

Articles

THE ANTIDISCRIMINATION PARADOX: WHY SEX BEFORE RACE?

*Kimberly A. Yuracko**

INTRODUCTION.....	1
I. AN ANTI-ASSIMILATION PRINCIPLE	6
A. <i>Gender Nonconformity</i>	6
B. <i>Racial Nonconformity</i>	17
II. AN ANTISUBORDINATION PRINCIPLE	19
A. <i>Gender Nonconformity</i>	19
B. <i>Racial Nonconformity</i>	31
III. A STATUS PRINCIPLE.....	34
A. <i>Gender Nonconformity</i>	35
B. <i>Racial Nonconformity</i>	41
CONCLUSION.....	46

INTRODUCTION

When Title VII¹ of the Civil Rights Act was passed in 1964, its target was clear. At the time, African Americans were routinely excluded from jobs and even from whole industries.² Women, too, were confined to “pink-collar” jobs and often barred from the more prestigious and profitable posi-

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

¹ 42 U.S.C. § 2000e-2(a)(1) (2006).

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

tions reserved for men.³ Title VII sought to end this kind of categorical status-based discrimination.⁴

In the ensuing years, a great deal has changed. No longer do women and minorities face categorical barriers to entry into the work world. Employers seek workers who possess technical job qualifications and who project the right corporate image. Those women and minorities who have the right qualifications and who “fit” the corporate mold are readily included.⁵

One of the great insights of recent employment law scholarship has been to recognize the race- and sex-based implications of these workplace conformity demands. Such demands are raced, scholars argue, in that they often require employees to match white middle-class norms of dress, speech, appearance, and behavior.⁶ Such demands are gendered, they argue, in that they require employees to embrace traditional conceptions of masculinity and femininity.⁷ Title VII, these scholars argue, should protect workers from such assimilationist conformity demands.

³ Diane L. Bridge describes, for example, a Westinghouse manual from the early 1900s which provided that “the lowest paid male job was not [to] [sic] be paid a wage below that of the highest paid female job, regardless of the job content and value to the firm.” Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL’Y & L. 581, 599 (1997) (alterations in original) (quoting Ray Marshall & Beth Paulin, *Employment and Earnings of Women: Historical Perspective*, in WORKING WOMEN: PAST, PRESENT, FUTURE 1, 12 (Karen S. Koziara et al. eds., 1987)). She also quotes the International Ladies’ Garment Workers’ Union contract from 1913, which limited women to the less skilled jobs and provided that “the highest paid female could not earn more than the lowest paid male.” *Id.*

⁴ See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001) (“What is clear from the law itself, its legislative history, and Congress’ subsequent actions, is that the goal of Title VII was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”).

⁵ This is not to suggest that status-based discrimination no longer exists, but only that it has diminished and rarely takes the open and explicit forms of the past.

⁶ See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 131 (2006) (describing the racial covering demands imposed on minority workers in order to conform to white assimilationist workplace norms); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1294 (2000) (describing the “identity work” that minority employees must do to comply with white cultural workplace norms); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (describing as “transparently white decisionmaking” the process by which employers define workplace rules and expectations according to white cultural norms); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 646 (2005) (questioning why workplace cultures “define acceptable and favored behavior along a white, male norm”); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1194–95 (2004) (describing employers’ shift from facially discriminatory policies to facially neutral ones that prohibit racially associated behaviors and attributes).

⁷ See generally Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2543–44 (1994) (describing and explaining courts’ frequent allowance of substantially different dress and appearance standards for female and male employees); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 66–68 (1995)

Certainly not all scholars agree. Most notably, Richard Thompson Ford has objected to protecting employees from conformity demands with which they can choose to comply.⁸ He worries that protecting workers' expressions of racial or gender identity will essentialize these groups based on traits and attributes that may be both contested and harmful.⁹ Nonetheless, the critical debate in employment law in recent years has been over the appropriate degree of judicial deference to workplace assimilation demands.¹⁰

In the sex context, many scholars argue that courts have already adopted a new anti-assimilationist antidiscrimination principle—one that protects workers from demands that they perform their gender in sex-stereotyped ways.¹¹ Scholars point for support to *Price Waterhouse v. Hopkins*, in which the Supreme Court held that an employer's refusal to

(arguing that sex-specific dress codes constitute sex discrimination under Title VII); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 340 (1997) (“[C]ourts have found that it is legal for employers to rely on what they see as dominant societal rules about how men and women should dress. Although courts have long held that Title VII prohibits employers from relying on stereotypes about men and women, courts in these cases overtly and unapologetically have allowed them to do just that.”).

⁸ See RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 188–90 (2005).

⁹ See Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 38, 55–56 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Ford, *Beyond Difference*] (discussing the dangers of essentializing groups by defining them in terms of the traits they have historically been permitted to have); Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1804–06 (2000) [hereinafter Ford, *Race as Culture?*] (questioning whether cultural identity rights arguments are the best mechanism for challenging status group oppression); see also Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) (“Essentialism is the notion that there is a single woman's, or Black person's, or any other group's, experience that can be described independently from other aspects of the person—that there is an ‘essence’ to that experience.”).

¹⁰ See, e.g., Bartlett, *supra* note 7, at 2542–45; Carbado & Gulati, *supra* note 6, at 1262; Case, *supra* note 7, at 4; Flagg, *supra* note 6, at 2014–15; Ford, *Race as Culture?*, *supra* note 9, at 1812–13; Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 32–36 (2000).

¹¹ See, e.g., Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in EMPLOYMENT DISCRIMINATION STORIES 105, 135 (Joel Wm. Friedman ed., 2006) (arguing that “a number of recent judicial opinions” reflect an understanding of *Price Waterhouse* as being “fundamentally about gender nonconformity and sex stereotyping”); Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, in EMPLOYMENT DISCRIMINATION STORIES, *supra*, at 65, 66 (arguing that *Price Waterhouse* should be read as a case that would “condemn decisionmaking that is tainted by group stereotypes” and noting that this “broader reading has been a linchpin of a generation-long effort to find in Title VII's ban on sex discrimination some basis for the protection of gender nonconformists—gay men and lesbians, ‘effeminate’ men and ‘masculine’ women, transsexuals, and others whose sexual preferences and outward behavior defy conventional gender stereotypes”); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205, 219 (2007) (contending that *Price Waterhouse* articulated the principle that “nonconformity to gendered expectations can constitute a form of statutorily proscribed sex-based discrimination”); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243, 247 (2008) (contending that in *Price Waterhouse* “[t]he Supreme Court . . . modified the traditional definition of ‘sex’ through judicial interpretation to include gender nonconforming behavior”).

promote a female employee because she was deemed overly masculine was a form of sex discrimination.¹² They also point to the widespread circuit court protection of male employees harassed because they are deemed overly feminine,¹³ as well as to the Sixth Circuit's protection of preoperative male-to-female transsexuals disciplined for adopting feminine styles of dress and grooming.¹⁴

In the race context, however, scholars note that no similar anti-assimilationist principle has taken hold.¹⁵ Courts uniformly and explicitly refuse to protect minority workers from demands that they conform to culturally white norms of dress, behavior, and appearance. Courts have refused, for example, to protect African-American women from workplace grooming codes barring cornrows¹⁶ or to protect non-native English speakers from English-only workplace rules.¹⁷

These cases suggest a paradox. Although Title VII prohibits employment discrimination based on both race and sex,¹⁸ race was its primary tar-

¹² 490 U.S. 228, 258 (1989).

¹³ See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 869 (9th Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997). Several other circuits have endorsed similar protection in principle. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) (“[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (“The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.” (citation omitted)). Female workers harassed for their perceived masculinity have also received protection. See, e.g., *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, 1229 (D. Or. 2002) (denying the employer’s motion for summary judgment because the plaintiff had presented evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance).

¹⁴ See *Barnes v. City of Cincinnati*, 401 F.3d 729, 733–38 (6th Cir. 2005) (upholding a sex discrimination jury verdict in favor of a male-to-female preoperative transsexual denied a promotion to police sergeant for failure to conform to masculine sex stereotypes, including coming to work wearing makeup and a French manicure); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a preoperative male-to-female transsexual diagnosed with Gender Identity Disorder (GID) who was discriminated against after he began “to express a more feminine appearance and manner on a regular basis, including at work” could state a claim for sex discrimination).

¹⁵ See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 717–18 (2001); Flagg, *supra* note 6, at 2029–30.

¹⁶ See *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at *2 (N.D. Ga. Sept. 19, 1996); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231–33 (S.D.N.Y. 1981); *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981).

¹⁷ See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980).

¹⁸ Section 703(a)(1) of Title VII makes it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, con-

get. The addition of sex was an afterthought, one commonly interpreted as an act of sabotage.¹⁹ Moreover, sex received weaker protection than race under Title VII, just as it does under the Equal Protection Clause.²⁰ Why, then, are courts currently interpreting Title VII to provide workers with more expansive protection from assimilationist demands under its sex discrimination prohibition than under its race discrimination prohibition? More specifically, why do courts appear to be adopting a new anti-assimilationist antidiscrimination principle in sex cases while rejecting such a principle in race cases?

In this paper I do not seek to join the normative debate over the extent to which antidiscrimination doctrine should protect anti-assimilationist conduct by workers.²¹ I seek instead to make sense of the case law. My goals are twofold: first, to explain when and why courts protect employees from workplace conformity demands that constrain expressions of racial or gender identity; and second, to explain why this protection looks more expansive in sex cases than race cases.

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

ditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁹ See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 168–69 (2004) (describing the process leading to the inclusion of sex in the Civil Rights Act of 1964).

²⁰ Title VII includes an exception to its general antidiscrimination mandate which permits discrimination on the basis of religion, sex, or national origin in "instances where religion, sex, or national origin is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). Title VII does not include a BFOQ exception for race. Moreover, while race receives strict scrutiny under the Equal Protection Clause, sex receives the lower intermediate scrutiny. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (noting that strict scrutiny has not been extended to classifications other than race or national origin).

²¹ I have joined the normative debate in other articles. See Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006); Yuracko, *supra* note 19.

vergence between race discrimination and sex discrimination jurisprudence is due not to doctrinal differences but to differences in the ways conformity demands operate in the two contexts.

I. AN ANTI-ASSIMILATION PRINCIPLE

In recent years, scholars have increasingly urged upon courts a new anti-assimilationist antidiscrimination principle. Title VII, they argue, should protect employees from demands that they “perform” their gender or race in accordance with mainstream social norms.²² In sex discrimination cases, courts have sometimes seemed to agree by protecting women and men respectively from feminine and masculine dress and behavior demands. In race discrimination cases, courts have unwaveringly rejected such anti-assimilationist arguments and routinely enforced employer demands that all employees conform to white middle-class cultural norms. However, I argue in this Part that, contrary to initial appearances, the sex and race cases are in fact doctrinally parallel with both rejecting claims for any principled anti-assimilationist protection under Title VII. I examine the sex cases first before turning to the race cases.

A. Gender Nonconformity

It is easy to understand why many recent scholars have interpreted contemporary sex discrimination jurisprudence as incorporating a new anti-assimilationist antidiscrimination principle.²³ The Supreme Court’s 1989 ruling in *Price Waterhouse v. Hopkins*, as well as numerous subsequent circuit court opinions, have encouraged such a conclusion.²⁴ Such a reading is, however, a mistake.

Price Waterhouse involved a claim of sex discrimination brought by a woman deemed insufficiently feminine by her employer. Ann Hopkins had worked at Price Waterhouse for five years when, in 1982, she became a candidate for partnership.²⁵ At the time, the firm had 662 partners, seven of

²² See Carbado & Gulati, *supra* note 6, at 1279 (criticizing demands that workers “perform” their racial or gender identity in particular ways); Case, *supra* note 7, at 67–69 (arguing that men should be protected from traditionally masculine dress and appearance requirements); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 887 (2002) (describing covering demands as requiring that individuals “perform” their identities in particular ways).

²³ See *supra* note 11 and accompanying text.

²⁴ 490 U.S. 228, 251 (1989); see also *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a male-to-female preoperative transsexual “sufficiently pleaded claims of sex stereotyping and gender discrimination” when he alleged that his employer discriminated against him due to his more feminine appearance); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that workplace sexual harassment due to a male employee’s feminine mannerisms is prohibited by Title VII); *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997) (denying summary judgment for employer where two heterosexual male employees were subject to verbal harassment and sexual requests from other male employees who deemed them insufficiently masculine).

²⁵ *Price Waterhouse*, 490 U.S. at 231.

whom were women.²⁶ Of the eighty-eight candidates for partnership in 1982, Hopkins was the only woman.²⁷ As the district court judge would later find, “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.”²⁸ Nonetheless, Hopkins was denied promotion.²⁹ The partner who was responsible for explaining to Hopkins the reasons for the company’s decision advised that, in order to improve her chances the following year, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³⁰ Hopkins sued, alleging that she had been the victim of sex discrimination.

The Supreme Court agreed, relying on an argument that Title VII prohibited sex stereotyping. The Court explained:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³¹

The Court’s language, prohibiting an employer from “assuming or insisting” that an employee conform to group stereotypes,³² distinguished two types of workplace stereotyping: ascriptive stereotyping and prescriptive stereotyping. Ascriptive stereotyping occurs when an employer assumes that an individual possesses certain traits and attributes because of her group membership. Prescriptive stereotyping occurs when an employer insists that an individual possess or exhibit certain traits and attributes because of her group membership.

Ascriptive sex stereotyping had been illegal well before *Price Waterhouse*³³ and was not what Hopkins faced. She was not denied a promotion

²⁶ *Id.* at 233.

²⁷ *Id.* Forty-seven of the candidates were admitted to the partnership, twenty-one were rejected, and twenty, including Hopkins, were held for reconsideration the following year. *Id.*

²⁸ *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112 (D.D.C. 1985).

²⁹ *Price Waterhouse*, 490 U.S. at 233.

³⁰ *Id.* at 235 (quoting *Hopkins*, 618 F. Supp. at 1117) (internal quotation marks omitted). Before the time for reconsideration came in the following year, the partners in Hopkins’s office withdrew their support of her and told her she would not be reconsidered for partnership. *Id.* at 233 n.1.

³¹ *Id.* at 251 (internal quotation marks omitted) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

³² *Id.*

³³ *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (striking down a federal statute that provided dependent benefits for all spouses of male service members, but provided the same benefits to the spouses of female service members only upon their showing actual dependence on their wives for over one-half of their support, because it was based on an assumption that women do not support their husbands); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198–99 (7th Cir. 1971) (striking down the employer’s no-marriage rule, which applied only to female flight personnel, because it was based on sex

because her employer believed that she possessed stereotypically feminine traits and attributes. Hopkins was denied a promotion because she did not possess the stereotypically feminine attributes that her employer thought were appropriate and desirable for a woman. It was, therefore, the Court's prohibition on prescriptive stereotyping that was critical to Hopkins's victory.³⁴

Both the Court's ruling and its language suggested a broad new anti-assimilationist antidiscrimination principle—one protecting workers from prescriptive stereotypes that demand conformance to sex-based gender norms.³⁵ Gender nonconformists, it seemed, were entitled to antidiscrimination protection.³⁶

Plaintiffs wasted no time in seeking to take advantage of such protection. Male employees harassed because of their perceived effeminacy have been particularly successful. In *Doe v. City of Belleville*, for example, the Seventh Circuit ruled that the harassment of two boys who were perceived by their male coworkers to be insufficiently masculine constituted sex discrimination.³⁷ In concluding that the plaintiffs had presented evidence suf-

stereotypes about women's domestic role); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring) (arguing that an employer may not discriminate against female employees with young children based on an assumption that women generally have more child-care responsibilities than men).

³⁴ It is not clear that the Court fully grasped how different these two forms of sex stereotyping were when it placed them quickly under the same label of sex discrimination. Ascriptive stereotyping involves predictive judgments about what characteristics are possessed by persons of different sexes and typically affects employees at the hiring stage. Prescriptive stereotyping involves normative judgments about how people of different sexes should behave and constrains employees throughout their employment. Nonetheless, the Court's language in the case does make explicit reference to both types of stereotyping. See *Price Waterhouse*, 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

³⁵ There is still a broader version of the anti-assimilation principle calling for the protection of all expressions of personal identity, whether connected to one's gender identity or not, but since such a version is not grounded in antidiscrimination doctrine and is not a plausible account of courts' current antidiscrimination jurisprudence, I do not discuss it here.

³⁶ As the Court memorably explained: "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor . . . does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Price Waterhouse*, 490 U.S. at 256.

³⁷ 119 F.3d 563, 566 (7th Cir. 1997). *Belleville* involved the harassment of two sixteen-year-old brothers working for the city as summer groundskeepers. Both brothers were subject to taunts and abuse by their male coworkers, but one of the brothers, H. Doe, was the main target. The harassment of H. focused on the fact that he wore an earring and was perceived as overly feminine. *Id.* at 567. The Seventh Circuit's opinion in *Belleville* was vacated by the Supreme Court for further consideration in light of its decision in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998), which held that same-sex harassment could be actionable under Title VII. *City of Belleville v. Doe*, 523 U.S. 1001, 1001 (1998). The case then settled before there was a decision on remand. The Supreme Court's decision in *Oncale* did not, however, directly challenge or retract the gender stereotyping logic set forth in *Price Waterhouse*, upon which the *Belleville* decision relied. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260

ficient to show that they had been harassed because of sex, the Seventh Circuit relied on the Supreme Court's anti-sex stereotyping language from *Price Waterhouse*.³⁸ As the court explained:

[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.³⁹

The Ninth Circuit provided similar protection to the plaintiff in *Nichols v. Azteca Restaurant Enterprises, Inc.*⁴⁰ Antonio Sanchez worked as a host and then a food server at Azteca restaurants in Washington State.⁴¹ During his four-year tenure, Sanchez was subjected to a steady stream of taunts and insults focusing on his perceived effeminacy.⁴² Relying on *Price Waterhouse*, the Ninth Circuit held that Sanchez had suffered actionable sex discrimination.⁴³ "At its essence," the court explained, "the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. . . . *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here."⁴⁴

In recent years, the Sixth Circuit has relied on *Price Waterhouse* to provide similar protection from gender conformity demands to preoperative

F.3d 257, 263 n.5 (3d Cir. 2001) (opining that "there is nothing in *Oncale* . . . that would call into question" the holding in *Belleville* that harassment based on a failure to live up to gender stereotypes is sex discrimination).

³⁸ *Belleville*, 119 F.3d at 580.

³⁹ *Id.* at 581.

⁴⁰ 256 F.3d 864, 875 (9th Cir. 2001).

⁴¹ *Id.* at 870.

⁴² According to the court, "Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'" *Id.*

⁴³ The Ninth Circuit concluded that the harassment was sufficiently severe to violate Title VII, that it was because of sex, and that the employer was liable for the harassment for failing to take adequate steps to stop it. *Id.* at 873, 874–75, 877.

⁴⁴ *Id.* at 874–75. The Ninth Circuit faced a similar case one year later in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc). Medina Rene worked as a butler on an exclusive floor of the MGM Grand Hotel reserved for wealthy and famous guests. *Id.* at 1064. All of the butlers on the floor were male. *Id.* Rene was subjected to a constant stream of abuse from his supervisor and fellow butlers. *Id.* The conduct included "whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muñeca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex." *Id.* In an en banc decision, the court held that Rene had stated a claim for sexual harassment in violation of Title VII. *Id.* at 1068. In the plurality opinion, Judge William Fletcher (joined by Judges Trott, Thomas, Graber, and Fisher) concluded that the alleged harassment was "because of" sex due to the sexual nature of the abuse. *Id.* at 1066–68. In a concurring opinion, Judge Pregerson (joined by Judges Trott and Berzon) argued that the case was better understood as a gender stereotyping case in which Rene was harassed because he had traits that were deemed inappropriately feminine. *Id.* at 1068–69 (Pregerson, J., concurring).

male-to-female transsexuals who adopt feminine styles of appearance.⁴⁵ In *Smith v. City of Salem*, the Sixth Circuit held that the plaintiff had successfully pleaded sex discrimination based on his allegations that he was suspended because of his failure to meet stereotypically masculine norms of behavior and appearance.⁴⁶ The plaintiff, Jimmie Smith, worked as a lieutenant in the Salem Fire Department in Salem, Ohio.⁴⁷ Smith was a biologically male, preoperative transsexual who had been diagnosed with Gender Identity Disorder (GID).⁴⁸ After Smith began presenting a more feminine appearance at work, his coworkers began to comment on his appearance and his inadequate masculinity.⁴⁹ Upon learning about Smith's GID, the Chief of the Fire Department "arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment."⁵⁰ Shortly thereafter, Smith was suspended for an alleged infraction of department policy.⁵¹ He sued for sex discrimination. In reversing the district court's grant of judgment on the pleadings for the city, the Sixth Circuit held that Title VII protected transgendered workers from demands that their expressions of gender identity conform to their biological sex.⁵² Relying on *Price Waterhouse* for support, the court explained:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's

⁴⁵ See *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004). While the Sixth Circuit was the first circuit court to provide such protection, a few district courts had previously, and have subsequently, recognized similar antidiscrimination protection for transsexual individuals from gender conformity demands. See *Schroer v. Billington*, 424 F. Supp. 2d 203, 212–13 (D.D.C. 2006) (holding that a male-to-female transsexual could state an actionable sex discrimination claim when the employer rescinded a job offer after learning that the plaintiff had gender dysphoria and would be presenting a female appearance at work); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05–243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a preoperative male-to-female transsexual who alleged harassment and termination based on a failure to conform to gender stereotypes could state a claim for sex discrimination); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02–1531PHX-SRB, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004) (holding that the plaintiff—a transitioning male-to-female transsexual—could state a claim for sex discrimination based on an allegation that she was required to use the men's bathroom); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that a transitioning male-to-female transsexual alleging harassment and discrimination because she failed to "act like a man" could state a claim for sex discrimination); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 9, 2001) (holding that a transsexual male-to-female alleging she was terminated because her appearance did not match gender expectations could state a claim for sex discrimination).

⁴⁶ 378 F.3d at 572.

⁴⁷ *Id.* at 567–68.

⁴⁸ The court explained that according to the American Psychiatric Association, GID is "a disjunction between an individual's sexual organs and sexual identity." *Id.* at 568.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 569.

⁵² *Id.* at 575.

sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.⁵³

The Sixth Circuit affirmed a jury finding of such discrimination one year later in *Barnes v. City of Cincinnati*.⁵⁴ Barnes was a preoperative male-to-female transsexual who worked as a police officer in the Cincinnati Police Department.⁵⁵ He presented evidence at trial showing that he was denied a promotion to sergeant because he violated masculine stereotypes.⁵⁶ The jury ruled in Barnes's favor on his sex discrimination claim.⁵⁷ Relying on its prior ruling in *Smith* for support, the Sixth Circuit explained that a jury could have reasonably concluded that Barnes was discriminated against because of his failure to conform to masculine gender norms.⁵⁸

Despite the judicial rhetoric, there is reason to doubt that a broad anti-assimilationist antidiscrimination principle is really motivating these decisions.⁵⁹ Most notably, courts' regular denial of protection to gender non-conformists challenging sex-based grooming codes belies such a principle. After *Price Waterhouse*, as before, courts routinely permit sex-based grooming requirements that prescribe how employees may express their gender at work. For example, courts uphold workplace grooming codes requiring that male, but not female, workers keep their hair short.⁶⁰ Similarly,

⁵³ *Id.* at 574.

⁵⁴ 401 F.3d 729, 733 (6th Cir. 2005).

⁵⁵ *Id.*

⁵⁶ Barnes was told by a supervisor that he was not masculine enough and was told by another superior officer that he was going to fail probation because he was not acting masculine enough. *Id.* at 738.

⁵⁷ *Id.* at 733.

⁵⁸ *Id.* at 737–38; see also *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (applying sex stereotyping theory, the court in a bench trial issued a verdict for a male-to-female transsexual).

⁵⁹ It is worth noting that not all scholars have interpreted *Price Waterhouse* as articulating an anti-assimilationist principle of the sort described here. Mary Anne Case, for example, has interpreted *Price Waterhouse* as requiring a kind of formal equality between the sexes whereby any gendered traits or behavior deemed appropriate for individuals of one sex must also be permitted to individuals of the other sex. See Case, *supra* note 7, at 7–8. Case contends: “[Effeminate men] as well as . . . men who violate sex-specific grooming codes by wearing feminine attire to work . . . are clearly protected by both the plain language of Title VII and the holding in [*Price Waterhouse*]. If their employer tolerates feminine behavior or attire in women but not in them, the employer is subjecting them to disparate treatment in violation of Title VII.” *Id.* at 7. I have argued previously that this formal “trait equality approach” is both conceptually vague—because true cross-sex trait equality can never exist—and normatively unappealing—because equating nondiscrimination with rigid gender-blind neutrality may do as much to harm women as to help them. Moreover, this is not the interpretation of *Price Waterhouse* that has been adopted by the lower courts. See Yuracko, *supra* note 19, at 185–204.

⁶⁰ See, e.g., *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (holding that a male employee fired for not complying with his employer's short hair requirement for men could not state a claim for sex discrimination); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (holding that “requiring short hair on men and not on women does not violate Title VII”); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351

courts uphold grooming requirements prohibiting male, but not female, employees from wearing earrings.⁶¹ Indeed, courts reaffirm such requirements even in cases in which they rely on sex stereotyping rhetoric to check other kinds of conformity demands. In *Nichols*, for example, the Ninth Circuit used the sex stereotyping rhetoric of *Price Waterhouse* to hold that discrimination against a male worker because of his perceived effeminacy was a form of sex discrimination.⁶² Nonetheless, the court emphasized that its “decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.”⁶³ Similarly, in *Smith v. City of Salem*, the Sixth Circuit distanced itself from prior case law denying antidiscrimination protection to transsexuals,⁶⁴ but it did not disavow or reject prior case law enforcing sex-specific grooming codes generally.⁶⁵ These cases undermine the plausibility of a broad judicial commitment to protecting gender nonconformity as such.

A broad anti-assimilationist principle is also incompatible with the Ninth Circuit’s en banc ruling in *Jespersen v. Harrah’s Operating Co. (Jespersen II)*, which upheld an employer’s requirement that female, but not male, bartenders wear makeup.⁶⁶ Darlene Jespersen had worked as a bartender at Harrah’s for twenty years when she was terminated for refusing to comply with the company’s sex-specific makeup requirement.⁶⁷ The ma-

(4th Cir. 1976); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091–92 (5th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896, 898 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

⁶¹ See, e.g., *Kleinsorge v. Eyeland Corp.*, No. CIV. A. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000) (holding that a grooming code allowing female but not male employees to wear earrings did not violate Title VII); *Capaldo v. Pan Am. Fed. Credit Union*, No. 86 CV 1944, 1987 WL 9687, at *2 (E.D.N.Y. Mar. 30, 1987) (holding that a grooming code prohibiting men but not women from wearing earrings did not constitute sex discrimination); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 804 (Iowa 2003) (holding in response to a sex discrimination claim brought by a male employee who was fired for refusing to stop wearing an earring that “personal grooming codes that reflect customary modes” of distinctly gendered grooming do not constitute sex discrimination); *Macissac v. Remington Hospitality, Inc.*, No. 03-P-1015, 2004 WL 1541807, at *2 (Mass. App. Ct. July 9, 2004) (holding that enforcement of a grooming code prohibiting male but not female employees from wearing earrings did not constitute sex discrimination); *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 604 (Or. Ct. App. 1990) (holding that a grooming code prohibiting male but not female employees from wearing facial jewelry did not constitute sex discrimination).

⁶² *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001).

⁶³ *Id.* at 875 n.7.

⁶⁴ 378 F.3d 566, 572–73 (6th Cir. 2004). The court explained that the logic of these “pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection” had been “eviscerated.” *Id.*

⁶⁵ The court did not, for example, mention its holding in *Barker v. Taft Broadcasting Co.*, 549 F.2d at 401, upholding a hair length restriction applied to male but not female employees against a sex discrimination claim.

⁶⁶ 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc).

⁶⁷ *Id.* at 1105–07. For a more extensive description of the events leading up to Jespersen’s lawsuit see Carbado, Gulati & Ramachandran, *supra* note 11, at 120.

keup requirement was part of a new “Personal Best” program that imposed grooming and appearance requirements on all bartenders.⁶⁸ While the program dressed bartenders of both sexes in the same uniform of black pants, white shirt, black vest and black bow tie, it also required female bartenders to wear makeup while prohibiting male bartenders from doing so.⁶⁹ Specifically, female bartenders were required to wear “face powder, blush and mascara . . . applied neatly in complimentary colors” with “[l]ip color . . . worn at all times.”⁷⁰ Relying, in part, on *Price Waterhouse*’s rhetoric against sex stereotyping, Jespersen challenged the makeup requirement as a form of illegal sex discrimination.⁷¹ The makeup requirement discriminated against her, she argued, by “requiring [her to] . . . conform to sex-based stereotypes as a term and condition of employment.”⁷²

The Ninth Circuit rejected Jespersen’s claim and affirmed summary judgment for Harrah’s.⁷³ With bald implausibility, the Ninth Circuit proclaimed: “There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.”⁷⁴ More revealingly, the court expressed its concern that if it were to protect Jespersen from having to comply with the makeup requirement “we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.”⁷⁵

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

It is conceivable, however, that courts may be adopting a narrower anti-assimilationist principle. Rather than protecting all personal and idiosyncratic expressions of gender identity, this narrower principle would protect

⁶⁸ *Jespersen II*, 444 F.3d at 1107.

⁶⁹ *Id.*

⁷⁰ *Id.* Female bartenders were also required to have their hair “teased, curled, or styled every day.” Male bartenders were required to keep their hair short, their fingernails trimmed, and wear no facial makeup. *Id.*

⁷¹ *Id.* at 1108. Jespersen also raised an unequal burdens argument. *See id.*

⁷² *Id.*

⁷³ *Id.* at 1106.

⁷⁴ *Id.* at 1112. As Judge Pregerson argued in dissent, it is difficult to see what a requirement that women must wear makeup and men must not could be based on other than a sex stereotype. According to Judge Pregerson: “The inescapable message is that women’s unadorned faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s faces, but because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive . . . to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex.” *Id.* at 1116 (Pregerson, J., dissenting).

⁷⁵ *Id.* at 1112.

only those expressions that are culturally group-associated in some way.⁷⁶ The narrower principle would, for example, protect female workers who choose to wear traditionally feminine attire to work, such as skirts or frilly blouses, from being forced to dress in more masculine attire—at least without proof from their employer that such attire directly impaired job performance. More significantly, the principle would call for a reconceptualization of traditionally male jobs so as to protect and accommodate traditionally feminine attributes like empathy and relationship building. A law firm accustomed to hiring only highly aggressive and competitive individuals as litigators would, for example, be forced to consider whether individuals who were cooperative problem solvers might in fact be equally effective. Unlike the broad anti-assimilation principle, the narrower principle is aimed at preserving group culture, not at protecting individual identity.

Feminists have argued for antidiscrimination protection of this sort for decades, both as a way to elevate the feminine and as a way to improve the status of women.⁷⁷ Kathryn Abrams and Laura Kessler, for example, have sought greater protection for a culturally feminine caregiving norm. Both have argued that employers should be obligated to restructure jobs and workplaces so as to accommodate women's caregiving work.⁷⁸ Mary Anne Case has argued for the protection of feminine clothing styles in the workplace, whether worn by female or male workers.⁷⁹ "Discrimination against the feminine," she notes, "is likely to have a disparate impact on

⁷⁶ The association may be due either to prevalence, history, or cultural meaning, but what is important is that the trait being penalized is one that is not only important to the employee's individual sense of group identity, but one that is also recognized as important to some broader cultural conception of the group itself.

⁷⁷ As Lucinda Finley asked over twenty years ago: "[R]ather than blaming women and their nature for their underrepresentation in the high paying jobs, why not reexamine the jobs and their values?" Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 939 (1987) (reviewing DAVID L. KIRP, MARK G. YUDOF & MARLENE STRONG FRANKS, *GENDER JUSTICE* (1986)).

⁷⁸ See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1223–25 (1989) ("If women with children are to attain equality in the workplace, then we must challenge the notion of a natural or pre-ordained line dividing work and family. . . . Employers will have to determine which jobs or tasks can be shared or accomplished through flexible scheduling, grant fringe benefits to part-time workers, and re-educate clients to greater confidence in the new arrangements."); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 372–73 (2001) ("Women, more so than men, perform the unpaid family caregiving work within our society. . . . The American workplace and discrimination laws governing employment have yet to address seriously this profound existential difference between men and women with regard to caregiving, despite women's substantial presence in the paid labor force for more than two decades.").

⁷⁹ See Case, *supra* note 7, at 7 ("It is my contention that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.").

women” and, as a result, “should be permitted only if job-related and justified by business necessity.”⁸⁰

Despite Case’s argument that feminine expressions by both women and men should be protected, one could argue that culturally associated traits merit protection only when performed by in-group members because outsider performance represents only an imitative and inauthentic version of the trait. Interpreted in this way, the narrow anti-assimilation principle is consistent with courts’ refusal to protect men wishing to express traditionally feminine traits at work—such as earrings and long hair. It is likewise consistent with the Ninth Circuit’s refusal to protect Darlene Jespersen’s desire to express a traditionally male attribute at work—an unmade-up face.

The narrow anti-assimilation principle is, however, wholly inconsistent with courts’ ready deference to employer demands that women leave their cultural femininity at the workplace door. In *Wislocki-Goin v. Mears*, for example, the plaintiff, who worked at a juvenile detention center, sued for sex discrimination after she was fired for wearing her hair down and wearing excessive makeup to work in violation of her employer’s unofficial dress code demanding the ““Brooks Brothers look.””⁸¹ The Seventh Circuit affirmed the district court’s judgment in favor of the employer and echoed the lower court’s deferential acceptance of the employer’s grooming demands.⁸² Rather than requiring the employer to show that the plaintiff’s feminine style actually impeded her job performance, the court simply presumed the reasonableness of the employer’s grooming requirements.⁸³

The district court in *Chi v. Age Group, Ltd.*⁸⁴ was similarly deferential to male workplace norms. The plaintiff, Theresa Chi, had worked long hours coordinating imports for her employer before taking maternity leave for the birth of her second child.⁸⁵ At the end of her leave, Chi told her employer that she would like to return to work on a part-time basis and would no longer be able to work overtime.⁸⁶ Asserting that full-time work with regular overtime was required, Chi’s employer deemed her unqualified for her position and fired her.⁸⁷ In granting summary judgment against Chi on her sex discrimination claim, the court concluded that she had not even made out a *prima facie* case of discrimination because she could not show

⁸⁰ *Id.* at 4.

⁸¹ 831 F.2d 1374, 1376–77 (7th Cir. 1987).

⁸² *Id.* at 1379.

⁸³ *Id.* at 1380 (“We cannot say that these requirements were not reasonably related to [the employer’s] ‘legitimate interest[s].’” (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977))).

⁸⁴ No. 94 CIV. 5253 (AGS), 1996 WL 627580 (S.D.N.Y. Oct. 29, 1996).

⁸⁵ *Id.* at *1–2.

⁸⁶ *Id.* at *2.

⁸⁷ *Id.* at *2.

she was “qualified for her position.”⁸⁸ As Kessler notes in her discussion of the case, “[t]he court did not consider the possibility that Age Group might work out a flexible schedule with Chi” so that she might be “qualified” if only her job were reconceptualized.⁸⁹ Rather than protecting culturally feminine caregiving norms, the court uncritically accepted the employer’s male-normative workplace demands.

The court’s approach was the same in *EEOC v. Sears, Roebuck & Co.*, a well-known case in which the EEOC alleged that Sears had engaged in a pattern or practice of excluding women from commission sales positions.⁹⁰ The EEOC presented evidence showing that women were significantly underrepresented in commission sales jobs.⁹¹ Sears defended by arguing that lack of interest by women, rather than discrimination, caused the underrepresentation.⁹² Commission sales jobs, according to Sears’s Retail Testing Manual, required a “special breed of cat,” someone who “possesses a lot of drive and physical vigor, is socially dominant, and has an outgoing personality.”⁹³ Sears looked for candidates who were “aggressive[],” “assertive[],” “competitive[]” and had a “social or extraverted personality.”⁹⁴ Women, Sears argued, were simply less interested in the positions than men.⁹⁵ In concluding that women’s lack of interest, rather than Sears’s discrimination, was to blame, the court did not pause to consider whether Sears’s masculine job description and hiring criteria may have affected women’s interest in the positions. Nor did it require Sears to demonstrate that such masculine attributes were in fact necessary for successful job performance. Far from protecting culturally feminine traits and attributes, the court used them to justify women’s exclusion.⁹⁶

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

⁸⁸ *Id.* at *5. As the court itself noted, such a conclusion is “unusual” given that the burden on the plaintiff to establish a prima facie case is “not onerous.” *Id.* at *5–6 (citations and internal quotation marks omitted).

⁸⁹ Kessler, *supra* note 78, at 404.

⁹⁰ 628 F. Supp. 1264, 1295 (N.D. Ill. 1986).

⁹¹ *Id.* at 1295–97.

⁹² *Id.* at 1305.

⁹³ *Id.* at 1290.

⁹⁴ *Id.* In addition, Sears gave most candidates a test which asked such questions as: “Do you have a low pitched voice?” “Do you swear often?” “Have you played on a football team?” *Id.* at 1300 n.29.

⁹⁵ *Id.* at 1305–06.

⁹⁶ *Id.* at 1324.

B. Racial Nonconformity

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

Most often the scholarly arguments for protection in race cases are based on narrow anti-assimilation grounds—regarding the need to protect group culture—rather than broad anti-assimilation grounds—regarding the importance of individual expression. Barbara Flagg, for example, has argued that antidiscrimination law should protect racial minorities from being required by employers to adopt “behaviors and characteristics associated with whites.”⁹⁷ Such “transparently white decisionmaking” should be treated as discriminatory because it forces blacks to “shed or disavow crucial facets of blackness” in order to get ahead in the work world.⁹⁸ Juan Perea makes a similar argument with respect to culturally associated traits and Title VII’s prohibition on national origin discrimination.⁹⁹ Perea contends that most of the discrimination faced by ethnic minorities results from their possession of certain traits, not from the fact of their national origin or place of birth.¹⁰⁰ As a result, he argues, Title VII should protect against discrimination based on “physical and cultural characteristics that make a social group distinctive either in group members’ eyes or in the view of outsiders.”¹⁰¹

⁹⁷ Flagg, *supra* note 6, at 2013–15.

⁹⁸ *Id.* at 2030, 2034. Paulette Caldwell too has argued for antidiscrimination protection for workplace expressions of racial identity and from employer demands of white cultural normativity. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (contending that “[a]ntidiscrimination law should be, and at its best is, directed toward the behavioral manifestations of such negative associations” with racially identified traits); *see also* Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 381 (2008) (“Assimilation demands have surfaced as one of the most important—and controversial—issues facing employment discrimination law today. . . . The issue is important because assimilation demands represent one of the more subtle and common ways in which discriminatory biases can translate into subordination and exclusion of women and people of color from the modern workplace.”); Rich, *supra* note 6, at 1139 (“[C]ourts should abandon the current definitions of race and ethnicity under Title VII that exempt from protection ‘voluntary’ aspects of racial and ethnic identities—what I call ‘race/ethnicity performance.’”).

⁹⁹ Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833, 839 (1994).

¹⁰⁰ *Id.* at 839.

¹⁰¹ *Id.* at 833. Perea describes such characteristics as including, but not limited to, “race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group.” *Id.* at 833. *See also* Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Rational Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1367–72 (1997) (arguing that courts fail to treat Spanish language discrimination as national origin discrimination because they do not appreciate the centrality of

Courts' rejection of such arguments has been explicit and unequivocal. In *Rogers v. American Airlines, Inc.*, for example, the plaintiff argued that she should be protected from American Airlines's rule prohibiting employees from wearing their hair in "cornrows" because cornrows were an integral part of her identity as a black woman.¹⁰² "[T]he completely braided hair style," she asserted "has been and continues to be part of the cultural and historical essence of Black American women."¹⁰³ The court, however, denied her protection. Indeed, the district court made clear that Title VII did not protect employee expressions of racial identity or prohibit assimilationist workplace demands. Mincing no words, the court explained that "an all-braided hair style . . . even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."¹⁰⁴ Expressions of racial identity as such were not entitled to antidiscrimination protection.¹⁰⁵

Similarly, in *Garcia v. Spun Steak Co.*, Hispanic workers who were bilingual challenged their employer's English-only rule as a form of national origin discrimination.¹⁰⁶ The policy, they argued, should be invalidated because "it denies them the ability to express their cultural heritage on the job."¹⁰⁷ The court rejected the plaintiffs' claim for protection of their group culture in no uncertain terms. "Title VII," the court explained, "does not protect the ability of workers to express their cultural heritage at the workplace."¹⁰⁸

Spanish language in constructing a Latino identity); Drucilla Cornell & William W. Bratton, *Dead-weight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 604 (1999) (arguing that Title VII should be extended to prohibit workplace rules that penalize employees for speaking a language other than English because "the legal system should treat language as a fundamental identification encompassed by each person's right of personhood"); Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1694 (2006) (arguing for a presumption of invalidity of English-only rules in the workplace).

¹⁰² 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

¹⁰³ *Id.* (citation and internal quotation marks omitted).

¹⁰⁴ *Id.*; see also *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at *1-2 (N.D. Ga. Sept. 19, 1996) (holding that "[a]s a matter of law, an employer's grooming policy prohibiting a braided hair style is not 'an unlawful employment practice' as defined by 42 U.S.C. § 2000e-2"); *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981) (holding that the employer did not engage in race discrimination when it terminated the plaintiff for wearing to work her hair in braids with beads at the end of each braid).

¹⁰⁵ See, e.g., *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 469 (N.D. Cal. 1978) (dismissing the race discrimination claim of a male employee who refused to shave his beard, which he claimed was part of his racial identity, by explaining that "[w]here easily changed physical characteristics are made the basis for an individual's racial identity, it is simply not the law that 'an asserted racial or cultural identity cannot legally be the basis for denial of employment'"); *Keys v. Cont'l Ill. Nat'l Bank*, 357 F. Supp. 376, 380 (N.D. Ill. 1973) (denying Title VII protection to a plaintiff challenging his employer's no-beard rule by arguing that beards and long sideburns were critical to his racial identity).

¹⁰⁶ 998 F.2d 1480, 1483 (9th Cir. 1993).

¹⁰⁷ *Id.* at 1486-87.

¹⁰⁸ *Id.* at 1487.

Close inspection of the case law reveals then that courts have not adopted an anti-assimilationist antidiscrimination principle in either their Title VII sex or race jurisprudence. Quietly in sex cases, and more loudly in race cases, courts have rejected claims that Title VII protects individuals as a matter of principle from workplace conformity demands that they perform their race or gender in accordance with dominant social norms. As this Part has sought to emphasize, these norms are similar across race and sex cases in that they constrain how individuals may express their racial or gender identity, yet they are importantly different across race and sex cases in that they hold individuals of all races to a uniform cultural code while holding women and men to explicitly divergent codes.

Nonetheless, employees have in some cases received protection from such assimilationist demands. Given that courts have not adopted an anti-assimilationist principle, I turn in Parts II and III to consider what alternative antidiscrimination principles may explain such protection.

II. AN ANTISUBORDINATION PRINCIPLE

The Supreme Court has long been explicit about Title VII's antisubordination project. Title VII's objective, as the Court made clear in *Griggs v. Duke Power Co.*, was not only to remove explicitly discriminatory barriers to job entry, but also to challenge the social norms and practices that reinforced race and sex-based hierarchies in the workplace.¹⁰⁹ In this Part, I consider whether courts' response to workplace conformity demands may reflect this longstanding project. I consider, in other words, whether courts invalidate those workplace conformity demands that reinforce the very status-group hierarchies at which Title VII took aim.

A. Gender Nonconformity

Courts have identified two distinct antisubordination-oriented tests for assessing the validity of gender conformity demands. The first is the "un-

¹⁰⁹ 401 U.S. 424, 430 (1971) (explaining that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); see also Thomas C. Grey, *Cover Blindness*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 85, 89 (2001) ("[M]odern antidiscrimination law requires identifying those social practices that operate as functional equivalents of the old formal restrictions."); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, in PREJUDICIAL APPEARANCES, *supra*, at 99, 138 ("When we consider how tropes of blindness have been deployed from a sociohistoric vantage point we can see that a commitment to alleviating stratification is and has been central to the project of antidiscrimination law since the beginning of the Second Reconstruction."); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1011 (1986) ("Although much of the scholarship on equal protection doctrine assumes that the anti-differentiation principle is justifiably the dominant perspective, a comparison of race and sex cases, as well as of constitutional and statutory cases, reveals that the anti-subordination principle better explains both much of the law and the aversion we feel to race and sex discrimination." (footnotes omitted)).

equal burdens” test, which calls upon courts to strike down gender conformity demands that disproportionately burden one sex. The second is the “double bind” test, which calls upon courts to reject gender conformity demands that make it more difficult for workers of one sex to succeed professionally. In this section I consider how well each principle actually explains courts’ sex discrimination jurisprudence.

1. *Unequal Burdens*.—Well before *Price Waterhouse* and its rhetorical ban on sex stereotyping, courts relied on an unequal burdens test to distinguish acceptable from unacceptable gender conformity demands.¹¹⁰ As commonly stated, the unequal burdens test finds discriminatory only those sex-specific workplace requirements that impose an unequal burden on female or male workers because of their sex.¹¹¹ Sex-based dress and appearance codes are permissible as long as they do not place a disproportionate burden on workers of one sex.

In *Laffey v. Northwest Airlines*, for example, the district court struck down as discriminatory the airline’s requirement that female flight attendants wear only contact lenses while male flight attendants could wear either contacts or eyeglasses.¹¹² In *Gerdorn v. Continental Airlines*, the Ninth Circuit struck down an airline’s imposition of weight requirements on female “flight hostesses” but not on male employees in comparable positions.¹¹³ Likewise, in *Frank v. United Airlines*, the Ninth Circuit struck down United Airlines’ sex-based weight requirements limiting male flight attendants to maximum weights that corresponded to large body frames but limiting female flight attendants to maximum weights that corresponded to medium body frames.¹¹⁴ In all three cases, the courts emphasized that the

¹¹⁰ See, e.g., Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 42–43 (2007) (“[R]ecently, several federal courts have ruled that sex-specific appearance codes are discriminatory only if they impose ‘unequal burdens’ on women and men.”); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y 467, 470 (2007) (“Since the 1970s, courts have permitted employers to require different uniforms for men and women, so long as those uniforms do not impose an unequal burden on one sex or the other.”).

¹¹¹ See, e.g., *Jespersen v. Harrah’s Operating Co. (Jespersen II)*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (“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.”); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (“A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a [bona fide occupational qualification].”).

¹¹² 366 F. Supp. 763, 790 (D.D.C. 1973).

¹¹³ 692 F.2d 602, 603, 610 (9th Cir. 1982) (“Continental’s policy of requiring an exclusively female category of flight attendants, and no other employees, to adhere to the weight restrictions at issue here constitutes discriminatory treatment on the basis of sex.”).

¹¹⁴ 216 F.3d at 854.

burdens imposed on female workers were disproportionate and unequal to those imposed on male workers.¹¹⁵

A per se unequal burdens test would demand the elimination of any and all gender conformity demands that burden one sex more than the other. In order to assess the relative burdens imposed by sex-based grooming codes, courts have suggested that the requirements should be looked at in total rather than item by item,¹¹⁶ and that burdensomeness should be assessed in terms of the time and money required for women and men to comply with their respective requirements.¹¹⁷

Conceived of in this way, however, the unequal burdens test cannot explain courts' responses to gendered conformity demands. Courts regularly fail to find sex-specific grooming requirements discriminatory even when their burdens are unequal by the courts' own terms. For example, courts have upheld employer grooming codes that require men to keep their hair short while imposing no hair length or style requirement on women—even though it is difficult to believe that a short hair requirement for men matched by no hair length or other sex-specific grooming requirement for women does not impose an unequal burden on male employees.¹¹⁸ Similarly, it is difficult to believe that a no-beard requirement for men, when not matched by any kind of general shaving or facial grooming requirement for women, does not impose an unequal burden on male employees. Nonethe-

¹¹⁵ *Id.* at 855 (noting that “[e]ven if United’s weight rules constituted an appearance standard, they would still be invalid” because they impose unequal burdens on women and men); *Gerdom*, 692 F.2d at 605–06 (concluding that the female-only weight requirement imposed a significantly greater burden on women than men); *Laffey*, 366 F. Supp. at 774 (emphasizing that the contact lenses that female flight attendants were required to wear were more expensive than the eyeglasses which male flight attendants were permitted to wear).

¹¹⁶ This was in fact a source of contention for the Ninth Circuit panel in *Jespersen I*. Compare *Jespersen v. Harrah’s Operating Co.* (*Jespersen I*), 392 F.3d 1076, 1081 (9th Cir. 2004) (majority decision) (applying the unequal burdens test by comparing the complete set of appearance requirements for women to the complete set of requirements for men), *with id.* at 1085–86 (Thomas, J., dissenting) (arguing that the unequal burdens test should be applied by comparing only the requirement that female employees wear makeup against the requirement that male employees do not).

¹¹⁷ *Jespersen v. Harrah’s Operating Co.* (*Jespersen II*), 444 F.3d 1106, 1110 (9th Cir. 2006) (en banc) (explaining that *Jespersen* could not demonstrate that the makeup requirement imposed an unequal burden on women because she “did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women”); see also *Selmi*, *supra* note 110 at 470–71 (explaining that an unequal burden “might be in the form of differential costs, or even the time that was required to comply with the policy; it might also arise if women were required to wear an excessively suggestive outfit”).

¹¹⁸ See, e.g., *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1086, 1092 (5th Cir. 1975) (upholding male-only short hair requirement); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1249 (8th Cir. 1975) (same); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) (same); *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1116 (D.C. Cir. 1973) (same).

less, courts have upheld such differential grooming requirements against claims of discrimination.¹¹⁹

Indeed, courts regularly uphold conformity demands that impose unequal burdens on male and female workers as long as the demands mimic conventional, role-appropriate gender norms.¹²⁰ In *Craft v. Metromedia, Inc.*,¹²¹ for example, television news anchor Christine Craft was subjected to intensive makeup and wardrobe oversight by her employer because of poor ratings and a concern that Craft's appearance was partly to blame. At one point, Craft was required to use a "clothing calendar," showing in detail what she was to wear for each day.¹²² In her sex discrimination lawsuit, Craft argued that the grooming requirements were discriminatory because the standards were more onerous for and more strictly enforced on women than men.¹²³ In support of her argument, Craft presented evidence showing that "only females were subject to daily scrutiny of their appearance or were ever required to change clothes at the station before going on the air."¹²⁴ Moreover, the image consultant that the station had hired to work with Craft on her appearance testified that "she had told Craft not to wear the same outfit more than once every three to four weeks because people would start calling in about it; males, however . . . could wear an outfit every week and a suit even twice within the same week if combined with a different tie."¹²⁵

Despite these disproportionate burdens on women and men, the court held that the television station's clothing and grooming requirements for anchors did not discriminate on the basis of sex. In reaching this conclusion, the court emphasized that the television station was simply enforcing appropriate gender norms for television news anchors.¹²⁶

Likewise, in *Jespersen*, Darlene Jespersen argued that Harrah's "Personal Best" grooming standards were discriminatory because they imposed a makeup requirement on women but not men. Although the Ninth Circuit

¹¹⁹ See, e.g., *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373, 374 (N.D. Tex. 1975) (upholding employer's no-beard policy against sex discrimination challenge); *Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316, 317 (S.D. Fla. 1972) (same).

¹²⁰ See Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in PREJUDICIAL APPEARANCES, *supra* note 109, at 1; *id.* at 38 ("Title VII decisions distinguish between grooming and dress codes that track 'generally accepted community standards of dress and appearance' and those that do not. The former are regarded as enforcing a 'neutral' baseline that negates any inference of sex discrimination.").

¹²¹ 766 F.2d 1205, 1207 (8th Cir. 1985).

¹²² *Id.* at 1209.

¹²³ *Id.* at 1212–13.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1214.

¹²⁶ The court noted that "[e]vidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being." *Id.* at 1215. Accordingly, the court held that the district court did not err "when it concluded that KMBC's appearance standards were shaped only by neutral professional and technical considerations." *Id.* at 1215–16.

emphasized that Jespersen had not presented evidence to the court below showing that Harrah's sex-based grooming requirements imposed an unequal burden on female and male bartenders,¹²⁷ the court seemed predisposed to reject the argument regardless of the evidence. The "Personal Best" requirements, the court emphasized, simply matched conventionally-gendered grooming requirements for bartenders and hence seemed definitionally to not "unreasonably burden one gender more than the other."¹²⁸

These cases suggest, however, that a narrower, more restrictive version of the unequal burdens test may be at work. It may be that courts care about unequal burdens imposed by gender conformity demands only when the demands are not justified by conventional, role-appropriate, gender norms. This narrower test explains why courts have been unwilling to strike down short hair and no-beard requirements for men despite the seemingly disproportionate burdens they imposed: such requirements were viewed by courts as simply enforcing conventionally gendered professional norms.¹²⁹ It also explains why courts have been willing to strike down sex-specific weight and eyeglasses rules for flight attendants. Rules requiring female flight attendants to be relatively thinner than male attendants and to refrain from wearing glasses go beyond both conventional gender norms and the more professional, less sexualized, role norms for flight attendants being imposed on airlines by the courts.¹³⁰

The narrower test also helps make sense of *Carroll v. Talman Federal Savings & Loan Association of Chicago*¹³¹ and *O'Donnell v. Burlington Coat Factory Warehouse*,¹³² two cases often referred to as exemplars of the unequal burden test.¹³³ In both cases, employers imposed sex-specific uni-

¹²⁷ *Jespersen v. Harrah's Operating Co. (Jespersen II)*, 444 F.3d 1106, 1111 (9th Cir. 2006) (en banc) ("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.").

¹²⁸ As the court explained: "Where, as here, such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities." 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." *Id.* at 1110 (quoting *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir.1975)).

¹²⁹ For example, in *Fagan v. National Cash Register*, the court upheld a short hair requirement for male employees by explaining: "Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment." 481 F.2d 1115, 1124-25 (D.C. Cir. 1973).

¹³⁰ See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (holding that "a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide" is "tangential to the essence of the business involved").

¹³¹ 604 F.2d 1028 (7th Cir. 1979).

¹³² 656 F. Supp. 263 (S.D. Ohio 1987).

¹³³ See *Frank v. United Airlines*, 216 F.3d 845, 855 (9th Cir. 2000) (citing *Carroll* as an example of a case applying the unequal burdens test); see also *Avery & Crain, supra* note 110, at 53 (referring to the

form requirements. In *Carroll*, female employees were required to wear a uniform that consisted of five basic items: “a color-coordinated skirt or slacks and a choice of a jacket, tunic or vest.”¹³⁴ Male employees were not required to wear a formal uniform but were required to wear “customary business attire” consisting of a “suit, a sport jacket and pants, or even a leisure suit, as long as it is worn with a shirt and tie.”¹³⁵ In *O’Donnell*, female sales clerks were required to wear smocks while male sales clerks were required to wear a shirt and tie.¹³⁶

The plaintiffs’ challenge, in both cases, was not to the employers’ enforcement of conventional gender norms, but to the employers’ different treatment of female and male employees in ways that were not demanded by these norms. The female employees in *Carroll*, for example, did not object to wearing female clothing, they objected to being constrained in their choices within this category in a way that male employees were not. Similarly, the female employees in *O’Donnell* did not object to dressing like women, they objected to wearing a nongendered smock when their male colleagues were not so similarly required.¹³⁷

On one level, these cases look like simple anticlassification cases having nothing to do with comparative burdens on female and male employees. By this view, the problem was that the employers marked female employees as different, not that they imposed disproportionate burdens on them. Indeed, although the court in *Carroll* did note that the uniform requirement subjected female employees to additional economic costs not

“unequal burdens’ test as articulated in *Carroll*”); Hilary J. Bouchard, *Jespersen v. Harrah’s Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 204, 209 (2006) (citing *Carroll* as a case decided using the unequal burdens test); Selmi, *supra* note 110, at 470–71 n.10 (same); Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261, 279 n.137 (2006) (citing *O’Donnell* as a case decided using the unequal burdens case); Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 535, 540 n.28 (2007) (citing *Carroll* and *O’Donnell* as cases involving conformity requirements struck down under the unequal burdens test).

¹³⁴ 604 F.2d at 1029.

¹³⁵ *Id.*

¹³⁶ 656 F. Supp. at 264.

¹³⁷ Indeed, the courts in both cases made clear that they did not view the challenged grooming codes as simply enforcing traditional gender norms. In *Carroll*, for example, the court explained:

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

604 F.2d at 1032–33. In *O’Donnell* the court emphasized that, unlike sex-based hair length requirements, the sex-specific smock requirement “finds no justification in accepted social norms.” 656 F. Supp. at 266.

born by male employees,¹³⁸ the *O'Donnell* court stated explicitly that no similar cost disparity existed in that case, suggesting again that differentiation, rather than disproportionate costs, prompted the courts' findings of illegality.¹³⁹

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

In *Carroll*, for example, the court explained that “when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”¹⁴⁰ Similarly, in *O'Donnell*, the court explained: “[I]t is demeaning for one sex to wear a uniform when members of the other sex holding the same positions are allowed to wear professional business attire.”¹⁴¹ In fact, it probably would not have mattered to the courts in *Carroll* and *O'Donnell* had it been the male employees who were required to wear uniforms and smocks instead of the female workers. Sex differentiation, not explained by conventional gender norms, stigmatizes female workers regardless of how the actual requirements go.

One would expect a similar finding of discrimination had Christine Craft been required to read the news off pink paper while her male co-anchor read off blue paper, or had Darlene Jespersen been required to serve her drinks in pink glasses while male bartenders served theirs in blue glasses. The compliance costs for female workers would not be any higher than for male workers. Nonetheless, the differentiation itself, unjustified by conventional professional gender norms, would stigmatize and thereby burden female workers.¹⁴²

It seems then that, while courts are not subjecting gender conformity demands to a per se unequal burdens test, they are subjecting such demands to a narrower, more refined version of the test—one that prohibits sex-based differentiation when not justified by conventional gender norms.

¹³⁸ See 604 F.2d at 1030 (explaining that “[t]he written dress code for female employees even discriminates with respect to their compensation, for defendant treats the cost of the two-piece uniform which it furnishes as income to women employees, withholding income tax on that amount from their wages”).

¹³⁹ See 656 F. Supp. at 266 (stating that “[u]nlike the case at bar, the female employees in [*Carroll* v.] *Talman* incurred the initial cost of their uniforms as well as subsequent cleaning and maintenance expenses”).

¹⁴⁰ 604 F.2d at 1033.

¹⁴¹ 656 F. Supp. at 266.

¹⁴² Conversely, if the differentiation had been between people born in Idaho and those born in Oregon, it would probably not have stigmatized either group. The stigma seems to come from making group identity salient in a context where one group is already assumed to be inferior.

This narrow unequal burdens test is not, however, the only antistatutory test at work in the case law.

2. *Double Bind*.—In *Price Waterhouse*, the Supreme Court did not rely solely on its broad rhetoric about sex stereotyping to explain its conclusion that Ann Hopkins was the victim of sex discrimination. The Court also articulated a double bind principle. An employer could not, the Court made clear, require employees of one sex or the other to satisfy gender conformity demands that conflicted with professional role demands.¹⁴³

Price Waterhouse had created such a double bind by demanding that Hopkins be demure and ladylike when successful performance of her job required more traditionally male attributes such as assertiveness and competitiveness. By refusing to allow *Price Waterhouse* to punish Hopkins for deviating from its feminine ideal, the Supreme Court shielded Hopkins from this double bind and facilitated her move up the corporate ladder.¹⁴⁴ As the Court explained: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”¹⁴⁵

Reading *Price Waterhouse* as articulating a double bind principle, rather than an anti-assimilation principle, eliminates much of the apparent inconsistency in the case law. For example, courts upheld short hair and no-earring requirements for male employees, both before and after *Price Waterhouse*, because in their view these gender conformity demands did not hinder men’s (or women’s) ability to succeed in the workplace.¹⁴⁶ Likewise, the Ninth Circuit refused to protect Darlene Jespersen from a requirement that she wear makeup—despite the Supreme Court’s decision to protect Ann Hopkins from requirements that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair

¹⁴³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

¹⁴⁴ See Mark Kelman, (*Why*) *Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. REV. L. & WOMEN’S STUD. 63, 80 n.40 (1997) (explaining that in defining “impermissible discrimination . . . we focus on the degree to which a particular social practice . . . instantiates and thus reinforces a cultural practice that we deem not just detrimental to the historically subordinated group, but significantly ‘definitional’ of the group’s second-class status”).

¹⁴⁵ *Price Waterhouse*, 490 U.S. at 251; see also *Dillon v. Frank*, 952 F.2d 403, *9–10 (6th Cir. 1992) (Table text in Westlaw) (adopting a double bind, rather than a broader anti-sex stereotyping, interpretation of *Price Waterhouse*).

¹⁴⁶ See, e.g., *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (explaining that grooming codes requiring that men but not women have short hair have been held not to violate Title VII because they “have only a *de minimis* effect”); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that an employer’s short hair requirement only for male workers did not violate Title VII and explaining that a grooming code imposing sex-specific hair length requirements “is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity”); *Pecenka v. Fareway Stores*, 672 N.W.2d 800, 804 (Iowa 2003) (upholding an employer’s no-earring rule for men and explaining that “Title VII . . . [was] not meant to prohibit employers from instituting personal grooming codes which have a *de minimis* affect on employment”).

styled, and wear jewelry”¹⁴⁷—because it concluded that the demand did not undermine Jespersen’s success as a bartender.¹⁴⁸ “The record contains nothing,” the court explained, “to suggest the grooming standards would objectively inhibit a woman’s ability to do the job.”¹⁴⁹

Although the Ninth Circuit did not explain why it found no double bind in the *Jespersen* case, the conclusion likely flowed from a tacit acceptance of the contemporary performance and display aspects of bartending. As Dianne Avery and Marion Crain have documented, although bartending in the United States was an almost exclusively male profession until the 1970s, “within less than two decades, bartending was feminized more rapidly and extensively than any other predominantly male profession.”¹⁵⁰ By 2004, women dominated the profession.¹⁵¹ Along with feminization came sexualization of the job. Increasingly, Crain and Avery explain, bartending is dominated by sexy young women for whom acting as eye candy for male customers is as integral to the job as pouring drinks.¹⁵² Given this recent feminization of bartending, the court might have believed that a makeup requirement would actually enhance, rather than impede, a woman’s professional success.

Indeed, a recent study by psychologist Peter Glick and his colleagues suggests that the Ninth Circuit might even have been correct.¹⁵³ Glick tested the effect sexy self-presentations had on perceptions of competence of female workers in high-status, traditionally male occupations and in low-status traditionally female occupations.¹⁵⁴ Study participants rated the competence of a woman in a video who was described as either a receptionist or a manager.¹⁵⁵ The woman in the video was dressed in either a deliberately sexy or a neutral manner.¹⁵⁶ Glick found that sexy dressing resulted in di-

¹⁴⁷ *Price Waterhouse*, 490 U.S. at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

¹⁴⁸ *Jespersen v. Harrah’s Operating Co. (Jespersen II)*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

¹⁴⁹ *Id.*

¹⁵⁰ Avery & Crain, *supra* note 110, at 92.

¹⁵¹ *See id.* at 95 (noting that “[o]f all full-time bartenders in 2004, 95,000 were men and 102,000 were women”).

¹⁵² *See id.* at 97 (describing the sexing up of bartenders); *see also* Linda A. Detman, *Women Behind Bars: The Feminization of Bartending*, in *JOB QUEUES, GENDER QUEUES: EXPLAINING INROADS INTO MALE OCCUPATIONS* 252, 252 (Barbara F. Reskin & Patricia A. Roos eds., 1990) (describing the growth of “sex specific demand for female bartenders”).

¹⁵³ *See* Peter Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 *PSYCHOL. WOMEN Q.* 389 (2005).

¹⁵⁴ *Id.* at 389.

¹⁵⁵ *Id.* at 390–91.

¹⁵⁶ According to the study, “For the neutral condition, the woman wore little makeup, black slacks, a turtleneck, a business jacket, and flat shoes. In the sexy condition, the same woman wore more makeup and her hair was tousled. She wore a tight, knee-length skirt, a low-cut shirt with a cardigan over it, and high-heeled shoes.” *Id.* at 391.

minished ratings of competence for the female manager but not for the receptionist.¹⁵⁷ Sexy dressing, in other words, undermined perceptions of competence only for women in high-status occupations.

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

The double bind faced by Hopkins in *Price Waterhouse* approached, but did not quite reach, this per se level, because seven women had been able to satisfy both sets of demands and become partners at Price Waterhouse.¹⁵⁸ Still, the requirement that Hopkins behave in a traditionally feminine manner directly conflicted with professional role demands calling for aggressive and competitive behavior. Moreover, the equation of aggressiveness with bitchiness for women made it virtually impossible for Hopkins to be viewed as both competent and collegial.

The double bind principle may, however, also be conceived of more broadly. Rather than requiring a direct conflict between gender conformity demands and professional role demands, the double bind principle may require only a tension between the two. This broader conception would call upon courts to strike down conformity demands that make it more difficult, even if not impossible, for workers of one sex to also satisfy professional role demands.¹⁵⁹

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

Courts check female sexual objectification demands in instances in which such demands are used to justify sex-based hiring. In *Wilson v. Southwest Airlines*, for example, the court held that female sexual objectification was not a legitimate job requirement for Southwest flight atten-

¹⁵⁷ Glick and his co-authors found that "participants rated the receptionist as equally competent whether she was dressed in a sexy or a neutral manner. In contrast, participants rated the manager as less competent when she dressed in a sexy manner than when she dressed in a conservative manner." *Id.* at 393.

¹⁵⁸ 490 U.S. 228, 233 (1989).

¹⁵⁹ In its broad form, the double bind principle resembles and blends with the broad unequal burdens test, because a double bind represents a disproportionate burden on the professional success of one sex as compared to the other. This similarity is not surprising since both principles reflect the same core antisubordination concerns.

dants.¹⁶⁰ As a result, the court forced Southwest to hire men as well as women to the newly desexualized positions.¹⁶¹ Similarly, in *Guardian Capital v. N.Y. State Division of Human Rights*, the court refused to allow the defendant restaurant to sex-up its business by firing its male waiters and replacing them with sexy female waitresses dressed in “alluring costumes.”¹⁶²

Courts also check such demands in cases in which women are harassed as a result of their objectification. Rather than simply hold employers liable for the harassment, courts routinely deny employers the power to objectify their female employees in the first place. In *EEOC v. Sage Realty*, for example, Margaret Hasselman, a lobby attendant in a New York City office building, was required to wear a bicentennial uniform, which was a red, white, and blue poncho-like outfit.¹⁶³ The uniform was largely open on the sides, but Hasselman was not permitted to wear a shirt under the uniform and could only wear blue dance pants on her legs.¹⁶⁴ The uniform revealed Hasselman’s thighs, portions of her buttocks, and both sides of her body.¹⁶⁵ When wearing the uniform, Hasselman was subjected to a steady stream of sexual comments and gestures by people entering and leaving the building.¹⁶⁶ Hasselman sued her employer for sexual harassment and won.¹⁶⁷ Yet the court not only found Sage liable for failing to stop the harassment, it also ruled that Hasselman could not be required to wear a sexually revealing uniform.¹⁶⁸ The court would not, in effect, permit Sage to explicitly sexualize the position of lobby hostess.¹⁶⁹

¹⁶⁰ 517 F. Supp. 292, 302 (N.D. Tex. 1981) (explaining, with respect to flight attendants and ticket agents, that “[m]echanical, non-sex-linked duties dominate both these occupations”).

¹⁶¹ *Id.* at 304; see Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers*, 22 J. CORP. L. 295, 311 (1997) (noting that Southwest got rid of its “high boots and hot pants” requirement for flight attendants in 1982).

¹⁶² 360 N.Y.S.2d 937, 938 (N.Y. App. Div. 1974).

¹⁶³ 507 F. Supp. 599, 604 (S.D.N.Y. 1981).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 605.

¹⁶⁷ *Id.* at 609–10 (“In requiring Hasselman to wear the revealing Bicentennial uniform in the lobby of 711 Third Avenue, defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant.”).

¹⁶⁸ According to the court, Sage was not justified in putting Hasselman in a sexually revealing uniform because sexual titillation was not a BFOQ of the position. The court explained: “While it may well be a [BFOQ] for Sage to require female lobby attendants in its buildings to wear certain uniforms designed to present a unique image, in accordance with its philosophy of urban design, it is beyond dispute that the wearing of sexually revealing garments does not constitute a [BFOQ].” *Id.* at 611.

¹⁶⁹ See also *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1981) (“Title VII is . . . violated when an employer requires a female employee to wear sexually suggestive attire as a condition of employment.”); E.E.O.C. Dec. 81–17, 27 Fair Empl. Prac. Cas. (BNA) 1791, 1792, 1981 WL 40388, at *2–3 (1981) (striking down an employer’s requirement that a receptionist wear a special sexually revealing costume consisting of “a halter-bra top and a mi[n]i-skirt with a slit in front running up to her thighs” in order to entertain visiting VIPs).

Finally, courts check such demands in cases in which only female workers are held to a sexualized ideal. Consider again the airline cases in which courts struck down dress and appearance requirements for female flight attendants. In *Gerdom, Frank, and Laffey*, the challenged grooming codes were part of a larger effort by the airlines to make women's bodies and sexuality part of the good for sale. In *Gerdom*, for example, Continental openly asserted that its weight standards for female flight attendants were implemented "to enhance its business image by assuring that passengers were served by attractive women."¹⁷⁰ "The purpose of the weight program was . . . to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'"¹⁷¹ The weight requirements at issue in *Frank* were a holdover from earlier days when United employed only women as flight attendants and required them, in addition to being slim, to refrain from marrying or having children, to satisfy general appearance criteria, and to retire by the age of thirty-five.¹⁷² Similarly, the no-eyeglasses rule at issue in *Laffey* had been part of a larger grooming and behavior code at Northwest that required female flight attendants to meet restrictive height and weight requirements, refrain from marrying, and retire at age thirty-two.¹⁷³

It is true that a per se double bind principle cannot explain these cases. It is not impossible for female flight attendants, waitresses, and lobby attendants to perform the technical functions of their jobs while looking sexy—particularly if the employer prevents actual harassment. A broader and more expansive double bind principle, however, can help explain them. Satisfying sexual objectification demands may make satisfying nonsexualized job demands more difficult for female workers in two ways. First, sexualization demands may distract women from the nonsexualized aspects of their jobs and diminish the energy they have left to devote to them.¹⁷⁴ Second, sexualization demands may distract customers and coworkers and diminish their perceptions of the competence of female workers.¹⁷⁵ Courts,

¹⁷⁰ 692 F.2d 602, 603 (9th Cir. 1982).

¹⁷¹ *Id.* at 604.

¹⁷² 216 F.3d 845, 848 (9th Cir. 2000). United began hiring male flight attendants after *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), in which the Fifth Circuit held that sex was not a BFOQ for the position of flight attendant.

¹⁷³ 366 F. Supp. 763, 773–75 (D.D.C. 1973). Although these cases are regularly cited as exemplars of the unequal burdens test, I believe the cases are better understood as reflecting a broad double bind prohibition.

¹⁷⁴ See Barbara L. Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 269, 280 (1998) (finding that women wearing a swimsuit while taking a challenging math test performed worse than those wearing a sweater while taking the test).

¹⁷⁵ See Brad J. Bushman & Angelica M. Bonacci, *Violence and Sex Impair Memory for Television Ads*, 87 J. APPLIED PSYCHOL. 557, 561 (2002) (finding that after viewing sexual images on television, people of both sexes had impaired memory for the substance of whatever came next); Sandra Forsythe et al., *Influence of Applicant's Dress on Interviewer's Selection Decisions*, 70 J. APPLIED PSYCHOL. 374,

therefore, may protect female workers from sexualization demands precisely because they place women in a catch-22 by making it more difficult for women to satisfy the other demands of their jobs.

Certainly, courts do not seek to eliminate female sexuality, or the female body as gaze object, from all jobs. They recognize that women's bodies and appearance may be an important part of the experience being sold in many service sector jobs.¹⁷⁶ Nonetheless, broad double bind concerns may help explain why courts are particularly suspicious of sexual objectification demands for female employees and why they use Title VII to keep sex out of many jobs and minimized in others.

Antisubordination concerns, as expressed through the unequal burdens and double bind tests, can, then, help explain when and why courts protect workers from gender conformity demands. Rather than applying an anti-assimilation principle, courts invalidate those gender conformity demands that reinforce sex inequality in particular ways.

B. Racial Nonconformity

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

1. *Unequal Burdens.*—In the race context, as in the sex context, scholars have challenged workplace conformity demands by arguing that they impose an unequal burden on minority workers. Devon Carbado and Mitu Gulati, most notably, argue that many workplace conformity demands impose unequal burdens on minority workers because the demands are coded culturally white, and minority workers must do extra work to comply with them.¹⁷⁷ Yet this is precisely the kind of unequal burden that courts did not care about in the sex context. It is not surprising, then, that they also do not care about it the race context.

Courts deciding racial discrimination cases, like those deciding sex discrimination cases, refuse to adopt a per se unequal burdens test for conformity demands. Courts do not care about conformity demands that disproportionately burden members of one group in terms of the time, money,

378 (1985) (finding that dressing female managerial job candidates in feminine clothing caused them to be perceived as less competent for managerial positions); Glick, *supra* note 153, at 393 (finding that sexy dressing diminished perceptions of the competence of female manager).

¹⁷⁶ See, e.g., *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214 n.11, (8th Cir. 1985) (noting that some focus on appearance for new anchors was unavoidable “[s]ince television is a visual medium”); *Jespersen v. Harrah’s Operating Co. (Jespersen II)*, 444 F.3d 1104, 1111–12 (9th Cir. 2006) (en banc) (noting that bartenders’ appearance was important because Harrah’s was part of the “entertainment industry”).

¹⁷⁷ Carbado & Gulati, *The Fifth Black Woman*, *supra* note 15, at 717–18 (describing how racially loaded workplace norms may disadvantage minority employees); Carbado & Gulati, *Working Identity*, *supra* note 6, at 1269–70 (explaining that minority workers must do extra work to overcome expectations of a poor fit).

and energy costs of compliance as long as the demands match conventional professional norms. White middle-class dress and behavior define professional norms. This is precisely the problem, according to many race discrimination scholars. Nonetheless, it is also what renders any disparity in the compliance costs for white and minority workers both invisible and immaterial to courts.

Meanwhile, the narrower unequal burdens test, which courts did use to check gender conformity demands in sex cases, simply generates no comparable protection in race cases. In the sex context, courts have been willing to strike down conformity demands that distinguished between the sexes in ways not justified by conventional gender norms, regardless of whether the burdens imposed were equal or unequal. In the race context, however, conformity demands never distinguish between the races in this way. Conformity demands are always uniform. In race cases, in other words, the burdens that exist are not ones that courts recognize, and the burdens courts recognize are not ones that exist. As a result, the unequal burdens test imposes no check on racial conformity demands.

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

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

Consider, for example, a black man facing the same hurdle as Ann Hopkins. He is an associate at a large accounting firm being considered for partnership. He is evaluated, as Hopkins was, based in part on his compliance with cultural conventions as well as with more role-specific demands. In accord with cultural conventions, he is expected to speak standard grammatically correct English, wear relatively expensive but understated clothes, and keep his hair and beard short and clean-cut. In accord with professional role expectations, he is expected to project strength, authority, and competence. The cultural conformity demands, rather than being in conflict with role demands, as they were for Hopkins, work in concert with them. Indeed, satisfying cultural assimilation demands actually increases the likelihood that the minority candidate will also be viewed as satisfying role demands.

Certainly one could conceive of a double bind scenario in the race context that parallels that faced by Ann Hopkins in the sex context. Imagine a world, perhaps in the not too distant past, in which cultural conformity demands for blacks and whites, just as for women and men, were explicitly different. Blacks were expected to be deferential, reverential, and subservient to whites. Whites, at least white men, were expected to be confident and assertive. Consider now the black applicant for partnership. In order to satisfy the role demands of a successful accountant, the candidate must project strength, authority, and competence. Now, however, the applicant's cultural conformity demands are in direct conflict with his professional role demands. If the black man satisfies his role demands, he fails his cultural conformity demands and is likely to be viewed as an uppity and arrogant black man—much as Ann Hopkins was viewed as a bitchy woman. If he satisfies the cultural conformity demands, he almost certainly fails his role demands. Double binding assimilation demands of this sort would constitute actionable race discrimination.¹⁷⁸ In practice, however, this is not how assimilationist demands operate on racial minorities.

A focus on the market consequences of assimilation demands may also help reveal the race–sex difference in the application of a narrow double bind prohibition. While assimilation demands tend to help women in low level jobs, they tend to hurt women in high level jobs.¹⁷⁹ Women in high level jobs receive market rewards by resisting traditionally female assimilation demands. The demands double-bind them. In contrast, assimilation demands always and only help minority workers satisfy professional role demands. There is no professional or market penalty for minority workers for abiding by such demands and no market reward for minorities who resist assimilationist demands.

The broad double bind principle—requiring only that professional demands are in tension with, rather than in direct conflict with, cultural demands—may seem to hold more promise for checking racial conformity demands. One could argue that just as sexualized conformity demands double-bind female workers by distracting their attention from the nonsexu-

¹⁷⁸ They would be actionable not only because of their subordinating effect, but also because race-specific demands, unlike sex-specific demands, are always illegal. See, e.g., Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 982–83 (2008) (noting that “[i]f a person treats someone differently—and adversely—because of that person’s race, then that would violate the plain terms of Title VII”).

¹⁷⁹ See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 8 (1983) (explaining that “[f]or the flight attendant, the smiles are a part of her work”); JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 114 (1995) (noting that “women lawyers are placed in a constant double bind between the requirements of the role of the ‘good woman’ and the role of the adversary”); Rosemary Pringle, *Male Secretaries*, in *DOING “WOMEN’S WORK”: MEN IN NONTRADITIONAL OCCUPATIONS* 128, 132–33 (Christine L. Williams ed., 1993) (describing how secretaries came to be defined in the twentieth century in “family and sexual terms”); Glick, *supra* note 153, at 392–93 (finding that sexy dressing diminished perceptions of competence for women in traditionally male but not traditionally female occupations).

alized aspects of their jobs, so too do culturally white conformity demands double-bind racial minorities by diminishing the attention they have left to expend on other aspects of their jobs.

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

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

The double bind imposed on racial minorities by normatively white conformity demands is different. The extent to which a minority worker is distracted and disadvantaged by having to conform to culturally white norms depends on the subjectivity of the particular employee. It depends in particular on the degree to which the minority employee is already comfortable or identified with white norms. For a minority worker who is fully acculturated to white middle-class norms, such conformity demands would not impose a double bind even in the broad sense. Rather than rejecting the broad double bind antidiscrimination principle in race cases, then, courts may simply not be seeing conformity demands that double bind in the structural manner that they care about.

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

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

III. A STATUS PRINCIPLE

Courts and scholars often emphasize that Title VII prohibits discrimination based on status, not conduct.¹⁸⁰ In this Part, I examine whether this

¹⁸⁰ See Engle, *supra* note 7, at 353 (“[F]or the most part . . . a line between status and volitional conduct separates employer actions that are prohibited by Title VII from those that fall under the discre-

distinction between protected status and unprotected conduct can further explain courts' workplace conformity decisions. I consider, in other words, whether courts prohibit workplace conformity demands that penalize traits that they consider to be more status-like than conduct-like.

A. Gender Nonconformity

The traditional and narrowest conception of status is ascriptive status. Ascriptive status is determined at birth, is not easily changed, and does not depend on individual conduct.¹⁸¹ Sex and race are paradigmatic types of ascriptive status. Both are assigned at birth based on legal and medical criteria, are highly stable, and are determined independently of any conduct on the part of the individual. Indeed, courts generally point to the ascriptive status of sex and race to explain why discrimination on these bases is prohibited.¹⁸²

A prohibition of discrimination based on ascriptive status cannot help to explain when courts strike down gender conformity demands. This is because none of the gender conformity demands employers impose on employees penalize status of this kind. For example, when employers discriminate against men with effeminate mannerisms, they do so because of the employee's actual conduct, not because of a condition ascribed to the employee at birth. Indeed, even Gender Identity Disorder, the official psychological diagnosis for one whose internal sense of gender does not correspond with birth sex,¹⁸³ does not seem to be a purely ascriptive status. Although there are theories that GID may have its origin in prenatal brain

tion of the employer, outside of Title VII's scope."); Rich, *supra* note 6, at 1200–01 (describing the “involuntary/voluntary or ‘status/conduct’ distinction in Title VII cases”); Charity Williams, Note, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 360 (“Immutable traits are characteristics of status, whereas mutable traits are considered conduct, and only discrimination based on status is forbidden.” (internal quotation marks and footnote omitted)).

¹⁸¹ Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 954 (1971) (“The development from status to contract is more accurately a movement from ‘ascriptive’ status, fixed by birth and family rights, to status acquired on the basis of individual achievement.” (internal quotation marks and footnote omitted)); Douglas Dribben, *Homosexuals and the Military: Strange Bedfellows*, 57 UMKC L. REV. 123, 126 (1989) (“The current suspect classes recognized by the Supreme Court are race and national origin, are defined by genetics and do not share any conduct or desire for a particular conduct peculiar to the class. It is because of the very nature of their trait—immutable, unchosen, and unrelated to any action on their part—that they have received suspect class status.”).

¹⁸² *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (“[T]he legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual . . .”); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972) (suggesting heightened scrutiny is triggered by discrimination based on “status of birth”); *see also* FORD, *supra* note 8, at 2 (arguing that civil rights law “properly focuses on ascriptive racial status, not on a metaphysics of ancestry or the unplumbed depth of subjective identity”).

¹⁸³ *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (4th ed. 2000) [hereinafter DSM-IV-TR].

development,¹⁸⁴ the condition cannot be identified at birth, for reasons that probably go beyond the inadequacy of current medical technology. Instead, diagnosis requires examination of a person's behavior.¹⁸⁵ Individuals are not diagnosed with GID—and certainly are not discriminated against because of it—without reference to their conduct. A narrow focus on protecting ascriptive status cannot, then, explain why courts protect men who are effeminate, as well as those diagnosed with GID, from being penalized for violating masculine conformity demands.¹⁸⁶

Ascriptive status is not, however, the only definition of status that courts have used to justify protecting individuals from discrimination. In *Robinson v. California*, for example, the Supreme Court held that the state of California could not criminalize the status of being a drug addict.¹⁸⁷ The status at issue in this case was not an ascriptive status. Although individuals are sometimes born addicted to drugs, drug addiction is more often the result of future conduct by the individual.

The Supreme Court's decision in *Robinson* thus suggests a broader definition of the kind of status that may deserve protection. In *Robinson*, the

¹⁸⁴ See J. MICHAEL BAILEY, *THE MAN WHO WOULD BE QUEEN: THE PSYCHOLOGY OF GENDER-BENDING AND TRANSEXUALISM* 169 (2003) (explaining that “femininity in boys and homosexuality in men are probably caused by incomplete masculinization of the brain during sexual differentiation”); Leslie M. Lothstein, *The Scientific Foundations of Gender Identity Disorders*, in *MENTAL DISORDERS IN THE NEW MILLENNIUM* 227, 246 (Thomas Plante ed., 2006) (“Newer findings . . . suggest that brain circuitry and specific brain nuclei may be responsible for organization and arousal, gender identity, sexual orientation, and love relationships.”).

¹⁸⁵ The *Diagnostic and Statistical Manual of Mental Disorders* defines GID as follows:

- A. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex).
- . . .
- B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
- . . .
- C. The disturbance is not concurrent with a physical intersex condition.
- D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

DSM-IV-TR at 581; see also Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 731 (2005) (arguing that in order to get a medical diagnosis of GID and access to a sex change operation, individuals are required to possess the conventional gender attributes of their psychological gender).

¹⁸⁶ Indeed, it was courts' allegiance to an ascriptive notion of status that helps explain their previous unwillingness to protect transsexuals from discrimination. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (“Holloway has not claimed to have [been] treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex.”).

¹⁸⁷ 370 U.S. 660, 666–67 (1962) (explaining that “we deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense” and holding that “a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment”).

Court emphasized that addiction was a condition over which an individual had little control. More precisely, the Court focused on two types of lack of control: lack of responsibility for acquiring the condition, and lack of ability to change the condition.

The Court considered lack of control of the first type when it noted that addiction is “an illness which may be contracted innocently or involuntarily.”¹⁸⁸ An addict, the Court suggested, is not responsible for and could not control the condition of being addicted. As Larry Alexander explains: “The Court’s rationale was that ‘being’ addicted was not a voluntary act, and that the Eighth Amendment required that punishment not be based on a status that could be acquired involuntarily.”¹⁸⁹ Of course, as Mark Kelman has argued, a finding of lack of responsibility for one’s condition is often a function of the time frame examined.¹⁹⁰ One may not be able to control the fact that one becomes addicted to narcotics, but often one can control whether one takes such narcotics in the first place. Or, to use Kelman’s own example:

Even if we should not blame people for being sick, we may well blame them for becoming sick. The addict may seem blameless in the narrow time frame, but in a broader time frame he may well be blameworthy. Certainly, it is not at all uncommon or bizarre for a parent to blame (and punish) a child who goes out of the house in a storm without adequate raingear for getting a cold, even though the same parent would not punish the child for the ‘status’ of being ill.¹⁹¹

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

The Court considered the second type of lack of control when it compared persecution of a person for being a drug addict with persecution of a person for being “mentally ill, or a leper, or . . . afflicted by a venereal disease.”¹⁹² What was unfair about persecution in all cases, it seemed, was that the conditions were not ones that the individual could readily change or eliminate.

This broad conception of status, defined by a lack of individual control rather than an absence of relevant conduct, does help to explain courts’ emerging protection of transsexuals from requirements that they satisfy the

¹⁸⁸ *Id.* at 667.

¹⁸⁹ Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 216 n.76.

¹⁹⁰ Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600 (1981) (noting that “[t]he tensions of time-framing are evident in the status versus conduct distinction”).

¹⁹¹ *Id.* at 601–02.

¹⁹² *Robinson*, 370 U.S. at 666.

grooming code of their biological sex.¹⁹³ Indeed, such protection followed, and seemed dependent upon, the medicalization of GID, which established a perception of transsexualism as a condition beyond one's control. In *Smith v. City of Salem*, for example, the first federal court of appeals case to protect a transsexual crossdresser, the court emphasized that Smith had been diagnosed with "Gender Identity Disorder," which, the court noted, "the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity."¹⁹⁴ The court went on to explain that Smith's decision to "express[] a more feminine appearance on a full-time basis" was "in accordance with international medical protocols for treating GID."¹⁹⁵ The court's medicalization of GID rendered

¹⁹³ As Michael Selmi has noted "it is now possible that within the Sixth Circuit only transsexuals are protected under the sex stereotyping theory." Selmi, *supra* note 110, at 477. The Sixth Circuit has not been alone in expanding protection for transsexuals. See *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000) (providing that Gender Motivated Violence Act protections apply to transsexuals); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (stating that refusal to hire someone based on their sexual identity was sex discrimination); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (stating that terminating a transsexual employee for "his failure to conform to sex stereotypes of how a man should look and behave" is gender discrimination); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) ("Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *5 (N.D. Ohio Nov. 9, 2001) ("[S]ince Doe may have been fired, at least in part, because her appearance and behavior did not fit into her company's sex stereotypes, rather than solely because of her transgendered status, dismissal of Doe's Title VII claims is not warranted."). *But see* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that Title VII does not provide "protection to transsexuals"); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("[W]e hold that discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (holding that a claim of discrimination on the basis of being a transsexual was not actionable under Title VII); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *3-5 (D. Utah June 24, 2005) (holding that Title VII's ban on discrimination does not extend to transsexuals); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (holding that Title VII does not protect against discrimination based on "sexual identity disorders"); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (stating that the definition of sex did not encompass transsexuality); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) ("Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism."); *Doe v. U.S. Postal Serv.*, No. Civ. A. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985) (holding that plaintiff failed to state a claim when alleged discrimination was based on being a transsexual). Antidiscrimination protection for transsexual and transgender employees continues to vary widely. See *Koch & Bales, supra* note 11, at 250-64.

¹⁹⁴ 378 F.3d 566, 568 (6th Cir. 2004).

¹⁹⁵ *Id.* Likewise, in *Barnes v. City of Cincinnati*, the Sixth Circuit emphasized that the plaintiff was a pre-operative transsexual who, by the time his case was decided, had transitioned from male to female. 401 F.3d 729, 733 (6th Cir. 2005).

it, like addiction, a condition or status beyond individual control and therefore worthy of protection.¹⁹⁶

The broad conception of status also helps explain courts' protection of effeminate men (and masculine women) from harassment stemming from their gender nonconformity. In the effeminate men cases, the plaintiffs are being harassed not (at least not wholly) because of some discrete characteristic over which they have easy control, such as what they wear, but because of the complex and highly personal way in which they inhabit their body. They are being harassed because of a combination of intangible factors—how they walk, talk, stand and move—that determine their self-presentation and the reactions they receive from others. For most people, the manner in which they engage in this type of conduct is subconscious, the product of natural inclinations rather than conscious practice.¹⁹⁷ Even for those who do practice a particular mode of talking, standing, and moving, such conduct eventually becomes automatic, involuntary, and difficult to alter.¹⁹⁸

Consider, for example, the harassment suffered by Antonio Sanchez in *Nichols v. Azteca Restaurant Enterprises*.¹⁹⁹ Sanchez, a food server, was harassed for “walking and carrying his serving tray ‘like a woman.’”²⁰⁰ But whatever it was about Sanchez’s movement that made Sanchez’s co-workers refer to him as “she” and “her”²⁰¹ was not susceptible to easy identification or quick fix. Indeed, the harassers themselves would probably have struggled to describe precisely what about Sanchez’s movements they found objectionable. Even if they could, it would have been difficult for Sanchez to alter his movements so as to eliminate the offending affect. Doing so is not like changing one’s shirt. It is more like changing one’s way of being in the world.

Consider also the harassment faced by sixteen-year-old H. Doe in *Doe v. City of Belleville*.²⁰² H. was subjected to repeated physical and verbal ha-

¹⁹⁶ Although the *Smith* court purported to rely on the broad anti-sex stereotyping rhetoric of *Price Waterhouse* to explain its protection of transsexuals, a status-based justification seems more consistent with the court’s overall approach. For example, the court neither disavows nor even addresses its own prior case law denying protection to nontranssexual gender nonconforming workers challenging sex-based clothing and grooming requirements. See, e.g., *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (upholding a hair length restriction on male but not female employees against a claim of sex discrimination). The court distances itself only from pre-*Price Waterhouse* cases denying such protection to transsexuals. See *supra* note 64 and accompanying text.

¹⁹⁷ See, e.g., Jill Gaubling, *Against Common Sense*, 31 U. MICH. J.L. REFORM, 637, 668 (1998) (discussing the operation of “unconscious” language rules upon speakers).

¹⁹⁸ See Rich, *supra* note 6, at 1203.

¹⁹⁹ 256 F.3d 864 (9th Cir. 2001).

²⁰⁰ *Id.* at 870.

²⁰¹ *Id.*

²⁰² 119 F.3d 563 (7th Cir. 1997).

rassment that focused on his inadequate masculinity.²⁰³ Certainly, H.'s earring was a focal point of harassment.²⁰⁴ Yet it is unlikely that the harassment would have ceased, or never started, if H. had simply removed the earring.²⁰⁵ The harassment was prompted not by a discrete or easily identifiable action on H.'s part. It was prompted and driven by the gestalt of how H. presented himself: the way in which he occupied and moved his body.²⁰⁶ As was the case for Sanchez, identifying what exactly it was about H.'s self-presentation, much less getting H. to change it, would likely be impossible. H.'s effeminacy, therefore, looks distinctly status-like.²⁰⁷

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

In *Pecenka v. Fareway Stores, Inc.*, for example, the Iowa Supreme Court upheld an employer's right to terminate a male employee for refusing to remove his ear stud, emphasizing that the requirement was one with which the employee could easily comply.²⁰⁸ "Wearing an ear stud is not an immutable characteristic," the court noted.²⁰⁹ "Pecenka can remove his ear stud or cover it with a bandage."²¹⁰ Similarly, in *Austin v. Wal-Mart Stores*,

²⁰³ In addition to other incidents of physical and verbal harassment, H. Doe was regularly called "queer" and "fag," was asked "are you a boy or a girl?" and was referred to by his primary harasser as his "bitch." *Id.* at 566–67.

²⁰⁴ *Id.* at 567.

²⁰⁵ Indeed, H.'s brother, J., was also harassed, albeit less severely, despite not wearing an earring. *Id.* at 566–67.

²⁰⁶ As the court explained: "H. Doe [did] not su[e] Belleville in order to challenge a workplace rule that forbade him from wearing an earring," he sued because "his gender had something to do with the harassment heaped upon him." *Id.* at 582.

²⁰⁷ Devon Carbado, Mitu Gulati, and Gowri Ramachandran have offered a slightly different status-oriented reading of the effeminate men harassment cases, one focused on the status of homosexuality rather than gender. They contend that by using the sex stereotyping rhetoric of *Price Waterhouse* to protect effeminate men from harassment, courts "quite possibly, . . . were engaging in subversive judging—namely, enacting a minor rebellion against the Constitutional refusal to provide any protection against sexual orientation discrimination." Carbado, Gulati & Ramachandran, *supra* note 11, at 137.

²⁰⁸ 672 N.W.2d 800, 805 (Iowa 2003).

²⁰⁹ *Id.*

²¹⁰ *Id.* The court also emphasized that the no-earring for men rule did not reinforce women's or men's subordination in the workplace: "Nor does [plaintiff] contend that the unwritten personal grooming code perpetuates a sexist or chauvinistic attitude in employment that significantly affects his employment opportunities." *Id.* See also *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 603 (Or. Ct. App. 1990) (upholding no-facial jewelry rule for male but not female employees and explaining that "[o]nly

Inc., a district court upheld an employer's sex-specific requirement that male employees keep their hair above the collar, noting that "hair length is not an immutable characteristic, for it may be changed at will."²¹¹ "Discrimination based on factors of personal preference," the court explained, "do not necessarily restrict employment opportunities and are thus not forbidden."²¹²

Personal choice was also important to the en banc *Jespersen* court's decision to deny Darlene Jespersen's challenge to her employer's makeup requirement. The court explained: "We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII."²¹³ Sex-specific grooming requirements, the court emphasized, did not become illegal simply because they were "personally offensive" to the plaintiff.²¹⁴

For Darlene Jespersen, Michael Pecenka, and James Austin, compliance with their employer's gender conformity demands was physically easy and relatively uncomplicated. Noncompliance was, according to the courts, largely a matter of choice and personal preference. Accordingly, these plaintiffs' nonconformity did not look status-like, and did not warrant nondiscrimination protection on that basis.

Protection of gender nonconforming behavior that appears sufficiently status-like helps complete the picture of courts' Title VII sex discrimination jurisprudence. Such jurisprudence does not reflect an emerging anti-assimilationist right to engage in gender nonconforming conduct as such. It does, however, reflect the courts' ongoing commitments to ending status-based discrimination and group subordination—commitments that do sometimes justify protection of gender nonconformity.

B. Racial Nonconformity

In the race context, the same broad status-based antidiscrimination principle helps to explain one of the few types of conformity demands that courts readily treat as racially discriminatory. These are demands that black

those distinctions between the sexes which are based on immutable, unalterable, or constitutionally protected personal characteristics are forbidden").

²¹¹ 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998).

²¹² *Id.* at 1256. Like the court in *Pecenka*, the *Austin* court made it clear that the sex-specific grooming requirement at issue did not raise antisubordination-oriented concerns. As the court explained: "The objective of Title VII is to equalize employment opportunities. Consequently, discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate Title VII because they present obstacles to the employment of one sex that cannot be overcome . . ." *Id.* at 1256 (citations omitted).

²¹³ *Jespersen v. Harrah's Operating Co. (Jespersen II)*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

²¹⁴ *Id.*

men with Pseudofolliculitis barbae (PFB), a skin condition that makes shaving painful, comply with no-beard requirements.²¹⁵

The medical diagnosis of PFB as a disease makes it look a lot like GID: a condition for which the individual is blameless and over which he lacks easy control. Indeed, critical to plaintiffs' success in such cases has been their ability to convince a court of the physical pain and hardship associated with shaving because of this racially correlated condition.²¹⁶

In *Richardson v. Quik Trip Corp.*, for example, the plaintiff was fired for refusing to shave his beard in violation of the company's grooming code.²¹⁷ The plaintiff sued, alleging that enforcement of the policy against black men like him who suffered from PFB constituted race discrimination. The court agreed, declaring that for PFB sufferers like the plaintiff, shaving was "insufferable."²¹⁸ Similarly, in *University of Maryland at Baltimore v. Boyd*, the plaintiff, a black man with PFB, claimed that, as applied to him, a no-beard requirement for university police officers was racially discriminatory.²¹⁹ In upholding his claim, the Maryland Court of Special Appeals emphasized the pain associated with shaving for PFB sufferers and the particular severity of the plaintiff's own case.²²⁰

²¹⁵ As the court explained in *Richardson v. Quik Trip Corp.*: "Pseudofolliculitis barbae . . . is a facial skin condition that afflicts certain persons with curly or kinky hair follicles. After shaving, the curved hair follicles cause the already curly hair to curve back into contact with the skin surface, and pierce and re-enter the skin, forming a pseudofollicle. The pseudofollicle becomes inflamed, and painful papules and pustules result. In severe cases, abscesses develop around the pseudofollicles and, if untreated, cause scarring, hyperpigmentation, and disfigurement." 591 F. Supp. 1151, 1153-54 (S.D. Iowa 1984); see also *Univ. of Md. at Balt. v. Boyd*, 612 A.2d 305, 311 (Md. Ct. Spec. App. 1992) (referring to expert testimony in the record that PFB makes shaving very uncomfortable). PFB affects a significant proportion of black men and affects almost exclusively black men. See *Richardson*, 591 F. Supp. at 1154 ("PFB is an immutable condition that, with few exceptions, afflicts only male blacks."); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 56 (D. Colo. 1981) ("[O]f the total black male population, 25% are unable to shave regularly without serious, painful disorders of the skin of the face."); *Boyd*, 612 A.2d at 311 ("PFB is predominately found in the African American male population and that the wearing of a beard is the most common cure.").

²¹⁶ The fact that the burden imposed is both physical and race related is critical to the success of these claims. See *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35, 42 (E.D. Va. 1976) (noting that "[t]he evidence adduced in the instant case does establish that the 'no beard' policy can act to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race").

²¹⁷ 591 F. Supp. at 1152.

²¹⁸ *Id.* at 1155.

²¹⁹ 612 A.2d at 307. The plaintiff in *Boyd* filed his claim under Maryland state law, though, as the court notes, Maryland's relevant antidiscrimination statute "is modeled on Title VII of the Civil Rights Act of 1964." *Id.* at 311 (internal quotation marks and citation omitted).

²²⁰ *Id.* at 311-12 ("[W]e find the hearing examiner's conclusion, that the University's policy adversely affects the African American male population afflicted with PFB, is supported by substantial evidence in the record."); *id.* at 311 (noting that "[e]xpert witnesses testified that the symptoms of PFB, skin irritation, pus and blood filled sores, and scarring, are brought on by shaving and that some sufferers of PFB must abstain from shaving"). The court further noted that the Maryland Commission on Human Relations found that "Mr. Boyd's PFB condition impaired his appearance, scarred his face and

When PFB makes it extremely painful for black men to shave, their cost of compliance with a no-beard policy is very high, and courts tend to grant protection from this conformity requirement. In contrast, when compliance costs are low, nonconformity looks less like a matter of racial status and more like a matter of personal choice. As a result, in low-compliance-cost cases courts refuse to use antidiscrimination law to protect workers from no-beard requirements.²²¹ Consider, for example, the Eighth Circuit's ruling in *Bradley v. Pizzaco of Nebraska*, a case brought by the EEOC on behalf of an African American man who suffered from PFB.²²² Langston Bradley, a delivery man for Domino's Pizza, was fired for failing to comply with the company's no-beard policy.²²³ The EEOC sought an injunction requiring Domino's to recognize an exception to its no-beard policy for PFB sufferers.²²⁴ Although the court ultimately ruled that Domino's was re-

created an externally visible disfigurement unless he wore a beard." *Id.* at 312 (internal quotation marks omitted). Moreover, the court concluded that "[t]here is substantial evidence to prove that the severity of Mr. Boyd's PFB condition significantly impairs his ability to socialize, considered to be a major life activity, and, therefore, is physically handicapping to him." *Id.* at 313. Although the court discussed this particular evidence in the part of the case addressing plaintiff's disability discrimination claim rather than his race discrimination claim it seems likely that the evidence also influenced the court's analysis of plaintiff's race discrimination claim.

²²¹ As a doctrinal matter, courts ground their protection for PFB plaintiffs in a disparate impact framework rather than in the disparate treatment framework used to protect effeminate men and transsexuals in the sex context. It would be a mistake, however, to conclude that this different doctrinal framework, rather than the same substantive concern with status discrimination, is driving the results. In fact, courts stretch traditional disparate impact doctrine considerably in order to find for plaintiffs in these cases. First, courts allow plaintiffs to establish their prima facie case by pointing to general population data rather than to qualified labor pool data. In other words, instead of showing the proportion of blacks and whites in the relevant qualified labor pool who are harmed by the hiring requirement, plaintiffs present only the more general evidence of the proportion of blacks and whites in the population at large who would be harmed by the hiring requirement. *See id.* at 311 (finding disparate impact from no-beard policy by looking at general population data regarding PFB); *Johnson v. Memphis Police Dept.*, 713 F. Supp. 244, 247 (W.D. Tenn. 1989) (finding disparate impact based on general population data of race-based impact of PFB and noting that "there is no way of determining how many, if any, black officers failed to apply or left the Department because they had folliculitis"); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 56–59 (D. Colo. 1981) (finding prima facie case of disparate impact by looking at general population data and noting that "it is scientifically proven that PFB is a disease unique or at least almost unique to blacks"). Second, and more importantly, courts allow plaintiffs to establish a disparate impact without any evidence, and indeed despite contrary evidence, that the hiring requirement is leading to a lower proportion of blacks in the relevant position than would be expected absent the challenged criteria. *See Boyd*, 619 A.2d at 311 (finding disparate impact despite defendant's argument that "the evidence did not prove that the University's policy has affected any African American male other than Mr. Boyd" and defendant's argument that "the University employment statistics show that the University employs a higher percentage of African Americans than is found in the labor pool or in other similar agency positions"); *Trailways*, 530 F. Supp. at 56 (rejecting defendant's argument that plaintiff failed to make a prima facie case of disparate impact because the defendant's "employment of black drivers and other public contact employees exceeds percentagewise the overall Denver or Colorado population percentage of blacks").

²²² 7 F.3d 795, 796 (8th Cir. 1993).

²²³ *Id.*

²²⁴ *Id.*

quired to recognize such an exception,²²⁵ it denied Bradley protection because it found that he suffered from only a mild case of PFB.²²⁶ Although the no-beard requirement constituted impermissible race discrimination as applied to those PFB sufferers for whom shaving was really painful, as to Bradley, for whom compliance costs were low, it was a legitimate workplace conformity demand.²²⁷

The broad status-based antidiscrimination principle also helps explain why protection from conformity demands is so rare in race cases. Unlike the PFB cases, the vast majority of racial conformity cases involve demands whose satisfaction is perceived by courts to be well within the control of minority workers. Indeed, it is the employee's ready control over the traits at issue that courts point to when denying antidiscrimination protection. For example, in *Rogers*, the case involving a challenge to an airline's no-cornrows requirement for flight attendants, the court emphasized that the plaintiff could easily comply physically with the no-cornrows rule by covering her hair or wearing it in a bun.²²⁸ Similarly, in *Garcia*, the case involving a challenge to an employer's English-only rule, the court noted that the bilingual plaintiffs could simply choose to speak English in order to comply.²²⁹ In these cases, because the traits at issue have not been medicalized as they have in GID and PFB cases, courts discount and ignore both the physical and psychic harm that would result from their abandonment. In addition, because the contested traits are discrete and clearly defined, unlike in the effeminate men cases, courts view compliance as easily attainable. Minority workers' nonconformity with racially dominant workplace norms is therefore seen as a form of conduct rather than as a reflection of status, and is left unprotected.

It is likely, though perhaps counterintuitive, that courts' refusal to treat virtually any expressions of racial identity as status-like is, at least in part, a

²²⁵ The court "remand[ed] to the District Court for entry of an injunction granting the EEOC the narrow prospective relief it seeks. The injunction shall be carefully tailored to place Domino's under the minimal burden of recognizing a limited exception to its no-beard policy for African American males who suffer from PFB and as a result of this medical condition are unable to shave." *Id.* at 799.

²²⁶ *Id.* at 796. The court "affirmed the District Court's finding that Bradley suffers only a mild case of PFB and can appear clean-shaven as not clearly erroneous. Bradley thus was not entitled to relief and is no longer a party to the litigation." *Id.*

²²⁷ Not surprisingly, courts also view compliance costs as low when noncompliance is due to a sense of racial or personal identity rather than physical pain. Employees do not have success challenging employers' no-beard policies when the challenge is grounded in a personal preference rather than a physical need. See, e.g., *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 469 (N.D. Cal. 1978) (holding that a no-beard policy was not racially discriminatory when applied to an employee whose beard was an important part of his racial identity); *Keys v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 357 F. Supp. 376, 380 (N.D. Ill. 1973) (same); *In re Pac. Sw. Airlines*, 77 Lab. Arb. Rep. (BNA) 320, 320 (1981) (Jones, Jr., Arb.) (holding that employer could enforce its no-beard policy against a pilot who "had become rather attached to [his] beard" and did not want to shave it).

²²⁸ 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

²²⁹ 998 F.2d 1480, 1487-88 (9th Cir. 1993).

legacy of the civil rights movement. As civil rights activists struggled to define and promote a conception of racial justice and equality, two competing positions fought for prominence within the movement: integrationism and nationalism.²³⁰ Integrationists responded to the country's racist legacy of essentializing blacks as different and inferior to whites by denying the significance of race altogether. Integrationists equated racial justice with racial transcendence, whereby individuals interacted and competed with each other in a race- and color-blind world.²³¹ Black nationalists, in contrast, argued that race did matter. They argued that blacks and whites had distinct communities, histories, and traditions that should be recognized and maintained.²³² Rather than racial transcendence, they sought the distribution and equalization of power across races.²³³ Integrationism, they contended, would lead not to some idyllic color-blind society, but instead to assimilation to white norms and the abandonment of black culture.²³⁴

To integrationists, black nationalism smacked of the same kind of essentialism as white supremacy.²³⁵ They believed that both ideologies needed to be suppressed and surpassed in the interests of racial justice. Indeed, Gary Peller has argued that this equation of black nationalism with white supremacy, and the subsequent marginalization of both, was the compromise required to incorporate civil rights into the mainstream. He explains:

Along with the suppression of white racism that was the widely celebrated aim of civil rights reform, the dominant conception of racial justice was framed to require that black nationalists be equated with white supremacists, and that race consciousness on the part of either whites or blacks be marginalized as beyond the good sense of enlightened American culture.²³⁶

²³⁰ See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 823 (explaining that “[t]he clash between nationalism and integrationism extended from the period starting in 1966—when the ‘Black Power’ slogan first gained national prominence—and lasted until the marginalization of black nationalists was complete in the mid-1970s”).

²³¹ See *id.* at 771.

²³² *Id.* at 792 (explaining that “the idea of race as the organizing basis for group consciousness asserts that blacks and whites are different, in the sense of coming from different communities, neighborhoods, churches, families, and histories, and of being in various ways foreigners to each other”).

²³³ *Id.* at 789.

²³⁴ *Id.* at 791, 797.

²³⁵ See FORD, RACIAL CULTURE, *supra* note 8, at 33 (observing that “[o]pposition to integration in the name of tradition and racial difference, while a competing position of the ‘nationalist’ left, was also and most notably the position of the racist right”); Peller, *supra* note 230, at 761 (explaining that “most white liberals and progressives, protecting themselves as the enlightened avant garde of the white community, automatically associated race nationalism with the repressive history of white supremacy”).

²³⁶ Peller, *supra* note 230, at 760.

Integrationism won the mainstream, and color blindness became the dominant social and legal conception of racial equality.²³⁷ It is this commitment to racial transcendence, and corresponding aversion to racial essentialism, that helps ensure that courts virtually never regard expressions of racial identity by minority workers as a necessary or inherent component of their racial status as such.

CONCLUSION

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

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

In another sense, however, the paradox is real. Employees are more likely to find their workplace expressions of gender identity protected than their expressions of racial identity. The difference, however, has more to do with culture, history, and, perhaps, biology, than with law. Sex is treated as rich and complex in ways that race is not. Indeed, individuals are viewed as having not only a sex but also a gender. While the two are no longer seen as invariably aligned, both are viewed as meaningful. Both are treated as biologically—or physiologically—based and as having some recognizable external manifestations. Race, in contrast, is viewed as a mere technical difference of skin tone unassociated with meaningful differences in behavior or self-presentation. In short, race is empty while sex is loaded.

²³⁷ See FORD, RACIAL CULTURE, *supra* note 8, at 33 (noting that “[i]ntegration (especially colorblindness and assimilation) became the ideals of the mainstream in the late 1960s and 1970s”); Peller, *supra* note 230, at 790 (describing the “centering of integrationism as the mainstream ideology of American good sense” and the marginalization of nationalism). Certainly the split between integrationist and nationalist ideology was not as simple or stark as my description suggests, nor was the victory of integration over nationalism as complete. A number of policies begun in the civil rights era refute any rigid commitment to colorblindness and reflect the country's continued race consciousness. See ANDREW KULL, THE COLOR-BLIND CONSTITUTION 190 (1992) (describing race balancing of public schools, affirmative action policies in business and race-based voting rights legislation).

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

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

As I said at the outset, my goal in this project has been to explain a body of case law, not to join the current normative debate over it. Nonetheless, what the present analysis reveals is that arguments to expand (or shrink) Title VII’s protection of nonconformists must operate not only at the level of legal doctrine but also at the level of culture. Antidiscrimination scholars must recognize how fundamentally different social conceptions of race and sex are affecting the impact of law in unexpected, and seemingly ahistorical, ways.

