the article suggests ways for litigants to refocus courts on first generation principles in dress code cases. This includes strategies for identifying the harm caused by the formal labeling of difference, a harm ignored in cases of sex discrimination but well understood for race. Such a

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litigation strategy would be more effective than pursuing the currently popular sex stereotyping theory, which has largely failed to expose the detrimental impact of sex-based dress codes on employees.

INTRODUCTION

In most contexts, courts readily acknowledge that facially sex-based practices and policies are presumptively unlawful under Title VII.[1] When it comes to dress codes, however, the opposite is almost always true. Although courts have acknowledged that dress codes that impose sexually exploitative dress requirements[2] or one-sided disadvantages for either men or women are impermissible,[3] the typical dress code that simply distinguishes the appearance of men and women in the workplace has been found to be unobjectionable by courts.[4]

Dress code challenges have arisen in a variety of contexts, but this Article focuses on instances where an employer requires different dress or grooming

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1. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (invalidating a policy barring all women, except those who were infertile, from jobs involving lead exposure as violative of Title VII); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (finding that a policy requiring female employees to make larger pension contributions than male employees violated Title VII).

2. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (ruling that a female employee could not be required to wear a "sexually revealing . . . uniform"); Marentette v. Mich. Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (suggesting that sexually provocative dress code requirements would be impermissible).

3. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1029-30 (7th Cir. 1979) (striking down a dress code that required women to wear uniforms but allowed men to wear business suits); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding impermissible a dress code requiring female sales clerks to wear a "smock" while allowing male sales clerks to wear shirts and ties, even absent a discriminatory motive, because it "perpetuate[d] sexual stereotypes"); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357 (C.D. Cal. 1972) (finding that a male employee who was discharged for having long hair while women were allowed to have long hair established prima facie sex discrimination).

4. *See, e.g.*, Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1080 (9th Cir. 2004) (upholding a policy of sex-differentiated grooming standards that allegedly burdened women more than men); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (dismissing a challenge to a policy that prohibited men, but not women, from having long hair); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (upholding an employer policy that required male employees to have short hair but did not require the same for female employees); Wislocki-Goin v. Mears, 831 F.2d 1374, 1380 (7th Cir. 1987) (dismissing a Title VII claim alleging that a grooming policy imposed unduly harsh requirements on women); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755-56 (9th Cir. 1977) (holding that requiring male, but not female, employees to wear ties was not sex discrimination under Title VII); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) (upholding policy that limited the manner in which men's hair could be cut and the manner in which women's hair could be styled); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (finding sex-differentiated grooming standards consistent with Title VII); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) (upholding policy that required short hair for men but not for women); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (finding a grooming policy that "reflect[ed] customary modes of grooming" acceptable even though differences in policy existed for men and women); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973) (upholding a policy that only prohibited men from wearing long hair); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998) (finding a grooming policy requiring male employees to maintain hair length above the collar acceptable under Title VII); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding a "policy that prohibits to both sexes a style more often adopted by members of one sex" under a Title VII challenge); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) (finding a sex discrimination claim insufficient where employer prohibited female, but not male, employees from wearing pantsuits in executive offices).

requirements for male and female employees:[5] either women must wear a particular article of clothing that men may not or men must wear a particular article of clothing that women may not.[6] The quintessential example is a policy that requires female employees to wear skirts or dresses and male employees to wear pants.[7]

Courts have found these dress code policies to be permissible despite the clarity of established disparate treatment law under Title VII and the direct evidence of discrimination that these policies produce.[8] I call this anomalous jurisprudence—the collection of cases upholding different standards of dress for men and women in the workplace—the "Title VII blind spot."[9]

This Article makes both a descriptive and a prescriptive point related to dress code jurisprudence. First, descriptively, I argue that the dress code caselaw reveals that courts have relied (overly so) upon group anti-subordination equality theory and ignore the "first-order" equality principle that different treatment of individuals is itself harmful even in the absence of demonstrable group-based harm.[10] The permission slip these cases have given to employers to impose sex-based workplace dress policies has a pernicious effect on significant numbers of people. Prescriptively, courts must recognize

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5. To be sure, there are two other important categories of dress code cases, but for different reasons they are not addressed herein. The first of the unanalyzed category of cases involves policies that may more fairly be categorized as cases of disparate impact based on the employee's sex. Batson v. Powell, 912 F. Supp. 565 (D.D.C. 1996) (holding that a facially neutral dress policy enforced against women but not men did not violate Title VII). For example, policies prohibiting facial hair apply to both male and female employees, but predominantly impact one sex. Barrett v. Am. Med. Response, N.W., Inc., 230 F. Supp. 2d 1160 (D. Or. 2001) (finding a "no beard" policy to be a legitimate exercise of discretion by the employer over the employees' appearance despite its disparate impact on men). A no-facial hair policy has a disproportionate effect on men since nearly all adult men have facial hair while only a minority of women do. A second category of dress code claims not analyzed by the Article includes those challenging policies that allow for discretion in one category (e.g., men can wear business attire) and rules in another (women must wear uniforms). *O'Donnell*, 656 F. Supp. 263 (finding that a policy requiring female sales clerks to wear smocks while allowing male sales clerks to wear shirts and ties—that is, granting male clerks the discretion to select their clothing—violates Title VII). This Article's focus is on dress codes that require men to look like men and women to look like women. Though important and interesting, I leave for another day the disparate impact and discretion versus rules cases in part because of the limited success already achieved in the last category and the different legal issues that arise in the disparate impact cases.

6. *See, e.g.*, *Harper*, 139 F.3d 1385 (prohibiting only men from having long hair); *Lanigan*, 466 F. Supp. 1388 (prohibiting only women from wearing pantsuits).

7. *Lanigan*, 466 F. Supp. 1388.

8. *See, e.g.*, *Fountain*, 555 F.2d 753; *Barker*, 549 F.2d 400; *Earwood*, 539 F.2d at 1350; *Longo*, 537 F.2d at 685; Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); *Knott*, 527 F.2d at 1252; Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); *Dodge*, 488 F.2d at 1337.

9. I am grateful to Richard Juang for this language.

10. *See, e.g.*, *Barker*, 549 F.2d at 401 (noting the absence of disparate treatment by stating, "There is no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged. Nor is there any allegation that the employer refused to hire men who did not comply with the code, but did hire women who were not in compliance."); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (distinguishing "employment policies resulting in significantly different levels of pension and health benefits for males and females" from hair length policies that are different for men and women).

that the public labeling of difference is not just normatively harmful, but also prohibited under well-established equality law.[11]

In sum, the anti-subordination principle developed by "second generation" equality theorists has been misapplied by courts deciding sex discrimination cases challenging gender-based dress codes. The harm caused by these dress codes is perceived exclusively as an individualized harm not shared by other members of the affected class. However, Title VII, the law that serves as the doctrinal basis of these claims does not require a showing of group harm. It only requires that an individual be able to demonstrate that he or she has been affected *personally* on the basis of gender—not that all men or all women are similarly affected by differential treatment. Therefore, courts should analyze these challenges by application of what I refer to as "first generation" anti-differentiation principles, a perspective that acknowledges individualized harms and imports no requirement of demonstrable group subordination.

In Part I, I set forth the foundational concepts upon which my analysis rests. I explain the original, anti-differentiation principle of equality theory as well as the later developed group-disadvantaging principle first articulated by Professor Owen Fiss[12] and later refined by scholars such as Catharine MacKinnon,[13] Reva Siegel,[14] Ruth Colker,[15] Cass Sunstein,[16] and others.[17] Part I also sets forth the basic analysis courts have developed in the context of gender-based dress code challenges. Part II tackles the project of articulating what is wrong with the dress code cases—including the extent to which gender-based dress codes harm employees as well as the doctrinal and logical errors made by the courts. I argue that over-emphasis on anti-subordination theory at the expense of first generation, formal, or anti-differentiation equality theory has prevented courts from seeing the discriminatory harms caused by sex-specific dress requirements.

In Part III, I explain the two underlying sex discrimination theories that have been brought (largely unsuccessfully) to challenge dress codes. The first

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11. *See* Anderson v. Martin, 375 U.S. 399, 402 (1964) (holding that labeling the race of candidates on ballots is impermissible under the equal protection guarantees of the Fourteenth Amendment without any demonstration of voter impact).

12. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

13. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1991).

14. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

15. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

16. Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

17. By grouping these theories together and describing them as "second generation," as I do below, I do not mean to equate them. I acknowledge their differences and important individual contributions. However, what they share is a rejection of an exclusive concern with what I below term the first generation goal of nondiscrimination law—equal treatment. As Professor Sunstein explained, there is no single "valid understanding of equality. On the contrary, there are many such understandings. Our Constitution's equality principle is plural rather than singular. It has numerous manifestations . . . ." *Id.* at 2412.

of those theories, what I term a straightforward sex discrimination theory, has been too often overlooked as a possible avenue for challenging gender-based dress codes. Where pursued, this theory has been incorrectly analyzed by courts. The second theory, a sex stereotyping theory, has had traction more recently, at least when advanced by gay/lesbian and transgender litigants in the context of workplace sexual harassment.[18] The success of those cases demonstrates the potential of the sex stereotyping theory as a basis for challenging sex-differentiated dress codes, but its incorporation of an anti-subordination approach imposes serious limits as well.

In Part IV, I discuss two recent cases—*Jespersen v. Harrah's*,[19] a challenge to sex-based grooming standards brought by a long-term female employee of Harrah's Casino, and *Schroer v. Billington*,[20] a challenge brought by a transsexual woman who lost a job opportunity she had been offered by the Library of Congress when her potential employer learned that she was transsexual. The two cases illustrate the descriptive points made, offer opportunities to incorporate the prescriptive one, and create a frame for implementing new litigation strategies to challenge sex-based dress codes.

I. FOUNDATIONAL PRINCIPLES OF THEORY AND PRACTICE

A. Anti-Differentiation v. Anti-Subordination

The first generation principle of equality is that people should be treated the same, without regard to certain identity characteristics that law has

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18. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that allegations that employee was discriminated against based upon employee's non-conforming gender behavior and appearance were actionable under Title VII); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (noting that stereotypes about a school psychologist's maternal obligations to her children could not inform the school's decision to deny her tenure); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (stating that a sexual harassment claim brought by a gay casino employee could also be cabined within the sex stereotype framework set forth in Nichols v. Azteca Rest. Enter., 256 F.3d 864 (9th Cir. 2001)); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) (noting that evidence of same-sex harassment based on sex stereotyping may support a sex discrimination claim); *Nichols*, 256 F.3d 864 (holding that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), applies with equal force to male employee who was harassed for failing to act sufficiently masculine); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (noting that a bank may not deny a loan to an otherwise qualified applicant for failing to dress in a manner consistent with his sex); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (finding that evidence that a state prison guard's actions were motivated by a transsexual inmate's gender, that is, by her assumption of a feminine rather than a typically masculine appearance or demeanor, could support a finding of a gender-motivated attack under the Gender Motivated Violence Act (GMVA)); Schmedding v. Tnemec Co., 187 F.3d 862 (8th Cir. 1999) (noting that evidence of male employees being labeled as gay by employer could substantiate a claim under *Price Waterhouse*); *cf.* Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997) (holding that a male-to-female transsexual student, who was in process of becoming female at time of a professor's alleged sexual harassment, was subject to discrimination based on sex, and could assert a Title IX claim).

19. 392 F.3d 1076 (9th Cir. 2004).

20. 424 F. Supp. 2d 203 (D.D.C. 2006).

determined to be irrelevant in most or all contexts.[21] I argue that this idea remains at the heart of developed equal protection jurisprudence as well as being the basis for Title VII, in which Congress explicitly identified the particular characteristics to which employers must turn a blind eye in making workplace decisions.[22] It stands in contrast to what I refer to as the second generation principle of equality that uses an anti-subordination analysis to determine which classification schemes survive or fail.

1. Anti-Differentiation Principles

The first generation formal equality principle, which has alternately been characterized as an anti-differentiation or anti-classification principle, was initially theorized in Joseph Tussman and Jacobus tenBroek's foundational article, *The Equal Protection of the Law*.[23] Acknowledging that equality guarantees cannot "demand that laws apply universally to all persons,"[24] Tussman and tenBroek set down the foundation for modern equality jurisprudence by identifying the constitutional impermissibility of certain classifications. In other words, they argued that certain classifications, such as race, alienage, color, and creed, are constitutionally irrelevant and therefore never a permissible basis for classification. Others may call for more solicitude and a close, but less strict, analysis of the relationship between the classifying trait and the ends sought to be achieved by the use of the classification. To be sure, Tussman and tenBroeck acknowledged the difficulty of figuring out which traits lead to impermissible classification and which require a higher (or lower) degree of scrutiny. By analogy, however, they explained that line-drawing difficulties are similarly raised by substantive due process analysis that had not "prevented a flourishing career for that doctrine."[25]

The strength and significance of their theory contributed to the eventual demise of the pernicious separate but equal doctrine within the next decade.

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21. The idea here is that certain characteristics, notably race or sex, should not be taken into account in deciding, for example, who gets a job or is allowed to patronize a restaurant. It is a legal limitation. It does not, however, necessarily eradicate social or cultural preferences. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the reality of private biases and possible injury they might inflict were impermissible considerations under the Equal Protection Clause for divesting a natural mother of custody of her child for miscegenation). Nor, some might argue, should it. *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 43-44 (2000) ("Is it really wrong to pay more attention to the men than the women at the party, if I am on the lookout for a partner? Gender (and it *is* gender, not just sex) seems relevant—or at least seems so for most people. As I scan the party, what I am considering offering to a potential partner is not something that is invidious to offer only to someone who, for some reason and in some way, attracts me.").

22. *Price Waterhouse*, 490 U.S. at 243-44 ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on . . . the forbidden criteria: race, color, religion, sex, and national origin.").

23. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

24. *Id.* at 343.

25. *Id.* at 355.

Moreover, their theory has become the well-established approach to equal protection analysis. It also was imported beyond the constitutional equal protection analysis that it addressed into modern civil rights law, including Title VII. Title VII adopted the anti-classification or anti-differentiation principle by identifying protected traits that cannot lawfully be the basis of discrimination in the workplace.[26] By its text and developed doctrine, Title VII is a clear example of first generation equality law.

The rhetoric associated with this first generation equal treatment mandate included that the law could "permit[] absolutely no distinctions of any kind based on" prohibited categories.[27] As their foes interpreted them, equality laws would "obliterate[] every restraint on intermingling."[28] In the analogous context of race, the rule is explained as "[t]he law should know nothing about a man's color."[29]

To apply first generation principles, one need only look to the language of the classification; if a policy or law differentiates, it is presumed suspect. Applying this approach to sex-based dress codes, one quickly sees a problem with them because they do just what first generation principles question—they classify employees by sex and treat them differently based solely on that classification.

2. *Rejection of the Anti-Differentiation Principle and Development of Anti-Subordination Theory*

A key problem with the first generation account is its application in certain contexts where treating individuals the same regardless of identity characteristics exacerbates or perpetuates inequality (disparate impact)[30] or where different treatment may be justified by the need to correct existing imbalances that have resulted from a history of discrimination (affirmative action).[31] As Owen Fiss explained in his foundational article, which he wrote

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26. While initially only addressing discrimination in private employment, Title VII was later amended to prohibit discrimination in public employment as well. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

27. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of The Laws,"* 50 COLUM. L. REV. 131, 147 (1950).

28. *Id.*

29. *Id.* at 148 (quoting 1 MCPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 117-18); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

30. Washington v. Davis, 426 U.S. 229 (1976) (noting disparate impact associated with written test); Berkman v. City of New York, 812 F.2d 52 (2d Cir. 1987) (noting disparate impact associated with strength tests); Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981) (noting disparate impact of head-of-household rule).

31. Gratz v. Bollinger, 539 U.S. 244 (2003) (finding that the University of Michigan's undergraduate admissions policy violated the Equal Protection Clause because its use of race was not narrowly tailored to achieve the asserted compelling state interest in diversity); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that a federal program designed to provide highway contracts to disadvantaged business enterprises must be reviewed by the court on a case-by-case basis under a

partially in reaction to the development of equal protection doctrine based on Tussman and tenBroeck's analysis, "The antidiscrimination principle has structural limitations that prevent it from adequately resolving or even addressing certain central claims of equality now being advanced [preferential treatment and disadvantaging, yet facially neutral criteria]. For these claims, the antidiscrimination principle either provides no framework of analysis or, even worse, provides the wrong one."[32] Although Fiss offered a number of broad criticisms of the first generation account,[33] his principle challenge was to its practical limits in the hardest cases then being pursued in the courts. The alternative model that he offered has developed into a series of nuanced versions of related ideas, the collection of which I broadly refer to as second generation accounts. At the heart of all of them is a concern about practices that reinforce the "subordinate position of a specially disadvantaged group."[34]

Second generation equality theory provides a framework for explaining departures from first generation principles of anti-differentiation in certain very important contexts either where treating people the same perpetuates subordination or where treating people differently does.[35] Numerous other scholars since Fiss have further developed his analysis. Their refinements include taking into account the unique historical results from sex discrimination,[36] offering a model for its enforcement in the legislative and executive realms,[37] and suggesting more ways to instantiate it in disparate

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strict scrutiny standard). Early criticisms of first generation accounts often used first generation rhetoric to develop second generation ideas. *See, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975).

32. Fiss, *supra* note 12, at 129.

33. Fiss criticized the antidiscrimination principle on two levels. First, he suggested that the ideals of the approach—objectivism, individualism, and universalism—"may not have any intrinsic merit" or that those ideals may not be advanced by the antidiscrimination principle. *Id.* at 121, 123, 128-29. But, the majority of his critique addressed what he referred to as "structural limitations" of the antidiscrimination principle. *Id.* at 129. Specifically, Fiss saw the antidiscrimination principle as flawed because: (1) pure application of the principle suggested that preferential treatment and discriminatory treatment were both impermissible, *id.*; (2) the antidiscrimination principle only recognizes discriminatory state conduct as problematic, leaving those harmed by other objectionable state conduct unprotected, *id.* at 136; and (3) the antidiscrimination principle provides no protection where state conduct "does in fact discriminate among persons, but not on the basis of a suspect criterion," even where the conduct disadvantages members of a group protected from discriminatory state conduct, *id.* at 141. Although he identified ways that courts had dealt or could deal with these shortcomings, he noted that those approaches often ran contrary to the logic underlying the antidiscrimination principle. *Id.* at 129, 136, 140-41, 146.

34. Fiss, *supra* note 12, at 157.

35. A slightly different approach to this second generation theory has been to credit women for the value of unpaid labor in order to put them on a level playing field with men whose work is traditionally (and, as importantly, financially) credited. *See* Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

36. Colker, *supra* note 15.

37. Sunstein, *supra* note 16.

impact cases.[38] Although many of these scholars offer a comprehensive framework for supplanting first generation analysis,[39] few acknowledge the way in which a total retreat from anti-differentiation creates a problem in cases where the majority of the affected class may not be negatively impacted even if a minority is to a high degree. That is, they do not take into account the dress code cases.

B. Courts' Legal Analysis in Dress Code Challenges

By and large, courts reject gender-based dress code challenges.[40] They do so in one of two ways: (1) they dismiss a challenge out of hand by completely rejecting a claim that the imposition of gender-based cultural or societal norms could be at all pernicious[41] or (2) they acknowledge the possibility of individual harm but require a group-based demonstration of harm to defeat a dress code.[42] Under either approach, courts apply an anti-subordination approach either implicitly (the category one cases) or explicitly (the category two cases).

Willingham v. Macon Telegraph Publishing Co.[43] is typical of the first approach. In that case, a male employee brought a sex discrimination claim against an employer that refused to hire him because of the length of his hair.[44] The potential employer, Macon Telegraph Publishing Company, had adopted a hair length requirement for men because of its perception that the community "was particularly sour on youthful long-haired males."[45] This souring was the result of an "International Pop Festival" held in a neighboring town that was attended by "hundreds of thousands of young people,"[46] many with long hair.[47]

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38. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

39. Ruth Colker, perhaps most clearly, takes on the affirmative project of suggesting a framework for incorporation of the proposed anti-subordination principle into all equal protection analysis. Colker, *supra* note 15.

40. *See supra* note 4.

41. *E.g.*, Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975); Fagan v. Nat'l Cash Register Co. 481 F.2d 1115 (D.C. Cir. 1973); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979); Jahns v. Mo. Pac. R.R. Co., 391 F. Supp. 761 (E.D. Mo. 1975); Knott v. Mo. Pac. R.R. Co., 389 F. Supp. 856 (E.D. Mo. 1975); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971).

42. *E.g.*, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755-56 (9th Cir. 1977); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); Wamsganz v. Mo. Pac. R.R. Co., 391 F. Supp. 306 (E.D. Mo. 1975); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141 (E.D. Mich. 1974); *Roberts*, 337 F. Supp. 1055.

43. 507 F.2d 1084 (5th Cir. 1975).

44. *Id.* at 1087.

45. *Id.* at 1087 n.3.

46. *Id.* at 1087.

47. The festival was undoubtedly attended by both young women and men with long hair, but apparently the community only soured on men with long hair.

Although initially successful, Willingham lost in an en banc opinion. The court explained that "the undisputed discrimination practiced by Macon Telegraph [wa]s based not upon sex, but rather upon grooming standards," which were outside the proscription of Title VII.[48] In other words, the employer had justified its seemingly sex-based different treatment of employees not by its consideration of their sex, but by its incorporation of community standards. This approach ignores the possibility that community standards could be discriminatory or prejudicial.

The second approach to sustaining gender-based dress codes is exemplified by the decision in *Jespersen v. Harrah's Operating Co.*[49] In *Jespersen*, the Ninth Circuit, sitting en banc, rejected a Title VII challenge to Harrah's Casino's policy requiring female bartenders to wear makeup, nail polish, and styled (teased or curled) hair.[50] The Ninth Circuit held that a demonstration of differential treatment of men and women was insufficient to state a prima facie case. Rather than looking to well-established precedent in which facially sex-based practices and policies have been found presumptively violative of Title VII,[51] the court only looked to cases involving appearance policies—ironically, two cases in which the court had struck down sex-based weight requirements.[52] But rather than following those cases, the court distinguished them from Jespersen's case and explained that because "[n]ot every differentiation between the sexes in a grooming and appearance policy creates a 'significantly greater burden of compliance,'" a plaintiff in a dress code case must demonstrate not just the existence of a sex-based policy but also that the policy is "more burdensome for women than for men."[53] In other words, the court required a showing that the policy did not simply differentiate between men and women but subordinated one gender to the other.

Although this "unequal burdens" requirement was arguably first characterized as such in the *Jespersen* case, the approach of including an additional pleading requirement in complaints against dress codes is hardly unique. Many other courts have imposed similar additional requirements, even if not articulated in so many words. For example, the Sixth Circuit dismissed a Title VII claim challenging a workplace policy that "explicitly permitted female employees to wear long hair but forbade male employees to do so."[54] Much like the Ninth Circuit in *Jespersen*, the Sixth Circuit acknowledged the sex-based differential treatment but said that for differential treatment in the

48. *Id.* at 1088 (citation omitted).

49. 444 F.3d 1104 (9th Cir. 2006).

50. *Id.* at 1107.

51. *See supra* note 1.

52. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (citing Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), and Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000)).

53. *Id.* at 1111.

54. Barker v. Taft Broad. Co., 549 F.2d 400, 402 (6th Cir. 1977) (McCree, J., dissenting).

context of appearance to be actionable, it must be within the traditional meaning of the "concept of discrimination."[55] By requiring both sex-based differential treatment and evidence of more traditional discrimination, the Sixth Circuit seemed to import the concept of anti-subordination into the Title VII context. For example, the court thought different requirements regarding employee hair length were too unrelated to the harms Congress sought to address in Title VII, but demonstrations of differential enforcement policies, which would show that one sex was being treated as less valuable, might provide sufficient evidence of discrimination.

In a more recent challenge to a hair length requirement, the Second Circuit similarly took an anti-subordination approach to assessing the validity of a claim.[56] The Second Circuit explained (with no support) that the doctrine had to account for the "factual context" of a case. Moreover, the court distinguished the precedential direct evidence cases as involving employment policies that resulted in significantly different levels of benefits for males and females. In other words, the problem with the plaintiff's challenge to a hair length requirement was the failure to show that the policy had the requisite subordinating effect.

By either approach—dismissing out of hand challenges to social and cultural gender norms or requiring a group-based demonstration of harm—the dress code challenges reveal that courts have been strongly influenced by anti-subordination principles where neither the language nor the doctrine of Title VII requires it.

II. THE PROBLEMS WITH DRESS CODES

The dress code caselaw has spawned many problems for employees, lawyers, and academics. It has permitted employers to impose sex-based workplace policies that have a pernicious effect on people whose gender identity does not fit within cultural norms. In addition, it has distorted foundational employment law principles as well as the equality theories that have developed to fill in the contours of equality law.

A. Gender-Based Dress Codes Have a Serious Negative Impact on Many People even if Others Experience Them as Benign

The strength of the anti-differentiation principle for dress code challenges is its recognition of the individualized nature of the harm that dress codes

55. *Id.* at 401-02 (citing Gen. Elec. v. Gilbert, 429 U.S. 125 (1976)).
56. Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2d Cir. 1996).

present.[57] Dress codes that require gender-stereotypical appearance for women and men do not affect all people to the same degree. Indeed, for most gender conforming men and women, the typical sex-based dress code policy is unobjectionable. For others, however, having to appear stereotypically feminine or stereotypically masculine is so discordant with their identities that it may result in a total inability to remain employed in a particular workplace. The power, therefore, of the anti-differentiation approach to equality for dress code challenges is that the discrimination in a dress code policy "inheres in the structure . . . not in its impact on any group or class."[58]

The *Jespersen* case powerfully illustrates the stakes of a gender-based dress code for one female employee even though its impact on other women may have been benign. Darlene Jespersen, twenty-year employee of Harrah's Casino, left her employment rather than wear make-up—which shows how traumatizing the requirement was to her. In deposition testimony, Jespersen explained that her employer's dress code made her feel so "very degraded and very demeaned" that she could not perform her job. The court did not question the sincerity of her reaction.[59]

While such an extreme reaction may be hard to understand for some, it is understandable, and perhaps not unusual, where a gender-based dress code forces someone to conform to a gender identity not his or her own. Scientifically, it has been suggested that gender identity—one's "total sense of self as being masculine or [feminine]"[60]—is deep-seated, generally impervious to manipulation or change, and "pervades one's entire concept of one's place in life."[61] It is well established that a person's core psychological sense of who they are as either male or female is fixed at a very early age and is generally impervious to change.[62] In cases involving transgender litigants,[63] courts have acknowledged this consensus view.[64] Indeed, studies that have been done on

57. Admittedly, this same individualized focus which is such a strength in the context of dress codes has been criticized as embodying a "limited conception of equality." *See* Fiss, *supra* note 12, at 108.

58. Notably Fiss invokes this as a criticism of the Tussman and tenBroeck conception of antidiscrimination. *See id.* at 127.

59. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107-08 (9th Cir. 2006); *id.* at 1118 (Kozinski, J., dissenting)

60. SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 8-11 (1978); John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, 1 J. AM. ACAD. PSYCHOANALYSIS 397-403 (1973).

61. M.T. v. J.T., 355 A.2d 204, 205 (N.J. Super. 1976) (quoting testimony of Dr. Ihlenfeld, plaintiff's medical doctor).

62. *Id.* at 205 (citing an expert witness testifying that "[t]here was . . . 'very little disagreement' on the fact that gender identity generally is established 'very, very firmly, almost immediately, by the age of 3 to 4 years.'").

63. A transgender person is one whose innate sense of being male or female differs from his or her birth sex. *See* STEDMAN'S MEDICAL DICTIONARY 1865 (27th ed. 2000) (defining a transgender person as one "with the external genitalia and secondary sex characteristic of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex").

64. Kosilek v. Maloney, 221 F. Supp. 2d 156, 163 (D. Mass. 2002) ("The consensus of medical professionals is that transsexualism is biological and innate."); Doe v. McConn, 489 F. Supp. 76, 78

the etiology of transgender identities reflect a strong physiological basis for the condition.[65]

In part because of courts' acknowledgement of the deep-seated nature of gender identity, transgender people have made significant progress in reversing a course of exclusion from the law's protection.[66] In cases challenging dress requirements, transgender litigants have successfully demonstrated the harm to individuals of having to express a gender inconsistent with their internalized sense of who they are as male or female.[67] For example, a Massachusetts court recognized that a biologically male student with a female gender identity who was forced by school officials to dress in a masculine presenting manner risked her "health and well-being."[68]

Several recent studies, which likewise focus principally on the effect of discrimination in the lives of transgender people, highlight the economic consequences of gendered expectations in the employment context. A 1994 San Francisco Human Rights Commission report found that "the economic hardship imposed on some transgender (particularly male-to-female) persons due to discrimination in employment and in medical and insurance services frequently forces them to live in poverty or to turn to sex work to survive."[69] A 2000 study by the same Commission found unemployment among some segments of the community to be "an astronomical 70%."[70] Another recent study of the economic impact on the transgender community in the San Francisco area revealed a remarkable figure of 64% of survey respondents earning less than $25,000 a year and nearly 80% earning less than $50,000.[71]

(S.D. Tex. 1980) ("Most, if not all, specialists in gender identity are agreed that the transsexual condition establishes itself very early, before the child is capable of elective choice in the matter, probably in the first two years of life; some say even earlier, before birth during the fetal period."); *In re* Heilig, 816 A.2d 68, 78 (Md. 2003) ("Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in 'curing' the patient.").

65. *See* Jaing-Ning Zhou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, NATURE, Nov. 2, 1995, at 68-70; F.P. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034-41 (2000).

66. *See infra* note 158.

67. *See* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412 (Super. Ct. 2002); Enriquez v. W. Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

68. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000) (recognizing that the "plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being"). Moreover, the court acknowledged that the school administrators' imposition of the male dress code on the student would "stifl[e] . . . plaintiff's selfhood." *Id.* at *7.

69. SAN FRANCISCO HUMAN RIGHTS COMM'N, INVESTIGATION INTO DISCRIMINATION AGAINST TRANSGENDERED PEOPLE 46 (1994), *available at* http://www.ci.sf.ca.us/sfhumanrights.

70. SAN FRANCISCO HUMAN RIGHTS COMM'N, ECONOMIC EMPOWERMENT FOR THE LESBIAN GAY BISEXUAL TRANSGENDER COMMUNITIES 10 (2000), *available at* http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/econ.pdf.

71. SHANNON MINTER & CHRISTOPER DALEY, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANSCISCO'S TRANSGENDER COMMUNITIES (2003), *available at* http://www.transgenderlawcenter.org.

A person's gender identity is no less central and significant to a non-transgender person. However, that fact is often missed by people whose identities happen to conform to gendered norms. In other words, someone who is biologically female and whose gender identity is also principally feminine may not recognize that her identity as feminine is a core aspect of her identity because society's expectations of how she should look and act likely do not depart from her sense of self. However, for persons like Darlene Jespersen, whose employers' expectations of how they should look and act depart from their internalized sense of how they should look and act, the harms associated with gender-based dress codes are quite severe.

In *The Last Time I Wore A Dress*, author Daphne Scholinski detailed the severe psychological trauma experienced by being forced to present in a stereotypically feminine appearance.[72] Scholinski's memoir describes the experience of being involuntarily institutionalized and facing curative therapies because she did not share in prevailing societal gender norms. Many other anecdotal and documented reports reflect similar experiences of harm, including hospitalization due to the dysphoria of having to conform to expectations, physical abuse by others,[73] and negative workplace consequences.[74]

For anyone who wonders about the degree of harm imposed by gender-based dress codes, Scholinski has recommended a thought experiment that asks readers to imagine being forced to express their gender identity in a way inconsistent with their sense of self. Furthermore, she asks them to imagine doing so not as a lark, but rather against one's will—first for a day, then a week, and then for a more extended period of time. "Try it. Wear an outfit that is utterly foreign—a narrow skirt when what you prefer is a loose shift of a dress. Torn-up black jeans when what you like are pin-striped wool trousers. See how far you can contradict your nature. Feel how your soul rebels."[75] For employees faced with gender-based dress codes the stakes are high. The consequence is that some lose their livelihoods rather than face their souls' rebellions.

The power of the first generation anti-classification principle is that it acknowledges the individual harms associated with stereotypical and different treatment of men and women despite the fact that many (perhaps even most) women and men are untouched by the imposition of gender-based dress requirements because they are gender conforming.

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72. DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS (1997).

73. An extreme example of this phenomenon was captured in a major release film about the life of Brandon Teena who was severely beaten, raped, and murdered when his group of "friends" learned that he was biologically female but living as male. BOYS DON'T CRY (Hart-Sharp Entertainment 1999).

74. Elaine Porterfield, *Judge Wants Women Attorneys to Wear Skirts in Her Courtroom*, SEATTLE POST-INTELLIGENCER, Sept. 30, 1999, *available at* http://seattlepi.nwsource.com/local/dres30.shtml (reporting on an attorney chastised by the court for wearing a pantsuit instead of a dress or skirt).

75. SCHOLINSKI, *supra* note 73, at x-xi.

B. Courts' Errors in Applying Second Generation Theories in Dress Code Challenges

Courts upholding dress codes have been overly persuaded by contemporary articulations of the group anti-subordination purposes of nondiscrimination law.[76] The proof of this rests in no small part on the fact that neither the language of Title VII nor the doctrine that has developed in its application requires a demonstration of group subordination. The relevant Title VII language takes a first generation approach to discrimination by prohibiting the *individual* classification or differentiation of employees on account of sex.[77] Moreover, as a matter of doctrine, Title VII requires only direct evidence of different treatment.[78] Perhaps recognizing the limits of first generation analysis, Title VII permits second generation analysis as a fallback (or alternative position) for litigants, by allowing burden shifting in cases where direct evidence is not available.

Despite this clear doctrinal incorporation of both first and second generation principles, most courts in the context of dress code challenges brought under Title VII have required not simply a demonstration of classification or differentiation by sex but, in addition, a group subordinating effect.[79] In other words, departing from basic doctrine, courts have declined to apply first generation principles to dress codes and instead required a showing of subordination. Although a subordinating effect has been demonstrated in a small number of dress code challenges,[80] that fact does not justify its wholesale adoption in the field. Moreover, requiring a demonstration of subordination is a departure from doctrine and a denigration of first generation principles.

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76. *See supra* note 10; *see also* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110-11 (9th Cir. 2006). ("Our settled law in this circuit . . . does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.").

77. Title VII states:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

78. *See infra* notes 96-99 and accompanying text.

79. *See supra* note 42.

80. *See supra* notes 3-4 and accompanying text.

C. *The Dress Code Cases Highlight Some Important Limitations of Second Generation Theories*

Although anti-subordination theory is important where "equal" treatment ignores the harm nonmajoritarian class members face in failing to meet majoritarian standards, courts should not allow these critical theories to erase the widely shared foundational point that harm is inherent in different treatment.[81]

Moreover, if second generation anti-subordination theory has led courts to hold that successful sex discrimination challenges to dress code policies require a demonstration of group-based harms, this suggests two possible structural criticisms of second generation theory.[82] Specifically, the Title VII blind spot either exposes real and serious errors in anti-subordination theories or it supports a limiting principle for the application of such theories. While it is not my objective to condemn anti-subordination theory wholesale, the analysis herein suggests that perhaps just as "hard cases make bad law,"[83] so too might the hard cases of affirmative action and disparate impact claims make bad theory. At a minimum, perhaps these cases have introduced flawed theory that invites reform to account for the problematic dress code cases. More modestly, the dress code cases may suggest that anti-subordination theories should be limited to the types of cases around which they developed, leaving anti-differentiation principles in place for the others. In other words, the Title VII blind spot suggests that anti-subordination theories should be limited to cases involving disparate impact or affirmative action, leaving anti-differentiation theories untouched in the main. This conclusion suggests that courts that have required a demonstration of a group harm in dress code challenges are wrong and should revisit their analysis in future cases.

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81. Indeed, the use of immutable characteristics to "categorize" people into distinct groups often has the pernicious effect of arousing private prejudice against groups that do not yet enjoy majoritarian support in the public square. In *Anderson v. Martin*, by way of example, the Court observed that allowing state-required publication of a candidate's race on ballots for elected office "direct[ed] the citizen's attention to the single consideration of race or color, [thereby] indicat[ing] that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice." Anderson v. Martin, 375 U.S. 399, 402 (1964) (striking down a Louisiana statute requiring the publication of candidates' race on election ballots precisely because the law implied that the government sanctioned private classifications). The Court's subsequent reasoning is instructive: "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Id.*

82. Admittedly, this is a criticism that is shared by the framers of the theories I address. *See* Sunstein, *supra* note 16, at 2431 ("Should we not speak of individuals instead of groups? . . . Freedom from desperate conditions is a liberal principle connected with both equality and liberty, and it can be violated even in the absence of group-based disadvantages."). Sunstein, at least, acknowledges the possibility of complementary and overlapping theories, which may be instrumental in addressing parts of, if not the entire, problem. His approach is a micro-application of the approach I offer in this Article. That is, I argue here that the combination of first and second generation nondiscrimination theory may be necessary to remedy the problem associated with the dress code exception to existing equality laws.

83. N. Sec. Co. v. U.S., 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

D. Why Differentiation Is Itself Problematic: The Sex-Tag Example

To the extent that this analysis is correct—that is, that second generation principles should apply only in the types of cases in which they arose, leaving first generation principles generally untouched—the following hypothetical demonstrates why the dress code cases have by and large been wrongly decided.

Imagine that an employer allows its employees to wear whatever clothing they wish in the work environment as long as they consistently, each morning, place a tag on their shirt (or dress or blouse) that indicates whether they are male or female.[84] Imagine as a second example an employer that strictly prescribes type of clothing and manner of grooming (including hair length and nail style) according to an employee's sex. This example includes an employer with a policy requiring women to wear only skirts or dresses, to have long nails, and to wear make-up, and men to wear only slacks and tailored shirts, to have short, trimmed nails, and to wear no make-up. Each policy has the effect of conveying to others the sex of the individual employee. Each requires a determination of an employee's sex and some outward expression or statement of it.

Importantly, in the sex-tag example, the employer merely requires a public indication of the employee's sex and imposes no gender norm. To the extent any gendered norm does attach, the norm is voluntarily expressed by the individual employee. In the dress code example, on the other hand, the employer requires the employee not only to publicly identify his or her sex, but also requires him or her to incorporate a particular norm of gender expression.

To the extent that the two examples can be compared quantitatively, the dress code example could be described as being more imposing than the first, equal to the sex-tag example with some additional terms. Stated as an equation, one might say that the "dress code example = the sex-tag example + the gendered norm as defined by the employer." Understood as such, and using basic modern mathematical principles, if the sex-tag example is impermissible, the dress code example should be as well, unless the addition of a gendered norm is what makes the dress code permissible. Because analytically the addition of an imposed gendered dress norm should make a policy worse, not better, under nondiscrimination laws, thinking about the permissibility of the

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84. Much has and could be written about the criterion for determining whether an individual is male or female. *See generally* Julie Greenberg, *When Is a Man a Man and When Is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000); Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999). For purposes of this Article, assume simply that the employer permits an employee to identify as either male or female at the time of employment based on government-issued identification. Nothing in this Article's analysis turns on the complexity, if any, of determining a person's sex.

sex-tag example may advance a clearer understanding of the impermissibility of dress codes based on gender norms.

Analyzing the sex-tag example under first generation principles both proves this point and demonstrates that the very act of identifying employees by their sex is prohibited under well-established precedent in the race context. Moreover, the labeling example illustrates why courts should not overlook first generation theory in cases that do not involve either disparate impact or affirmative action.

In *Anderson v. Martin*,[85] the Supreme Court addressed the question of whether a Louisiana statute could require that ballots place the race of candidates for elective office alongside their names.[86] In defending the plaintiffs' equal protection challenge, Louisiana argued that it was simply providing otherwise publicly available information to voters, drawing no conclusions and suggesting nothing about the relevance of the information.[87] Nonetheless, the Supreme Court struck down the practice.[88] As the Court explained, the problem with the race-tag alongside the name was not that the tag itself created an injury, but rather that (1) the State had "furnishe[d] a vehicle by which racial prejudice" might be aroused, and (2) the State had, by definition, demarked that characteristic as "important" by requiring the race-tag to be placed alongside candidate's names.[89]

Like the race-tag example presented by *Anderson v. Martin*, cases where an employer is permitted to require employees to tag themselves as either female or male by differentiated dress requirements are problematic from an equality standpoint.[90] Courts that reject challenges to sex-tagging dress codes

85. 375 U.S. 399 (1964).

86. *Id.* at 400.

87. *Id.* at 403-04.

88. *Id.* at 403.

89. *Id.* at 402.

90. The fact that *Anderson v. Martin* involved an equal protection challenge rather than a Title VII one does not undermine this analysis. Congress, by its adoption of Title VII, incorporated at least as much of the equality commitments in the context of sex and private employment as had been guaranteed to individuals in the context of race and state action under the Fourteenth Amendment's equal protection guarantees. Mary C. Daly, *Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from* Weber *to* Johnson, 30 B.C. L. REV. 1, 12 (1988) ("Establishing liability under the Equal Protection Clause is more difficult than establishing liability under Title VII."); *see also* Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194 (2000). To the extent there are interesting questions about the difference between the degree of protection offered by the equal protection guarantees of the Fourteenth Amendment and the sex- and race-based non-discrimination guarantees of Title VII, they focus on whether Title VII permits race- or sex-conscious policies to address historic or existing discrimination (for example, affirmative action) and whether equal protection permits disparate impact analysis. *See, e.g.*, Jessica Bulman-Pozen, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408 (2006) (analyzing availability of affirmative action programs under Title VII after *Grutter*); Daly, *supra* (analyzing the availability of disparate impact claims under equal protection); Jared M. Mellott, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 WM. & MARY L. REV. 1091 (2006) (analyzing availability of affirmative action programs consistent with Title VII after *Grutter*); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003). In other words, most commentators agree that equal protection sets the

allow employers to make sex a relevant characteristic in the workplace. They undermine Title VII equality commitments by saying that sex is a meaningful, even an important, characteristic in the workplace. In addition, as with the race-tag example, the sex-tag created by a gender-based dress code in the workplace furnishes the vehicle by which sex-based prejudice in the workplace may not just be aroused, but tolerated and encouraged.

Rather than being a benign reflection of cultural norms, gender-based dress codes (much like the race markers at issue in *Anderson*) lie at the heart of the problem that equality guarantees seek to address.

III. TWO MODELS OF SEX DISCRIMINATION: A BASIC IDEA AND A POTENTIAL MISSTEP

Litigants have used two basic approaches to challenge gender-based dress codes: a straightforward sex discrimination claim and a sex stereotyping claim. There has recently been much enthusiasm among litigators and theorists for sex stereotyping claims. This enthusiasm stems in part from its success in a sex discrimination case brought by a senior female executive of a major accounting firm who was denied partnership at a time when few could imagine a legal way to break through the glass ceiling restricting women's professional advancements.[91] Enthusiasm for the theory rests also on its analytical strength and the possibility it portends for reversing the Title VII blind spot. I argue that because the foundational case that established the theory was one that would clearly satisfy inquiries from an anti-subordination approach, there are serious limits in the extent to which it may ultimately succeed in challenging gender-based dress codes that cannot easily be shown to have a group-wide negative effect.

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floor for equality guarantees that Title VII extends to the private context even though questions remain about what exceptions from equal protection guarantees flow through to Title VII in the context of affirmative action and whether equal protection permits disparate impact analysis.

To be sure, there is a different standard for evaluating sex and race claims under the Fourteenth Amendment. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny." (internal quotation omitted)); United States v. Virginia, 518 U.S. 515, 532 (1996) ("Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)." (footnote omitted)). There is no textual basis or legislative history, however, to support any more relaxed standard of scrutiny for gender-based claims under Title VII nor have courts applied one. The only relevant difference between race and sex analysis in the context of Title VII is the provision of a bona fide occupational qualification (BFOQ) analysis for sex, but not race. While there arguably could be a BFOQ analysis for dress code requirements (or even the sex-tag example raised herein), the standard is exceedingly high and no gender-based dress code challenges have even engaged it. *Anderson v. Martin* would be strong precedential support for prohibiting an employer from administering a race-based dress code in the context of private employment and is therefore no less applicable to a sex-based dress code.

91. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The sex stereotyping theory was explored in 1995 in two important law review articles that scrutinized the purported distinction between the use of the terms "gender" and "sex."[92] Katherine M. Franke criticized the idea that sex, as a biological distinction between men and women, was a legitimate basis for classification, but that gender, with its social and cultural construction, was not. Mary Ann Case, on the other hand, criticized the disparate treatment of women displaying traditionally masculine traits and men displaying traditionally feminine traits, which resulted from a failure to see gender as a unique trait. She was specifically troubled that courts treated effeminacy in men as an indicator of sexual orientation, a trait not clearly protected by Title VII, while treating discrimination against masculinity in women as impermissible sex discrimination. Both Franke and Case provided historical and social context; they more accurately situated associations with the term "sex" and explained how those associations were no more fixed, objective, or natural than the associations with the term gender.[93] Case explored the imprecision involved in treating sex and gender as a single trait and the extensive way that traits have been gendered in ways that have, over time, increased the ways women, but not men, may express themselves. Importantly, both scholars laid the foundation for the development of a jurisprudence of sex stereotyping that has been instrumental in bringing successful claims of sex discrimination on behalf of marginalized people, including transgender persons, masculine women (often, but not always, lesbians), and feminine men.[94] The ideas developed in these articles supported a new theory of sex discrimination—a sex stereotyping claim

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92. Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995).

93. Interestingly, this was a false distinction that Justice Scalia had noted a year earlier. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.").

94. Case, *supra* note 92; Franke, *supra* note 92; *see also* Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (finding discrimination against a police officer's gender non-conforming behavior and appearance actionable under to Title VII); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (finding discrimination against a firefighter's gender non-conforming behavior and appearance actionable under Title VII); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb.17, 2006) (finding discrimination against a sales representative for gender non-conforming behavior and appearance actionable under Title VII); Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (finding employment termination for failure to conform to gender stereotypes in the use of restrooms actionable under Title VII); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (finding discrimination against an employee for failure to "act like a man" impermissible under Title VII); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *2 (N.D. Ohio Nov. 9, 2001) (finding discrimination against an employee for gender non-conforming behavior and appearance actionable under Title VII).

as distinct from a straightforward sex discrimination claim. Despite its promise, though, this theory's success has been limited in the general area of gender-based dress distinctions in employment.[95]

In this Part, I explain and distinguish both sex stereotyping and straightforward sex discrimination claims. I then argue that the reason why the sex stereotyping theory has achieved less success in the context of dress code challenges than it has in the context of harassment claims brought by gay, lesbian, bisexual, and transgender litigants is because it requires a demonstration of group subordination that ignores the individualized harms associated with gender-based dress codes.

A. Straightforward Sex Discrimination

Enthusiasm for sex stereotyping claims coupled with the apparent difficulty of understanding the harms associated with gender-based dress codes for non-gender conforming people has had the unfortunate effect of altering the way dress code cases are litigated. The result has been that many litigants ignore the possibility of bringing straightforward sex discrimination claims, claims that require only a demonstration of differentiation on the basis of sex.

The straightforward claim described in this section is one supported by direct evidence of sex discrimination. So much progress has been made towards women's equality in the workplace that there are very few reported contemporary Title VII decisions involving direct evidence sex discrimination cases.[96] Direct evidence is "conduct or statements by persons involved in the decision-making process, which indicate a discriminatory attitude was more likely than not a motivating factor in the employer's decision."[97] Few direct evidence cases are brought because, in most cases in which an employer admits that the reason for different treatment is an employee's sex, the parties settle the

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95. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) ("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 . . . . [Were we to accept Jespersen's argument], we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.").

96. Recent Fourteenth Amendment equal protection cases involving direct evidence are easier to find. *See* United States v. Virginia, 518 U.S. 515 (1996) (holding that excluding women from a citizen-soldier program offered at Virginia military college violated the Equal Protection Clause); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that a state-supported university policy limiting nursing school enrollment to women violated the Equal Protection Clause); Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995) (holding that the exclusion of women from the Citadel violated the Equal Protection Clause). This is true, in part, because of the establishment of the "real difference" jurisprudence and indeterminate mid-level scrutiny for equal protection. In practical reality, employment cases in both the private and public context rarely involve cases (other than in the dress code context) in which employers make decisions explicitly and unapologetically because of an employee's sex.

97. Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1046 (8th Cir. 2005) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)). Where there is direct evidence, the burden is on the employer to prove that it would have made the same decision absent the illegitimate motive. *Id.*

case before a court's ultimate resolution of it. This is due both to the power of the "smoking gun"[98] and to the considerable burden imposed on the employer, not just to state a legitimate nondiscriminatory reason for its employment decisions, but to prove it was the actual one acted upon for the disparate treatment despite its facially contradictory actions.[99]

Most reported contemporary sex discrimination cases may be characterized not as direct evidence but as indirect evidence cases that require a *McDonnell Douglas*[100] burden-shifting analysis. *McDonnell Douglas* requires a litigant to demonstrate (1) that he was a member of a protected class; (2) that he was qualified for the job in question; (3) that, despite his qualifications, he was rejected or fired; and (4) that, after his rejection or termination, the position remained open and the employer continued to seek applications from persons of complainant's qualifications or the employer replaced the employee with someone of the opposite sex.[101] Upon the plaintiff's successful pleading of these elements, the burden of production then shifts to the employer to demonstrate that it had a non-discriminatory justification for the different treatment.[102] The burden ultimately falls to the employee to show that the proffered justification is pretextual and that the real reason for the adverse employment action was discriminatory.[103]

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98. Examples of direct evidence, or "smoking guns," include "epithets or slurs uttered by an authorized agent of the employer, a decisionmaker's admission that he would or did act against the plaintiff because of his or her protected characteristic, or, even more clearly, an employer policy framed squarely in terms of race, sex, religion, or national origin." HAROLD S. LEWIS & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 165 (2d ed. 2004). Notwithstanding the significance of this determination, "there remains rampant disagreement and confusion in the appellate decisional understanding of what evidence is 'direct.'" *Id.* at 167.

99. The dearth of reported direct evidence cases suggests Title VII is largely working. More recent Title VII claims generally do not involve categorical exclusions of women from positions of employment as reported in older cases. *See, e.g.*, Burkey v. Marshall County Bd. of Ed., 513 F. Supp. 1084 (N.D.W. Va. 1981) (restricting coaching positions for boys' sports to male teachers violates Title VII); Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 767 (D.D.C. 1973) (restricting purser jobs at airline to men violates Title VII); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that a pension plan requiring greater contributions by women violates Title VII).

100. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

101. *McDonnell Douglas*, 411 U.S. at 802. It should be noted that the *McDonnell Douglas* framework used to build a prima facie case is "an evidentiary standard, not a pleading requirement." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 510 (2002). Accordingly, while the plaintiff will likely use this method to inferentially prove disparate treatment, she does not need to plead these elements in her complaint. *See also* LEWIS & NORMAN, *supra* note 98, at 181 n.8.

102. *McDonnell Douglas*, 411 U.S. at 802; *see also* LEWIS & NORMAN, *supra* note 98, at 182 (stating that when a member of a protected class "is not hired for a vacant job, the failure to hire alone suffices to raise an inference of discrimination, which the employer must then rebut by producing evidence of a legitimate, nondiscriminatory reason").

103. *McDonnell Douglas*, 411 U.S. at 804-05 (noting that the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision . . . ."). While the purpose of the *McDonnell Douglas* test is to eliminate at the outset the most common nondiscriminatory reasons for an employer to deny employment or advancement to an employee, thereby increasing the likelihood that the employer actually ran afoul of Title VII in its employment decisions, the burden of demonstrating discrimination nevertheless remains with the plaintiff throughout. Because the defendant's obligation to articulate a legitimate, nondiscriminatory reason for its employment decision is a burden of production

Dress code cases easily fit into this straightforward sex discrimination claim. In a classic dress code case, such as *Jespersen*, the plaintiff loses her job for refusing to comply with a dress code that requires her to conform her outward appearance to a certain standard simply because she is a woman.[104] Under the most straightforward analysis of discrimination, firing this employee because she failed to conform her outward appearance is termination "because of sex"—had she been a man, she would not have been fired. Few, if any, logical leaps need be made to understand the claim or how it fits within Title VII's direct evidence model.[105]

Despite the strength of its logic, the claim generally fails because the court misperceives the relevance of anti-subordination theory. In *Jespersen*, the Ninth Circuit inexplicably required a demonstration of a group-based harm.[106] The court ignored the formal inequality demonstrated in the workplace and imposed a requirement of some showing of group subordination.

The distinction between direct and indirect evidence may explain the court's confusion about when an individual harm, as opposed to a group-based harm, must be demonstrated. In direct evidence cases, a plaintiff alleges facts that alone support a legal determination that she was treated differently (not hired, fired, etc.) "because of sex."[107] In indirect evidence cases, because the employee must demonstrate that the basis for the different treatment was her sex and not the nondiscriminatory reason that the employer has proffered, how the employer treats women as a class is significant in ways that are simply irrelevant in the direct evidence context. Specifically, the employer's treatment of women generally becomes relevant because it may strengthen or prove pretextual the employer's nondiscriminatory justification. For example, in the classic pretext case, an employee is fired for bad reviews, the employee alleges that reason is pretextual, and the employer supports its justification by showing that many women got good reviews.

In other words, treatment of other women matters in the classic indirect evidence case. It does not, however, matter in direct evidence cases. In direct evidence cases, the discrimination claim is proved by the truth of the evidence of differential treatment. In indirect evidence cases, no such evidence is available so the court must resort to group-wide treatment in order to substantiate the claim.

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only, the plaintiff will usually need to demonstrate, either through affirmative evidence or through showing the proffered explanation to be implausible, that the pretext is false. LEWIS & NORMAN, *supra* note 98, at 182-94.

104. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1177 (9th Cir. 2006).

105. The logic of the straightforward sex discrimination claim has not, however, led to its success. *See supra* note 8.

106. *Jespersen*, 444 F.3d at 1112 ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.").

107. *See infra* notes 109 & 156.

The dress code cases addressed by this Article are direct evidence cases and, as such, would be easily resolved by first generation principles if only courts would properly apply them.[108] A plaintiff alleges that a policy treats women differently than men. The plaintiff must then demonstrate only the existence of the policy. If the policy classifies on an impermissible basis, it is unlawful. Requiring a litigant to prove that the different treatment of women has no subordinating effect generally on women is beyond the requirement of a direct evidence claim even if it might be relevant (and even provable)[109] in the indirect evidence context and under second generation anti-subordination principles.

B. Sex Stereotyping

Building on the foundational case of *Price Waterhouse*, Professor Katherine Franke theorized that the sex stereotyping theory could be important in the context of transgender litigants and other gender non-conforming persons, including some gay and lesbian employees, masculine women, and feminine men.[110] While this claim has proven successful in such cases, it has had less traction when pursued by litigants who are not characterized, at least by the report of the case, as either transgender or gay. The reason for the limits of the sex stereotyping theory in practice is its ultimate incorporation of the anti-subordination approach associated with second generation equality theory.

In *Price Waterhouse*, the Supreme Court addressed the burden shifting requirements under Title VII. In dicta, the Court stated that a woman who proffered evidence that she received an adverse employment decision due to a failure to conform to expectations of gendered expression in the workplace had stated a claim of sex discrimination.[111] As the Court explained, "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."[112] This was a key advance in Title VII law. Franke understood it to mean that "[e]mployment decisions made

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108. *See supra* notes 23-29 and accompanying text.

109. In *Rosa*, by way of example, the court noted that, to succeed in her claim, she would only have to prove that the bank denied her loan because she was a man dressed as a woman rather than a woman dressed as a man, that is, that her loan was denied "because of sex;" she would *not* have to prove that the bank had a general policy of subordinating all men dressed like women. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) ("[U]nder *Price Waterhouse*, 'stereotyped remarks' [including statements about dressing more 'femininely'] can certainly be evidence that gender played a part.") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

110. Franke, *supra* note 92. Beyond being theorized, the claim has been litigated to great success and is now well-established despite some backlash. *See* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000). *But see* Maurice Wexler & Angie Davis, *Transsexualism, Sex Stereotyping, and* Price Waterhouse v. Hopkins*: A Staircase to Paradise or a Slippery Slope?*, 36 U. MEM. L. REV. 41 (2005) (criticizing the theory in the context of transgender litigants).

111. *Price Waterhouse*, 490 U.S. at 250.

112. *Id.*

on the basis of gender role identity are now included within the meaning of discrimination 'because of one's sex.'"[113] Further, Franke explained, "The law . . . should no longer require . . . that discriminatory conduct be directed exclusively at one or the other biological sex. Any adverse action in the workplace on account of a person's gender should be cognizable under Title VII, regardless of the body parts of the plaintiff or the defendant."[114]

This somewhat aspirational articulation of the meaning of *Price Waterhouse* has been compromised in practice.[115] One reason is that because *Price Waterhouse* was actually a straightforward sex discrimination case[116] there is some suggestion that there is no separate sex stereotyping theory to be developed out of the case. Another reason is that there is a dispute about the central holding of the case. In one version, *Price Waterhouse* stands for the proposition that any sex stereotyping in the workplace is impermissible and violative of Title VII. In another, *Price Waterhouse* means that sex stereotyping is impermissible only insofar as it has a pernicious effect on the advancement of women in the workplace. [117] For courts that adopt the latter interpretation, a sex stereotyping claim ultimately reflects second generation equality principles

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113. Franke, *supra* note 92, at 95.

114. *Id.*

115. I know this because of my efforts early in the development of the sex stereotyping theory to expand its use. In 1999, armed with the developed sex stereotyping theory as described by Franke and Case, I brought a sex discrimination claim on behalf of a bank loan applicant (biologically male) who was denied the opportunity to apply for a loan because he did not appear sufficiently masculine. The case was brought under the Equal Credit Opportunity Act, a banking statute that is interpreted to be consistent with Title VII principles. *See* Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000). The case was ultimately successful, at least in defeating a motion to dismiss, and I have elsewhere described the theory behind the case and the role it could play in the development of the sex stereotyping theory. *See* Brief for the Plaintiff-Appellant Lucas Rosa, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (No. 99-2309), *available at* Jennifer L. Levi, *Brief for the Plaintiff-Appellant Lucas Rosa in the United States Court of Appeals for the First Circuit Lucas Rosa v. Park West Bank and Trust Company on Appeal from the United States District Court for the District of Massachusetts*, 7 MICH. J. GENDER & L. 147 (2001); Katherine M. Franke, *Lucas Rosa v. Park West Bank and Trust Company*, 7 MICH. J. GENDER & L. 141 (2001); Jennifer L. Levi, *Epilogue*, 7 MICH. J. GENDER & L. 179 (2001). Despite its early success, I got a glimpse of some of the difficulty that the theory might pose to judges at a later procedural stage of a case. At the panel hearing, I was repeatedly asked a question which I could not understand. When I finally parsed through it, I realized I was being asked what the plaintiff might prove at trial to demonstrate a successful claim under a sex stereotyping theory. More specifically, I was asked whether it was only impermissible for a bank to impose a dress code that enforced gender-based stereotypes. In other words, could a bank require men and women to dress differently when applying for a loan as long as it did not have unfair and gender-based stereotypes about the creditworthiness of males and females? As asked by the judge, why wouldn't the first (the dress requirement) be simply difference and the latter be discrimination? It was at this point that I realized the sex stereotyping theory might not be a panacea for gaps in the straightforward sex discrimination claim, at least in the dress code context.

116. *See, e.g.*, Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1045-46 (8th Cir. 2005) ("Kratzer may proceed under *Price Waterhouse* if she produces direct evidence of conduct or statements by persons involved in the decision-making process, which indicate a discriminatory attitude was more likely than not a motivating factor in the employer's decision.") (citing *Price Waterhouse*, 490 U.S. at 258).

117. *Price Waterhouse*, 490 U.S. at 251 ("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.").

and requires not simply a showing of sex stereotyping (or differentiation between men and women) but subordination as well. Because most women are gender conforming, such a showing is difficult, at best, to make.

Despite its success in the area of transgender and lesbian/gay plaintiffs,[118] in practice the sex stereotyping theory has proven far less useful for nontransgender litigants, such as Darlene Jespersen,[119] who have brought challenges to sex-based dress policies. This theory, which has been so successful at the margins, has not moved the courts at the center (for example, in cases involving dress codes brought by seemingly gender conforming individuals). Further, sex stereotyping reasoning has been rejected recently in a case brought by a transgender litigant[120] in favor of the older, rejected theory (the straightforward sex discrimination claim), in order to preserve the Title VII blind spot now so well-established in law.

IV. RECENT CASELAW OFFERS SOME IMPORTANT INSIGHT

Two recently decided cases, *Jespersen* and *Schroer*, merit discussion because they illustrate that second generation anti-subordination equality theory has sometimes inappropriately supplanted first generation principles and because they offer an opportunity to evaluate the strength of the alternative litigation strategies offered by this Article. In *Jespersen*, the court looked past the existence of disparate sex-based grooming requirements and the harm to an individual forced to comply, denying relief because women as a class were not harmed by the policy. *Schroer* illustrates the practical limits of the sex stereotyping theory and supports the predictive claim that returning courts' focus to first generation principles may be the only hope for change in the area of dress code challenges.

A. Jespersen v. Harrah's Operating Co.

In *Jespersen v. Harrah's Operating Co.*, plaintiff Darlene Jespersen, a twenty-year employee of the defendant company, challenged a sex-differentiated grooming policy imposed on all of Harrah's employees.[121]

118. *See infra* note 158.

119. Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).

120. Schroer v. Billington, 424 F. Supp. 2d 203, 210-11 (D.D.C. 2006).

121. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 (9th Cir. 2004). For the twenty years that Jespersen worked at Harrah's, her employer encouraged her (and other female beverage servers) to wear makeup, although it was not a job requirement. *Id.* at 1077. It was not until 2000 that Harrah's implemented its "Beverage Department Image Transformation" program and imposed "appearance standards" on its employees. *Id.* Although all beverage servers, regardless of gender, were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform," it incorporated sex-differentiated requirements to carry out its goals. *Id.* Notably, women were required to wear colored nail polish, make-up, and styled hair; men were prohibited from doing so. *Id.*

Among other things, the policy required female, but not male, bartenders to tease, curl, or style their hair and to wear stockings and nail polish.[122] It also required them to attend a "Personal Best" program, which taught them how to maximize their appearance and conform to that appearance every day at their job.[123]

Jespersen found the requirements so inconsistent with her gender identity that she declined to comply with the policy and, as a result, lost her job.[124] She testified that wearing makeup adversely affected her self-esteem and mental health. Years earlier, she had worn make-up for a short time in an attempt to heed her employer's prior suggestion, but not requirement, that women employees wear make-up.[125] She stopped after a short time, however, because she found that wearing it "made her feel sick, degraded, exposed, and violated."[126] As the Ninth Circuit explained, she "felt that wearing makeup 'forced her to be feminine' and to become 'dolled up' like a sexual object, and . . . 'took away [her] credibility as an individual and as a person.'"[127]

During the litigation, Harrah's never questioned the sincerity of Jespersen's response to the make-up requirement and both the majority and dissent accepted, as they had to, the allegations relating to the effect on Jespersen of her compliance with the policy.[128] That is, Harrah's never challenged Jespersen's claim that the job requirements she faced because she was a woman made her incapable of doing her job.

Jespersen's claim under Title VII was a straightforward sex discrimination claim: The "Personal Best" program required female employees to conform—and prohibited male employees from conforming—to certain dress and make-up standards and, therefore, constituted disparate treatment based on sex.

As is reflective of dress code cases generally, when the Ninth Circuit reheard the case en banc, very little, if any, of the dismissal of Jespersen's disparate treatment claim rested on traditional disparate treatment analysis. Rather, the panel relied on a doctrinal exception created for dress codes. The panel stated that different treatment (for example, differentiation) is not sufficient to prove a discrimination claim based on a dress code policy. Citing a broad, doctrinal exception to the general rule for proving a disparate impact claim, the panel explained that the "settled law in this circuit, . . . does not

122. *Id.*

123. *Id.* at 1078. Some pretty incredible details relating to the Personal Best program are omitted from the en banc opinion. As detailed in the Ninth Circuit's three-judge panel decision, not only did employees have to attend a full training to learn how to dress and groom themselves to look their best, the training culminated in a picture being taken of each employee looking his or her best. *Id.* The picture was then distributed to his or her supervisor and a daily evaluation was made of each employee's ability to measure up to his or her stylized self. *Id.*

124. *Id.*

125. *Id.* at 1077.

126. *Id.*

127. *Id.*

128. *Id.* (noting that the "facts are undisputed").

support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case."[129]

What is so exceptional about the panel's analysis is the suggestion that the demonstration of different treatment of men and women is not, alone, direct evidence of discrimination. Even though different treatment alone proves sex discrimination in nearly every other situation, the panel decided that, in the context of dress codes, different treatment is not enough to prove a claim.[130]

Oddly, the Ninth Circuit used the language of "disparate effects,"[131] suggesting that it actually meant that Jespersen failed to prove class-based effects (or harm) rather than an individualized impact on her "because of sex."[132] After stating the exception that it applies in sex discrimination cases, the court articulated an "unequal-burdens" test focused on whether female employees are more significantly burdened than their male counterparts as proof of what it characterized as "disparate effects."[133] This seems to be more accurately characterized as a class-based effect (or harm).[134]

While courts have used the "unequal burdens" language in evaluating the legitimacy of dress codes, generally they have not applied that test as

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129. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc).

130. *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) ("It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) (affirming the district court's dismissal for failure to state a claim where the plaintiff alleged the employer mandated shorter hair for male employees than for female employees); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976) ("[S]ex-differentiated grooming standards do not, without more, constitute discrimination under Title VII of the Civil Rights Act of 1964."); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) ("[R]equiring short hair on men and not on women does not violate Title VII."); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) ("[W]e conclude that minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination . . . ."); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (holding that gender differentiated grooming standards related to hair length are not prohibited because they do not inhibit employment opportunities based on immutable or protected characteristics); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974) ("We are not persuaded that tolerance of a certain hair length for female employees but not for males 'discriminates' on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964."); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973) ("We do not believe that Title VII was intended to invalidate grooming regulations which have no significant effect upon the employment opportunities afforded one sex in favor of the other.").

131. *Jespersen*, 444 F.3d at 1109 ("Harrah's 'Personal Best' policy contains sex-differentiated requirements regarding each employee's hair, hands, and face.").

132. *Id.* ("While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other.").

133. *Id.* at 1109-10.

134. *Id.* at 1110 ("The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender . . . . Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.").

mechanistically as the Ninth Circuit did in *Jespersen*.[135] The Ninth Circuit panel that first decided the case on appeal characterized the application of the test to *Jespersen* as one of first impression,[136] arguably because it misinterpreted the unequal burdens precedent.

Further, rather than acknowledging that sex discrimination law protects individuals, not just classes of individuals, the Ninth Circuit turned Title VII on its head in interpreting its precedent to mean that Darlene Jespersen could not prevail unless she demonstrated that all women were burdened, not just those women offended and harmed by having to wear make-up. As a result, the Ninth Circuit departed from well-established law.[137]

Judge Kozinski[138] dissented, joined by two other judges.[139] He argued that the majority's error was, in essence, applying anti-subordination equality principles to a case that did not necessitate it.[140] Rather than focusing solely on whether all women are harmed by a dress code policy, Judge Kozinski looked at whether the plaintiff was harmed because she was a woman.[141] His criticism of the majority was that it missed the individual harm that the grooming requirement cause for some—even if not all—women.[142] He explained that, in his view, the court incorrectly dismissed the evidence of gender-based harm because of its undue focus on whether the policy substantially burdened *all* women.[143] Notably, his dissent acknowledged that people who happen to fit the stereotypes of what real women or real men should look or act like are advantaged by the majority's approach and identified the gendered norm as being culturally, not biologically or "naturally," prescribed.[144] As Kozinski explained, the majority's dismissal of the case for lack of demonstration of the policy's substantial burden on all women

> presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face

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135. *See* Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 317-21 (describing and critiquing the "unequal burdens" test and its application in *Jespersen*).

136. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1080 (9th Cir. 2004).

137. Even under constitutional equal protection analysis, the Supreme Court has held that an individual can state a claim of unequal treatment as a "class of one." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City, 488 U.S. 336 (1989))).

138. Hardly a liberal, Judge Kozinski has been described as a "conservative libertarian." Jeffery Rosen, *Perhaps Not All Affirmative Action Is Created Equal*, N.Y. TIMES, June 11, 2006, at 14.

139. *Jespersen*, 444 F.3d at 1117-18 (Kozinski, J., dissenting). Judge Pregerson wrote a separate dissent, joined by Judges Kozinski, Graber, and Fletcher. *Id.* at 1113-17.

140. *Id.* at 1117 (Kozinski, J., dissenting).

141. *Id.* at 1118.

142. *See id.*

143. *See id.* at 1117.

144. *See id.*

> one presents to the world—is an intensely personal choice . . . . If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance.[145]

Moreover, even if the court had correctly applied an unequal burdens test (that is to say, required a demonstration of subordination), it is nearly laughable to imagine that the Harrah's policy could have survived it, as Judge Kozinski explains in dissent.[146] The court concluded that Jespersen could not prove her case because she had not introduced evidence that could prove that wearing make-up on a daily basis pursuant to the "Personal Best" program would take more money or time than was required by the men to maintain appropriate haircuts and trimmed nails.[147] As Judge Kozinski empathically explained:

> Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave . . . . While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.[148]

The case of "unequal burdens" is proved for the dissent by the fact that Jespersen's male colleagues would not be forced to make the choice between wearing make-up and losing their jobs. In the end, the dissent saw the problem with the dress code under both first and second generation equality principles.

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145. *Jespersen*, 444 F.3d at 1117-18 (Kozinski, J., dissenting). Quite remarkably, Judge Kozinski has engaged in a thought experiment I urged litigants to press upon courts considering these types of claims. *See* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 111-12 (2006). That thought experiment was drawn from the powerful message included in the introduction to Daphne Scholinski's book, *The Last Time I Wore A Dress*. *See* SCHOLINSKI, *supra* note 75. Proving a point I have made elsewhere, it is only when those who enjoy gender conformity privilege can see that privilege and imagine their lives lived without it that the magnitude of the effect of the imposition of gender norms will be acknowledged.

146. As Judge Kozinski explained, "I find it perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. 'teased, curled, or styled' hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the 'overall policy' more burdensome for the former than for the latter." *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting) (citations omitted). Empathically, Judge Kozinski went on to note, "[I]s there any doubt that putting on makeup costs money and take time? . . . You don't need an expert witness to figure out that [makeup] do[es]n't grow on trees . . . ." *Id.*

147. *Id.* 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.").

148. *Id.* at 1117-18 (Kozinski, J., dissenting).

The second part of the panel's analysis addressed the sex stereotyping challenge to the dress policy. In dismissing the sex stereotyping theory for Jespersen's sex discrimination claim, the panel emphasized that the policy does not "single out" Jespersen.[149] This reference to singling out is odd because sex stereotyping does not normally require any singling out. Rather, it focuses on the group impact of a policy. The majority explained the policy applied to all bartenders, male and female, and "for the most part" was unisex.[150] The court nevertheless held that the policy (despite the clearly non-unisex rules relating to make-up and hair styling) was not "adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."[151] Ignoring the obvious, the court retreated to the alternative reading of *Price Waterhouse*—the one suggesting the case was about the glass ceiling for women in male-dominated work environments and not about some more general problem with gender stereotypes. Because the court found that the grooming standards did not "objectively inhibit a woman's ability to do the job,"[152] it denied Jespersen's sex stereotyping claim.

What is most striking about the stereotyping analysis in *Jespersen* is that it departs from the direction that most courts have gone in the context of other sex discrimination claims, particularly those brought by gay/lesbian and transgender litigants, including cases involving dress policy challenges and sex harassment.[153] That is, other courts hearing such claims in cases not directly addressing the legitimacy of dress codes have taken the Supreme Court at its word in *Price Waterhouse* that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, 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."[154]

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149. *Id.* at 1111. The reason I characterize this as "odd" is because, in the first part of the opinion, the court focused on Jespersen's failure to demonstrate that the policy had a group-based harm. In the second part, the court focused on Jespersen's failure to demonstrate an individual singling out by the policy. She was damned that she didn't and damned that she did.

150. *Id.* at 1112.

151. *Id.*

152. *Id.*

153. I have argued elsewhere that where courts can sufficiently distinguish themselves from the litigant bringing a claim as a result of evidence related to a diagnosed condition, the harms associated with sex-based dress policies are more apparent, though less threatening, and the litigants' claims have, as in the context of transgender litigants, been more successful. *See* Levi, *supra* note 145, at 100-04. In that article, I argued that the inclusion of a disability claim allowed judges to marginalize the nature of the claim and acknowledge the impermissibility of a gender-based dress code. I also argued that the *Jespersen* outcome, though widespread, is analytically insupportable.

154. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

The *Jespersen* analysis suggests that, despite the evolution of the sex stereotyping theory, courts remain comfortable with the enforcement of gendered stereotypes as long as the enforcement does not create a group-wide problem for women. Notably, the court relied on the anti-subordination principle associated with second generation theory to legitimize the enforcement of such gendered norms.

B. Schroer v. Billington

The second case that frames this discussion is *Schroer v. Billington*.[155] The case is important because it is one in which a litigant, Diane Schroer, successfully[156] brought a claim advancing both sex stereotyping and straightforward sex discrimination theories. Only her straightforward sex discrimination theory was credited. The court went to lengths to explain that it was rejecting her sex stereotyping theory because of a fear of its success in a different context—that of dress codes.[157] In *Schroer*, unlike in *Jespersen*, the court credited the demonstration of formal inequality and imposed no additional hurdle relating to anti-subordination. At the same time, though, it preserved the ability of courts to avoid doing so in the context of dress codes. Significantly, the case departed analytically from a recent line of precedent protecting transsexual people under a sex stereotyping theory.[158] Although

155. 424 F. Supp. 2d 203 (D.D.C. 2006).

156. The Plaintiff survived a motion to dismiss. *Id.* at 213 (denying defendant's motion to dismiss because the facts could "support [Schroer's] claim that the library refused to hire her solely because of her sexual identity, and that in doing so, the library discriminated against her 'because of sex'"). Following its denial of the defendant's motion to dismiss, the court "directed the parties to develop an appropriate factual record, 'one that reflects the scientific basis of sexual identity in general, and gender dysphoria in particular,' to which the Court could look when making its legal determination as to whether Plaintiff states a claim for discrimination 'because of sex.'" Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss and in the Alternative for Judgment on the Pleadings at 9, Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2007) (No. 05-1090), 2007 WL 2125236, *available at* http://www.aclu.org/images/asset_upload_file69_30088.pdf. Both parties retained experts who made reports to the court. *Id.* at 2. The defendant then filed a second motion to dismiss. On June 11, 2007, the plaintiff filed a memorandum opposing defendant's motion and requesting an evidentiary hearing to resolve contradictory representations in the experts' reports. *Id.* at 1-2.

157. *Schroer*, 424 F. Supp. 2d at 210-11.

158. *Id.* Historically, courts denied sex discrimination claims brought by transsexual persons for two different but related reasons. Some courts explained that the language of Title VII, including the term "sex," was not intended to provide protections for transsexual people, as demonstrated by Congress's failure to pass explicit laws to cover gay and lesbian people. The second explanation for courts' refusal to protect transsexual people under Title VII law was that, in the view of those courts, Title VII was intended to cover exclusively women *qua* women and men *qua* men. Some courts viewed transsexual people as neither men nor women and therefore not covered by existing law. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men . . . . [A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("[T]he major thrust of the 'sex' amendment was towards providing equal opportunities for women."); Holloway v. Arthur Andersen & Co., 566 F.2d

consistent with these cases in outcome, the *Schroer* court rejected the sex stereotyping theory that other courts had acknowledged while accepting the straightforward disparate treatment claim.[159] Remarkably, the judge explained in dicta that the reason for departing from established analysis was to preserve the dress code exception under sex discrimination law, even though, as the court itself acknowledged, that issue was not before it.[160]

The *Schroer* case presented compelling facts. The plaintiff Diane Schroer applied for a position as a terrorism research analyst with the Congressional Research Service, a division of the Library of Congress.[161] She was eminently

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659, 664 (9th Cir. 1977) ("A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."); Doe v. U.S. Postal Serv., Civ. A. No. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985) (agreeing with the *Ulane* court that "a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder.").

As has comprehensively been described elsewhere, the more recent trend of courts has been to reject the earlier unprincipled exclusions of transsexual people from coverage under existing sex discrimination laws (both state and federal). Currah & Minter, *supra* note 114; *see also* Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5 (2000). Most recent courts that have addressed the question have held that transsexual people are covered under existing laws. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (finding that discrimination against a transsexual police officer based upon the employee's gender non-conforming behavior and appearance was actionable pursuant to Title VII); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (finding that allegations that a transsexual firefighter was discriminated against based upon the employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that the Gender Motivated Violence Act applies with equal force to both men and women, and that its protection extends to transsexuals); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that allegations that a transsexual bank loan applicant was discriminated against based upon the applicant's gender non-conforming behavior and appearance were actionable pursuant to the Equal Credit Opportunity Act); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (holding that allegations that a transsexual sales representative was discriminated against based upon the employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); Kastl v. Maricopa County Cmty. Coll. Dist., No. 02-1531-PHX-SRB, 2004 WL 2008954, at *3 (D. Ariz. June 3, 2004) (holding that an allegation of employment termination for failure to conform to gender stereotypes in the use of restrooms was actionable pursuant to Title VII); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that alleged discrimination against a transsexual employee for failing to 'act like a man' is actionable pursuant to Title VII); *Doe*, 2001 WL 34350174, at *4 (holding that allegations that a transsexual employee was discriminated against based upon the employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII). *But see* Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2004 WL 1505610 (D. Utah June 24, 2005) (stating that Congress did not intend transsexuals to be covered by Title VII); Oiler v. Winn-Dixie, Inc., No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. 2002) (same); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993) (same); Cox v. Denny's Inc., No. 98-1085-CIV-J-16B, 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994) (holding that being discharged on the basis of one's transsexuality does not violate the District of Columbia Human Rights Act).

159. *Schroer*, 424 F. Supp. 2d at 213 ("There are facts that Schroer could prove which would support her claim that the Library refused to hire her solely because of her sexual identity, and that in so doing, the Library discriminated against her 'because of . . . sex.'").

160. *Id.* ("Dealing with transsexuality straightforwardly, and applying Title VII to it (if at all) as discrimination 'because of . . . sex,' preserves the outcomes of the post-*Price Waterhouse* caselaw without colliding with the sexual orientation and grooming code lines of cases.").

161. *Id.* at 205.

qualified for the position, which her potential employer confirmed.[162] Schroer was a twenty-five-year veteran of the armed services, during which time she served in combat and in special operations units.[163] The last portion of her military career was spent working with the United States Special Operations Command to defeat international terrorist networks.[164] As part of her job, she coordinated a classified operation "charged with tracking and targeting high-threat international terrorist organizations."[165] Even after her retirement from the military, she continued to work on security matters in the private sector.[166]

After interviewing her for an advertised position as a terrorism research analyst,[167] the Library of Congress offered Schroer the job.[168] Convinced of her qualifications, the Library of Congress even followed up with a call to assure her that it could meet her private sector salary.[169] Schroer accepted the job.[170] When Schroer showed up to negotiate some administrative details, she raised an issue that had not come up during the interview process. Diane Schroer, who had interviewed for the job as David Schroer, dressing and appearing in traditionally masculine clothing and appearance, informed her soon-to-be employer that she was transsexual.[171] Although assigned the sex of male at birth, Diane Schroer had a female gender identity and was to begin the process of transitioning from male to female consistent with a course of medical treatment.[172] She had gone through the interviews before she was able to transition and wanted to inform her employer that she was about to begin the process of sex-reassignment consistent with a medical protocol.[173]

Charlotte Preece, the representative of the Congressional Research Service who had been Schroer's contact, responded that Schroer had "really given [her] something to think about."[174] The next day, Preece called Schroer to say that under the circumstances and "for the good of the service," Schroer was no longer a "good fit" for the job.[175] About a month and a half later, Schroer received a form e-mail stating that the position she had been offered was filled.[176] Schroer brought suit claiming that the refusal to hire her violated Title

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162. *Id.* at 206 ("[The employer] stated that the selection committee believed that Schroer's skills and experience made her application far superior to those of the other candidates.").

163. *Id.* at 205.

164. *Id.* at 205-06.

165. *Id.* at 206. Indeed, her analysis in this position merited audiences with the Vice President, the Secretary of Defense, and the Joint Chiefs of Staff to conduct intelligence briefings. *Id.*

166. *Id.* Schroer worked as a senior analyst and program manager at a private consulting firm that specialized in military and national security issues.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 205.

173. *Id.* at 206.

174. *Id.*

175. *Id.*

176. *Id.* at 206-07.

VII's prohibition against sex discrimination.[177] The defendant moved to dismiss Schroer's claim citing a long line of cases excluding transsexual litigants from protection under Title VII.[178] Diane Schroer countered that the earlier line rejecting claims brought by transgender litigants was interrupted and reversed by *Price Waterhouse* and, furthermore, that under a straightforward sex discrimination theory, the Library of Congress acted impermissibly by withdrawing Schroer's offer because it did so "because of sex."[179]

Notably, the D.C. District Court rejected Schroer's theory of sex stereotyping[180] but accepted the straightforward sex discrimination claim.[181] In addition to the lengths to which the court went to preserve the "gender-specific dress and grooming code"[182] exception under Title VII, discussed above, this analysis is also striking because the court rejected the very claim that prevailed in nearly every successful action brought by a transgender litigant.[183] Despite rejecting the sex stereotyping theory advanced by Schroer, the court nevertheless denied the motion to dismiss on the straightforward argument that "discrimination against transsexuals because they are transsexuals is 'literally' discrimination because of sex."[184] As the court explained, "Dealing with transsexuality straightforwardly, and applying Title VII to it (if at all) as discrimination 'because of . . . sex,' preserves the outcomes of the post-*Price Waterhouse* caselaw without colliding with the . . . grooming code lines of cases."[185]

C. Lessons Drawn

Jespersen and *Schroer* highlight the anomaly of the Title VII dress code cases. *Jespersen* does so by replicating the doctrinal and conceptual errors courts have made for over thirty years. *Schroer* does so by the lengths to which it goes to ensure the continued vitality of the Title VII blind spot even as the court secures legal protections for a transgender 0litigant who historically

177. *Id.* at 207. In addition to the Title VII action, her complaint also included an equal protection claim. *Id.* at 205.

178. Defendant's Motion to Dismiss and in the Alternative for Judgment on the Pleadings at 6-7, *Schroer*, 424 F. Supp. 2d 203 (No. CIV.A. 05-1090), 2007 WL 2125236.

179. *See* Schroer, 424 F. Supp. 2d at 210.

180. *Id.* at 211 ("*Price Waterhouse* does not create a Title VII claim for sex stereotyping in the absence of disparate treatment, and . . . the allegations of Schroer's complaint do not assert a *Price Waterhouse* type of claim in any event [because] the logic of such a rule does not extend to situations where the dress and makeup are intended to express, and are understood by the employer to be expressing, a female identity.").

181. *Id.* at 212-13 ("[D]iscrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex.'" (quoting Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983))).

182. *Id.* at 208.

183. Indeed, the claim has been central to the reversal of the earlier line of cases that had excluded transgender litigants from the scope of Title VII's coverage. *See* Currah & Minter, *supra* note 114.

184. *Id.* at 212.

185. *Id.* at 213.

would have been denied them. The litigation suggestions I have offered throughout this article could be implemented in a case such as *Jespersen* to try to eradicate the Title VII blind spot. These include: refocusing courts' attention on anti-differentiation principles and the limits of anti-subordination ones,[186] highlighting that the case is one of direct rather than indirect evidence,[187] and clarifying the harms caused by differentiation even with no evidence of anti-subordination by analogizing to the sex-tag to the race-tag addressed in *Anderson v. Martin*.[188] While it is, of course, impossible to predict the potential success of these litigation strategies, the language of both cases supports their use.

CONCLUSION

In non-dress code contexts, courts readily acknowledge that facially sex-based practices and policies are presumptively unlawful under Title VII. When it comes to dress codes, however, nearly the opposite has proven to be true. This pervasive attitude of judicial laissez-faire toward sex-based dress codes is increasingly anomalous in the wider context of sex discrimination caselaw, yet it shows no signs of abating.

An over-emphasis on anti-subordination theories has skewed dress code caselaw and prevented courts from seeing the discriminatory harms caused by sex-specific dress requirements. One way to expose the doctrinal Title VII blind spot is for litigants to draw from the race analogy to reveal the harm of labeling sex differences in the workplace. The race analogy helps explain that the labeling of an employee's sex is harmful because it identifies the characteristic of sex as a meaningful distinction in the workplace, something that Title VII purports to address. Another specific step that could be taken is to do some basic legal education in particular cases about the difference between direct and indirect evidence, legal doctrine often ignored or misunderstood by the bench and bar. These strategies would be more effective than pursuing the currently popular sex stereotyping theory, which has largely failed to expose the detrimental impact of sex-based dress codes on employees. It would also do much to advance a proper understanding of the relationship between formal and anti-subordination equality theories.

The *Jespersen* and *Schroer* cases demonstrate the ultimate weakness of the sex stereotyping argument in fighting invidiously discriminatory dress code policies. As long as courts rely exclusively on group-based equality claims rooted in second generation anti-subordination analysis, these dress code challenges will likely fail. By reinvigorating the first generation formal equality

186. *See supra* Part II.B.
187. *See supra* Part III.A.
188. *See supra* Part II.D.

theory and its call for equal individual rights, however, Title VII can be reborn as an effective tool for fighting dress code employment discrimination. This does not mean that second generation theories have no place in discrimination claims. Where past discriminatory treatment makes present day "fair treatment" facially unjust, group-based understandings of rights are appropriate and necessary. However, for dress code policies that harm the individual on the basis of sex, first generation arguments are a key to regaining lost ground.