Toward Real Workplace Equality: Nonsubordination and Title VII Sex-stereotyping Jurisprudence

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INTRODUCTION

Employment discrimination is a much-discussed topic among feminists; not only is it highly relevant to the lives of individual women, but legislation seeking to remedy sex discrimination in employment can also shed light on the ways that the law can transform sexist ideology—or at least mitigate the actual impact of those ideologies on women. “Sex stereotyping” jurisprudence, first articulated by the Supreme Court in Price Waterhouse v. Hopkins in 1989, is a legal concept with the potential to combat sexism in the workplace more effectively than previous applications of Title VII of the Civil Rights Act of 1964, an important anti-discrimination statute. Price Waterhouse interprets Title VII to prohibit employment discrimination on the basis of “impermissible sex stereotypes” about men and women.¹ This idea has the potential to make Title VII a powerful tool for overcoming the subordination of women, because sex-stereotyping arguments can examine the underlying inequalities and sexism behind generally accepted sex stereotypes in the workplace. For sex-stereotyping jurisprudence to become a more effective avenue for social change, though, scholars and courts must come up with a working conception of “impermissible stereotypes”—a concept that has yet to be defined—that courts can and will actually apply. Drawing on feminist nonsubordination theory, I propose that a sex stereotype is “impermissible,” and therefore constitutes sex discrimination under Title VII, if it is grounded in or perpetuates female subordination.

Nonsubordination has only relatively recently made inroads into the legal application of antidiscrimination statutes. Early versions of employment discrimination legislation designed to

prohibit discrimination on the basis of sex may fairly be characterized as based on first-wave legal feminist principles of formal equality, which is essentially “a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions based on their sex, race, ethnicity, sexual orientation, or other impermissible characteristics.”

One example is the “Equal Pay Act,” which prohibits employers from wage discrimination on the basis of sex and is a “paradigmatic application of formal equality principles” because it “requires equal pay for equal work.”

Title VII is also arguably grounded in formal equality concerns insofar as its initial concern was prohibiting “employment rules or decisions that treat an employee less favorably than others explicitly because of an employee’s race, sex, religion, or national origin.”

However, since its enactment over forty years ago, Title VII has undergone some major changes. Notably, Title VII has been held by courts and later amended by Congress to protect employees not only from disparate treatment based on prohibited categories (such as race or sex), but also from “facially neutral” policies or practices that have disproportionate impacts on protected classes. Some feminists argue that this disparate impact formulation of Title VII focuses more on the results of a rule than the form of a rule, and thus “more closely fits the model of substantive, rather than formal, equality.”

Substantive equality moves beyond the equal application of neutral rules and focuses on achieving “equality of results or effects.”

Substantive equality may be useful insofar as it can fill in the gaps where formal equality regimes have failed to result in genuine workplace and social equality for women.

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3 Id. at 50.
4 Id. at 57.
6 BARTLETT & RHODE, supra note 2, at 58.
7 Id. at 151.
Both formal and substantive equality, however, have been criticized for failing to achieve real equality for women. Some scholars argue that Title VII “requires more . . . [than] formal access to the work world for women”; it requires “a change in the social norms and gender scripts that make it more difficult for women to compete effectively in the work world.”\(^8\) One limitation on Title VII’s ability to change “gender scripts” for women is that Title VII jurisprudence focuses too much on the inquiry of “whether women are like, or unlike, men.”\(^9\) Catharine MacKinnon argues that formal equality leaves the focus on men and masculinity, and that, in practice, men have actually benefited the most from a formal equality regime.\(^10\) To address this problem, a third theory of feminism, nonsubordination or dominance theory, “shifts the focus of attention from gender-based difference to the imbalance of power between women and men”; it asks not whether there are differences between men and women that explain or justify a rule, but “whether a rule or practice serves to subordinate women to men.”\(^11\) Some argue that this approach will help examine the underpinnings of central inequalities between men and women, and thus address and remedy those inequalities better than formal or substantive equality theories.\(^12\)

Sexual harassment in the workplace is one aspect of Title VII sex-discrimination law that has already been discussed in terms of nonsubordination feminist theory.\(^13\) Among the reasons for the identification of sexual harassment as an issue of nonsubordination include the idea that it

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\(^9\) Bartlett & Rhode, *supra* note 2, at 399.

\(^10\) Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32–37, 40–43 (1987). She cites the fact that “[a]lmost every sex discrimination case that has been won at the Supreme Court level has been brought by a man.” *Id.* at 35.


\(^12\) Bartlett & Rhode, *supra* note 2, at 400.

is grounded in sexual and economic relationships of unequal power, that it serves as a reminder to a woman “that she is viewed as an object of sexual derision rather than as a credible co-worker,” and it “has emerged as a means of preserving male control over the workplace.” Katherine Franke further suggests that:

[T]he sexual harassment of a woman by a man is an instance of sexism precisely because the act embodies fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered, men as masculine subjects and women as feminine objects. . . .

[S]exual harassment—between any two people of whatever sex—is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace. . . . [I]t perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.

Franke’s characterization of sexual harassment raises interesting questions about the connections between “sex stereotyping” Title VII jurisprudence and nonsubordination theory and practice, and nonsubordination theory’s potential application to other types of employment discrimination prohibited by Title VII.

The potential impact of a sex-stereotyping jurisprudence has, however, been limited by the fact that there is no clear standard distinguishing permissible from impermissible forms of discrimination based on sex stereotypes. Using the nonsubordination standard that I advocate,

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14 See MacKINNON, SEXUAL HARASSMENT, supra note 13, at 25.
15 Abrams, Gender Discrimination, supra note 13, at 1208.
16 Abrams, New Jurisprudence, supra note 13, at 1206.
17 Franke, supra note 13, at 693.
18 See Yuracko, supra note 8, at 177. Yuracko discusses “sex-specific trait discrimination” whereby employers enforce trait requirements on one sex but not the other; this is similar to sex stereotyping discrimination, although Yuracko argues that there are differences between trait discrimination and gender stereotyping because gender stereotyping “sometimes refers to the erroneous attribution of traits and attributes to a particular individual because of that person’s membership in a particular social group.” Id. at 181. Trait equality, she argues, is a more precise type of gender stereotyping. Id. I choose to use the term gender or sex stereotyping rather than trait discrimination, but Yuracko’s arguments are still relevant insofar as trait discrimination is a type of sex stereotyping. Either way, the standards for sex stereotyping and trait discrimination are unclear; Yuracko points out that “the effect of Title VII on sex-specific trait discrimination is . . . uncertain. Courts and scholars have struggled to decide whether sex-specific trait discrimination violates Title VII’s nondiscrimination mandate, and if so when.” Id. at 177.
nearly all sex stereotypes will be invalidated and individuals will be protected to express themselves in the way that they prefer, notwithstanding their gender. Beyond that, I hope that this piece will cause courts to engage more deeply with the stereotypes at issue in employment decisions, help develop the jurisprudence, and change the “gender scripts” at work in the workplace and elsewhere.

I choose “female subordination” and not “gender inequality” or other frameworks of analysis deliberately, because this article “recognizes a society in which women are allocated a disproportionately small share of wealth and power,” and because sex stereotyping in the workplace (and elsewhere) is “of particular importance to women, even when men are the apparent victims.”19 As I will recognize in this article, sex stereotypes about femininity and masculinity can hurt both males and females, and a clearer standard will protect not only women but also men who face discrimination based on sex stereotypes about the way that men and women should look, dress, and act.

Part I of this Article provides background on sex discrimination under Title VII, focusing on Price Waterhouse, the evolution of sex-stereotyping sex discrimination, and courts’ treatment of sex-stereotyping claims in recent cases. It then discusses the problems and contradictions that exist in today’s sex-stereotyping jurisprudence, based primarily on the lack of a workable definition of “impermissible stereotypes,” and focusing on discrimination against gender non-conforming individuals20 as a way to explore sex-stereotyping jurisprudence. Part II introduces

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19 See Mary Whisner, Comment, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN’S L. J. 73, 75 (1982).

20 Gender non-conforming individuals are people who stray from stereotypical notions of gender in their dress and other elements of gender presentation. On one extreme of gender non-conforming individuals are individuals such as transsexuals (individuals who are transitioning to the sex opposite their designated sex at birth through psychological, hormonal, or surgical treatment) or transvestites (individuals who, while not physically transitioning into the opposite sex, occasionally or frequently dress and otherwise assume the characteristics of the opposite sex). Other gender non-conforming individuals include individuals who otherwise stray from typical notions about the way males and females should dress or act, such as individuals who may be labeled (or sometimes may label themselves) as androgynous, effeminate, or butch. To the extent that I use labels for such individuals (such as
several potential theories for interpreting and applying sex-stereotyping jurisprudence, and advocates a nonsubordination approach. Part III applies this nonsubordination approach to the sex-stereotyping problems identified in Part I and identifies how nonsubordination would resolve those contradictions. Part IV offers concluding remarks about the potential outcome of a nonsubordination approach.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, national origin, religion, color, or sex. The Supreme Court interprets Title VII to mean that “gender must be irrelevant to employment decisions.” Moreover, under Title VII it is unlawful for an employer to be motivated by sex in any employment practice, “even though other [lawful] factors also motivated the practice.” This concept is particularly important for sex-stereotyping claims because discrimination against people who fail to conform to gender stereotypes may be motivated by both lawful (i.e. sexual orientation) and unlawful (i.e. sex) factors.

Price Waterhouse is the definitive interpretative Supreme Court decision with regard to sex-stereotyping discrimination under Title VII. Congress implicitly approved of Price Waterhouse when it amended Title VII in 1991, incorporating Price Waterhouse’s burden of proof and causation requirements by amending Title VII to clarify that sex discrimination is unlawful even if other factors also motivated the discrimination. As such, the analysis in Price Waterhouse will be most helpful in examining the ambiguities in Title VII that are particularly relevant to sex-stereotyping discrimination. The Court in Price Waterhouse held that, where an

androgynous, effeminate, or masculine), I do so only to describe the way that gender non-conforming individuals may be perceived by others and therefore discriminated against.

22 Price Waterhouse, 490 U.S. at 240.
24 Id.
employer denied a woman partnership because she failed to talk, walk, and dress femininely, that employer engaged in unlawful sex discrimination by employing sex stereotypes (albeit unconsciously) in its evaluation procedures. The Court emphatically pronounced that the language of Title VII mandates that “gender must be irrelevant to employment decisions.” The decision, however, is subject to various interpretations, none of which has been resolved by the Supreme Court. The following sections analyze those interpretations, explaining first what Title VII definitely does and does not prohibit, and then examining forms of discrimination that have been held permissible by some courts, but prohibited by others.

A. Discrimination clearly prohibited by Title VII

Although the law remains ambiguous in many areas of Title VII, particularly with regard to sex-stereotyping claims and gender non-conforming individuals, there are some activities that Title VII definitely prohibits. Title VII has long been interpreted to prohibit discrimination on the basis of biological sex (i.e., discrimination against a woman solely because she is a woman or against a man because he is a man). In fact, until Price Waterhouse, courts interpreted Title VII as prohibiting only that type of discrimination.

The Supreme Court has also clarified that “Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women.” Furthermore, discrimination can be perpetrated by a person that is of the same sex as the victim. That holding is particularly important in the context of a gender non-conforming individual’s claim, because discrimination against such a person may come from either sex, regardless of the victim’s biological sex.

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25 Price Waterhouse, 490 U.S. at 258.
26 Id. at 240.
27 See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984) (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men”); Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).
29 Id. at 79 (“...we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex”).
Another accepted basis for a Title VII sex-discrimination claim is discrimination against a woman because she is perceived to be too masculine, which is an unacceptable form of sex stereotyping. In *Price Waterhouse*, the Supreme Court held that, “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”  

**B. Discrimination clearly not prohibited by Title VII**

There are also several bases upon which courts have held that Title VII does not prohibit discrimination. Courts have uniformly held that Title VII does not prohibit discrimination on the basis of sexual orientation, regardless of the egregious nature of such discrimination. Because Congress has had many opportunities to amend Title VII to include sexual orientation as a protected category, and has declined to do so, courts conclude that sexual orientation is clearly not intended to be part of Title VII until the statute is specifically amended. Similarly, courts have failed to recognize a claim of discrimination based on sexual identity, such as transsexuality, reasoning that the plain meaning of Title VII denies such relief. Additionally, courts consistently affirm gender-differentiated facilities (such as restrooms and locker rooms) and dress codes.

**C. “Grey areas”: Discrimination that may be prohibited by Title VII**

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30 *Price Waterhouse*, 490 U.S. at 250.
31 See Bibby v. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (holding that harassment on the basis of sexual orientation is not actionable under Title VII); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).
32 See Bibby, 260 F.3d at 261.
33 *Ulane*, 742 F.2d at 1084; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662. Federal courts seem particularly ambivalent about their application of *Ulane*: some declare that *Price Waterhouse* implicitly overturned *Ulane*; others assume its continuing validity and use it to dismiss sex-stereotyping claims by transgendered individuals. See Jesperson v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc); Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 875 n.7 (9th Cir. 2001); Harper v. Blockbuster Video, Inc., 139 F.3d 1385 (11th Cir. 1998); Barker v. Taff Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont’l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); Knott v. Mo. P. R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).
Despite Title VII’s clarity on a few discrimination issues, such as its prohibition of discrimination based solely on biological sex and its failure to prohibit discrimination based on sexual identity or orientation, there remain many grey areas where Title VII may prohibit discrimination. These grey areas have the potential to protect gender non-conforming individuals from employment discrimination, and are the areas where sex stereotyping is most likely to come into play.

1. **Discrimination on the basis of gender**

   A recurring theme in Title VII litigation is the distinction between “sex” and “gender.” While Title VII was originally interpreted only to prohibit discrimination on the basis of sex (the biological characteristics that differentiate males and females), *Price Waterhouse* introduced the notion that Title VII prohibits discrimination on the basis of gender (the social and cultural differences attributed to males and females). Many circuit courts have interpreted the Supreme Court’s use of the term “gender” and its analysis in *Price Waterhouse* to expand Title VII’s treatment of sex discrimination beyond biological sex. Other courts, however, construe *Price Waterhouse* narrowly and continue to focus on sex discrimination as relating primarily to biology.

   Those courts that resist extending Title VII to gender discrimination use the distinction between “sex” and “gender” to bar sex-stereotyping claims in a number of ways. Most obviously, insisting that Title VII prohibits only discrimination based on biological sex seriously undermines the potential power of sex-stereotyping claims based on norms about gender. In *Spearman v. Ford*, for example, the Seventh Circuit denied a claim for sexual harassment where

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35 *See Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination”); Nichols, 256 F.3d at 874-75; Schwenk v. Hartford, 204 F.3d 1187, 1201-2 (9th Cir. 2000) (“for the purposes of [Title VII], the terms ‘sex’ and ‘gender’ have become interchangeable”).

36 *See Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000); Etsitty v. Utah Transit Auth., 2005 WL 1505610, 5 (D. Utah); Oiler v. Winn-Dixie La., Inc., 2002 U.S. Dist. LEXIS 17417, 30 (E.D. La.) (“After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with Ulane and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex”).

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a male homosexual employee was called a female-oriented epithet, subjected to graffiti associating him with a drag queen, and assigned to jobs he claimed were “traditionally reserved for women.”

The plaintiff alleged that these vulgar and sexually explicit insults were “motivated by ‘sex stereotypes’ because his co-workers perceived him to be too feminine to fit the male image at Ford.”

The court, however, declined to permit his claim, emphasizing that “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”

Having established that, the court determined that the plaintiff “was not harassed because of his sex (i.e. not because he is a man).”

Most courts, however, accept Price Waterhouse’s (relatively clear) implication that discrimination based on gender is actionable under Title VII. However, some courts still insist on another, more subtle, argument resting on the assumption that biological sex must be the basis of discrimination. These courts require that the gender non-conforming plaintiff demonstrate that he or she was treated differently than a gender non-conformer of the opposite sex, thus highlighting the idea that discrimination must be based on treating differently the biological sexes. For example, in James v. Ranch Mart Hardware, a district court held that relief could be granted to a male living as a female only if the employer treated a female living as a male better.

A Louisiana district court ruled similarly in Oiler v. Winn Dixie, Louisiana, Inc., and found that since a male plaintiff who was fired for cross-dressing off-hours could not present evidence of a

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37 231 F.3d 1080, 1085 (7th Cir. 2000). See also Etsitty, 2005 WL 1505610 at 5; Oiler, 2002 U.S. Dist. LEXIS 17417 at 30 (“Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase “sex” has not been interpreted to include sexual identity or gender identity disorders.”).
38 Id.
39 Id.
40 Id.
41 1994 U.S. Dist. LEXIS 19102, 4 (D. Kan.).
female cross-dresser who was treated differently than him, his discrimination claim lacked merit.\textsuperscript{42}

Obviously, the requirement to show that gender non-conformers of the opposite sex are treated differently increases the burden of proof on the part of the plaintiff and makes such a claim nearly impossible; ironically, the more an employer discriminates against all gender non-conformers, the less likely the claim is to prevail. An effective sex-stereotyping standard—and the standard that is most consistent with Supreme Court jurisprudence—must recognize that gender discrimination violates Title VII.

2. Sex stereotyping as sex discrimination

Broadly interpreting “gender” opens the door to other sex-stereotyping claims. Some courts, however, are reluctant to extend the holding in \textit{Price Waterhouse} to other gender stereotypes, such as males who are perceived to be effeminate. The District Court for the District of Columbia recently declined to apply sex-stereotyping jurisprudence to a male-to-female transsexual.\textsuperscript{43} The court held that the discrimination suffered by a transsexual when she was denied a job for which she was highly qualified stemmed from the fact that her gender identity failed to match her anatomical sex, and that this was different from sex-stereotyping discrimination and therefore not barred by Title VII.\textsuperscript{44} This reasoning was similar to the \textit{Oiler} court’s holding that, “Plaintiff’s actions are not akin to the behavior of plaintiff in \textit{Price Waterhouse}.”

\textsuperscript{42} 2002 U.S. Dist. LEXIS 17417 at 28. Another example of this argument appears in the First Circuit’s decision in \textit{Rosa v. Park West Bank & Trust Co.} Although that case dealt with gender discrimination under the Equal Credit Opportunity Act (ECOA), the court specifically looked at Title VII case law (even quoting at length from \textit{Price Waterhouse}), so the analysis may still be relevant to Title VII jurisprudence. 214 F.3d 213 (1st Cir. 2000). In \textit{Rosa}, the plaintiff was a male dressed as a female; for that reason, he was refused service at a bank. The court held that only if the plaintiff could demonstrate that the bank better-treated a woman dressed as a man could he have made out a claim of sex stereotyping discrimination. \textit{Id.} at 215-216.


\textsuperscript{44} \textit{Id.} The district court did concede, however, that, “A transsexual plaintiff might successfully state a \textit{Price Waterhouse}-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . but such a claim must actually arise from the employee’s appearance or conduct and the employer’s stereotypical perceptions. \textit{Id.} at 211. For an interesting academic discussion of the way that courts insert sexual identities such as “transsexual” or “homosexual” and thereby circumvent claims of sex discrimination, see Sunish Gulati, Note, \textit{The Use of Gender-loaded Identities in Sex Stereotyping Jurisprudence}, 78 N.Y.U. L. Rev. 2177 (2003).
Waterhouse. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona."\textsuperscript{45} The Oiler and Schroer courts thus made a categorical distinction between discrimination based on sex stereotypes and discrimination based on gender identity, refusing to apply \textit{Price Waterhouse} to transsexuals.

Courts often deny the Title VII claims of gender non-conformers by characterizing the discrimination that they face to be based on an unprotected class (such as sexual orientation) and ignoring the sex stereotyping aspects of the discrimination. The Seventh Circuit in 2003 decided that a man who had been called a “faggot,” a “bisexual,” and a “girl scout,” among other things, and had been threatened with physical injury, was not discriminated against “because of . . . sex,” but instead was harassed because of his co-workers’ “perceptions of his sexual orientation.”\textsuperscript{46}

Other courts had ruled similarly in the past. Both the First Circuit, in 1999,\textsuperscript{47} and the Third Circuit, in 2001,\textsuperscript{48} found that the harassment complained of was due to sexual orientation and that the plaintiffs had not alleged specifically enough that they had been discriminated based on sex stereotypes. However, both courts recognized the legal possibility of a valid sex-discrimination claim by a male homosexual (or heterosexual) plaintiff, if there was sufficient evidence that the discrimination was based on sex and not sexual orientation.\textsuperscript{49}

\textsuperscript{45} 2002 U.S. Dist. LEXIS 17417 at 29.
\textsuperscript{46} Hamm v. Weyauwega Milk Prods., 332 F.3d 1058, 1059, 1062 (7th Cir. 2003).
\textsuperscript{47} Higgins, 194 F.3d at 259.
\textsuperscript{48} Bibby, 260 F.3d at 265.
\textsuperscript{49} Higgins, 194 F.3d at 261; Bibby, 260 F.3d at 264. In fact, district courts in the First and Third circuits have applied these reassurances from Higgins and Bibby. In Centola v. Potter, a Massachusetts district court upheld the plaintiff’s claim that his co-workers discriminated against him on the basis of sex when they made comments and left photographs “mocking his masculinity, portraying him as effeminate, and implying that he was a homosexual.” 183 F.Supp.2d 403, 406 (D. Mass. 2002). The types of harassment included placing signs on his desk that indicated that he was homosexual, posting near him pictures of openly homosexual and effeminate men, asking questions about whether the plaintiff had AIDS and whether he would be marching in a gay rights parade, and calling him anti-gay epithets. Id. at 407. Although previous courts may have been likely to decide that this was harassment based on sexual orientation and was therefore permissible, the district court reasoned that the plaintiff “does not need to allege that he suffered discrimination on the basis of sex alone or that sexual orientation played no part in his treatment.
Other courts, however, have taken more seriously Title VII’s prohibition against sex stereotyping and have accepted sex-stereotyping claims from gender non-conformers such as homosexuals and transsexuals. On one end of the interpretive scale, some argue that *Price Waterhouse* means that any discrimination based on non-conformity to a sex stereotype (such as discrimination against a homosexual man because he does not fit into the stereotype that men are attracted to women, or discrimination against a transsexual woman because she defies stereotypes about the way that women dress, act, and otherwise present themselves) is sex discrimination under Title VII. Such a broad reading would easily include homosexuals, transsexuals, and other gender non-conforming individuals. Although this view is generally not accepted in courts, one district court speculated in dicta that:

[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real men don’t date men.” The gender stereotype at work here is that “real” men should date women and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because

Section 107 of the 1991 Civil Rights Act allows recovery based on proof of a “mixed motive,” a combination of a lawful and an unlawful motive. [Citation omitted.] Thus, if Centola can demonstrate that he was discriminated against “because of . . . sex” as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.” *Id.* at 410.

A district court in Pennsylvania recently reached a similar decision, but in the context of a male-to-female transsexual. In *Mitchell*, the plaintiff was fired after he had announced his intention to transition from a male to female and had begun to present himself as a female. *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173, 1 (W.D. Pa.). The court upheld his claim because the plaintiff included facts “showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions.” *Id.* at 2.

See *Gulati, supra* note 44, at 2182.
of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don’t do.\footnote{\textit{Centola}, 183 F.Supp.2d at 410.}

Courts have generally been more conservative than that interpretation, but the Sixth Circuit did parallel that logic in its decisions in \textit{Smith v. City of Salem}, and again in \textit{Barnes v. Cincinnati}. \textit{Smith} dealt with a claim by an employee who had been fired when his employers discovered his transsexuality and when he began expressing himself in feminine ways at work.\footnote{\textit{Smith}, 378 F.3d at 572.} The complaint set forth the plaintiff’s conduct and mannerisms that did not comply with his employer’s and co-workers’ sex stereotypes, and alleged that the plaintiff’s co-workers had begun “commenting on his appearance and mannerisms as not being masculine enough.”\footnote{Id.} While other courts faced with similar facts had reasoned that claims made by transsexuals, homosexuals, and transvestites are not actionable under Title VII because the discrimination occurs because of a plaintiff’s unprotected sexual identity or orientation, rather than sex, the \textit{Smith} court countered:

Such analyses cannot be reconciled with \textit{Price Waterhouse}, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical [sic] behavior simply because the person is a transsexual. Discrimination against . . . a transsexual . . . is no different from the discrimination directed against Ann Hopkins in \textit{Price Waterhouse} . . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex-discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.\footnote{Id. at 574.}
Later, the Sixth Circuit reaffirmed this holding in *Barnes v. Cincinnati*, in which the plaintiff, a transsexual firefighter, was demoted when he dressed and otherwise presented himself as a woman at night and adopted a feminine appearance while at work, wearing a French manicure, arched eyebrows, and lipstick.\(^{55}\) The court relied on *Smith* to hold that the plaintiff had an actionable claim under Title VII.\(^{56}\)

Even some courts with a less generous reading of *Price Waterhouse* have permitted sex-stereotyping claims to proceed under Title VII where there is evidence that the discriminatory action was related to gender. In *Nichols v. Azteca*, a case presented before the Ninth Circuit, an employee produced evidence that he was “attacked for walking and carrying his tray ‘like a woman,’” harassed for “not having sexual intercourse with a waitress who was his friend,” and referred to by co-workers as “she” and “her.”\(^{57}\) He was also called vulgar names “cast in female terms.”\(^{58}\) Based on this evidence, the court concluded that the harassment was “closely linked to gender” and that “*Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.”\(^{59}\) The Ninth Circuit followed the *Nichols* decision later, in *Rene v. MGM Grand Hotel, Inc*.\(^{60}\) *Rene* is particularly significant because it held that, even if part of the motive for discrimination is based on an unprotected class, such as sexual orientation, a plaintiff may still have a cause of action if part of the discrimination was also motivated by sex.\(^{61}\)

More recently, the Second Circuit held that a plaintiff who was subjected to difficult tasks in order to (in his supervisor’s words) “make a man” out of him, and who had received other insults about not being manly enough, had alleged sufficient evidence from which a court

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\(^{55}\) *Barnes v. Cincinatti*, 401 F.3d 729, 733-34 (6th Cir. 2005).

\(^{56}\) *Id.* at 733.

\(^{57}\) 256 F.3d 864, 874 (9th Cir. 2001).

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) 305 F.3d 1061, 1063 (9th Cir. 2002).

\(^{61}\) *Id.*
could “reasonably infer that [plaintiff’s] failure to conform to sex stereotypes was a reason for his being discriminated against based on his gender.”

3. Gender differentiated dress codes

Gender-differentiated dress codes may provide another ambiguity in Title VII. Although it is well-established that employers may establish such policies, some courts suggest that dress codes may be unacceptable when they result in an unequal burden on one gender or are based on “impermissible stereotypes” that inhibit a worker’s ability to do his or her job. I do not intend to extensively address appearance discrimination and dress codes, but will insofar as they are implicated in sex-stereotyping claims. Sex-stereotyping jurisprudence may allow plaintiffs to invalidate the types of dress codes that courts previously upheld if such dress codes are based on impermissible sex stereotypes.

Even before Price Waterhouse, courts had invalidated dress codes where they demean women, or subject them to harassment. Currently, “impermissible” stereotypes regarding dress codes are interpreted narrowly, with many courts suggesting that Price Waterhouse means only stereotypes that create a “catch-22” are impermissible. Under that standard, only discrimination similar to Price Waterhouse would be impermissible: women have to be masculine in order to succeed in business, but masculinity subjects them to discrimination, putting them in a double-bind. Other courts, however, do not seem to think that a double-bind is necessary for a stereotype to be impermissible, and hold that any action based on a stereotype can constitute discrimination based on sex.

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63 See, e.g., Nichols, 256 F.3d at 875 n. 7; Harper v. Blockbuster Entrm’t Corp., 139 F.3d 1385 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2d Cir. 1996).
64 See Jesperson, 444 F.3d 1104.
67 See Jesperson, 444 F.3d at 1111; Schroer, 424 F.Supp.2d at 211.
68 See Smith, 378 F.3d at 573; Bibby, 260 F.3d at 264 (3d Cir. 2001) (denying relief based on the facts asserted but affirming that sex stereotyping of an effeminate male is sex discrimination). Those courts may be more willing to
The recent Ninth Circuit decision in Jesperson v. Harrah’s highlights the confusion regarding dress codes and sex stereotyping. That decision held that a policy requiring women to wear makeup (and forbidding men from doing so) was not sex discrimination because the requirement did not impose an “undue burden” on women, and because the requirement was not based on an “impermissible stereotype.”\(^{69}\) In Jesperson, the plaintiff had not provided evidence of the added cost or time that it would take to wear makeup daily, although a dissenting opinion suggested that it should be obvious enough that buying makeup and applying it every day costs more and takes more time than not buying makeup and never applying it.\(^{70}\) The court also found that the plaintiff did not show that the requirement to wear makeup hurt an employee’s ability to work or was otherwise motivated by an unfair sex stereotype. Another dissent, though, argued that a policy requiring women to wear makeup presents the “inescapable message . . . that women’s undotored faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s face, but because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup.”\(^{71}\)

While Jesperson may have dealt a blow to the possibility of sex-discrimination claims based on grooming and dress standards, proving such a claim may still be possible. Even the Jesperson majority recognized that “a claim of sex stereotyping on the basis of dress or appearance” may be possible, but that the plaintiff in this case simply did not allege facts sufficient to show that the dress policy was the result of “a stereotypical motivation on the part of the employer.”\(^{72}\)

\(^{69}\) Jesperson, 444 F.3d at 1106.
\(^{70}\) Id. at 1117 (Kozinski, J., dissenting).
\(^{71}\) Id. at 1116 (Pregerson, J., dissenting).
\(^{72}\) Id. at 1113.
II. SEX STEREOTYPING THEORIES

Lack of conformity among federal courts and explicit Supreme Court or statutory direction notwithstanding, courts and scholars have developed various ways of evaluating sex-stereotyping claims. In this section, I will describe and analyze some of these approaches.

A. Undue burdens

One common approach to sex-stereotyping claims, particularly regarding sex-differentiated dress codes, is to ask whether the sex-specific requirements pose “unequal burdens” on one sex.\(^{73}\) The Ninth Circuit’s decision in Jesperson illustrates this argument; the majority held that there was no sex discrimination in the employer’s “personal best” policy because Jesperson had not produced sufficient evidence that a dress code requiring that she wear a full face of makeup and have her hair curled and teased cost more money or required more time than the requirements that men be clean-shaven and have their hair trimmed regularly.\(^{74}\)

The court’s decision demonstrates some of the weaknesses of an undue burdens approach. First, it seems difficult for the court to directly compare the requirements imposed on men to the requirements imposed on women from the sex-specific policy. The policy was comprehensive, and although the court ultimately decided to compare the policy as a whole\(^ {75}\)—all of the requirements for women compared to all of the requirements to men—it could have compared those parts of the policy that were most sex-specific and most objectionable to the plaintiff. Judge Pregerson, in his dissent, argued that insulating the sexist portions of the dress code within all of the “neutral” categories such as dress, hair, and grooming masked the real

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\(^{73}\) Courts generally regard as “undue” only those burdens that are “unequal.” It is arguable that a burden can be undue for women even if it is applied similarly to men. It is also arguable that an undue burden does not need to be compared between men and women; for example, in Fourteenth Amendment abortion analysis, a law can pose an undue burden on women without being measured in comparison to its burden on men. See Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992). This is not an interpretation that courts have adopted in analyzing Title VII claims, but would be consistent with the nonsubordination standard that I propose.

\(^{74}\) Id. at 1106, 1110-1111.

\(^{75}\) Id. at 1109-1111.
issue, and he focused on those parts of the dress code that were clearly rooted in sexist stereotypes (such as the makeup requirement).\footnote{Id. at 1116 (Pregerson, J., dissenting.).}

Moreover, the court defined “burden” only in terms of time and money. Not only does it seem obvious that purchasing makeup and taking the time to put it on daily costs more money and takes more time than not purchasing makeup and not applying it daily, but it is unclear that that was the only “burden” that Jesperson herself faced because of the policy. Jesperson refused to wear makeup and eventually quit her job not because she did not want to spend money or take time, but because wearing makeup conflicted with her “self-image” and because she found it “offensive”; she felt “so uncomfortable wearing makeup that she found it interfered with her ability to perform” her job.\footnote{Id. at 1108.} Judge Kozinski’s dissent points out that it was unfair for the majority to dismiss that as evidence of the burdens that the policy imposed on Jesperson.\footnote{Id. at 1117 (Kozinski, J., dissenting.).}

The Jesperson majority’s failure to grasp the real nature of the burdens imposed by the “personal best” policy is typical of courts using an unequal burdens analysis. Katharine Bartlett, for example, argues that “courts have engaged in little or no comparative analysis of the burdens men and women, respectively, face. In some cases it has been enough that some requirements were imposed on both men and women, regardless of how burdensome or demeaning either set of requirements might be.”\footnote{See David Cruz, Making Up Women: Casinos, Cosmetics, and Title VII, 5 NEV. L.J. 240, 247 (2004).} David Cruz compares the court’s treatment of equal burdens, particularly its ignorance of Jesperson’s personal account of the burden that she faced, as “not much more inspiring than the majority’s claim in \textit{Plessy v. Ferguson} that there was nothing stigmatizing in racially segregated railroad accommodations save perhaps black people’s eccentric subjectivities.”\footnote{Id. at 248.}
Additionally, Cruz argues that “accepting the equal burdens argument here risks reinforcing social division and a view of supposedly fundamental ‘difference’ between men and women.”\(^{81}\) And that difference usually implies female inferiority: Bartlett notes that “few female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have become interwoven with their historically inferior status.”\(^{82}\) Focusing on burdens while ignoring stereotypes behind the burdens imposed will often fail to achieve real equality in the workplace. Moreover, focusing on undue burdens seems inconsistent with *Price Waterhouse*: in that case, the Supreme Court did not accept Hopkins’ discrimination claim because it would have been a burden on her to act and dress femininely, but because the very idea that she ought to act femininely was grounded in an impermissible stereotype that women should be docile, not aggressive.\(^{83}\)

B. Trait-based approaches

If, then, courts are not to evaluate sex-differentiated requirements based on the burdens that those requirements impose, they must come up with a different standard by which to measure the permissibility of such stereotypes. Some approaches focus on the “nature of the particular trait [or stereotype] at issue.”\(^{84}\)

1. **Immutable characteristics or fundamental rights**

One approach would prohibit sex-stereotyping discrimination only if the discrimination was “based on immutable characteristics or fundamental rights.”\(^{85}\) Under this approach, discrimination based on immutable biological differences between the sexes would be illegitimate, as would discrimination that targeted rights such as child-bearing. But the approach

\(^{81}\) *Id.*


\(^{83}\) *See Price Waterhouse*, 490 U.S. at 258.

\(^{84}\) Yuracko, *supra* note 8, at 204

\(^{85}\) *Id.* at 205.
in general is “radically under-inclusive in the types of trait discrimination it would treat as actionable.”\textsuperscript{86} Ann Hopkins of \textit{Price Waterhouse} would have had no protection from the adverse employment consequences of her personality traits because “aggressiveness is not an immutable characteristic” nor is it a “protected fundamental right.”\textsuperscript{87} A sex-stereotyping scheme that would permit employers to discriminate against aggressive women certainly does not meet the goals of Title VII, and is inconsistent with the Supreme Court’s understanding of sex-stereotyping jurisprudence in \textit{Price Waterhouse}.

\textbf{2. Group-identity}

Another approach that focuses on the traits being discriminated against is what Yuracko calls the “group-identity” approach, whereby sex-specific discrimination would be “actionable only when the trait for which certain women (or men) are singled out is one that is integral to their gender group identity.”\textsuperscript{88} This idea has most often been used in the context of national origin or racial discrimination, where plaintiffs argue that discrimination based on accents, speaking languages other than English, and certain physical traits is illegal trait-based discrimination.\textsuperscript{89}

The problem with this approach, especially when applied to gender, is the difficulty or impossibility of “identifying traits that are integral to one’s identity as a woman or man.”\textsuperscript{90} Additionally, even if one could identify traits that are integral to being male or female, the approach is inadequate because it “would not protect women [or men] who are singled out for adverse treatment precisely because they deviate from gender stereotypes.”\textsuperscript{91} Finally, like the unequal burdens approach, even trying to identify traits that are “integral” to the sexes affirms

\textsuperscript{86} \textit{Id.} at 206.  
\textsuperscript{87} \textit{Id.} at 206-07.  
\textsuperscript{88} \textit{Id.} at 207.  
\textsuperscript{89} \textit{Id.} at 207-213.  
\textsuperscript{90} \textit{Id.} at 214.  
\textsuperscript{91} \textit{Id.} at 216. Thus, it would not protect Ann Hopkins for deviating from the norm that women should be docile rather than aggressive.
difference, which, particularly regarding gender differences, can “affirm the qualities and characteristics of powerlessness.” 92 It is thus more likely to “entrench than to challenge group-based subordination.” 93

C. Mechanism of harm

In order to avoid the problems inherent in trait-based evaluations of sex stereotyping, some courts and scholars have suggested that, in determining whether there has been sex discrimination, the relevant question is not “why the women were singled out but the means by which they were harmed.” 94 Discrimination is actionable if the “method of harm,” as Yuracko terms it, is “sexualized abuse and harassment.” 95 Some courts have found that when conduct is sexual in nature, it is necessarily “because of” sex, meeting Title VII’s requirement; on the other hand, when it is not, it is not “because of” sex. 96 Certainly, sexual conduct and harassment in the workplace is important for courts to identify and remedy, partly because of “the role that sexuality has played and continues to play in maintaining and reinforcing gender hierarchy.” 97 However, limiting sex-discrimination claims to those that involve sexual conduct would be under-inclusive 98 of other types of sex-based and sex-stereotyping discrimination. Hopkins’ denial of partnership might not fairly be characterized as sexual in nature, but it was certainly based on harmful stereotypes about women. Other women might similarly be singled out for heavier than normal workloads, “intense monitoring,” and other harmful employment actions, but would not have a sex-discrimination claim. 99

93 Yuracko, supra note 8, at 216.
94 Id. at 217.
95 Id.
96 See id.
97 Id. 219.
98 Yuracko also argues that this approach would be over-inclusive of some types of behavior that are not sex discrimination. Not all conduct that is sexual in nature, she argues, is discrimination “because of” sex. Id. at 223-224.
99 Id. at 224.
Having determined the ineffectiveness or inappropriateness of the unequal burdens approach, trait-based approaches, and the “mechanism of harm” approach, there are two other major potential approaches to sex-stereotyping jurisprudence: an equality approach, and a nonsubordination approach, which is the approach that I advocate.

D. Equality

A seemingly simple approach to sex discrimination and sex stereotyping is an equality approach: “it is sex discrimination . . . for individuals of one sex to be disadvantaged for engaging in an activity or possessing an attribute that the employer deems perfectly acceptable when possessed or engaged in by individuals of the other sex.” An equality approach would protect, for instance, a “male employee who routinely appeared for work in skirts and dresses,” if the employer allowed female employees to wear similar skirts and dresses. The equality approach would probably also support the court’s approach in Centola when it reasoned that discrimination based on sexual orientation is sex discrimination because it is based on the stereotype that men should be sexually attracted to women, not other men. It also appears to have been the approach taken in Smith v. Salem and Barnes v. Cincinnati, where the Sixth Circuit upheld the claims of a transsexual firefighter and a transsexual police officer who had been discriminated against for appearing too feminine, and in the Ninth Circuit’s decision in Nichols v. Azteca.

The equality approach seems to have the advantage of being straightforward and consistent with the text of Title VII. It may also be consistent with Price Waterhouse, on its most basic terms, if one understands Price Waterhouse as standing for the proposition that a woman

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100 Yuracko refers to it as a “trait equality” approach. Id. at 177.
101 Id.
103 See supra note 51 and accompanying text.
104 See supra notes 52-54 and accompanying text.
105 See supra notes 57-59 and accompanying text.
discriminated against for possessing a characteristic that was permissible for a man to have has a
Title VII claim. However, there are compelling arguments that an equality approach is not
actually consistent with Title VII’s statutory scheme or Price Waterhouse. There are also several
disadvantages to an equality approach.

While some argue that the aim of Title VII is to completely obliterate gender-based
differences in the workplace, Robert Post (among others) contends that this is an “implausible”
reading of Title VII. For example, while it is probably true that Title VII seeks to create a
color-blind workplace, giving no exceptions or caveats to its prohibition against racial
discrimination, the same cannot be said for sex, for which there are bona fide occupational
qualification defenses. Moreover, one can argue that Price Waterhouse did not mean that it is
sex discrimination anytime a man or woman is discriminated against for failing to conform to
stereotypes about their sex. Indeed, the Supreme Court was careful to include qualify that
motivating discriminatory factors must be “impermissible.” That language alone suggests that
there are some sex stereotypes that are permissible. The fact that courts have continued to uphold
sex-differentiated dress codes also supports the idea that not all sex-based differences in the
workplace are to be eliminated.

Yuracko further criticizes an equality approach on two grounds. First, she argues that a
“trait equality” approach cannot work because “men and women never possess exactly the same
trait in exactly the same way.” Thus, findings of discrimination become “the product of

106 See supra notes 25-27 and accompanying text.
108 This idea is also consistent with Equal Protection doctrine in general, whereby race is almost never a legitimate
classification, but gender sometimes is.
109 See Price Waterhouse, 490 U.S. at 250-252.
110 Yuracko, supra note 8, at 188. Especially with regard to biological traits, some sex-specific traits do not translate
very well at all. For instance, Yuracko argues that, under a rigid equality logic, “pregnancy discrimination would
never constitute sex discrimination. Because a pregnant woman could never show that she was being treated worse
than a man with precisely the same trait, she could never show that adverse employment actions related to her
pregnancy discriminated against her based on sex.” Id.
indeterminate nominalism choices—for instance, how does one name the trait at issue and frame the appropriate approximate cross-sex comparison?" For example, consider an employer who "refuses to hire women who wear sexy clothes to work." What is the male equivalent to female sexy dressing? A court could look at it in "a narrow and literal way" by looking at the particular clothing, such as "low-cut blouses and tight skirt." In that case, a court could only find sex discrimination if the woman were treated worse than a man who wears low-cut blouses and tight skirts to work; framing the issue in that way "is unlikely to result in a finding of sex discrimination." Additionally, it is arguable that an employer’s treatment of a man wearing a low-cut blouse and a tight skirt is not related to the treatment of the woman; the employer may discriminate against such a man not because he is dressing “sexy” but because he is defying gender norms about males.

One could also frame the comparison in terms of a man who wears sex-specific sexy clothing, but “deciding what constitutes sexy clothing for men is itself not obvious.” On the most abstract level, one could compare the sexy-dressed female to another man who violates appropriate workplace norms, but at that point “the trait equality approach becomes toothless and unable to challenge employers’ endorsement of any gender stereotypes.”

Yuracko’s second criticism of an equality approach is that it enforces an overly rigid conception of gender neutrality. Robert Post agrees, arguing that it is neither realistic nor normatively desirable to require that all gender conventions be obliterated. A better interpretation, Post argues, recognizes that Title VII participates and interacts with social norms

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111 Id.
112 Id. at 192.
113 Id.
114 Id.
115 Id. at 193
116 Id.
117 Id.
118 Id. at 198.
119 See Post, supra note 107, at 20.
about gender just as employers and employees do, and would require us “not to imagine a world of sexless individuals, but would instead challenge us to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning.” Gender norms are and will likely remain important in American culture, Post argues; thus, “Title VII must be understood as marking a frontier between those gender conventions subject to legal transformation and those left untouched or actually reproduced in the law.”

E. Nonsubordination

Post goes on to argue that “antidiscrimination law is understood as a social practice that acts on other social practices,” and that our task in interpreting Title VII is to ask “how the law alters and modifies” stereotypic impressions based on gender. How this plays out depends on “the nature of the specific principles that we seek to implement through antidiscrimination law.” Post’s argument, then, is that Title VII can be used to transform gender norms and stereotypes, but we must make a choice about what principles we value in antidiscrimination law. Post does not propose a specific principle to be used in implementing and interpreting Title VII. I propose that the principle we ought to use in interpreting Title VII is that of nonsubordination. Where a policy or practice is rooted in sex stereotypes that subordinate women, that policy or practice is rooted in an impermissible sex stereotype and is thus sex discrimination for the purposes of Title VII.

Katharine Bartlett and Kimberley Yuracko have both suggested similar approaches to Title VII and sex stereotyping. Bartlett focuses on dress and appearance codes, and argues that where those codes “further gender-based disadvantage in the workplace,” they violate Title VII.

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120 Id.
121 Id. at 30.
122 Id. at 31.
123 Id.
VII. Yuracko similarly argues that discrimination “based on gender norms or scripts that inhibit the ability of individuals of a particular sex to participate successfully in the work world” is sex discrimination. While I find both approaches useful and both inform my perspective, I suggest a category of analysis broader than looking only at those stereotypes that limit women’s success in the workplace. I argue that any stereotype or practice rooted in female subordination in general, not just stereotypes that seem to inhibit female success in the workplace, should be impermissible.

The first problem with limiting impermissible stereotypes to those that hurt women in the workplace is that it would leave many women who have been discriminated against based on harmful sex stereotypes without legal recourse. For example, the workplace approach would certainly apply to Hopkins’ case. If aggression was necessary to succeed in Hopkins’ workplace, but she was discriminated against for being aggressive, the stereotype that females cannot be aggressive certainly undermined her ability to succeed in the workplace. She was left in a double-bind: either behave femininely, thereby hurting her own job performance, or behave masculinely and perform well but be discriminated against for being too masculine. However, I am not sure that the workplace standard would apply in a case like Jesperson. Jesperson was going to be fired for not wearing makeup as was required by her employer. Wearing or not wearing makeup is not necessarily a stereotype or standard that would hurt women, as a group, in the workplace (although it did, in Jesperson’s opinion, hurt her own ability to succeed in the workplace). But the idea that women should wear makeup is clearly rooted in assumptions about women as ornamental and as sex objects; as Judge Pregerson said in his dissent, it sends the

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124 Bartlett, supra note 82, at 2545.
125 Yuracko, supra note 8, at 225.
126 Cruz, supra note 79, at 248.
message that women’s faces, undoctored, are unacceptable.127 A non-work focused standard would better protect individual women (and men) than would Yuracko’s.

This problem illustrates a second criticism of the workplace success approach. On the one hand, it is understandable that Bartlett and Yuracko limit their focus to workplace success and equality because that is precisely what Title VII aims to do: although I would hope that changing norms about gender in the workplace will have a broader cultural impact, I also recognize that such an impact is not necessarily an appropriate use of Title VII, which is specifically aimed at equality in the workplace. However, Bartlett and Yuracko may define workplace equality too narrowly. They seem to focus on whether women will be able to succeed in the workplace in spite of the sex stereotypes they are faced with; if those stereotypes make them unable to make partner at a law firm, for instance, then the stereotypes hurt workplace equality. When the impact of discrimination is viewed in terms of the loss of employment benefits, we ignore, for example, “employees who, though they may not have been fired, nevertheless had to make unreasonable efforts to stay employed . . . . We need a fuller understanding of impact that is not limited to the loss of tangible job benefits.”128 There is more to workplace equality than successfully completing one’s job. A woman could be successful in the workplace despite facing sexual harassment; that would hardly be an equal work environment, though. Jesperson could perhaps have continued to work successfully and wear makeup, but she would have loathed herself and the way that she looked. For real workplace equality—not only economic but also social and cultural—to exist, there is no room for any sex stereotype rooted in female subordination. In sum, I think that Bartlett and Yuracko’s approaches leave untouched too many impermissible sex

127 Jesperson, 444 F.3d at 1116.
stereotypes. Yuracko herself admits that, under her approach, court decisions would not come out that much differently than they have so far.\textsuperscript{129}

Having said that, I still find Bartlett and Yuracko’s analysis useful in many ways. If Bartlett and Yuracko’s analysis leads to the conclusion that a sex stereotype is impermissible, mine probably would as well; there are probably instances, though, where they would find a stereotype permissible and I would not. Both focus on a highly contextualized examination of what stereotypes are at issue, what messages those stereotypes might send about women, and how they affect women in the workplace in practice. I similarly advocate that, when courts evaluate a sex-stereotyping claim, they must attempt to identify the stereotypes at issue and the impacts that those stereotypes have on sex equality.\textsuperscript{130}

My analysis, though, will focus more on the way that sex stereotyping perpetuates patriarchy and hierarchy in the workplace and in American culture. Several aspects of sex stereotyping reinforce patriarchy and female subordination.\textsuperscript{131} First, any differences in requirements for men and women force people to “‘wear’ their gender for all to see, setting the stage for differential treatment, and reinforcing the belief that ‘the sexes’ are ‘opposite.’ And, because differentiation takes place in the context of patriarchy, it works to the detriment of women as a class.”\textsuperscript{132} Second, regulating female appearance and behavior perpetuates sexual objectification.\textsuperscript{133} Even if a stereotype does not appear to overtly disadvantage women in the workplace, “[f]or women in a patriarchal society, the ramifications of such regulations multiply. When women are regulated as women or as part of a gender differentiation agenda, images of women and women themselves are manipulated to perpetuate the scheme of a patriarchy.”\textsuperscript{134}

\textsuperscript{129}See Yuracko, \textit{supra} note 8, at 235.
\textsuperscript{130}See Bartlett, \textit{supra} note 82, at 2569
\textsuperscript{131}Whisner, \textit{supra} note 19, at 77.
\textsuperscript{132}Id. at 76–77.
\textsuperscript{133}Id. at 77.
\textsuperscript{134}Id. at 118.
Eliminating such stereotypes from the workplace, then, may help to undermine patriarchy more generally.

III. NONSUBORDINATION APPLIED

Having established the standard by which I will measure whether or not sex stereotyping is impermissible and results in Title VII sex discrimination, I want to return to my earlier discussion of the policies and practices that Title VII may or may not prohibit and analyze the current ambiguities in the law in light of a nonsubordination standard.

A. Discrimination on the basis of gender

Obviously, an approach to Title VII that holds sex stereotypes impermissible if they subordinate women would prohibit discrimination both on the basis of biological sex and gender. Even when discrimination is not based on biological differences between men and women, a nonsubordination approach could find discrimination where gender stereotypes are at issue. Moreover, a nonsubordination approach would solve the problem facing courts when they attempt to compare a gender non-conforming plaintiff of one sex to a gender non-conforming plaintiff of another sex. From the perspective of nonsubordination and sex stereotyping, it is not relevant that an employer discriminates equally against a masculine woman and a feminine man. The relevant inquiry is what stereotypes the discrimination is based on, and whether those stereotypes reinforce female subordination. I will discuss more specifically how courts might approach gender non-conforming individuals and sex stereotypes in the next section. The important point with regard to gender versus sex discrimination is that a nonsubordination sex-stereotyping approach will encourage courts to engage more deeply with the stereotypes at issue and their legitimacy, rather than ending their analysis at a formal equality level.
B. Impermissible sex stereotypes

Having established that a nonsubordination inquiry will permit sex-stereotyping claims for sex discrimination, the next major question is what types of stereotypes a nonsubordination approach may find impermissible. As described earlier, courts have varied widely in their treatment of sex-stereotyping claims, particularly when those claims come from gender non-conformers. Some courts refuse protection to individuals such as transsexuals, transvestites, and homosexuals on the basis that Title VII does not protect those classes.135 Other courts have skipped over an “impermissibility” analysis entirely and have found sex discrimination whenever a sex stereotype is at issue.136

Applying a nonsubordination sex-stereotyping standard to these cases would nearly always lead to a finding of sex discrimination because cultural norms about sex differences are generally grounded in or serve to perpetuate female inferiority, either through directly affecting females in the workplace, devaluing femininity in the workplace, or exploiting female sexuality.

Certainly, aggressive women and effeminate men will be protected from sex-stereotyping discrimination under a nonsubordination analysis. The stereotype that aggressive women are unsuitable for the workplace is impermissible because it can prevent women from succeeding in the workplace,137 and because it is grounded in assumptions about female femininity and passivity generally. Similarly, discrimination against effeminate men would also be an actionable form of sex discrimination because punishing femininity in men is:

[O]ften a way of policing gender roles in the workplace and reaffirming gender scripts that discourage men from engaging in nurturing and caregiving activities. Such discrimination pushes men to act in hypermasculine and traditionally macho ways.

While such role policing certainly confines men, it also undermines women’s ability to

135 See supra notes 44-47 and accompanying text.
136 See supra notes 52-56 and accompanying text.
137 See Yuracko, supra note 8, at 227.
compete successfully in the workplace. Enforcing a code of masculinity on male employees reinforces women’s position as different and other. Moreover, hypermasculinity defines itself not only as different from that which is female but as distinctly superior to it.\textsuperscript{138}

In addition to reinforcing gender hierarchies in the workplace, stereotypes about men and masculinity reify existing patriarchal structures more generally.\textsuperscript{139}

Commentators are more divided when it comes to more extreme forms of gender non-conformity. It is easy to argue that prohibiting\textsuperscript{140} women from wearing pants in the workplace would be based on an impermissible stereotype, grounded in the “cultural coding of skirts that disadvantages their wearers by making them seem, say, less professional and more ornamental or vulnerable than those who wear pants.”\textsuperscript{141} Requiring women to conform to stereotypes in dress and appearance that “convey disparaging messages about women or restrict them in gender-based ways”\textsuperscript{142} would likely be impermissible under nonsubordination interpretations of Title VII.

Determining impermissibility is more difficult, however, when dealing with stereotypes about what is appropriate for men. Is the expectation that males wear pants, not skirts, for example, an impermissible sex stereotype? One could argue that, “Insofar as pants symbolize power and competence, requiring them for men does not pose the same problem of disadvantage as requiring skirts for women.”\textsuperscript{143} Yuracko argues that eradicating the particular gender norm that men do not wear dresses or high-heels or lipstick, for example, to work “is not necessary for the substantive equality of women and men in the work world. Men are not prevented from

\begin{footnotes}
\footnotetext{138}{Id. at 227-228.}
\footnotetext{139}{See Whisner, supra note 19, at 76.}
\footnotetext{140}{In this section, I am limiting my discussion to workplace discrimination that occurs in the absence of a dress code—such as the discrimination that the plaintiffs in Barnes and Smith faced. I will discuss the legitimacy of gender-differentiated dress codes in part C of this section.}
\footnotetext{141}{Bartlett, supra note 92, at 2569.}
\footnotetext{142}{Id. at 2571.}
\footnotetext{143}{Id.}
\end{footnotes}
matching the ideal worker by being prohibited from wearing dresses . . . . Women, likewise, are not harmed by having male employees’ clothing choices limited in a way theirs is not.”  

It is in this regard, though, that my approach to nonsubordination differs significantly from Bartlett and Yuracko’s. While it might be true that not wanting men to wear skirts (or makeup or long hair) is not grounded in a stereotype that would hurt men or women in the workplace, it is grounded in a stereotype that privileges masculinity over femininity generally and reinforces the differences between men and women. A nonsubordination approach would probably find that impermissible because it “reflects and perpetuates gender-role expectations that men wear the pants and only women, or sissies, wear skirts.” Furthermore, some argue that, if we want to elevate femininity and respect it as much as we do masculinity, we must allow men to be feminine. Mary Anne Case argues that “the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well.”

Under a nonsubordination approach, the plaintiff in Oilier, who was fired because he dressed as a woman off-hours, would have had a Title VII sex-discrimination claim. As the Sixth Circuit held in Smith and Barnes, men who are fired, demoted or harassed because they express themselves in feminine ways at work would have a Title VII sex-discrimination claim as well. A nonsubordination approach would prevent courts from asserting “gender-loaded identities,” such as transsexual, to deny sex-discrimination claims by arguing that the discrimination was based on sexual identity status, not sex. Some scholars argue that the “judicial employment of gender-loaded identities unnecessarily has complicated the analysis of cases where a victim is discriminated against because of her failure to conform to sex

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144 Yuracko, supra note 8, at 228.
145 Case, supra note 102, at 7.
146 Id.
147 See supra note 43 and accompanying text.
148 See supra notes 52-57 and accompanying text.
149 See Gulati, supra note 44, at 2180.
stereotypes,” when in fact, the nature of gender-loaded identities is “necessarily based on sex stereotypes.”

There is a practical concern raised by this approach: some argue that employers, rather than permitting both men and women to dress as women, would simply prohibit women’s clothing (or makeup or whatever) for either sex, leaving women and effeminate or cross-dressing men worse off. While that might be the result under an equality approach (if men can’t do it, then women can’t do it), it would probably not be under a nonsubordination approach. Adopting an “androgynous” (in other words, male) dress code at work would similarly rest on assumptions about the appropriateness of femininity in the workplace, and would be impermissible under Title VII if viewed through a nonsubordination paradigm. Additionally, concerns about the workplace being flooded with gender non-conformers are likely overstated. Prohibiting discrimination against men wearing dresses, for example, will probably not significantly increase the number of men who decide to wear dresses to work. Not only are relatively few men interested in wearing dresses (because of their own sex stereotypes), but even those who are may have other reasons for dressing differently at work than they do off-hours (as did many of the plaintiffs in the cases discussed earlier). For example, a male attorney may like to cross-dress but may choose not wear women’s clothing to work, even though he is protected from discrimination by his employer, because he is still interested in portraying a “professional” image to his clients. Title VII should protect him if he does choose to dress in traditionally female clothing, but concern about a flood of cross-dressers (and subsequent backlash) entering into the workplace is probably unnecessary.

150 Id.
151 See Yuracko, supra note 8, at 229.
152 Id. at 178.
153 See, e.g., Barnes, 401 F.3d at 733-34; Smith, 378 F.3d at 572; Oiler, 2002 U.S. Dist. LEXIS 17417 at 29.
Just as other gender non-conformers will be protected by a nonsubordination approach to Title VII, so will homosexuals. Discrimination against homosexuals is quite simply based on stereotypes that men should like women and women should like men; more deeply, it is based on a gender norm that “femininity requires sexual attachment to men.”\textsuperscript{154} Yuracko argues that sexual-orientation discrimination will not be protected by Title VII because, although such discrimination reinforces hierarchies, it reinforces hierarchies of “straight over gay” rather than male over female.\textsuperscript{155} That discrimination against homosexuals involves more than just straight versus gay, though, is apparent in much of the case law treating sexual-orientation discrimination: regardless of any particular feminine characteristics, gay men are often harassed in sex-stereotypical terms, such as being called female epithets.\textsuperscript{156}

C. Dress codes

The cases and problems discussed above involved discrimination in the absence of a dress code. What would a nonsubordination approach say about dress codes, though? While it is well-established that employers can enforce dress codes on their employees,\textsuperscript{157} a nonsubordination approach to Title VII would invalidate dress codes that are based on impermissible sex stereotypes.\textsuperscript{158} Some courts have already invalidated dress codes because they demean women or subject them to harassment.\textsuperscript{159} Adopting a nonsubordination approach to Title VII sex stereotyping would build on that jurisprudence and expand it to include dress codes.

\textsuperscript{154} Yuracko, supra note 8, at 232
\textsuperscript{155} Id.
\textsuperscript{156} See, e.g., Rene, 305 F.3d 1061; Nichols, 256 F.3d 864; Centola, 183 F.Supp.2d 403.
\textsuperscript{157} See supra note 63 and accompanying text.
\textsuperscript{158} I am conscious of Title VII jurisprudence and, in articulating and defending my theory of nonsubordination, have sought to be consistent with established Title VII jurisprudence so that the theory can be valid in light of current interpretations of Title VII. Dress codes are currently generally accepted, but many of the dress code cases pre-date Price Waterhouse, and I think that courts after Price Waterhouse have incorrectly applied (or rather, failed to apply) sex stereotyping jurisprudence to dress codes.
\textsuperscript{159} See supra note 64 and accompanying text.
based on impermissible stereotypes about women, such as the dress code in Jesperson that
required women to wear make-up and wear their hair teased.\textsuperscript{160}

Dress codes would not always be invalidated, though. Dress standards can be based on
norms that do not encompass female subordination. For example,

Dress conventions like judicial robes, theme-park costumes, police uniforms, and clerical
garb can make employees more aware of their roles and thus more attuned and faithful to
those roles. Dress standards can legitimate the functions of some individuals, like nurses,
police, or sports referees, who require respect in those functions in order to do their jobs
more effectively. Such standards also can provide cues allowing customers and member
of the public to recognize who may be asked to perform what services.\textsuperscript{161}

Similarly, employers would not be prohibited from imposing basic and sex-neutral rules about
cleanliness and personal hygiene, as those rules are unlikely to be based on sex stereotypes that
subordinate women.

IV. CONCLUSION

The approach that I have suggested for resolving Title VII sex-discrimination
jurisprudence is consistent with the developing jurisprudence of Title VII, and indeed mandated
by sex-stereotyping jurisprudence. Although Congress probably never intended to cover
homosexuals, transsexuals, and other gender non-conformers under Title VII, the statutory
language providing that any discrimination based on sex is illegitimate,\textsuperscript{162} combined with the
Supreme Court’s insistence that gender be “irrelevant” to employment decisions,\textsuperscript{163} seem to
mandate the approach I have taken. Admittedly, though, inserting nesubordination analysis is at

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{160} See Jesperson, 444 F.3d at 1107.
\item \textsuperscript{161} Bartlett, supra note 82, at 2554-55.
\item \textsuperscript{162} 42 U.S.C. § 2000e-2(m).
\item \textsuperscript{163} Price Waterhouse, 490 U.S. at 240.
\end{itemize}
\end{footnotesize}
some level a choice in the principles that Title VII ought to promote and protect. However, there are advantages to articulating a specific principle in antidiscrimination law.

Some of the advantages of the approach that I advocate relate to judicial application of sex-stereotyping jurisprudence. First, applying antidiscrimination law in a particular way can “create greater judicial accountability” than can current applications.\textsuperscript{164} Forcing the court to examine the sex stereotypes behind policies and practices would allow for a more frank and productive discussion about sex stereotypes and sex discrimination in the workplace than is currently available. Even where courts have protected gender non-conformers in the past, they have done an unsatisfactory job of explaining their reasoning as to why the stereotypes at issue were unacceptable. That failure can prevent the cultural dialogue that Title VII has the potential to promote.

Second, this standard encourages “greater doctrinal coherence”\textsuperscript{165} because courts would actually have an applicable standard to apply, rather than looking at sex stereotyping willy-nilly. To date, courts have applied a myriad of theories to either accept or reject discrimination claims, leaving the jurisprudence messy and highly inconsistent across circuits.\textsuperscript{166} Third, applying a specific principle will focus judicial attention on the question of what sort of transformations Title VII is meant to accomplish, and what practices need to be eliminated to accomplish that purpose.\textsuperscript{167} It engages in a more thoughtful analysis than a strict equality approach because it will still be possible to make sex distinctions where those distinctions are either genuine to a particular individual (and therefore not based on impermissible sex stereotypes) or are not rooted in female subordination.

\begin{footnotes}
\item[164] See Post, supra note 107, at 32.
\item[165] \textit{Id.} at 33.
\item[166] See supra notes 35-72.
\item[167] Post, supra note 107, at 36.
\end{footnotes}
That possibility leaves open perhaps the greatest benefit to a nonsubordination approach to Title VII. Post argues that if antidiscrimination were to “reorient itself around the project of purposively reshaping the social practices of race and gender, explicit . . . gender classifications may or may not be suspect, depending upon whether they affect . . . gender practices in ways that are incompatible” with nonsubordination.\textsuperscript{168} In other words, a nonsubordination approach to sex stereotyping could \textit{permit} sex classification where that classification is not rooted in stereotypes about female subordination. That would probably mean that pregnancy benefits and maternity benefits to women would be permissible because it is not an impermissible sex stereotype that only women get pregnant and give birth. A formal equality, intermediate scrutiny approach to Title VII has ironically curtailed such benefits in some cases—requiring an entirely separate statute to deal with pregnancy discrimination.\textsuperscript{169} Indeed, one complaint about Title VII is that it has benefited men more often than women. A nonsubordination approach would not hurt men’s rights in the workplace, but it would also recognize the unique position that women are in based on historical subordination and so would be justified in treating women differently in some circumstances.

In addition to differences rooted in actual biological differences, a nonsubordination approach to Title VII could also protect affirmative action programs aimed at remedying the effects of past discrimination (and present subordination) of women in the workplace. Unlike formal equality, which is “premised on the assumption that . . . sexual differentiations are invidious,” nonsubordination is “premised on the assumption that society is a racial patriarchy. The problem with this hierarchy is that the people at the bottom . . . do not have sufficient power to control or value their own lives. The evil is therefore the lack of power and control, not

\textsuperscript{168} \textit{Id.} at 38.
differentiations.” When you approach the problem of discrimination from that perspective, “it is more invidious to have a rule that excludes blacks [or women] than a rule that excludes whites [or men], because whites [or men], as a class, have not faced subordination.”

If it is, as I believe, Title VII’s aim to “transform existing practices of . . . gender,” that aim will be better served by a standard that evaluates employment practices based on whether they classify individuals in a harmful way, rather than denying classification altogether. In the end, an account of Title VII that focuses on the principle of nonsubordination may soften the “sharp and consequential distinction between facially neutral laws and laws that employ explicit . . . gender classifications. . . . [it] both de-emphasizes the singularity of . . . gender classifications and enhances the visibility of the multiple ways in which facially neutral laws affect existing practices of . . . gender.” Rather than focusing on the sharp divide between facially discriminatory and facially neutral rules, then, a nonsubordination approach will “encourage us to inquire whether [the effect of rules] are consistent or inconsistent” with antidiscrimination law. Ultimately, the approach may lead to more complete economic, social, and cultural equality between the sexes in a way that existing Title VII interpretations have failed to do.

170 Colker, supra note 128, at 63-64.
171 Id. at 65.
172 Post, supra note 107, at 38-39
173 Id. at 39.
174 Id.