

Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law

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I. INTRODUCTION

On one level antidiscrimination law is necessarily all about values. It is about which kinds of discrimination society is committed to eradicating and which kinds it is content to let continue. Society prohibits discrimination against women but not people born in August, not because the former is more irrational than the latter, but because society cares more about ensuring women's social participation than that

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of those born in August. Certainly the social pervasiveness of discrimination is an important part of this determination. Irrational but idiosyncratic discrimination is less harmful, both to individuals and socially salient groups, than irrational and systemic discrimination. It therefore warrants fewer social expenditures. Pervasiveness alone, however, does not explain antidiscrimination protection. The overweight and unattractive face systemic and often irrational discrimination but receive no federal antidiscrimination protection.¹ On a most basic level, antidiscrimination law is about which groups are deemed worthy of social admission and protection and which are not.

Yet, I argue in this paper that antidiscrimination law in practice is also about a more controversial and covert set of values—one focused on promoting certain kinds of individual development, rather than undermining group hierarchy, and driven by conceptions of individual rather than group worth. Antidiscrimination law’s scope, at least at the margins, reflects perfectionist judicial conceptions of human flourishing. Courts use antidiscrimination law’s carrot of inclusion and stick of exclusion to encourage those traits and attributes they deem important for a good human life and to discourage those they deem harmful or worthless.

Current Title VII case law reveals the critical role that both sets of values play in defining the actual scope and shape of antidiscrimination protection. At the most basic level, Title VII prohibits discrimination in employment on the basis of race, sex, religion, color, and national origin.² The statute embodies society’s core liberal antidiscrimination

1. See Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WEEK., Mar. 16, 1998, at 18 (noting that the “wage differential between attractive and ugly people is about 10% for both sexes”); T.L. Brink, *Obesity and Job Discrimination: Mediation Via Personality Stereotypes?*, 66 PERCEPTUAL & MOTOR SKILLS 494 (1988) (showing in a laboratory setting that weight had more significant negative effects on participants’ ratings of potential employees than age, race, or sex); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1192 (1994) (For both women and men “wages of people with below-average looks are lower than those of average-looking workers; and there is a premium in wages for good-looking people”); Regina Pingitore et al., *Bias Against Overweight Job Applicants in a Simulated Employment Interview*, 79 J. APPLIED PSYCHOL. 909 (1994) (studying effects of weight and sex on hiring decisions); Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 969 (1999) (reviewing twenty-nine studies showing discrimination against the obese in hiring, wages and benefits).

2. Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(a) (2000).

commitments to status blindness and antisubordination through the undermining of traditional caste-based hierarchies.³ The Act's disparate treatment framework demands the former.⁴ Women and men—or blacks and whites—must be subject to the same set of hiring and employment requirements. Similarly qualified applicants cannot be treated differently because of their sex or race.⁵ The Act's disparate impact doctrine demands the latter.⁶ Employers are prohibited from treating women and men—or blacks and whites—who are in fact different, differently if

3. Both goals are prominent in the Act's legislative history. Statements made on the floor of the House by supporters of the sex discrimination amendment to Title VII made clear that they intended the prohibition to end the blanket exclusion of women from jobs and to dismantle the sex-based hierarchy of the work world that such exclusion maintained. Representative Martha Griffiths, for example, argued that without including protections for sex in the Act, women would continue to populate lower paid jobs and be excluded from better jobs reserved for men. *See* 110 CONG. REC. 2577-84 (1964), reprinted in U.S. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3213-19 (1968). Similarly, Representative St. George argued in favor of the amendment as a way to challenge restrictive protective labor laws that prevented "women from going into the higher salary brackets." *Id.* at 3221. St. George explained: "Women are protected—they cannot run an elevator late at night and that is when the pay is higher. They cannot serve in restaurants and cabarets late at night—when the tips are higher—and the load . . . is lighter." *Id.*

4. *See* 42 U.S.C. § 2000e-2(a).

5. To be sure, the disparate treatment framework has significant antisubordination effects, but such effects are not required for its application. Title VII's disparate treatment doctrine demands status-blind treatment for dominant group members—such as men or whites—even though such protection is not necessary to undermine traditional forms of status group hierarchy. *See* *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women . . .") (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) ("Title VII of the Civil Rights Act of 1964 . . . prohibits the discharge of 'any individual' because of 'such individual's race' Its terms are not limited to discrimination against members of any particular race.") (internal citation and footnote omitted).

6. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

Id.

doing so will reinforce traditional status hierarchies and the treatment is not justified by business necessity.⁷

Title VII is often thought of as a paradigmatic liberal antidiscrimination statute.⁸ Scholars often contrast its antidiscrimination demands with the explicit accommodationist demands of the Americans with Disabilities Act (ADA) which require employers to absorb reasonable costs in hiring individuals who can effectively perform jobs with, but not without, additional inputs.⁹ The significant accommodationist costs Title VII

7. Historically, courts have conceived of the disparate impact cause of action as antistatutory-oriented, one available to racial minorities or women but not to whites or men. See *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) (affirming dismissal of disparate impact case brought on behalf of men on grounds that “a neutral practice that has an adverse impact on a favored class simply cannot operate ‘to “freeze” the status quo of prior discriminatory employment practices’ within the meaning of *Griggs*,” and, therefore, such suits are not permissible under Title VII absent some “background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination”) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)); see also John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 897, 898 (2001) (“[A] neutral employment practice that disadvantages white men yet has no business justification is permissible, while the same practice would be unlawful if it were to disadvantage women or minorities.”). With the increasing anticlassificationist focus of statutory and constitutional antidiscrimination law, however, there is a chance that disparate impact doctrine will in fact come to be applied in a status-blind way without regard to larger issues of social group hierarchy and subordination. See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1512 (2004) (concluding that “[a]pplying disparate impact beyond minorities and women is profoundly ahistorical and inconsistent with the theoretic underpinnings of the theory,” but nonetheless that “limiting disparate impact to minorities and women cannot survive equal protection analysis”).

8. See, e.g., Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 827 (2003) (describing the Civil Rights Act of 1964 as “the canonical employment discrimination statute”); Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 168 (2005) (describing as paradigmatic the intentional forms of race and sex discrimination prohibited by Title VII); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001) (“The canonical idea of ‘antidiscrimination’ in the United States condemns the differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics.”); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (describing Title VII as embodying “traditional antidiscrimination norms”).

9. See, e.g., Linda Hamilton Krieger, *Forward—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3-4 (2000).

The ADA incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII of the Civil Rights Act of 1964. . . . The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.

itself imposes on employers are often overlooked or minimized.¹⁰ Employers are regularly required by Title VII to hire people with whom their customers or other employees do not want to work. Employers are also, at times, required to reshape jobs and business plans to include workers who would otherwise be left out. In other words, Title VII sometimes requires employers to change social preferences and sometimes requires them to change job requirements in order to include protected group members. Both requirements are costly for employers, and thus are not lightly imposed by courts unless important values are at stake. Such values, I argue, are both traditionally liberal and perfectionist.

This paper focuses on two muddled and contested areas of sex discrimination case law—the first deals with sexuality and the second with gender nonconformity in the workplace. Both are areas in which courts, at times, impose significant accommodationist demands on employers in the name of Title VII’s antidiscrimination mandate. Section II addresses cases in which employers attempt to discriminate on

Id. For other scholarly work in this vein, see for example Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 35 (2000) (“[T]he ADA appears to make a revolutionary break with the old ways of thinking about discrimination while charting a new course of affirmative obligations to ensure real equality.”); Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 353 (2001) (“Many courts are troubled by [the] contradiction between the traditional civil rights label given the ADA and the affirmative action obligation imposed by the Act which vastly exceeds the traditional nondiscrimination mandate of the civil rights laws the ADA purports to emulate.”); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1387 (2003) (“[T]he categories of antidiscrimination and accommodation draw a meaningful distinction between alternative strategies for defining and remedying employment discrimination and that the ADA’s accommodation provisions differ in important ways from preexisting law.”).

10. Recently, however, several scholars have been drawing attention to these costs. See Bagenstos, *supra* note 8, at 830 (“[T]he ADA’s accommodation requirement is fundamentally of a piece with the core antidiscrimination requirements of Title VII”); Stein, *supra* note 8, at 617 (“Contrary to the canonical view of traditional antidiscrimination measures, applying the remedies provided by Title VII and other traditional regulations always engenders cost to employers because civil rights laws challenge, and when necessary amend, discriminatory workplace norms.”); see also Jolls, *supra* note 8, at 643-45:

[O]bservers sharply contrast Title VII of the Civil Rights Act of 1964 and other older civil rights enactments, which are said to be “real anti-discrimination law[s],” with the Americans with Disabilities Act of 1990 (ADA) and the Family and Medical Leave Act of 1993 (FMLA), said to be “accommodation” laws. . . . [However,] in a broader respect than has generally been appreciated, some aspects of antidiscrimination law—in particular its disparate impact branch—are in fact requirements of accommodation.

the basis of sex in order to protect customers' personal or sexual privacy or to provide customers with a particular kind of sexual titillation. As a general matter, courts permit discrimination in the first type of case—imposing no accommodationist demands on employers, while prohibiting discrimination in the latter—imposing significant accommodationist demands. Section III addresses claims by gender nonconforming women and men that Title VII protects them from disadvantage in the workplace. In such cases courts require employers to hire some, but not all, gender nonconforming individuals despite discomfort from coworkers and customers, thereby imposing significant accommodationist costs on employers in the instances in which discrimination is prohibited.

I contend that the antidiscrimination demands imposed on employers in these areas cannot be fully understood and explained by resort to Title VII's core liberal commitments, but instead reflect underlying and implicit judicial conceptions of human flourishing. These judicial conceptions of human flourishing need not be deliberate, nor even conscious, but a recognition of their presence is necessary to explain, or render intelligible, the current state of sex discrimination caselaw.¹¹ In other words, at least at the margins, the scope of Title VII's antidiscrimination protection is driven by judicial judgments about what kinds of people, with what kinds of traits and attributes, are valuable enough to be worth the costs of inclusion. Before turning to an analysis of the case law, I begin by discussing briefly the concepts that are critical to my analysis.

II. DEFINING CONCEPTS

Liberalism protects individual rights and demands social agnosticism toward what people do with these rights and how they choose to live their lives. It is, in other words, rights-based and value-neutral toward competing conceptions of the good.¹² Title VII, on its face, is a classic piece of liberal legislation.

11. To use Professor Rosati's language, my purpose is primarily to rationalize courts' sex discrimination decisions by providing a framework in which to fit them. However, as Professor Rosati suggests, my claims are somewhat broader than this. I do believe that judges' conceptions of human flourishing influence and hence cause to some degree their decisions in the hard cases, though I do not pretend this is a conscious causal story. Moreover, I am sympathetic to the perfectionist ideals underlying some of the sex discrimination case law, though the case law is muddled and inconsistent, and I certainly do not subscribe to all of the seemingly underlying ideals. My purpose in this paper is to offer a more complete theory of antidiscrimination law by pointing out the role that perfectionist ideals necessarily play in structuring its meaning and impact.

12. See generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 4 (1996) ("The political philosophy by which we live is a certain version of liberal political theory. Its central idea is that government should

Title VII guarantees protected group members status-blind treatment in the work world.¹³ Women and men—and blacks and whites—who are similar in their interests and abilities must face similar treatment in the work world. The Act guarantees access and opportunity. It is agnostic, however, as to whether women—or blacks—actually take advantage of these rights. Title VII requires that women can be doctors, not that they must be.¹⁴

The Act's antisubordination goals, while group-focused, are also decidedly liberal. The Act seeks to undermine traditional caste hierarchies and increase the integration and participation of protected group members by invalidating business practices that disproportionately exclude protected group members for reasons unrelated to business necessity.¹⁵ The goal is to increase the numbers of women and blacks in the work force, particularly at the higher levels.¹⁶ It does not matter from an antisubordination perspective, however, whether the women who achieve promotion are disproportionately those without children or family responsibilities as opposed to those with such caretaking obligations. Nor does it matter if the blacks who achieve success are disproportionately middle class and culturally assimilated rather than poor and from racially segregated inner city neighborhoods.¹⁷ Title VII's antisubordination concerns are bottom line oriented, remaining agnostic about which kinds of individuals within groups are rewarded.

Perfectionism, in contrast, endorses a substantive conception of human flourishing. As Andrew Koppelman has defined it, perfectionism is “the view that some ways of life are intrinsically better than others, and that the state may appropriately act to promote these better ways of life.”¹⁸

be neutral toward the moral and religious views its citizens espouse.”); KIMBERLY A. YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES 4 (2003) (“Liberalism is a theory based on individual rights and social agnosticism toward what people do with these rights.”).

13. See *supra* notes 3-7 and accompanying text.

14. For an interesting account of how courts actually respond to employers' claims that women are simply uninterested in certain jobs see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

15. See *supra* notes 6-7 and accompanying text.

16. See *supra* note 3.

17. Richard Ford essentially makes this form of liberal antisubordination argument when arguing against expanding Title VII's protection to include discrimination based on racially and culturally associated traits. See RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE (2005).

18. Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 634 (2004).

Perfectionist theories divide into those arguing that certain activities and traits are inherently valuable—valuable in light of human nature—and those arguing that certain activities and traits are intrinsically valuable—valuable regardless of human nature.¹⁹

Thomas Hurka, George Sher, and Martha Nussbaum all offer inherent perfectionist theories. Hurka, for example, starts from the premise that a good human life is one which develops “human nature” to a “high degree.”²⁰ Hurka equates human nature “with the properties essential to humans and conditioned on their being living things”²¹ and identifies physical perfection, theoretical rationality, and practical rationality as the goals of a good human life.²² Sher also contends that human flourishing comes from the development of fundamental human capacities. He determines which capacities are fundamental by asking which characteristics are nearly universal and nearly inescapable for all persons. He then sets out to discover the telos of these capacities—the end toward which they aim.²³ Like the other theorists, Martha Nussbaum’s perfectionism focuses on essential forms of human functioning and the capacities necessary for such functioning.²⁴ However, instead of arguing that the good life requires that individuals develop and exercise these capacities to their fullest, Nussbaum contends that a good human life is one in which the individual has the capacity for various forms of essential human functioning, regardless of whether she necessarily utilizes these capacities.²⁵

Joseph Raz, in contrast, offers an intrinsic perfectionism. His perfectionism derives not from a theory of human nature or essence but from a belief in the intrinsic value of autonomy.²⁶ For Raz human flourishing requires that individuals possess the capacities and conditions

19. GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 9 (1997). Vinit Haksar describes these views as weak and strong perfectionism, respectively. VINIT HAKSAR, *EQUALITY, LIBERTY AND PERFECTIONISM* (1979). According to Haksar, weak perfectionism asserts that some forms of human life are superior to others because they “are more suited to human beings.” *Id.* at 3. In contrast, strong perfectionism says there are *x*’s and *y*’s such that “whatever human nature turns out to be . . . it would still be the case that *x* would be intrinsically superior to *y*.” *Id.* at 3-4.

20. THOMAS HURKA, *PERFECTIONISM* 3 (1993).

21. *Id.* at 17.

22. *Id.* at 37.

23. SHER, *supra* note 19, at 202.

24. See Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 83-85 (Martha Nussbaum & Jonathan Glover eds., 1995) [hereinafter Nussbaum, *Human Capabilities*]; Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in *OXFORD STUDIES IN ANCIENT PHILOSOPHY* 160-64 (Supp. 1 1988) [hereinafter Nussbaum, *Nature, Function and Capability*].

25. See Nussbaum, *Human Capabilities*, *supra* note 24, at 94-95.

26. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 390-95 (1986).

for an autonomous life because autonomy is good in itself.²⁷ In fact, Raz's perfectionism requires not only that individuals live autonomously but that they direct their lives toward valuable ends.²⁸ Raz is vague, however, about what constitutes valuable autonomy.²⁹

Despite their different points of origin, these contemporary perfectionist theorists converge on a shared commitment to the importance of intellectual and rational development for a meaningful human life. For Nussbaum such development must be only to the degree necessary to allow one to form and act upon one's own life plans and projects, while for Hurka, Raz, and Sher such development must be to some higher, if not the highest possible, degree.³⁰ Nonetheless, all human flourishing requires attention to and development of individuals' intellectual capacities.

Several theorists also stress the importance for human flourishing of certain kinds of sexual and intimate expression. Nussbaum argues that human flourishing requires that individuals be able to make "personal and self-defining choices," such as those regarding sexual expression, without undue interference.³¹ Raz and Sher both stress the importance of particularly valuable kinds of intimate personal relationships. For Sher such relationships are caring and nonmanipulative,³² while for Raz such relationships are nonmonetized, requiring individuals to treat

27. *Id.* at 368-73.

28. *Id.* at 381.

29. *Id.* at 390-95.

30. For Nussbaum, human flourishing requires that individuals have the cognitive and intellectual capacities necessary to be able to plan and direct a course for their lives. See Nussbaum, *Nature, Function, and Capability*, *supra* note 24, at 160-61. For Hurka human flourishing requires the development and exercise of humans' capacities to form and act on sophisticated beliefs. HURKA, *supra* note 20, at 41. Likewise for Raz autonomy requires that an individual possess the mental abilities necessary to form intentions, develop complex plans, and connect means with their probable ends. See RAZ, *supra* note 26, at 372-73. For Sher human flourishing requires the development of individuals' capacities for reason and knowledge to their highest degree. SHER, *supra* note 19, at 203.

31. See Nussbaum, *Human Capabilities*, *supra* note 24, at 83-85.

32. For Sher human flourishing requires social interaction aimed at mutual respect and recognition. See SHER, *supra* note 19, at 206-07. Sher contends that friendships or romantic relationships between people who care for and respect each other are far more successful at achieving mutual recognition than are "interpersonal relations that are (e.g.) manipulative, exploitative, coercive, or destructive." *Id.* at 205-07.

themselves, others, and their relationships as incommensurable and noncommodifiable.³³

Margaret Jane Radin, who offers a more narrowly circumscribed perfectionist theory, also emphasizes the importance for human flourishing of noncommodified conceptions of sexuality. “[T]o see the rhetoric of the market—the rhetoric of fungibility, alienability, and cost-benefit analysis—as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing,” Radin argues.³⁴ To understand sexuality and certain other aspects of ourselves, “as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.”³⁵

In the following sections I show that courts’ antidiscrimination mandates cannot be fully explained and understood in purely liberal terms, but instead reflect underlying perfectionist ideals. Moreover, I demonstrate that these ideals map in large part onto the dominant commitments to intellectual and rational development and valued sexual expression of contemporary perfectionist theory.

III. SEXUALITY AT WORK

Issues related to sexuality at work arise in two types of Title VII sex discrimination cases. First, employers sometimes seek to discriminate on the basis of sex in order to protect customers’ personal and sexual privacy. Second, employers sometimes seek to discriminate on the basis of sex in order to provide customers with a particular kind of sexual titillation. In some sense, these cases are the flip side of each other. In the first set of cases employers seek to discriminate to satisfy customers’ desires to shield their bodies and sexuality from exposure. In the second set of cases employers seek to discriminate to satisfy customers’ desire to purchase sexuality. In both sets of cases, employers contend that sex-based hiring is necessary and justified by the bona fide occupational qualification (BFOQ) exception to Title VII’s prohibition on sex discrimination.³⁶ While employers are generally successful in the first

33. Raz contends that certain valuable social forms, like intimate personal relations, can only exist if people recognize that the social relations are incommensurable with other kinds of market goods. See RAZ, *supra* note 26, at 347-53.

34. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885-86 (1987).

35. *Id.* at 1905-06.

36. The BFOQ exception provides:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for

type of cases, they are generally unsuccessful in the latter, at least when the employer seeks to sell sex along with other nonsexual goods and services. In this section I show that courts' treatment of sexuality in both types of cases cannot be explained by Title VII's core liberal commitments but is instead motivated by judicial commitments to intellectual and rational development and noncommodified sexual expression.

Privacy cases raising antidiscrimination claims fall along a continuum measured by degrees of physical and visual contact. At one end of the spectrum are the strongest BFOQ claims, those most likely to succeed. These claims typically involve jobs requiring actual physical contact with or inspection of others' naked bodies. Courts have upheld sex discrimination in such situations based on the intimate nature of the services being provided. For example, courts have allowed sex discrimination in hiring labor-room nurses, personal caregivers, nurses' aides, and certain other types of hospital staff.³⁷

employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

42 U.S.C. § 2000e-2(e) (2000). Under the terms of the statute, race never constitutes a BFOQ. *See id.*

37. *See, e.g.,* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996) (permitting sex to be a BFOQ for psychiatric hospital staff treating emotionally disturbed and sexually abused children and adolescents because “[c]hild patients often [had to be] accompanied to the bathroom, and sometimes . . . bathed.”); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935 (S.D. Miss. 1987) (“The job duties of male and female nurse assistants and male orderlies often require that such employee view or touch the private parts of their patients.”); EEOC v. Mercy Health Ctr., No. Civ. 80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982) (holding sex to be a BFOQ for nurses in hospital labor and delivery rooms); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191 (E.D. Ark. 1981) (same), *vacated by* 671 F.2d 1100 (8th Cir. 1982) (holding issue moot); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1352-53 (D. Del. 1978) (“The Home has the responsibility of providing twenty-four hour supervision and care of its elderly guests. Fulfillment of that responsibility necessitates intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching . . .”). *But see* Olsen v. Marriott Int’l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999) (holding impermissible the consideration of sex in hiring of massage therapists). In *Olsen*, Marriott’s customers overwhelmingly requested female therapists. *Id.* at 1063. Although the court noted that massage generally involved a naked customer covered by a sheet or towel and being touched in “intimate areas such as abdominals, inner thighs, and, with [customer’s] permission,

The middle of the BFOQ privacy continuum involves jobs that require an employee to see—but not touch—patients or customers in various states of undress. In these situations, courts have generally upheld sex discrimination in hiring based on a similar intimacy rationale.³⁸

The far end of the privacy continuum is composed of cases in which an employee's duties might cause a client or coworker embarrassment or discomfort when performed by an individual of the opposite sex, but the duties do not necessarily involve touching or seeing a client's or coworker's naked body. These are the weakest BFOQ cases, though they are still sometimes successful.³⁹

In sum, courts are generally quite permissive toward sex discrimination in privacy cases. Such permissiveness, however, is inexplicable from a purely doctrinal perspective. Sex-based hiring in even the strongest privacy cases—those involving physical contact with a customer's naked body—directly violates Title VII's requirement of status blindness. Just as male doctors are as competent as female doctors to act as obstetricians and gynecologists, male nurses are just as physically and technically competent to act as labor and delivery room nurses as female nurses. Likewise, just as male doctors are as competent as female doctors to care for elderly women, male personal assistants are as capable of providing caregiving services to elderly women as are female assistants.

Nonetheless, courts permit such discrimination by relying on Title VII's BFOQ exception. The BFOQ exception permits employers to discriminate on the basis of sex if sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"⁴⁰ As courts explain, the BFOQ

buttocks," the court held that the privacy interests raised by massage did not justify the Marriott's sex-based hiring of massage therapists. *Id.* at 1070-74.

38. *See, e.g.,* Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376, 381-82 (S.D.N.Y. 1992) (permitting sex to be a BFOQ for staffing of treatment assistants at a state-run psychiatric hospital because the positions sometimes necessitated that the treatment assistants view patients naked or partially undressed); Brooks v. ACF Indus., 537 F. Supp. 1122, 1125, 1133 (S.D. W. Va. 1982) (holding sex was a BFOQ for cleaning men's bathhouses at a railroad car plant because of the likelihood that male workers would be viewed in various states of undress by the janitor cleaning the bathhouse).

39. *Compare* Norwood v. Dale Maint. Syst., 590 F. Supp. 1410, 1416-17 (N.D. Ill. 1984) (holding that sex was a BFOQ for staffing attendants who cleaned single-sex restrooms in a large office building, not because office workers might be seen naked by someone of the opposite sex, but because they would feel "embarrassment" and "increased stress" from being expected to use washrooms in the presence of someone of the opposite sex), *with* EEOC v. Hi 40 Corp., 953 F. Supp. 301, 303-05 (W.D. Mo. 1996) (holding that sex was not a BFOQ in the hiring of weight-loss counselors, even though the employer's predominantly female clientele was uncomfortable with male counselors taking their body fat measurements either on bare skin or through clothing).

40. 42 U.S.C. § 2000e-2(e)(1) (2000).

exception permits discrimination when it is necessary to preserve the “essence of the business” in a particular case.⁴¹

The BFOQ exception cannot, however, adequately explain courts’ permissiveness toward sex-based hiring in these cases. Discrimination would only be necessary to preserve the essence of the business in these privacy cases if business essence itself were defined wholly in terms of customer preferences. Yet, the regulations and case law interpreting the BFOQ exception make clear that such preferences cannot justify sex-based hiring.⁴²

While doctrine does not well explain courts’ privacy decisions, perfectionism does. Indeed, courts’ perfectionism is quite explicit in these cases. Courts permit discrimination in these cases because of their belief that human dignity and flourishing is tied to one’s ability to shield one’s body and sexuality from unwanted and forced exposure. For example, in *Local 567, American Federation of State, County, & Municipal Employees v. Michigan Council 25*,⁴³ the district court held that the need to provide personal hygiene care for patients could justify sex-based

41. See *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (stating that sex discrimination “is valid only when the *essence* of the business operation would be undermined . . .” if the business eliminated its discriminatory policy) (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971)); see also *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (holding that sex discrimination is permissible under the BFOQ exception only if those aspects of a job that allegedly require discrimination fall within the “essence” of the particular business.); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) (same); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1350 (D. Del. 1978) (same).

42. The regulations interpreting the BFOQ exception provide:

The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: . . .

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except . . .
[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress.

29 C.F.R. §1604.2(a)(1) (2005); see also *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting employer’s argument that sex-based hiring for the position of Vice President of International Operations was justified because Latin American clients would react negatively to a woman in that position); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that sex based hiring of flight attendants was not justified by customers’ preference for women in these positions).

43. 635 F. Supp. 1010 (E.D. Mich. 1986).

hiring of workers at state mental healthcare institutions.⁴⁴ In reaching its conclusion, the court explained: “We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield ‘one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”⁴⁵

The Ninth Circuit expressed similar sentiments in *Michenfelder v. Sumner*.⁴⁶ A prisoner in a maximum-security facility sued Nevada state prison officials, alleging that their policy of conducting strip searches and otherwise exposing unclothed male inmates to view by female guards and visitors violated the Fourth and Eighth Amendments.⁴⁷ The court found no constitutional violation because female officers were not routinely present for strip searches of male prisoners and because visitors were not able to view such searches.⁴⁸ It noted, however, that prisoners “retain a limited right to bodily privacy”⁴⁹ and that such preferences were directly linked to individuals’ “self-respect and personal dignity.”⁵⁰

Several courts have explained their decision to permit sex-based hiring in privacy cases by simply quoting the Larson & Larson employment discrimination treatise: “[G]iving respect to deep-seated feelings of personal privacy involving one’s own genital areas is quite a different matter from catering to the desire of some male airline passengers to experience the hovering presence of . . . an attractive female flight attendant.”⁵¹ For these courts, customer preferences to shield their

44. The court made clear, though, that whether sex-based hiring was actually permissible in that case depended on the state’s ability to show that there were no reasonable alternatives by which the state could protect patients’ privacy interests without engaging in sex-based hiring. *See id.* at 1014.

45. *Id.* at 1013 (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)). The court went on to emphasize the connection between personal dignity and the preference for personal physical privacy: “Obviously most people would find it a greater intrusion of their dignity and privacy to have their naked bodies viewed (or any number of personal services performed) by a member of the opposite sex.” *Id.* at 1013-14.

46. 860 F.2d 328 (9th Cir. 1988).

47. *Id.* at 329-34.

48. *See id.* at 334. *Contra* *Jordan v. Gardner*, 986 F.2d 1521, 1531 (9th Cir. 1993) (en banc) (holding that a policy at a women’s prison permitting random cross-gender clothed-body searches of female inmates constituted cruel and unusual punishment in violation of the Eighth Amendment).

49. *Michenfelder*, 860 F.2d at 333.

50. *See id.*

51. LEX K. LARSON & ARTHUR LARSON, 3 EMPLOYMENT DISCRIMINATION § 43.02[3][b], at 43-8 (2d. ed., rev. 73, 2006); *see also* *Veleanu v. Beth Isr. Med. Ctr.*, No. 98 CIV. 7455(VM), 2000 WL 1400965, at *8 (S.D.N.Y. Sept. 25, 2000) (quoting the corresponding passage from a prior edition of LARSON & LARSON); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. at 1191, 1194-95 (E.D. Ark. 1981) (same), *vacated by* 671 F.2d 1100 (8th Cir. 1982) (holding issue moot).

bodies and sexuality from exposure are simply different and more valuable than other types of customer preferences, in particular those for commodified sexuality.

The perfectionist ideal underlying and driving courts' permissiveness toward discrimination in the privacy cases is one focused on the value and importance of protecting personal and sexual autonomy, particularly from forced exposure. Courts do not require that women or men shield their bodies and sexuality from exposure to the opposite sex; rather, they are vigilant in ensuring that women and men who choose to do so should be so permitted.⁵²

The flip side of the privacy cases is the sexual titillation cases in which employers seek to discriminate on the basis of sex in order to provide customers with a desired form of sexual titillation. These employers also raise the BFOQ defense to justify their discrimination. While courts accept such BFOQ defenses from employers that sell virtually nothing but sex, they refuse to accept it from employers that sell sex along with other goods and services. I refer to businesses of the first type as sex businesses and businesses of the second type as plus-sex businesses.⁵³ As before, courts' rulings in these cases simply cannot be explained by Title VII's core doctrinal requirements of status blindness and antisubordination. While it was courts' permissiveness toward discrimination in the privacy cases that revealed their perfectionism, it is their impermissiveness toward discrimination in these cases that is so revealing.

Sexual titillation-based BFOQ cases can also be thought of as falling along a continuum. At one end are cases involving jobs in which a particular body is needed and used physically for the sexual gratification

52. This concern with protecting personal autonomy over one's body and sexuality explains why courts protect women's preferences in these cases even when they appear to be illogical or based on socially harmful stereotypes regarding appropriate gender roles. For instance, courts respect women's preferences to be cared for only by female obstetrics and gynecology nurses and thus permit hospitals to discriminate on the basis of sex in hiring such nurses, even when the same women are having their babies delivered by male doctors. See *EEOC v. Mercy Health Ctr.*, No. Civ. 80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982); *Backus*, 510 F. Supp. at 1193. Similarly, courts respect elderly women's preferences to be served only by female nurses even when the same women are simultaneously being cared for by male doctors. See *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978).

53. See Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004) (examining cases in this area and adopting this terminology).

of another person. Prostitution and, arguably, lap dancing rest at this end of the sexual titillation continuum. Though I know of no challenges to the sex-based hiring of prostitutes (where legal) or lap dancers by businesses that employ such workers, it seems likely that courts would permit such sex-based hiring as a BFOQ.

The middle of the sexual titillation continuum consists of cases in which the good for sale is not the use of another's body for sexual gratification but the use of another person as a sexual gaze object. As in the cases described above, sexual titillation is the exclusive good for sale, but the means of arousal differs. Cases involving the sex-based hiring of strippers and Playboy centerfolds fall into this category. Again, courts and commentators have assumed that sex is a BFOQ for these positions.⁵⁴ I refer to business of both sorts as sex businesses.

The other end of the sexual titillation continuum consists of cases in which employers seek to sell sexual arousal, generally through the provision of gaze objects along with some other nonsexual good or service. In these "plus-sex businesses," the nonsexual good or service being sold can be anything from food to safe air transport. Attempts to discriminate on the basis of sex in hiring for plus-sex businesses are virtually always unsuccessful.⁵⁵

The most famous plus-sex BFOQ case is *Wilson v. Southwest Airlines*.⁵⁶ In 1971, Southwest, then a fledgling airline trying to carve out a market niche for itself, took the advice of an advertising agency

54. See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) ("[I]n jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer, the job automatically calls for one sex exclusively"); LARSON & LARSON, *supra* note 51, § 43.03[1], at 43-24 (contending that sex is a BFOQ for hiring in businesses where the "distinctive product inherently includes a component of female sexiness"); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 205 (1992) (noting that hiring only females as strippers is permissible).

55. See, e.g., *Wilson*, 517 F. Supp. 292 (prohibiting sex discrimination in hiring flight attendants and ticket agents). Cf. *Guardian Capital Corp. v. N.Y. State Div. of Human Rights*, 360 N.Y.S.2d 937 (N.Y. App. Div. 1974) (requiring a threshold showing of economic advantage to qualify for BFOQ exception). An interesting exception to this rule was the hiring of Playboy Bunnies at Playboy Clubs. Bunnies generally served customers food along with sexual eye candy. Despite the plus-sex nature of the business, state adjudicatory bodies held that sex was a BFOQ for hiring Playboy Bunnies. See *St. Cross v. Playboy Club*, Case No. CSF 22618-70, Appeal No. 773 (N.Y. State Div. of Human Rights, Dec. 17, 1971), available at <http://njlegallib.rutgers.edu/misc/aromi.pdf> (quoting opinion in its entirety at *5-7) (last visited Aug. 20, 2006); *Weber v. Playboy Club*, Case No. CSF 22619-70, Appeal No. 774 (N.Y. State Div. of Human Rights Dec. 17, 1971), available at <http://njlegallib.rutgers.edu/misc/aromi.pdf> (quoting opinion in its entirety at *5-7) (last visited Dec. 20, 2006). Hooters restaurants are perhaps the most obvious current example of a plus-sex business, though no court has ruled on Hooters' policy of hiring only women as food servers, or "Hooters Girls."

56. 517 F. Supp. 292 (N.D. Tex. 1981).

and decided to conceptualize and market itself as a company selling not only air travel but also heterosexual male titillation.⁵⁷ In accordance with Southwest's conceptualization of itself as the "love airline," Southwest hired only women for the high-customer-contact positions of ticket agent and flight attendant.⁵⁸ A class of male job applicants who were denied positions as a result of Southwest's female-only hiring criteria sued the airline.⁵⁹

Despite evidence that Southwest's business had flourished during the "love airline" campaign, the district court rejected Southwest's BFOQ defense, concluding that airlines were in the business of selling safe transport and not sexual titillation.⁶⁰ "Like any other airline," the court ruled, "Southwest's primary function is to transport passengers safely and quickly from one point to another."⁶¹ Sexual titillation was "tangential" to Southwest's business and could not justify sex-based hiring.⁶²

As *Southwest* indicates, courts do not permit employers to sell sexual titillation along with other goods and services. In rejecting plus-sex

57. *See id.* at 294. As the court noted, Southwest adopted a specific female personality as its corporate image:

This lady is young and vital . . . she is charming and goes through life with great flair and exuberance . . . you notice first her exciting smile, friendly air, her wit . . . yet she is quite efficient and approaches all her tasks with care and attention

Id. (quoting materials Southwest's advertising agency provided to the airline). The court also noted that "[u]nabashed allusions to love and sex pervade all aspects of Southwest's public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love." *Id.* at 294 n.4.

58. *Id.* at 294-95.

59. *Id.* at 293.

60. *Id.* at 295 n.6, 304.

61. *Id.* at 302.

62. *Id.* The court explained:

While possession of female allure and sex appeal have been made qualifications for Southwest's contact personnel by virtue of the "love" campaign, the functions served by employee sexuality in Southwest's operations are not dominant ones. According to Southwest, female sex appeal serves two purposes: (1) attracting and entertaining male passengers and (2) fulfilling customer expectations for female service engendered by Southwest's advertising which features female personnel. As in *Diaz*, these non-mechanical, sex-linked job functions are only "tangential" to the essence of the occupations and business involved. Southwest is not a business where vicarious sex entertainment is the primary service provided. Accordingly, the ability of the airline to perform its primary business function, the transportation of passengers, would not be jeopardized by hiring males.

Id.

BFOQ defenses, courts force these businesses either to become traditional nonsex businesses and abandon their sexual titillation mission or, alternatively, to adopt a more pure sex focus.

It is difficult, however, to argue that courts' prohibition on sex discrimination by plus-sex businesses is required by some formal conception of sex-blind equality. In a meaningful sense, plus-sex employers are treating female and male applicants equally, subjecting both to the same set of hiring requirements. It is simply the case that, depending upon whom the employer is trying to sexually arouse, individuals of one sex or the other are likely to be deemed unqualified.

Consider a restaurant owner who defines food server positions as requiring that individuals serve food while acting as sexually arousing gaze objects for heterosexual men. If the employer's job definition is accepted, then male applicants are not being denied equal treatment when they are refused food server jobs. They are being refused jobs because they are simply not as well qualified as women given the employer's stated job requirements.

At the very least, hiring of this sort seems to fall squarely within Title VII's BFOQ exception. Sex-based hiring in such cases is necessary to the "normal operation of the business" as well as to its "essence" as conceived by both employers and customers. To force an employer trying to sell heterosexual male titillation through sexy female food servers to also hire male food servers is to fundamentally change the nature of its business. Not surprisingly then, in deciding such cases, courts do not just require employers to compare women and men on the same job-related metric as defined by employers. Instead they redefine the metric employers may use to be one on which women and men will have similar chances of success. Courts must, in short, first redefine the nature of the business at issue in order to then find that sex-based hiring is actionable discrimination.⁶³ Something other than a formal principle of sex-blind equality is driving the initial redefinition. This something else, I contend, is perfectionism.

Courts' prohibition on discrimination in these plus-sex cases is also difficult to explain by relying on a standard antisubordination principle. Given the far greater demand for the commodification of female

63. Richard Epstein strongly criticizes just this kind of redefinition. According to Epstein, "the dangers of government tyranny are systematically underestimated when [Title VII] tells a firm that it cannot provide its customers with the service they want and instead tells the customers to like the services that are provided." RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW 305 (1992).

sexuality than male sexuality,⁶⁴ allowing employers to define businesses as including explicit sexual titillation elements would in all likelihood lead to a wide range of jobs from which men but not women are excluded. In other words, from a purely numerical perspective, the sexualization of mainstream jobs is likely to help, rather than hurt, women's job prospects.

There is, however, a more subtle slippery slope antisubordination argument that helps to explain and justify courts' treatment of plus-sex businesses. This slippery slope argument focuses on the parade of horrors that would occur if employers could include sexual titillation as a job requirement for mainstream jobs. Once employers are permitted to make hiring decisions based on their desire to sell female sexual gaze objects along with other goods and services, it becomes difficult to see why employers should not also be permitted to make hiring decisions based on their desire to sell not only a gendered type of sexuality, but also a gendered type of allure or aura, or even a particular kind of business ambience inextricably linked with workers of one sex or the other. I refer to such hiring requirements as "sex-specific soft qualifications."⁶⁵ The concern is not only that jobs will be explicitly gendered, but that the jobs linked directly or indirectly to maleness, for which an employer will hire only men, will be of higher status and higher pay than the jobs linked directly or indirectly to femaleness, for which an employer will hire only women.⁶⁶

64. There is little statistical data available regarding the numbers of women and men in the sex industry. However, the different circulations of *Playboy* and *Playgirl* magazines are suggestive of the greater social demand for commodified female sexuality than for commodified male sexuality. Accounting for both newsstand and subscription sales, *Playboy's* monthly circulation in 2001 was more than five times greater than *Playgirl's*—3,150,000 and 575,000, respectively. 3 ULRICH'S PERIODICALS DIRECTORY 2002, at 5716, 8105 (40th ed. 2001). The relative pay scales of female and male centerfolds also reflects this greater social demand for commodified female sexuality. *Playboy* playmates are paid \$25,000 for the monthly centerfold. *Playboy* Playmate Frequently Asked Questions, *Playboy* Magazine, <http://www.playboy.com/playmates/faq/tradition.html> (last visited Dec. 20, 2006). In comparison, male models posing for the centerfold of *Playgirl* are paid between \$1000 and \$10,000, depending on whether the model is a celebrity and whether the model arranges independent publicity for the magazine. *Playgirl* has never paid more than \$10,000 to obtain a centerfold model. Interview by Lia Monahan with Michelle Zipp, Editor-in-Chief, *Playgirl* Magazine (Nov. 25, 2002).

65. For a fuller discussion of the distinction between technical and soft job qualifications see Yuracko, *Private Nurses and Playboy Bunnies*, *supra* note 53, at 184-88.

66. For example, many of the jobs traditionally thought of as male—such as doctor, lawyer, and airline pilot—are relatively high in pay and prestige. According to

Consider, for example, the argument made by Joe's Stone Crab in response to allegations that it discriminated against women in hiring food servers. Joe's Stone Crab is a Miami Beach landmark restaurant in service since 1913.⁶⁷ In 1991, the Equal Employment Opportunity Commission (EEOC) filed a charge against Joe's alleging that it discriminated against women in hiring food servers. From 1950 on, the serving staff at Joe's was almost exclusively male.⁶⁸ Indeed, from 1986 through 1990, Joe's 108 food servers were all male.⁶⁹ In response to the EEOC's disparate treatment claim, Joe's argued that it did not intentionally discriminate against women in hiring, but instead hired so as to create a particular kind of Old World ambience associated with the highest quality restaurants in Europe.⁷⁰ This ambience, Joe's managers and experts made clear, was inextricably linked with male-only food servers.⁷¹

After a bench trial, the district court found that Joe's "sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu."⁷² Despite this factual finding, the district court concluded that Joe's had not engaged in intentional

the Bureau of Labor Statistics, in 2001 average salaries for doctors (family and general practitioners), lawyers, and pilots were \$110,020, \$91,920, and \$99,400, respectively. See United States Dep't of Labor, Bureau of Labor Statistics, 2001 National Occupational Employment and Wage Estimates, http://www.bls.gov/oes/2001/oes_nat.htm (follow links to appropriate occupational field) (last visited Dec. 20, 2006). Many jobs traditionally thought of as female—such as nurses, secretaries, and kindergarten teachers—are relatively lower in pay and prestige. That same year, nurses, secretaries, and kindergarten teachers earned an average of \$48,240, \$25,710, and \$41,100, respectively. *Id.* Perhaps not surprisingly, then, in the almost forty years since the passage of Title VII, women have made great strides in entering at least some of these male fields. Women make up 27.9% of doctors and 29.6% of lawyers, but only 3.7% of airline pilots. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 380-82 (121st ed.). In contrast, men have not rushed to become nurses, secretaries, or kindergarten teachers. These jobs remain overwhelmingly female, with women making up 92.8% of registered nurses, 98.9% of secretaries, and 98.5% of kindergarten teachers. *Id.*

67. EEOC v. Joe's Stone Crab, Inc., 969 F. Supp. 727, 730 (S.D. Fla. 1997), vacated by 220 F.3d 1263 (11th Cir. 2000).

68. *Id.* at 731.

69. *Id.* at 733. In the years after the EEOC filed its charge against Joe's, the restaurant added eighty-eight food servers, nineteen of whom were women. *Id.*

70. *Id.* at 732-33.

71. *Id.* at 731-32. In fact, Joe's former owner and manager, Grace Weiss, attributed the company's male-only hiring practices to "the ambience of the restaurant" and other factors. *Id.* at 732 (emphasis omitted). Joe's expert in restaurant management, Karen McNeil, helped elaborate precisely what kind of atmosphere Joe's was trying to create and why the appropriate atmosphere was necessarily exclusively male:

It has been an attitude and standard, it comes from Europe. In all of Europe you will find in all of the grade three restaurants in Europe, there is an impression that service at that high level is the environment of men, and that it ought to be that way.

Id.

72. *Id.* at 733.

discrimination against women.⁷³ In reaching this conclusion, the court necessarily accepted that a job candidate's ability to contribute to the particular ambience that Joe's sought to create was a legitimate qualification upon which Joe's could base hiring decisions.

The court of appeals, however, did not agree.⁷⁴ According to the Eleventh Circuit, Joe's practice of hiring food servers based, in part, on the sex-specific soft qualification of their ability to contribute to the restaurant's Old World ambience was an illegitimate form of intentional sex discrimination.⁷⁵

The slippery slope argument contends that if mainstream employers are permitted to make sexuality a job requirement, it will be impossible to keep mainstream employers, like Joe's, from making other sex-specific soft qualifications job requirements. Again, the danger is not only that women will be disproportionately excluded from jobs, but that they will be excluded from jobs that are the most desirable.

In actual fact, however, the slope may not be so slippery. Simply recognizing sexiness as a job requirement in plus-sex businesses does not necessarily mean that courts will be unable to prevent employers from requiring a wide range of other sex-specific soft qualifications. Courts could easily, and reasonably, hold that sex-based hiring by businesses trying to sell a particular type of sexual arousal is necessary and bona fide, while sex-based hiring in order to provide a more diffuse and socially constructed kind of gendered atmosphere is not.

Courts could, for example, distinguish between a restaurant's desire to sell sexual titillation along with food and an investment bank's desire to sell male machismo along with investment advice, permitting sex-based hiring in the former but not the latter. This distinction may be justified either on the ground that the former is more biologically linked than the latter, and hence raises a stronger demand for sex-based hiring, or on the ground that while both "goods" require sex-based hiring, only the former is valuable and significant enough to customers and employers to justify sex-based hiring.

73. *Id.* at 741.

74. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1267-68 (11th Cir. 2000).

75. The court of appeals explained: "[T]he record extant and some of the district court's findings of fact can be read to support the alternate conclusion that Joe's management intentionally excluded women from food serving positions in order to provide its customers with an 'Old World,' fine-dining ambience." *Id.* at 1281 (emphasis omitted).

It is difficult, then, to understand courts' prohibition on sexual titillation in mainstream jobs without resort to underlying perfectionist ideals. Courts' wholesale redefinition of these businesses—stripping them of their explicit sexualization element—is simply neither demanded nor explained by Title VII's antidiscrimination mandates.

Such redefinition reveals instead both a sense of the importance of promoting individuals' intellectual and cognitive development and a sense of the danger that explicit sexualization poses to such development. Consider, for example, courts' rulings in sexual harassment cases prompted by employer attempts to explicitly sexualize workers. In *EEOC v. Sage Realty Corp.*, the plaintiff, Margaret Hasselman, worked as a lobby attendant in an office building in New York City.⁷⁶ Her employer referred to her position as that of "lobby hostess"⁷⁷ and employed only women in the position.⁷⁸

As part of her job, Hasselman wore a theme-based uniform that changed approximately every six months.⁷⁹ In the spring of 1976, Sage required Hasselman to wear a bicentennial uniform, which was a red, white, and blue poncho-like outfit. Although the uniform was largely open on the sides, Hasselman was not permitted to wear a shirt under the uniform and could only wear blue dance pants on her legs.⁸⁰ The uniform revealed Hasselman's thighs, portions of her buttocks, and both sides of her body.⁸¹

Hasselman sued Sage arguing that the costume inappropriately turned her into a sex object⁸² and made her the target of sexual propositions, lewd comments, and obscene gestures.⁸³ The district court ruled that the uniform requirement constituted illegal sex discrimination because the bicentennial uniform caused Hasselman to be sexually harassed.⁸⁴ The

76. 507 F. Supp. 599, 602 (S.D.N.Y. 1981).

77. *Id.* at n.3.

78. *Id.* at 609 n.15 ("Defendants adopted an all-female 'lobby hostess' practice in the fall of 1975.")

79. *Id.* at 603-04.

80. *Id.* at 604.

81. *Id.* at 605 & n.11.

82. *Id.* at 606 & n.12. Hasselman complained about her sexualization in a letter to Sage's president. Hasselman wrote:

[T]he uniform is apparently designed in such a way that it is sexually revealing. . . . I always see my post in the lobby as one which is charged with definite duties and responsibilities. None of these duties and responsibilities . . . requires me to be a sex symbol in skimpy costume. . . . To put it simply, the uniform that I am required to wear is degradative [sic] to my character and offensive to me as a woman.

Id. at 606 n.12 (second alteration in original).

83. *Id.* at 605-06.

84. *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

court did more, however, than order the employer to stop the harassment.⁸⁵ It also ruled that Sage could not require Hasselman to wear a sexually revealing uniform.⁸⁶ The court simply would not permit Sage to explicitly sexualize Hasselman's lobby attendant position.

Similarly, in *Priest v. Rotary*, a hotel lounge hired the plaintiff to work as a cocktail waitress.⁸⁷ When the plaintiff refused to wear clothing that was sufficiently sexually revealing, she was reassigned to the hotel coffee shop where waitresses received significantly lower tips. While working at the coffee shop, the plaintiff was subjected to repeated sexual touching by the supervisor who had hired her. Again, the court held not only that the supervisor had engaged in illegal sexual harassment, but also that the supervisor had acted illegally by requiring the plaintiff to wear sexually revealing clothes and sell sexual titillation along with drinks as part of the job of cocktail waitress.⁸⁸

harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant.”)

85. Even the court's very conclusion that the conduct at issue in this case constituted harassment seemed to depend on its implicit conclusion that this was not a business in which the sale of sex was permissible or appropriate. To the extent that the employer in Sage Realty was attempting to define the job of lobby hostess as involving the explicit sale of sexual titillation along with various lobby services, it is not clear that the sexual comments and gestures the plaintiff received would actually constitute sexual harassment. Several commentators have argued, for example, that what constitutes sexual harassment must be context specific, for example, conduct that might be considered legal harassment when directed at a librarian might not so qualify when directed at a stripper. See, e.g., Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994); Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1146-47 (1995).

86. 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].

Sage Realty, 507 F. Supp. at 611.

87. 634 F. Supp. 571, 574 (N.D. Cal. 1986).

88. *Id.* at 574-76, 581. The court explained:

Title VII is . . . violated when an employer requires a female employee to wear sexually suggestive attire as a condition of employment. Plaintiff Priest established a prima facie violation of Title VII by demonstrating that defendant Rotary removed her from her full-time, permanent employment as a cocktail lounge waitress because she refused to wear such sexually suggestive dress.

These sexual harassment decisions, like the BFOQ decisions, reflect a judicial concern not only with ensuring women access to jobs, but with ensuring women access to particular kinds of jobs—those that will foster a valuable kind of human development. This valuable self-development emphasizes rational and intellectual, rather than sexual, capabilities. Moreover, the decisions reflect a skepticism about the possibility, perhaps for women in particular, of developing these valued capacities in contexts that have explicit sexual and nonsexual components. In other words, courts' neat division of the work world into sex and nonsex jobs and their unwillingness to allow employers to sexualize mainstream jobs seems driven, at least in part, by an implicit perfectionism that seeks to promote and protect women's ability to develop as intellectual and rational actors by carving out a work space where they cannot be formally and explicitly sexualized.

In sum, courts' decisions in these sexuality-related discrimination cases reveal a fairly consistent and uniform set of perfectionist ideals. Courts routinely prohibit explicit sexual titillation demands within mainstream businesses in order to preserve a desexualized zone of the work world in which women and men will be explicitly and exclusively valued for their intellectual and cognitive achievements. Courts routinely permit sex discrimination on behalf of customer privacy preferences in order to protect individuals' ability to shield their bodies and sexuality from forced market exposure. Intellectual development and noncommodified forms of sexual autonomy and expression are distinctly valued while commodified sexuality is deemed less valuable and even, in some contexts, potentially harmful.

Empirical research provides some support for courts' underlying disaggregation hypothesis. Studies suggest that the sexualization or hyper-feminization of women in the workplace alters the way they are treated by others, so that their intellectual and professional attributes are less likely to be recognized and encouraged. Psychologists Brad Bushman and Angelica Bonacci conducted a study in which subjects watched sexually explicit and neutral television programs. They found that after viewing sexual images, people of both sexes had impaired memory for the substance of whatever had come next.⁸⁹ These television findings may also hold with respect to interpersonal contact.

Defendant Rotary failed to articulate any legitimate non-discriminatory reason for the imposition of the dress requirement on Ms. Priest.
Id. at 581 (citations omitted).

89. See Brad J. Bushman & Angelica M. Bonacci, *Violence and Sex Impair Memory for Television Ads*, 87 J. APPLIED PSYCHOL. 557 (2002). Bushman and Bonacci studied the effects that watching violent, sexually explicit, or neutral television shows had on individuals' ability to recall the substance of commercials embedded within the

It may be that the more explicitly sexualized women are, the more distracted men are, and the less men listen to the substance of what women say. Other studies show that the feminization of women in the work world, even without their explicit sexualization, leads to perceptions of their diminished professional competency. Sandra Forsythe and her colleagues found that simply dressing female managerial job candidates in feminine clothing caused them to be perceived as less competent for managerial positions.⁹⁰ One can reasonably assume that such perceptions of diminished capability affect the way others treat and interact with these feminized women.

Research suggests that sexualizing women at work may also undermine women's intellectual development by diverting their own energies and attention from intellectual pursuits to their physical and sexual appearance. Consider a 1998 study by Barbara Fredrickson and her colleagues seeking to test the impact of women's self-objectification on their ability to perform intellectually demanding tasks.⁹¹ The researchers had male and female students take a challenging math test while trying on either a swimsuit or a sweater. The swimsuit was meant to trigger, at least for women, the same body consciousness caused by their social sexual objectification.

shows. Bushman and Bonacci found that memory recall was impaired for individuals watching either violent or sexually explicit shows and suggested that the impairment might be due to individuals focusing more of their attention on violent and sexually explicit shows than on neutral shows, and this increased attention decreases the attention they can direct to any other competing message. *Id.* at 561.

90. See Sandra Monk Forsythe et al., *Dress as an Influence on the Perceptions of Management Characteristics in Women*, 13 HOME ECON. RES. J. 112 (1984); Sandra Forsythe et al., *Influence of Applicant's Dress on Interviewer's Selection Decisions*, 70 J. APPLIED PSYCHOL. 374 (1985). Forsythe and her colleagues had seventy-seven personnel administrators, 80% of whom were male, evaluate videotapes of four applicants for a managerial position. The applicants were dressed in outfits that differed in their degree of masculinity and femininity. Participants rated video applicants as being least forceful, self-reliant, dynamic, aggressive, and decisive when they wore the most distinctly feminine dress. Interestingly, though, participants viewed the female candidates as most strongly possessing these traits not when they wore the most masculine outfit but when they wore the second most masculine outfit. The researchers hypothesized that this occurred because the participants viewed the most masculine outfit as being inappropriate for women, and it therefore resulted in lower managerial competency ratings. See Forsythe, *Dress as an Influence on the Perceptions of Management Characteristics in Women*, *supra* at 118-19; Forsythe, *Influence of Applicant's Dress on Interviewer's Selection Decisions*, *supra* at 375-78.

91. Barbara Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 269 (1998).

The study involved eighty-two undergraduate students at the University of Michigan, forty-two women and forty men.⁹² Researchers told participants that they were taking part in a study concerning “emotions and consumer behavior.”⁹³ After first bolstering the cover story by asking participants to evaluate a fragrance, researchers left participants alone in a room and told them, over headphones, to try on either a swimsuit or a sweater. They randomly assigned female participants to try on either a one-piece swimsuit or a V-neck sweater. They randomly assigned male participants to try on either swim trunks or a crew-neck sweater.⁹⁴ While wearing either the swimsuit or the sweater, participants completed questionnaires asking how they felt about themselves—both generally and at that moment. Researchers then asked the participants, again via headphones, to complete a math test, which they claimed was unrelated to the study.

Fredrickson and her colleagues found that individuals in the swimsuit were more focused on their bodies and described themselves more in terms of their bodies than individuals wearing the sweaters.⁹⁵ According to the researchers, wearing the swimsuit caused an increase in self-objectification—an increase in the feeling that “I am my body”—for both women and men as compared to those wearing the sweater.⁹⁶ This self-objectification differed, however, in both its nature and effect for the female and male students.

Wearing the swimsuit prompted women to feel an increase in shame about their bodies but did not raise such feelings in men.⁹⁷ More importantly, wearing a swimsuit actually impaired women’s, but not men’s, intellectual performance. Controlling for students’ past performance on standardized math tests, the researchers found that women wearing the swimsuits performed significantly worse on the math test than did women wearing the sweaters. Men’s performance on the math test was not affected by what they were wearing.⁹⁸ The researchers concluded, somewhat cautiously, that women’s self-objectification “does indeed draw on women’s attentional resources and disrupt[s] their mental performance.”⁹⁹

92. *Id.* at 276-77.

93. *Id.* at 277.

94. *Id.*

95. *Id.*

96. *Id.* The researchers describe self-objectification as a preoccupation with physical appearance. *Id.* at 270-71.

97. *Id.* at 277-78. Body shame was measured based on participants’ degree of endorsement of statements such as “I wish I were invisible,” “I feel like covering my body,” and “I wish I could disappear,” and on participants’ ratings of how much they would like to change specific attributes of their bodies. *Id.* at 273, 276-77.

98. *Id.* at 279.

99. *Id.* at 280.

Subsequent research suggests that the negative effects of self-objectification may not in fact be sex-specific. Michelle Hebl and her colleagues hypothesized that the Fredrickson study found a sex-based performance impact because the study did not induce a parallel state of self-objectification for men and women. Hebl and her colleagues replicated the Fredrickson study, but instead of asking male participants to wear either a sweater or swim trunks, as Fredrickson had, they asked male participants to wear either a sweater or a Speedo bathing suit.

The researchers believed that asking male participants to try on Speedos placed men in comparably objectifying conditions to those experienced by their female counterparts.¹⁰⁰ The researchers found that men in the Speedo, just like women in the swimsuit, did indeed perform more poorly on the math test than their sweater-clad counterparts.¹⁰¹ Together, these studies suggest that courts may indeed be right in viewing the explicit sexualization of the workplace as potentially dangerous to other more valuable forms of individual development.

IV. GENDER NONCONFORMITY AT WORK

In this section, I examine an area of case law in which courts' antidiscrimination decisions also reveal underlying perfectionist value judgments but where these judgments are fractured and inconsistent—namely, cases addressing the antidiscrimination demands of gender nonconforming women and men. The cases reveal, through their inconsistency and incoherence, courts' own disagreement about the value of different conceptions and expressions of gender and personal identity.

Courts' treatment of discrimination against gender nonconforming women and men is unstable and muddled. With some exceptions discussed in more detail shortly, courts treat discrimination against butch women and effeminate men as actionable sex discrimination¹⁰² but allow

100. Michelle R. Hebl et al., *The Swimsuit Becomes Us All: Ethnicity, Gender, and Vulnerability to Self-Objectification*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1322, 1324 (2004).

101. *Id.* at 1329 (“[A]ll participants tended to perform worse when they were in a self-objectifying situation than when they were in the control condition.”). The researchers also found a general increase in body shame among women and men in the swimsuit as opposed to the sweater. *Id.* at 1327.

102. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination against a woman for failing to behave in a feminine enough manner constituted discrimination because of sex), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-1966, 105 Stat. 1071 (setting new standards for the affirmative

discrimination against those who violate sex-specific grooming codes or engage in cross-dressing.¹⁰³ Employers must bear the costs of including

defense in “mixed motive” cases but not affecting the holding regarding what constitutes sex-based discrimination, as cited in many of the cases listed here), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994); Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (finding that “[a]t its essence, the systematic abuse directed at [plaintiff] reflected a belief that [plaintiff] did not act as a man should act” and concluding that discrimination of this sort constituted actionable harassment “because of sex”); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (noting that “a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (stating that “[t]he Court in Price Waterhouse implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex”); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (explaining that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”) (citation omitted); Doe ex rel. Doe v. City of Belleville, Ill., 119 F.3d 563, 581 (7th Cir. 1997) (explaining that “a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he 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”), *vacated*, 523 U.S. 1001 (1998) (remanding for further consideration in light of *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998)); Martin v. New York State Dep’t of Corr. Servs., 224 F. Supp. 2d 434, 446-47 (N.D.N.Y. 2002) (recognizing sex stereotyping as a form of sex discrimination but finding that the plaintiff did not present any evidence showing that he was, or was perceived by his coworkers to be, effeminate); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217-18, 1222-25 (D. Or. 2002) (denying defendant’s summary judgment motion and holding that discrimination because of female plaintiff’s masculine traits and appearance constituted valid Title VII sexual harassment claim); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (holding that the plaintiff had presented sufficient evidence of sex discrimination to survive summary judgment by showing that his coworkers “punished him because they perceived him to be impermissibly feminine for a man”); Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 134 (D. Mass. 2001) (finding that the plaintiff had stated a cause of action under Title VII where he alleged that he was discriminated against because he did not conform to the male gender stereotype), *dismissed*, 183 F. Supp. 2d. 415 (D. Mass. 2002) (granting post discovery summary judgment after finding insufficient evidence of sex discrimination).

103. See, e.g., Tavora v. New York Mercantile Exch., 101 F.3d 907, 908-09 (2d Cir. 1996) (holding that it did not violate Title VII for an employer to require male employees to have short hair while imposing no similar restriction on female employees); Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1087-88 (5th Cir. 1975) (holding that company policy prohibiting long hair for male employees but not for female employees did not violate Title VII); Oiler v. Winn-Dixie La., Inc., No. CIV.A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. Sept. 16, 2002) (granting defendant’s motion for summary judgment on grounds that the male employee who was terminated for dressing and acting like a woman during off-work hours was not discriminated against because of sex); Dobre v. Nat’l R.R. Passenger Corp., 850 F. Supp. 284, 285-87 (E.D. Pa. 1993) (holding that plaintiff, a male-to-female transsexual who claimed she was discriminated against by, among other things, being forced to dress as a man, could

the first group of gender nonconformists in the workplace while the latter group must bear the costs of changing themselves if they want inclusion. Certainly some of courts' antidiscrimination mandates may be justified by antisubordination concerns and still others may be justified by a particularly "thick" conception of sex-blind equality. Neither traditional doctrine explains, however, why courts limit antidiscrimination protection in the ways they do. Ultimately, courts' distinction between protected and unprotected forms of gender bending reflects changing and unsettled judicial judgments about the relative worth of different forms of gender identity expression.

The Supreme Court laid the groundwork for antidiscrimination protection of gender nonconformists in *Price Waterhouse v. Hopkins*.¹⁰⁴ Ann Hopkins had worked in the Washington, D.C., office of Price Waterhouse for five years when the partners in that office proposed her for partnership in 1982.¹⁰⁵ Hopkins was the only woman among eighty-eight employees proposed for partnership that year.¹⁰⁶ The district court judge who initially heard Hopkins's sex discrimination case found that "[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."¹⁰⁷ Nonetheless, Hopkins was passed over for partnership and held for reconsideration the following year.¹⁰⁸

The man assigned by Price Waterhouse to tell Hopkins why they held over her candidacy provided her with several suggestions for improving

not state a claim for sex discrimination); *Lockhart v. Louisiana-Pac. Corp.*, 795 P.2d 602, 604 (Or. Ct. App. 1990) (holding that it did not constitute sex discrimination under Oregon law for an employer to fire a man for wearing an earring when female employees were permitted to do the same thing). *But see Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005) (finding sex discrimination stemming from male employee's adverse treatment resulting from his feminine mannerisms and appearance); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that plaintiff penalized for feminine appearance could state a claim for sex discrimination). *See generally infra* note 136 and accompanying text (discussing these opinions further).

104. 490 U.S. 228.

105. *Id.* at 233.

106. *Id.*

107. *Id.* at 234 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112 (D.D.C. 1985), *aff'd in part & rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, *Price Waterhouse*, 490 U.S. 228).

108. *Id.* at 233. Of the eighty-eight people proposed for partnership that year, forty-seven were admitted to the partnership, twenty-one were rejected, and twenty were held for reconsideration the following year. *Id.*

her chances the following year.¹⁰⁹ He told her she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹¹⁰

The Supreme Court, ruling in favor of Hopkins, held that it was an impermissible form of sex discrimination for an employer to penalize a woman for acting in the aggressive and competitive ways deemed acceptable and even desirable in men. The Court held that “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.”¹¹¹ Sex stereotyping of this sort, the Court held, was actionable sex discrimination and was clearly present in this case. According to the Court:

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.¹¹²

Price Waterhouse was ultimately ordered to admit Hopkins to the partnership.¹¹³

The Supreme Court justified its antidiscrimination requirement on antisubordination grounds. Women would be put in an impermissible “catch 22,” the Court said, if they could be penalized for being aggressive and competitive when prestigious jobs often required these very characteristics.¹¹⁴ Women would be denied high powered jobs if they

109. *Id.* at 235 (quoting *Hopkins*, 618 F. Supp. at 1117).

110. *Id.* As part of the partnership consideration process, several partners at Price Waterhouse submitted comments regarding Hopkins’s candidacy. Several of these also touched on Hopkins’s apparent gender inappropriateness:

One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.”

Id. (first alteration in original) (citations omitted).

111. *Id.* at 250.

112. *Id.* at 256.

113. *See Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990) (affirming the lower court’s order that Hopkins be admitted to the partnership); *see also* ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996) (describing the circumstances preceding and following Hopkins’ sex discrimination case against Price Waterhouse).

114. According to the Court, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and

were not aggressive and competitive—because they would then not be able to successfully do the job—and denied such jobs if they were aggressive and competitive—because such traits were found unpleasant in women. Such a double bind, the Court held, was impermissible, as it would deny women access to a wide range of jobs, particularly those with power and prestige.¹¹⁵ “Title VII lifts women out of this bind” by demanding a disconnect between the social perception of aggressiveness in women with bitchiness.¹¹⁶

Several scholars have argued that *Price Waterhouse*’s antisubordination principle demands similar antidiscrimination protection for both effeminate men and cross-dressers. Such antisubordination arguments necessarily focus on the importance for women of preventing certain kinds of discrimination against men. Scholars have argued, for example, that discrimination against effeminate men is a means of policing gender roles in the workplace and reaffirming gender scripts that discourage men from engaging in nurturing and caregiving activities. Such discrimination, the argument goes, pushes men to act in hyper-masculine and traditionally “macho” ways. While such role policing confines men, it also undermines women’s ability to compete successfully in the workplace.¹¹⁷ Allowing employers to discriminate against effeminate men reinforces gender norms that define male workers in large part by

impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.” *Price Waterhouse*, 490 U.S. at 251.

115. *Id.*

116. *See id.* The holding in *Price Waterhouse* is also consistent with an underlying perfectionism emphasizing the importance of an aggressive and assertive model of self-determination. Indeed, the Court’s choice to require employers to accept butch women, rather than to reformulate jobs to accommodate the demure and feminine, may indicate just such perfectionist principles. Perfectionism is not necessary, however, to make sense of the Court’s holding. As suggested here, one can explain *Price Waterhouse* by antisubordination concerns alone. The Court’s choice between reshaping preferences toward butch women and reshaping jobs to no longer require butchness is also consistent with a sense that it is simply more efficient to disturb the connection for women between butchness and bitchiness than to restructure high profile jobs so that the demure and feminine can do them as effectively.

117. Catharine MacKinnon, for example, analyzes both the cause and desired effect of the harassment of a gender-deviant man by his male coworkers as follows: “Goluszek was punished, ostracized, insulted, and forced to consume pornography to make him conform to [his male coworkers’] stereotype of how a man should be a man by subordinating women sexually.” Brief of National Organization on Male Sexual Victimization, Inc. et al. as Amicus Curiae Supporting Petitioner, at 10-11, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814 (discussing *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)).

their superiority over their female coworkers, thereby making women's effective participation in the workplace more difficult.¹¹⁸

Mary Anne Case has been the most articulate proponent of a similar antisubordination argument in favor of protecting male cross-dressers. “[U]nfortunately,” Case contends, “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.”¹¹⁹ As with the argument for protecting effeminate men, an antisubordination argument for protecting cross-dressing men focuses on the need for such protection in order to facilitate women's, not men's, integration into the work world and successful participation there. Women's full respect and integration in the workplace requires, according to Case, not only challenging the normativity of maleness in the workplace but challenging the normativity of male styles of dress as well.¹²⁰

Although lower courts have relied on *Price Waterhouse* to extend antidiscrimination protection to some gender nonconforming men, they have not relied on the case's antisubordination premise as a reason for doing so. Courts routinely rely on *Price Waterhouse* to protect effeminate men, but make no mention in those cases of any antisubordination concerns.

Instead, such courts have stripped the *Price Waterhouse* holding of its antisubordination foundation. They interpret the case as prohibiting not only those forms of sex stereotyping that reinforce traditional forms of sex-based subordination, but all sex stereotyping by which women and men are treated differently for engaging in the same behavior. They

118. For several versions of this argument, see generally Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-07 (1998) (describing how sexual harassment creates male control in the workplace and perpetuates masculine norms); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 760 (1997) (remarking that sexual harassment is a problem for both men and women as it is a “mechanism by which an orthodoxy regarding masculinity and femininity is enforced, policed, and perpetuated in the workplace”); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776 (1998) (“Just as dominant male workers may harass women who threaten their idealized image of masculinity on the job, they may also harass such nonconforming men.”).

119. 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, 7 (1995).

120. I have, elsewhere, challenged Case's antisubordination claims. It seems to me unlikely that having men in dresses in the workplace would challenge norms about women in dresses, or women more generally in the workplace. Instead, my suspicion is that men in dresses would only emphasize the non-normativity of feminine dress that is usually, although not exclusively, associated with women, leading career-minded women, and men, to avoid such clothing choices. See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 228-29 (2004).

interpret the case, in other words, as requiring a kind of formal status-blind trait equality whereby men must be permitted to do whatever women can do and vice versa.¹²¹

This reformulation of *Price Waterhouse* is perplexing for two reasons. It is difficult to understand as a conceptual matter, and it is difficult to reconcile with courts' actual decisionmaking.

As a conceptual matter, it is not clear that in the sex context defining nondiscrimination as status-blind trait equality makes theoretical or practical sense. Nondiscrimination as status blindness requires that women and men engaged in the same behavior be treated the same. It is not clear, however, that women and men can ever engage in precisely the same behavior in precisely the same way.

In a sexist society, nothing done by men and women has precisely the same meaning. Traits are not understood or viewed as isolated technical attributes. They are necessarily viewed in relation to all of the other traits an individual possesses and through a systematically gendered lens. Traits such as competitiveness or active leadership, for example, are perceived very differently when possessed by women or men. Consider one study in which researchers told participants to evaluate job candidates for a position as a university computer lab manager. Participants viewed videotapes and read "life philosophy" essays from female and male candidates.¹²² Researchers found that female candidates with essays that emphasized "agentic" qualities such as competitiveness were rated

121. 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"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (stating that "Price Waterhouse sets a rule that bars discrimination on the basis of sex stereotypes" and agreeing with Sanchez's contention "that the holding in Price Waterhouse applies with equal force to a man who is discriminated against for acting too feminine"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (citing *Price Waterhouse* to support its conclusion that men can sue for discrimination based on "stereotyped expectations of masculinity"); *Doe v. City of Belleville, Ill.* 119 F.3d 563, 580 (7th Cir. 1997) ("The Supreme Court's decision in *Price Waterhouse v. Hopkins* . . . makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."), *vacated*, 523 U.S. 1001 (1998) (remanding for further consideration in light of *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998)).

122. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 749-50 (2001). The study involved 172 undergraduates at Rutgers University—105 women and 67 men. *Id.* at 749.

“less socially skilled and likeable than an identically presented man.”¹²³ Another study found that the same leadership activities of women and men resulted in very different affective responses from those dealing with them.¹²⁴ Women engaging in group leadership activities received more displeased responses and fewer pleased responses from group members than did men engaging in the same behavior and making the same suggestions and arguments.¹²⁵

Price Waterhouse itself provides a good example of such gendered meanings. It is simply not the case that Hopkins was fired for exhibiting the same behavior that her male coworkers exhibited. Social meanings are real. Aggressiveness in women is bitchy in a way that aggressiveness in men is not. Competitiveness in women is threatening in a way that competitiveness in men is not. Vulgarity in women is shocking and disturbing in a way that vulgarity in men is not. Even if Ann Hopkins had engaged in the same types of conduct as her male colleagues, her behavior would not have been socially the same. Moreover, even when technical trait symmetries are possible, in the sense that women and men can physically do precisely the same thing, traits will mean very different things when possessed by a woman or by a man. Consider a man fired for wearing high-heeled shoes to work. What it means to wear heels as a man is very different from what it means to wear high heels as a woman. Wearing high heels as a woman fits into a particular pattern of aesthetic traits and attributes commonly and acceptably associated with women. Wearing high heels has meaning for women—a meaning

123. *Id.* at 757.

124. See Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48, 54-57 (1990). The study involved 168 student participants—84 women and 84 men. *Id.* at 49. Participants took part in small discussion groups composed of one male and one female participant plus one male and one female confederate trained by the researchers to perform the role of group leader in a standardized manner. *Id.* The study used two leader scripts, *A* and *B*, in all discussions. *Id.* In half the sessions, the male leader used script *A* while the female leader used script *B*; in the other sessions it was reversed. *Id.* Coders sat in an adjacent room behind one-way mirrors and tallied participants' nonverbal affect expressions. *Id.* at 50. Coders tallied nonverbal cues of pleasure—such as smiling or nodding in agreement—and nonverbal cues of displeasure—such as a furrowed brow, tightening of the mouth, or nods of disagreement. *Id.* In addition to controlling what the female and male leaders said, the researchers monitored the leaders for eye contact, gaze direction, body posture, amount of body movement, talking time, and four attitude measures—such as “friendly” and “aggressive.” *Id.* at 50-51. They found that the leaders did not differ significantly in any area except talking time, probably because participants challenged the female leaders more often. *Id.*; see also Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 16 (1992) (finding that women managers with a direct task-oriented leadership style are evaluated more negatively than men with similar management styles).

125. Butler & Geis, *supra* note 124, at 54.

associated with sexiness, dressiness, and physical display which stems from the trait's comfortable place within gender appropriate behavior. What it means to wear high heels as a man is entirely different. High-heel wearing is not part of a set of gender appropriate behaviors for men. As a result, high-heel wearing for men is commonly perceived as neither sexy nor dressy, but simply deviant and strange.¹²⁶

The lack of a real cross-sex parallel to the aggressive woman or the cross-dressing man raises significant problems for a status-blind conception of nondiscrimination. To whom must Hopkins be compared in order to determine if Price Waterhouse engaged in sex discrimination—a swearing, aggressive man or a man engaged in socially inappropriate and offensive office behavior? Similarly, to whom must the man in heels be compared—a woman in high heels or a woman in gender inappropriate and strange clothing?¹²⁷

Given the social reality of gender, an antidiscrimination law requiring sex-blind trait equality is at best indeterminate and at worst incoherent. This may, however, suggest the real points of courts' sex stereotyping prohibition rather than the problem with it.

The prohibition on sex stereotyping may reflect a significantly "thicker" conception of sex blindness—one requiring the eradication of, or at least willful blindness toward, gender norms. The underlying idea may be that nondiscrimination requires rigid neutrality toward women and men engaged in technically similar behavior, not because the

126. In *Oiler v. Winn-Dixie La., Inc.*, for example, the district court saw a man dressing as a woman as not only dissimilar from a woman dressing as a woman, but as disordered. *Oiler v. Winn-Dixie La., Inc.*, No. CIV. A. 00-3114, 2002 WL 31098541, at *5 (E.D. La. Sept. 16, 2002). According to the court:

[T]his is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. . . . The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

Id.

127. To point out that women and men can never possess precisely the same traits in precisely the same way is not to argue that employers are therefore justified in treating women and men differently. Recognizing the gendered meanings of traits is important, though, because it highlights that, to the extent that women and men should be treated the same, it is not because they are in fact precisely the same but in spite of the fact that they are not.

behavior really looks the same, but because the reason it looks different is illegitimate. Employers must be blind not only to sex as an independent characteristic when making employment decisions, they must also be blind to all the ways in which gender norms affect the social meanings attached to various behaviors and characteristics. This thick conception of sex blindness provides an analytical basis for, if not justification of, courts' anti-sex-stereotyping rhetoric.¹²⁸

This thick conception of antidiscrimination as sex blindness does not, however, explain courts' actual decisions. If one were to accept the notion that women and men performing similar acts must be treated the same regardless of gender norms, it makes no sense to distinguish, as courts do, between employers' treatment of men with effeminate mannerisms and their treatment of men in dresses or lipstick. Surely if sex blindness means that employers must treat effeminate men the same as feminine women, they must also treat men in dresses and lipstick the same as women in dresses and lipstick.¹²⁹ Courts' anti-sex-stereotyping interpretation of *Price Waterhouse* should, in other words, lead to prohibitions on discrimination against cross-dressing men, against those

128. There is not a good antidiscrimination-based justification for throwing out all gender norms without regard to their import or effect. See Yuracko, *supra* note 120, at 198-204.

129. This is precisely the argument made by both Mary Anne Case and Richard Posner and is the reason that Case favors, and Posner disfavors, such an interpretation of *Price Waterhouse*. Case contends:

[E]ffeminate men . . . as well as . . . men who violate sex-specific grooming codes by wearing feminine attire to work . . . are clearly protected by both the plain language of Title VII and the holding in *Hopkins*. If their employer tolerates feminine behavior or attire in women but not in them, the employer is subjecting them to disparate treatment in violation of Title VII.

Case, *supra* note 119, at 7. Posner, meanwhile, argues that "the case law has gone off tracks in the matter of 'sex stereotyping' . . ." precisely because some courts are interpreting Title VII to lead to the conclusions for which Case argued. *Hamm v. Wyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (2003) (Posner, J., concurring). According to Posner:

[T]here is a difference that subsequent cases [post-*Hopkins*] have ignored between, on the one hand, using evidence of the plaintiff's failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called "sex stereotyping," as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers to strip to the waist in hot weather. If a court of appeals requires lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual, against whom it is free to discriminate? That seems to me a very strange extension of the *Hopkins* case.

Id. at 1067.

who violate discrete sex-specific grooming codes, and even potentially against those penalized because of the sex of their romantic partners.¹³⁰

The fact that courts' gender nonconformity decisions do not in practice lead to such prohibitions suggests that something other than traditional concerns with subordination and status blindness are at work. The cases suggest that more complicated—and contested—value judgments about worthwhile and worthless expressions of gender identity are also playing a role in the decisions. In other words, what appears on the surface to be a liberal antidiscrimination principle may in fact be perfectionism in drag.

On one level, courts seem to be distinguishing between types of gender nonconforming behavior based on a guess about how important and integral the behavior is to the individual's sense of gender identity.¹³¹ Mannerisms and behaviors are given more protection than clothing and hair choices—particularly when courts deem the latter to be idiosyncratic expressions of personal preference rather than concerted efforts to express a core gender identity. Courts routinely deny antidiscrimination protection to men seeking to wear long hair or earrings where the behavior is not part of an overall effort to project a female gender identity.¹³² Similarly the Ninth Circuit, sitting en banc, recently rejected a woman's claim that her employer discriminated by

130. Several scholars have made this point. *See* Case, *supra* note 119, at 7 (arguing that discrimination against cross-dressing men is a form of sex discrimination); Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 120-38 (2002) (assessing and defending the argument that discrimination against gays and lesbians is a form of sex discrimination); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145 (1988) (arguing that discrimination based on sexual orientation is a form of sex discrimination).

131. Robert Post has made a similar suggestion. He notes: "It seems to be important that grooming and dress codes regulate voluntary behavior, for courts tend to conceptualize employees who present themselves in ways that violate established gender grooming and dress conventions as asserting a 'personal preference' to flout accepted standards." ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 45 (2001).

132. *See, e.g.,* Tavora v. New York Mercantile Exch., 101 F.3d 907, 908-09 (2d Cir. 1996) (holding that it did not violate Title VII for an employer to require male employees to have short hair but imposing no similar restriction on female employees); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087-88 (5th Cir. 1975) (holding that company policy prohibiting long hair for male employees but not for female employees did not violate Title VII); Lockhart v. Louisiana-Pac. Corp., 795 P.2d 602, 604 (Or. Ct. App. 1990) (holding that it did not constitute sex discrimination under Oregon law for an employer to fire a man for wearing an earring when female employees were permitted to do the same thing).

“requiring” that women, but not men, wear makeup.¹³³ In upholding the employer’s makeup requirement, the court minimized the plaintiff’s interest in not wearing makeup and emphasized that sex-specific grooming requirements did not become illegal simply because they were “personally offensive” to the plaintiff.¹³⁴ Behavioral expressions of one’s core gender identity, in contrast, are deemed more important and worthy of protection than expressions of personal taste or preference regarding one’s own comfort or aesthetic.¹³⁵ It seems unlikely that this distinction is just about the perceived mutability of the trait at issue. It is not at all clear that effeminate mannerisms in men or masculine mannerisms in women are immutable. Certainly the partners in *Price Waterhouse* did not believe Hopkins’ masculine mannerisms were immutable given the detailed instructions they gave her about how to change her behavior. The distinction seems to rely on a more fundamental sense of the trait’s importance to the holder and the court’s degree of respect for that connection. Given this hierarchy, it is not surprising that the first two cases in which courts have provided antidiscrimination protection to male cross-dressers have involved preoperative transsexuals for whom the cross-dressing was integral to their expression of what they understood to be their authentic gender identity.¹³⁶

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

134. *See id.* at 1112. 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. If we were to do so, 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.

Id.

135. Devon Carbado, Mitu Gulati, and Gowri Ramachandran offer a similar explanation for courts’ protection of effeminate men, namely that such protection is an attempt by courts to recognize and protect expressions of sexual orientation through a back door. The authors contend:

Because sexual orientation *qua* sexual orientation cannot be employed to support a claim of discrimination, the courts grounded their finding of discrimination on the *Price Waterhouse* theory of sex stereotyping. . . . Quite possibly, they were engaging in subversive judging—enacting a minor rebellion against the Congressional refusal to provide any protection against sexual orientation discrimination.

Devon Carbado, Mitu Gulati & Gowri Ramachandran, *Makeup and Women at Work*, 42 HARV. C.R.-C.L. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=873881>, at *36-37.

136. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 733-38 (6th Cir. 2005) (upholding a sex discrimination jury verdict in favor of a male-to-female preoperative transsexual denied a promotion to police sergeant for failure to conform to masculine sex stereotypes, including coming to work wearing makeup and a French manicure); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that plaintiff—a

On another level, however, these decisions seem to reflect a sense—albeit unstable and nonuniform—about how valuable or harmful certain manifestations of gender identity are to the individual. In other words, courts seem to distinguish gender bending behaviors based on the courts' own view of the worth(lessness) of the behavior involved.

It is difficult to explain courts' newly divergent treatment of cross-dressing by transsexual men independent of the courts' own views about the inherent value of such behavior. The fact that some courts treat cross-dressing by transsexuals as a kind of sickness not warranting antidiscrimination protection, while other more recent courts treat it as a protected form of gender expression, suggests that only a changing perception of the worth of the activity is driving the antidiscrimination demands in these cases. The decision about whether to require society to accommodate cross-dressing transsexuals, or to require such individuals to conform to traditional norms, seems necessarily to reflect courts' divergent views about whether the behavior at issue is within the range of normal or is instead morally repulsive and diseased.¹³⁷

Certainly antisubordination concerns justify some protections of gender nonconforming behavior. Women would have been significantly impaired in their ability to fully integrate into the workplace if the Supreme Court had not delegitimized the aggressive woman/bitchy woman equivalence in *Price Waterhouse*. Moreover, a rich conception of sex-blind equality would call for even broader protection of gender

preoperative male-to-female transsexual diagnosed with Gender Identity Disorder—who was discriminated against after he began “to express a more feminine appearance and manner on a regular basis, including at work,” could state a claim for sex discrimination using the sex stereotyping theory from *Price Waterhouse*).

137. Treating transsexualism as a kind of disease does not then lead to protection under the Americans with Disabilities Act because that Act explicitly excludes “transsexualism” and “gender identity disorders not resulting from physical impairments” from the Act’s definition of disability. Americans with Disabilities Act, 42 USC § 12211 (2000). A similar kind of normative flux may also explain courts’ treatment of discrimination based on sexual orientation. Although courts generally hold that discrimination based on sexual orientation is not protected by Title VII, two district courts have interpreted *Price Waterhouse* as providing protection for individuals harassed because of their sexual orientation. See *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (“A jury could find that [plaintiff’s supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (holding that a plaintiff harassed because of his actual or perceived sexual orientation, but otherwise “stereotypically masculine in every way,” could maintain a Title VII cause of action for sexual harassment).

bending behavior. Yet neither traditional antidiscrimination mandate explains the odd way in which courts in fact distinguish between those gender bending activities that fall within the zone of protection and those that do not. Ultimately, the cases reflect a quite uniform judicial sense that, as a general matter, expressions of gender identity are somehow more important and deserving of protection than more transient kinds of personal preferences as well as an inconsistent and unstable judicial sense about the particular kinds of gender identity that nonetheless remain unworthy of protection.

V. CONCLUSION

Certainly most antidiscrimination demands are consistent with standard liberal principles requiring that like must be treated alike and that caste-based hierarchies must be, whenever possible, dismantled. Moreover, some antidiscrimination demands are consistent with both standard liberal principles and perfectionist ideals. The Supreme Court's holding in *Price Waterhouse*, for example—requiring a disconnect between aggressiveness and bitchiness in women—is consistent with both a perfectionist commitment to promoting rationality and self-determination and an antisubordination commitment to including more women in the upper echelons of the work world. I have focused in this paper, however, on areas of sex discrimination law that cannot be fully explained without relying on underlying perfectionist principles.

The perfectionism that has emerged parallels in core respects those of the contemporary theorists discussed at the paper's start. Courts' antidiscrimination decisions reflect a belief in the importance of intellectual and cognitive development and also a belief in the importance of certain valued forms of noncommodified sexual expression and autonomy. Courts go to considerable lengths to maintain at least a portion of the work world in which women and men will be valued as intellectual and rational agents, rather than as sexual objects, and where their expressions of gender identity will, to an increasingly large degree, be protected. Likewise, courts go to considerable lengths to allow individuals to protect their personal and sexual identities from forced market participation and exposure.

Again, my claim is not that antidiscrimination law always and invariably operates on judicial perfectionist ideals. Rather, my claim is that antidiscrimination law cannot be fully understood as operating wholly independently of such ideals. I have focused in this paper on those areas of law in which standard equality and antisubordination arguments are at their most indeterminate and incoherent. It is in these areas that the role of perfectionism is most clear. The cases reveal that,

in practice, antidiscrimination law relies not only on explicit judgments about what social groups are entitled to full membership but also on implicit judgments about what kinds of individuals within those groups are worthy of support, encouragement, and full social membership.

