TOWARD REAL WORKPLACE EQUALITY:

NONSUBORDINATION AND TITLE VII SEX-STEREOTYPING JURISPRUDENCE

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I. INTRODUCTION

Sex discrimination in employment should be an important topic to feminists. Not only is it highly relevant to women's lives, but legislation seeking to remedy sex discrimination in employment sheds light on the ways law can transform sexist ideology, or at least mitigate the actual impact of those ideologies on women. "Sex stereotyping" jurisprudence, first articulated by the Supreme Court in *Price Waterhouse v. Hopkins*[1] in 1989, is a legal concept with the potential to combat sexism in the workplace by applying Title VII of the Civil Rights Act of 1964,[2] a federal anti-discrimination statute, to prohibit employers from discriminating based on stereotypes about the way that men and women should appear and behave. According to *Price Waterhouse*, Title VII prohibits employment discrimination not merely on the basis of biological sex, but also on the basis of certain sex-stereotypes or gender norms about men and women.[3] Incorporating sex-stereotypes into Title VII jurisprudence allows courts to examine the underlying inequalities and sexism behind generally accepted sex-stereotypes in the workplace, helping to overcome female subordination.

However, the Supreme Court in *Price Waterhouse* did not go so far as to say that *any* discrimination on the basis of a sex-stereotype violates Title VII; it suggested that only discrimination on the basis of certain unacceptable or impermissible sex-stereotypes violates Title VII.[4] For sex-stereotyping jurisprudence to become a more effective avenue for social change, then,

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1. 490 U.S. 228 (1989).
2. 42 U.S.C. §§ 2000e-2000e-2 (2001).
3. *See* 490 U.S. at 250.
4. *See id*. at 251.

scholars and courts must come up with a working definition of which sex-stereotypes are impermissible and will trigger Title VII protections. Drawing on feminist nonsurbordination theory, which focuses on "the imbalance of power between women and men,"[5] I propose that employment discrimination based on a sex-stereotype that is grounded in or perpetuates female subordination should constitute illegal sex discrimination under Title VII.

The application of nonsubordination theory to Title VII may reflect the next step in the development of Title VII jurisprudence. Early versions of employment discrimination legislation were based on formal equality, a first-wave legal feminist principle that emphasizes equal treatment.[6] Under formal equality, "individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions based on their sex, race, ethnicity, sexual orientation, or other impermissible characteristics."[7] Thus, these early forms of employment discrimination legislation prohibited discrimination on the basis of sex.[8]

Subsequent applications of employment discrimination legislation focused not only on formal equality, but also on substantive equality. Substantive equality moves beyond the equal application of neutral rules and focuses on achieving equal results.[9] Substantive equality may be useful insofar as it can fill in the gaps where formal equality regimes have failed to result in genuine workplace equality for women. For example, Title VII was held by courts and later amended by Congress to explicitly protect employees not only from disparate *treatment* based on the protected classes of race, color, religion, sex, and national origin, but also from "facially neutral" policies or practices that have disproportionate impacts on those protected classes, creating a cause of action for disparate *impact* discrimination.[10] Some feminists argue that this disparate *impact* formulation of Title VII focuses more on the results of a rule than the form of a rule, and thus "more closely fits the model of substantive, rather than formal, equality."[11]

Both formal and substantive equality, however, have been criticized for failing to achieve real equality for women. Title VII is arguably grounded in

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5. KATHARINE BARTLETT & DEBORAH RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 399 (4th ed. 2006).

6. *Id.* at 1.

7. *Id*.

8. *See* 29 U.S.C. § 206(d) (2001); *see also* BARTLETT & RHODE, *supra* note 5, at 50 (demonstrating that a paradigmatic example of formal equality legislation is the Equal Pay Act, which prohibits employers from wage discrimination on the basis of sex and "requires equal pay for equal work").

9. BARTLETT & RHODE, *supra* note 5, at 151.

10. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429, 436 (1971) (holding that facially neutral requirements that are unrelated to job performance and disproportionately impact racial minorities violate Title VII); *see also* Civil Rights Act of 1991, 42 U.S.C.S. § 2000e-2(h) (2006).

11. BARTLETT & RHODE, *supra* note 5, at 58.

formal equality concerns insofar as its disparate treatment formulation prohibited "employment rules or decisions that treat an employee less favorably than others explicitly because of an employee's race, sex, religion, or national origin."[12] Feminist scholar Catharine MacKinnon argues that formal equality is ineffective because it leaves the focus on men and masculinity.[13] Some scholars argue that Title VII calls for changing the social norms and practices that inhibit women's success in the workforce,[14] which goes beyond formal equality. However, one limitation on Title VII's ability to change social norms for women is that existing Title VII jurisprudence focuses too much on the inquiry of "whether women are like, or unlike, men."[15]

To address this problem, a third theory of feminism, nonsubordination theory,[16] analyzes the power differential between men and women rather than focusing on gender differences.[17] Importantly, nonsubordination theory asks "whether a rule or practice serves to subordinate women to men."[18] Some argue that this approach will help examine the underpinnings of "central inequalities" between men and women, and thus address and remedy those inequalities better than formal or substantive equality theories.[19]

In this piece, I hope to shed light on how a nonsubordination standard can be used in connection with sex-stereotyping jurisprudence. The potential positive impact of sex-stereotyping jurisprudence has been limited by the fact that there is no clear standard distinguishing permissible from impermissible forms of discrimination based on sex-stereotypes.[20] A nonsubordination

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12. *Id.* at 57.

13. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-37, 40-43 (1987). She cites the fact that "[a]lmost every sex discrimination case that has been won at the Supreme Court level has been brought by a man." *Id.* at 35.

14. *See* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality,* 83 TEX. L. REV. 167, 172 (2004).

15. *See* BARTLETT & RHODE, *supra* note 5, at 399.

16. Nonsubordination theory is also frequently called dominance theory or dominance feminism. *See id.*

17. *Id*.

18. *Id*. *See also* MACKINNON, *supra* note 13, at 40.

19. *See* BARTLETT & RHODE, *supra* note 5, at 400.

20. *See* Yuracko, *supra* note 14, at 177. Yuracko discusses "sex-specific trait discrimination," whereby employers enforce trait requirements on one sex but not the other. *Id.* Sex-specific trait discrimination is similar to sex stereotyping discrimination, although Yuracko argues that there are differences between trait discrimination and gender stereotyping because gender stereotyping "sometimes refers to the erroneous attribution of traits and attributes to a particular individual because of that person's membership in a particular social group." *Id.* at 181. Trait equality, she argues, is a more precise type of gender stereotyping. *Id*. I choose to use the term gender or sex stereotyping rather than trait discrimination, but Yuracko's arguments are still relevant insofar as trait discrimination is a type of sex stereotyping. Either way, the standards for sex stereotyping and trait discrimination are unclear. Yuracko points out that "the effect of Title VII on sex-specific trait discrimination is . . . uncertain. Courts and scholars have struggled to decide whether

approach could provide that standard, and could invalidate those sex-stereotypes that negatively impact women in the workplace. Ultimately, the nonsubordination standard I advocate will invalidate many sex-stereotypes, despite current ambiguity regarding which forms of sex-stereotyping discrimination are legal, and individuals will be protected such that they can express themselves as they prefer notwithstanding their gender. Beyond that, I hope that this piece will cause courts to engage more deeply with the stereotypes at issue in employment decisions, work to develop sex-stereotyping jurisprudence, and help change negative, stereotypical gender norms at work in the workplace and elsewhere.[21]

Part II of this Article provides background on sex discrimination under Title VII, focusing on *Price Waterhouse*, the evolution of sex-stereotyping jurisprudence, and courts' treatment of sex-stereotyping claims in recent cases. Part III introduces several potential theories for interpreting and applying sex-stereotyping jurisprudence, finally advocating a nonsubordination approach. Part IV describes the ambiguity surrounding application of Title VII to gender-based discrimination, and resolves the ambiguity by applying the nonsubordination approach. Part V goes into further detail, explaining the problems surrounding Title VII analysis of sex-stereotypes. Like Part IV, it then applies the nonsubordination approach to address the issues courts face in sex-stereotyping discrimination cases. Finally, Part VI offers concluding remarks regarding the advantages of adopting a nonsubordination approach to Title VII jurisprudence.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, national origin, religion, color, or sex.[22] The Supreme Court interprets Title VII's prohibition against sex discrimination to mean that employers may not make employment decisions based on an employee's sex.[23] The Court in *Price Waterhouse v. Hopkins* introduced into

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sex-specific trait discrimination violates Title VII's nondiscrimination mandate, and if so when." *Id.* at 177.

21. I choose "female subordination" and not "gender inequality" or another framework of analysis deliberately, because this article "recognizes a society in which women are allocated a disproportionately small share of wealth and power," and because sex stereotyping in the workplace (and elsewhere) is "of particular importance to women, even when men are the apparent victims." *See* Mary Whisner, Comment, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L. J. 73, 75 (1982) (discussing appearance regulations in the workplace). As I will recognize in this Article, sex-stereotypes about femininity and masculinity can hurt both males and females, and a clearer standard will protect not only women but also men who face discrimination based on sex-stereotypes about the way that men and women should look, dress, and act.

22. 42 U.S.C. § 2000e-2(a) (2001).

23. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

Title VII jurisprudence the idea of sex-stereotyping discrimination.[24] There, the Court held that, where an employer denied a woman partnership because she failed to talk, walk, and dress femininely, that employer engaged in unlawful sex discrimination by inadvertently employing sex-stereotypes in its evaluation procedures.[25] The Court emphatically pronounced that the language of Title VII mandates "that gender must be irrelevant to employment decisions."[26] Congress implicitly approved of *Price Waterhouse* when it amended Title VII in 1991, incorporating *Price Waterhouse*'s legal analysis to clarify that sex discrimination is unlawful even if other factors also motivated an adverse employment action.[27] The decision, however, is subject to various interpretations, none of which have been resolved by the Supreme Court. Thus, there are many ambiguities and inconsistencies in federal courts' application of sex-stereotyping jurisprudence to claims of sex discrimination.

Despite these ambiguities, Title VII has long been interpreted to prohibit discrimination on the basis of biological sex–discrimination against a woman solely because she is a woman or against a man because he is a man.[28] In fact, until *Price Waterhouse*, courts interpreted Title VII as prohibiting *only* that type of sex discrimination.[29] The Supreme Court has also clarified that Title VII protects both men and women from discrimination based on biological sex.[30] Furthermore, courts have held that Title VII prohibits sex discrimination even when perpetrated by a person who is the same sex as the victim.[31]

Title VII also prohibits discrimination against a woman who is perceived as too masculine, which is an unacceptable form of sex-stereotyping.[32] In *Price Waterhouse*, the Supreme Court held that an employer engages in impermissible gender discrimination when making employment decisions based on the idea that women "cannot be aggressive,"[33] based on the stereotype that women should be passive or submissive.

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24. *See, e.g.,* Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004) (applying *Price Waterhouse*); Costa v. Desert Palace, Inc., 299 F.3d 838, 856 (9th Cir. 2002) (same); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) (same); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (same).

25. *Price Waterhouse*, 490 U.S. at 228, 258.

26. *Id.* at 240.

27. 42 U.S.C. § 2000e-2(m) (2001).

28. *E.g.,* Ulane v. E. Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984).

29. *See id.* (stating "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men"). *See also* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

30. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

31. *Id.* at 79 (stating "we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex").

32. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

33. *Id.*

However, courts have uniformly held that Title VII does not prohibit discrimination on the basis of sexual orientation, regardless of its nature.[34] Because Congress has had many opportunities to amend Title VII to include sexual orientation as a protected category, and has declined to do so, courts conclude that sexual orientation is not a protected class under Title VII.[35] Similarly, courts have failed to recognize a claim of discrimination based on sexual identity, such as transsexuality, reasoning that the plain meaning of Title VII denies such relief.[36] Additionally, courts consistently affirm gender-differentiated facilities, such as restrooms, locker rooms, and dress codes,[37] except where those dress codes demean women[38] or subject them to harassment.[39] Often, courts use the fact that Title VII does not prohibit discrimination on the basis of sexual orientation and sexual identity, and permits some forms of gender-differentiation in the workplace, to foreclose sex discrimination claims from homosexuals, transsexuals, transgendered individuals, and others who do not conform to gender norms.

Despite Title VII's clarity on the types of discrimination described above, Title VII jurisprudence does not clearly address the permissibility of discrimination on the basis of sex-stereotypes, particularly with regard to individuals who do not conform to accepted gender norms. Those individuals may include effeminate men or masculine women, such as a man who insists on shaping his eyebrows, wearing lipstick, and getting French manicures,[40] or a woman who refuses to wear makeup and style her hair.[41] As a result, individuals who fail to conform to gender-based stereotypes in their appearance or behavior often lack remedies to employment discrimination they face as a result of their non-conformity. Fortunately, applying nonsubordination theory

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34. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (holding that harassment on the basis of sexual orientation is not actionable under Title VII); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).

35. *See Bibby*, 260 F.3d at 261.

36. Ulane v. E. Airlines, 742 F.2d 1081, 1084 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

37. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981).

38. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1032-33 (7th Cir. 1979).

39. *But see* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 n.7 (9th Cir. 2001); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976) (per curiam); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

40. *See* Barnes v. City of Cincinatti, 401 F.3d 729, 734 (6th Cir. 2005).

41. *See Jespersen*, 444 F.3d at 1106.

to this type of sex-stereotyping discrimination can provide the clarity and protection needed in these ambiguous areas of Title VII jurisprudence. Before this application, however, it is helpful to understand the different sex-stereotyping theories that are available and why nonsubordination theory most effectively addresses discrimination on the basis of gender and sex-stereotypes.

III. SEX-STEREOTYPING THEORIES

Lack of conformity among federal courts and explicit Supreme Court or statutory direction notwithstanding, courts and scholars have developed various ways of evaluating sex-stereotyping claims. These theories include the "undue burdens" requirement, "trait-based" evaluations, a "mechanism of harm" analysis, an "equality" paradigm, and, finally, the nonsubordination approach that I advocate. This section will analyze each theory in turn, concluding that nonsubordination is the superior approach.

A. Undue Burdens

One approach to sex-stereotyping claims, particularly regarding sex-differentiated dress codes, is to ask whether the sex-specific requirements pose "unequal burdens" on one sex.[42] The Ninth Circuit's decision in *Jespersen v. Harrah's Operating Co.* illustrates this argument.[43]

The court there held that a policy requiring women to wear makeup (and forbidding men from doing so) was not sex discrimination because the requirement did not impose an "unequal burden" on women.[44] The majority reasoned that there was no sex discrimination in the employer's "personal best" policy because Jespersen had not produced sufficient evidence that a dress code requiring that she wear a full face of makeup and have her hair curled and teased cost more money or required more time than the requirements that men be clean-shaven and have their hair trimmed regularly.[45]

The court's decision demonstrates some of the weaknesses of an undue burdens approach. First, it seemed difficult for the court to directly compare the requirements imposed on men to the requirements imposed on women by the sex-specific policy.[46] The policy was comprehensive, and although the court ultimately decided to compare the policy as a whole[47]—all of the requirements for women compared to all of the requirements for men—it could have focused on those parts of the policy that were most sex-specific and most objectionable, which Judge Pregerson did in a dissent. He reasoned that insulating the sexist portions of the dress code within all of the "neutral" categories such as dress,

42. *See id.* (regarding as "undue" only those burdens that were "unequal").
43. *Id.* at 1104, 1106, 1110-1111.
44. *Id.* at 1106.
45. *Id*. at 1107, 1110-11.
46. *See id.* at 1106.
47. *Id.* at 1109-11.

hair, and grooming masked the real issue, and he instead focused on those parts of the dress code that were clearly rooted in sexist stereotypes, such as the makeup requirement.[48] By failing to look at the sex-stereotypes in their own terms, the majority permitted an employer to maintain a policy that was quite obviously rooted in sex-stereotypes, merely because the policy employed stereotypes for both males and females. In his dissent, Judge Pregerson argued that a policy requiring women to wear makeup presents "[t]he inescapable message . . . that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup."[49]

Moreover, the court's application of the undue burden theory is unconvincing because it defined "burden" only in terms of time and money.[50] Not only does it seem obvious that applying makeup daily requires money and time, and is therefore more burdensome than not wearing makeup,[51] but it is unclear that the only "burdens" Jespersen faced in regards to the policy were time and money. In fact, Jespersen refused to wear makeup because it "conflict[ed] with her self-image" and she found it "offensive," not because she did not want to spend money or time.[52] She "felt so uncomfortable wearing makeup that she found it interfered with her ability to perform" her job, and she eventually quit.[53] Judge Kozinski pointed out that it was unfair for the majority to dismiss Jespersen's feelings about wearing makeup as evidence of the burdens imposed by the policy.[54]

The *Jespersen* majority's failure to grasp the real nature of the burdens imposed by the "personal best" policy is typical of courts using an undue burdens analysis. One scholar argues that "courts have engaged in little or no comparative analysis of the burdens men and women, respectively, face. In some cases it has been enough that *some* requirements were imposed on both men and women, regardless of how burdensome or demeaning either set of requirements might be."[55] Another describes the Ninth Circuit's treatment of equal burdens, particularly its ignorance of Jespersen's personal account of the unique burden she faced, as "not much more inspiring than the majority's claim in *Plessy v. Ferguson* that there was nothing stigmatizing in racially segregated

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48. *Id.* at 1116 (Pregerson, J., dissenting).
49. *Id.*
50. *Id.* at 1110-11.
51. *See id.* at 1117 (Kozinski, J., dissenting).
52. *Id.* at 1108.
53. *Id*.
54. *Id.* at 1117 (Kozinski, J., dissenting).
55. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2561 (1994).

railroad accommodations save perhaps black people's eccentric subjectivities."[56]

Additionally, it is arguable that the court's application of the undue burdens theory may reinforce the "supposedly fundamental 'difference' between men and women."[57] That "difference" usually implies female inferiority. For example, many dress codes are tied to sex-stereotypes originating from the view that women are inferior.[58] Focusing on burdens while ignoring the stereotypes that encourage the burdens will often fail to achieve real equality in the workplace.[59] Furthermore, focusing on undue burdens seems inconsistent with *Price Waterhouse*. In that case, the Supreme Court did not accept the plaintiff's discrimination claim on the basis that it would have been a burden on her to act and dress femininely. Rather, the Court sided with the plaintiff because the very idea that she ought to act femininely was grounded in the stereotype that women should be docile, not aggressive.[60]

B. Trait-Based Approaches

Other ways of evaluating sex-stereotyping discrimination claims under Title VII "focus on the nature of the particular trait [or stereotype] that is at issue."[61] These approaches include the immutable characteristics, or fundamental rights, approach and the group identity approach.[62]

1. Immutable Characteristics or Fundamental Rights

The immutable characteristics approach, also called the fundamental rights approach, prohibits sex-stereotyping discrimination against unchangeable characteristics and rights.[63] Under this approach, discrimination based on biological differences between the sexes is illegitimate, as is discrimination that targets sex-specific rights such as child-bearing. Generally, the approach only applies to a narrow list of traits and rights.[64] For example, the immutable characteristics approach would not have protected the plaintiff in *Price Waterhouse* because her aggressive personality is not considered immutable or fundamental.[65] A sex-stereotyping scheme that would permit employers to discriminate against aggressive women certainly does not meet the goals of

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56. David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 248 (2004).

57. *Id.*

58. *See* Bartlett, *supra* note 55, at 2570.

59. *See generally id.* (discussing the link between sex stereotypes and gender disadvantage in the workplace).

60. *See Price Waterhouse*, 490 U.S. at 258.

61. Yuracko, *supra* note 14, at 204.

62. *Id*.

63. *Id.* at 205-06.

64. *See id.* at 206.

65. *Id.* at 206-07.

Title VII, and is flatly inconsistent with the Supreme Court's understanding of sex-stereotyping jurisprudence in *Price Waterhouse*.

2. Group-Identity

Like the immutable characteristics approach, the group-identity approach prohibits discrimination based on a person's traits. Under the group-identity approach, sex-specific discrimination is impermissible only when centered on a trait that is essential for a person to identify with his or her gender.[66] This theory has most often been applied to claims regarding national origin or racial discrimination, where plaintiffs argue that discrimination based on accents, speaking languages other than English, and certain physical traits is illegal trait-based discrimination.[67]

The problem with the group-identity approach when applied to gender is the difficulty or impossibility of distinguishing which traits are fundamental to identifying oneself as a man or woman.[68] Additionally, even if one could identify traits that are integral to being male or female, the approach is inadequate because it "would not protect women [or men] who are singled out for adverse treatment precisely because they deviate from gender stereotypes."[69] Finally, like the undue burdens approach, even trying to identify traits that are "integral" to the sexes affirms difference.[70] Affirming gender differences can reinforce negative sex-stereotypes[71] and thus "is more likely to entrench rather than to challenge group-based subordination."[72]

C. Mechanism of Harm

In order to avoid the problems inherent in trait-based evaluations of sex discrimination, some courts and scholars have suggested using a mechanism of harm analysis which considers how women were harmed, rather than why.[73] Discrimination is actionable "[i]f the mechanism of harm is sexualized abuse and harassment."[74] Some courts have found that when conduct is necessarily sexual in nature, it is "because of" sex and actionable under Title VII.[75] On the other hand, if conduct is not sexual in nature, it is not "because of" sex and

66. *Id.* at 207.
67. *Id.* at 207-13.
68. *Id.* at 214.
69. *Id.* at 216. Thus, the group-identity approach would not protect the plaintiff in *Price Waterhouse* for deviating from the norm that women should be docile rather than aggressive.
70. *See* MACKINNON, *supra* note 13, at 38-39.
71. *See id.*
72. Yuracko, *supra* note 14, at 216.
73. *Id.* at 216-17.
74. *Id.*
75. *Id.*

does not violate Title VII[76]—even if it might be adverse to a woman and related to her sex.

Certainly, addressing sexual conduct and harassment in the workplace is important for courts to identify and remedy.[77] However, limiting sex-discrimination claims to those involving sexual conduct is under-inclusive[78] of other types of sex-based discrimination. For example, the *Price Waterhouse* employer's denial of partnership might not fairly be characterized as sexual in nature, but it was arguably based on harmful stereotypes about women.[79] Other women might similarly be subject to heavier than normal workloads, "intense monitoring," and other harmful employment actions, but would not have a sex-discrimination claim under the mechanism of harm theory.[80]

D. Equality

The equality[81] theory is a fourth approach to sex discrimination and sex-stereotyping. According to the equality theory, sex discrimination occurs when an employer disapproves of acts or traits carried on by one sex, but not when those same acts or traits are carried on by the other.[82] An equality approach would protect, for instance, male employees who regularly wear traditionally female attire to work if the employer allowed female employees to wear similar clothing.[83]

The equality approach seems to be consistent with the text of Title VII. It may also be consistent with *Price Waterhouse*, on its most basic terms, if one understands *Price Waterhouse* as standing for the proposition that a woman has a Title VII claim when she is discriminated against for possessing a characteristic that would be accepted in a male. However, there are compelling arguments that an equality approach is not actually consistent with Title VII's statutory scheme or *Price Waterhouse*, and that its application has several disadvantages.

The equality approach may not be consistent with either Title VII or *Price Waterhouse*, depending on how each is interpreted. While some argue that the aim of Title VII is to completely obliterate gender-based differences in the workplace, Yale law professor Robert Post contends that this is an

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76. *Id.*

77. *See id.* at 219 (noting that sexual abuse and violence are tied to sexual harassment).

78. *Id.* at 223-24 (arguing that this approach would be over-inclusive of some types of behavior that are not sex discrimination; not all conduct that is sexual in nature, she argues, is discrimination "because of" sex).

79. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

80. Yuracko, *supra* note 14, at 224.

81. *Id.* at 177 (referring to a "trait equality" approach).

82. *Id*.

83. 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, 48-49 (1995).

"implausible" reading of Title VII.[84] For example, while it is probably true that Title VII seeks to create a color-blind workplace, the same cannot be said for sex, for which there are "bona fide occupational qualification" defenses.[85] Moreover, one can argue that *Price Waterhouse* did not indicate that sex discrimination occurs anytime a man or woman is discriminated against for failing to conform to sex-stereotypes, but only when the stereotypes to which men or women are held are harmful in some way.[86] That reasoning suggests that some sex-stereotypes are permissible. The fact that courts have continued to uphold sex-differentiated dress codes[87] also supports the idea that Title VII did not aim to eliminate all sex-based differences in the workplace.

Others further criticize the equality approach because it is trait-based and inflexible. First, a trait equality approach cannot work because "men and women never possess exactly the same trait in exactly the same way."[88] Thus, discrimination findings are imprecise because a court must find a comparable trait in the opposing sex where such a trait may not exist.[89] For example, consider an employer who will not hire women dressed in sexy clothing.[90] To determine the male equivalent of female sexy dressing, a court could literally consider the particular clothing, such as cleavage-bearing tops or tight bottoms.[91] In that case, a court could only find sex discrimination if the woman were treated worse than a man who wears low-cut tops and tight bottoms to work.[92] Framing the issue in that way will probably not support a claim of sex discrimination, because an employer is likely to be intolerant of men in such attire just as it may be for women, though for different reasons.[93] An employer's treatment of a man wearing a low-cut top and a tight bottom is arguably not related to the treatment of the woman because the employer may

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84. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law,* 88 CAL. L. REV. 1, 20 (2000).

85. *See*, *e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332-33 (1977) (stating "§ 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), . . . permits sex-based discrimination 'in those certain instances where . . . sex . . . is a bona fide occupation qualification reasonably necessary to the normal operation of that particular business or enterprise"). A classic example of a bona fide occupational qualification would be the qualification that a wet-nurse be female, or that a sperm-donor be male.

86. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989).

87. *See supra* notes 37-39 and accompanying text.

88. Yuracko, *supra* note 14, at 188. Especially with regard to biological traits, some sex-specific traits do not translate very well. For instance, under a rigid equality logic, "pregnancy discrimination would never constitute sex discrimination. Because a pregnant woman could never show that she was being treated worse than a man with precisely the same trait, she could never show that adverse employment actions related to her pregnancy discriminated against her on the basis of sex." *Id.* at 190.

89. *See id* at 188.

90. *Id.* at 192.

91. *Id*.

92. *Id.*

93. *See id.*

be discriminating against such a man because he defies male stereotypes rather than because he dresses "sexy".[94]

Alternatively, the court could consider sex-specific equivalents of the trait in question, rather than looking for comparable traits between the sexes. However, as in the example above, "deciding what constitutes sexy dressing for men is itself not obvious"[95] and therefore it is not always clear what a sex-specific equivalent to the trait at issue may be. On the most abstract level, one could compare the sexy-dressed female to another man who violates appropriate workplace norms, but at that point the equality approach becomes ineffectual in addressing sex-stereotypes because it becomes too removed from the factual situation.[96]

A second criticism of the equality approach is that it enforces an overly rigid conception of gender neutrality.[97] Indeed, it may be neither realistic nor normatively desirable to obliterate all gender conventions.[98] A better interpretation recognizes that Title VII participates and interacts with gender norms just as employers and employees do, and would "challenge us to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning," rather than "require us to imagine a world of sexless individuals."[99] Gender norms are and will likely remain important in American culture.[100] Thus, Title VII should distinguish between acceptable and unacceptable gender norms, [101] which cannot be accomplished by an equality approach which would look only at a difference and not at the reason behind the difference.

E. Nonsubordination

Finally, I propose Title VII should be interpreted in light of the nonsubordination principle, which holds that a policy or practice rooted in sex-stereotypes that subordinate women is therefore rooted in an impermissible sex-stereotype and constitutes Title VII sex discrimination. As I will explain, nonsubordination theory effectively addresses scholars' concerns that discrimination law is treated as a practice influenced by other practices and understood in terms of how law impacts sex-stereotypes.[102]

Other scholars have suggested similar, though narrower, approaches to Title VII and sex-stereotyping. Feminist scholar Katharine Bartlett focuses on dress and appearance codes, arguing that those codes violate Title VII when

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94. *Id.* at 193.
95. *Id.*
96. *Id.*
97. *Id.* at 198.
98. *See* Post, *supra* note 84, at 20.
99. *Id.*
100. *See id.* at 30.
101. *See id.*
102. *See id.* at 31.

they promote sex-based discrimination.[103] Kimberly Yuracko similarly contends that sex-based discrimination affecting one sex's ability to succeed at work constitutes Title VII sex discrimination.[104] While I find both approaches useful and informative, I suggest a category of analysis that looks beyond stereotypes that limit women's success in the workplace. I argue that any stereotype or practice rooted in female subordination in general, not just stereotypes that seem to inhibit female success in the workplace, should be impermissible.

The first problem with limiting impermissible stereotypes to those that hurt women in the workplace is that it leaves many women who have been discriminated against based on harmful sex-stereotypes without legal recourse. For example, the workplace approach would apply to *Price Waterhouse*. If aggression were necessary to succeed in the plaintiff's workplace, but she was discriminated against for being aggressive, the stereotype that females cannot be aggressive certainly undermined her ability to succeed in the workplace.[105] She was left in a double-bind: either behave femininely, thereby hurting her own job performance, or behave masculinely and perform well but be discriminated against for being too masculine. However, the workplace approach probably would not work in a case like *Jespersen*. Jespersen was fired for not wearing makeup as required by her employer.[106] Wearing or not wearing makeup is not necessarily a stereotype or standard that hurts women, as a group, in the workplace, but the idea that women should wear makeup is clearly rooted in assumptions about women as "ornamental" and as sex objects.[107] As Judge Pregerson wrote in his dissent, requiring women to wear makeup sends the message that women's faces, "undoctored," are unacceptable.[108] A non-work focused standard would better protect individual women (and men) than would Yuracko's because it would encompass more forms of sex-stereotyping than one focused only on work-related stereotypes.

A second problem with limiting impermissible stereotypes to those that hurt women in the workplace is that workplace equality may be defined too narrowly. On the one hand, it is understandable that Bartlett and Yuracko limit their focus to workplace success and equality because that is precisely what Title VII aims to do. Although I would hope that changing norms about gender in the workplace will have a broader cultural impact, I also recognize that Title VII is specifically aimed at equality in the workplace. Advocates of the workplace approach focus on whether women will be able to succeed in the

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103. Bartlett, *supra* note 55, at 2545.

104. Yuracko, *supra* note 14, at 225.

105. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).

106. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

107. Cruz, *supra* note 56, at 248.

108. *Jespersen*, 444 F.3d at 1116.

workplace in spite of the sex-stereotypes they face.[109] For example, if sex-stereotypes prevent women from making partner at a law firm, then the stereotypes hurt workplace equality.[110] However, when the impact of discrimination is viewed in terms of the loss of employment benefits, we ignore instances where employees went to unfair lengths to keep their jobs.[111] Importantly, workplace equality comprises more than the ability to successfully complete one's job. For instance, the plaintiff in *Jespersen* could have continued to work successfully and wear makeup, but she would have loathed herself and the way that she looked.[112] For economic, social, and cultural sex equality to exist in the workplace and elsewhere, there is no room for any sex-stereotype rooted in female subordination.

Nonetheless, the workplace standard is still useful in that it provides a roadmap for my broader application of the nonsubordination theory. Both standards focus on a highly contextualized examination of what stereotypes are at issue, what messages those stereotypes might send about women, and how they affect women in the workplace in practice.[113] I similarly advocate that courts must attempt to identify the stereotypes at issue and the impacts those stereotypes have on sex equality when evaluating sex-stereotyping claims.[114] Having now established the standard by which I will measure whether or not sex-stereotyping is impermissible and results in Title VII sex discrimination, I want to return to my earlier reference to the policies and practices Title VII does not clearly address.[115]

IV. NONSUBORDINATION APPLIED TO GENDER-BASED DISCRIMINATION

A recurring theme in Title VII litigation is whether Title VII prohibits discrimination based on both "sex" and "gender". While Title VII was originally interpreted only to prohibit discrimination on the basis of sex—the biological characteristics that differentiate males and females[116]—*Price Waterhouse* introduced the notion that Title VII prohibits discrimination on the basis of gender—the social and cultural differences attributed to males and

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109. *See* Bartlett, *supra* note 55, at 2545; Yuracko, *supra* note 14, at 225.

110. *See* Bartlett, *supra* note 55, at 2545; Yuracko, *supra* note 14, at 225.

111. Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 67 (1987).

112. *Jespersen*, 444 F.3d at 1108.

113. *See generally* Bartlett, *supra* note 55, at 2569 (arguing that courts must carefully scrutinize each sex stereotype at issue rather than apply a rigid set of preconceived rules).

114. *See id.*

115. *See supra* Part II.

116. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (stating "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men"); *see also* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

females.[117] Many circuit courts have interpreted the Supreme Court's use of the term "gender" and its analysis in *Price Waterhouse* to expand Title VII's treatment of sex discrimination beyond biological sex.[118] Other courts, however, construe *Price Waterhouse* narrowly and continue to focus on sex discrimination as related primarily to biology.[119] Nonsubordination theory resolves this ambiguity by prohibiting gender-based discrimination because it is rooted in female subordination.

A. Gender Discrimination Analysis Under Title VII

Those courts that resist extending Title VII to gender discrimination use the distinction between "sex" and "gender" to bar sex-stereotyping claims in a number of ways. Primarily, insisting that Title VII only prohibits discrimination based on biological sex seriously undermines the potential power of sex-stereotyping claims based on gender norms.[120] In *Spearman v. Ford*, for example, the Seventh Circuit denied a claim for sexual harassment where a male homosexual employee was called a female-oriented epithet, subjected to graffiti associating him with a drag queen, and assigned jobs he claimed were typically given to women.[121] The plaintiff alleged that the vulgar and sexually explicit insults, in particular, were "motivated by 'sex stereotypes' because his co-workers perceived him to be too feminine."[122] However, the court declined to permit his claim, emphasizing that Title VII only protects discrimination based on sex, not sexual orientation.[123] Having established that, the court determined that the plaintiff did not experience sex-based discrimination.[124]

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117. Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 250 (1989).

118. *See* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (stating "[t]he Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (stating "for the purposes of [Title VII], the terms 'sex' and 'gender' have become interchangeable").

119. *See* Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *10, *13 (D. Utah June 24, 2005), *aff'd* 502 F.3d 1215 (10th Cir. 2007); Oiler v. Winn-Dixie Louisiana, Inc., No. 00-3114 SECTION: "I", 2002 U.S. Dist. LEXIS 17417, at *30 (E.D. La. Sept. 16, 2002) (stating "[a]fter a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with Ulane and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex"); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000).

120. *See Spearman*, 231 F.3d at 1085. *See also Etsitty,* 2005 U.S. Dist. LEXIS 12634, at *12-13; *Oiler*, 2002 U.S. Dist. LEXIS 17417, at *30 (stating "Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase 'sex' has not been interpreted to include sexual identity or gender identity disorders").

121. 231 F.3d at 1085.

122. *Id.*

123. *Id.*

124. *Id*.

Other courts insisting that Title VII protects only against sex-based discrimination have required the plaintiff to demonstrate that he or she was treated differently than an employee of the opposite sex. Such a requirement highlights the idea that discrimination must be based on treating the biological sexes differently.[125] For example, in *James v. Ranch Mart Hardware, Inc.,* a district court held that relief could be granted to a male living as a female only if the employer treated a female living as a male more favorably.[126] That, of course, would be impossible to prove except in the unlikely scenario that there was another employee at the company who was a female living as a male, effectively foreclosing the plaintiff's claim. A Louisiana district court ruled similarly in *Oiler v. Winn Dixie, Louisiana, Inc.*, finding that since a male plaintiff who was fired for cross-dressing off-hours could not present evidence of a female cross-dresser who was treated differently than him, his discrimination claim lacked merit.[127]

The requirement to show that individuals of the opposite sex are treated differently increases the burden of proof on the part of the plaintiff and makes such a claim nearly impossible, because often there will not be a female-to-male transsexual in the workplace for a male-to-female transsexual to compare his treatment to (and vice versa). Ironically, under this theory, the more an employer discriminates against *all* people who fail to conform to gender stereotypes, the less likely the claim is to prevail. An effective sex-stereotyping standard—and the standard that is most consistent with Supreme Court jurisprudence—must recognize that gender discrimination violates Title VII.

B. Gender Discrimination Analysis Under Nonsubordination Theory

A Title VII approach holding that sex-stereotypes are impermissible if they subordinate women prohibits discrimination both on the basis of biological sex and gender.[128] Even when discrimination is not based on biological differences between men and women, a nonsubordination approach could find discrimination where gender stereotypes are at issue. Moreover, a nonsubordination approach would solve the problem courts face when they

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125. *See supra* Part II.

126. No. 94-2235-KHV,1994 U.S. Dist. LEXIS 19102, at *3 (D. Kan. Dec. 23, 1994).

127. No. 00-3114 SECTION: "I", 2002 U.S. Dist. LEXIS 17417 at *28 (E.D. La. Sept. 16, 2002). Another example of this argument appears in the First Circuit's decision in Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000). Although that case dealt with gender discrimination under the Equal Credit Opportunity Act (ECOA), the court specifically looked at Title VII case law (even quoting at length from *Price Waterhouse*), so the analysis may still be relevant to Title VII jurisprudence. *Id.* In *Rosa,* the plaintiff was a male dressed as a female; for that reason, he was refused service at a bank. *Id*. at 215. The court held that only if the plaintiff could demonstrate that the bank treated a woman dressed as a man better could he have made out a claim of sex-stereotyping discrimination. *Id.* at 215-16.

128. *See supra* Part II.

attempt to compare a plaintiff of one sex to an employee of another sex.[129] From the perspective of nonsubordination and sex-stereotyping, whether an employer discriminates equally against a masculine woman and a feminine man is irrelevant. The relevant inquiry is what stereotypes underlie the discrimination and whether those stereotypes reinforce female subordination. I will discuss more specifically how courts might approach gender non-conforming individuals and sex-stereotypes in the next section. The important point with regard to gender versus sex discrimination is that a nonsubordination sex-stereotyping approach will encourage courts to engage more deeply with the stereotypes at issue and their legitimacy, rather than ending their analysis at a formal equality level.

V. NONSUBORDINATION APPLIED TO IMPERMISSIBLE SEX-STEREOTYPES

Because Title VII does not clearly address whether it prohibits discrimination based on both sex and gender, it similarly does not address other sex-stereotyping claims based on broad interpretations of "gender". Nonsubordination theory would prohibit most discrimination based on sex-stereotypes because many sex-stereotypes are founded on the assumption of female inferiority.

A. Impermissible Sex-Stereotype Analysis Under Title VII

Some courts are reluctant to extend the holding in *Price Waterhouse* to gender stereotypes beyond the *Price Waterhouse* stereotype that women should not be aggressive. These courts often deny plaintiffs' Title VII claims by characterizing the discrimination they face as based on an unprotected class (such as sexual orientation) and ignoring the sex-stereotyping aspects of the discrimination.

For example, courts have denied Title VII claims based on sexual orientation or based on sexual identity. The Seventh Circuit in 2003 decided that a man who had been called a "faggot" and "girl scout," among other things, and had been threatened with physical injury, was not "discriminated against 'because of' sex," but instead was harassed because of his "co-workers'…perceptions of [his] sexual orientation."[130] Other courts had ruled similarly in the past.[131] The District Court for the District of Columbia recently declined a male-to-female transsexual's claim, holding that the discrimination she suffered stemmed from the fact that her gender identity failed to match her anatomical sex, which is different from sex-stereotyping discrimination and

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129. *See supra* notes 126-27 and accompanying text.

130. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1060, 1062-64 (7th Cir. 2003).

131. *See, e.g.,* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).

therefore not barred by Title VII.[132] That court made a categorical distinction between discrimination based on sex-stereotypes and discrimination based on gender identity, refusing to apply *Price Waterhouse* to transsexuals.

Other courts, however, have taken Title VII's prohibition against sex-stereotyping more seriously and have accepted sex-stereotyping claims from homosexuals and transsexuals. On one end of the interpretive scale, some argue that *Price Waterhouse* means that any discrimination based on non-conformity to a sex-stereotype is sex discrimination under Title VII.[133] Such a broad reading would easily protect homosexuals, transsexuals, and other transgendered individuals from discrimination based on sex-stereotypes. Although this view is generally not accepted in courts, one district court speculated in dicta that:

> [S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co- worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.[134]

Courts have generally been more conservative than this broad interpretation, but the Sixth Circuit did parallel that logic in its decisions in *Smith v. City of Salem*,[135] and again in *Barnes v. City of Cincinnati*.[136] *Smith*

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132. *See* Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D. D.C. 2006). The district court did concede, however, that

> [a] transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions."

Id. For an interesting academic discussion of the way that courts insert sexual identities such as "transsexual" or "homosexual" and thereby circumvent claims of sex discrimination, see Sunish Gulati, Note, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177 (2003).

133. *See* Gulati, *supra* note 132, at 2182.

134. Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

135. 378 F.3d 566, 572 (6th Cir. 2004).

dealt with a claim by an employee who had been fired when his employers discovered his transsexuality and he began expressing himself in feminine ways at work.[137] The complaint established the plaintiff's behaviors that failed to comply with his employers' and co-workers' sex-stereotypes, and alleged that the plaintiff's co-workers had asserted that he was not presenting himself in a sufficiently masculine way.[138] While other courts faced with similar facts had reasoned that claims made by transsexuals, homosexuals, and transvestites are not actionable under Title VII because the discrimination occurs because of a plaintiff's unprotected sexual identity or orientation,[139] the *Smith* court countered:

> Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical [sic] behavior simply because the person is a transsexual…[d]iscrimination against . . . a transsexual . . . is no different from the discrimination directed against [the plaintiff] in Price Waterhouse . . . . Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex-discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.[140]

Later, the Sixth Circuit reaffirmed this holding in *Barnes v. City of Cincinnati*.[141]

Even some courts with a less generous reading of *Price Waterhouse* have permitted sex-stereotyping claims to proceed under Title VII where there is evidence that the discriminatory action was related to gender. In *Nichols v. Azteca Rest. Enters.,* a case presented before the Ninth Circuit, an employee produced evidence that he was "attacked for walking and carrying his tray 'like a woman,'" harassed "for not having sexual intercourse with a waitress who was his friend," and referred to by co-workers as "she" and "her".[142] He was also called vulgar epithets that generally refer to females.[143] Based on this evidence, the court concluded that the harassment was tied to gender and that *Price Waterhouse* supports claims from men who face discrimination for

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136. 401 F.3d 729, 737 (6th Cir. 2005).
137. 378 F.3d at 572.
138. *Id*.
139. *See supra* notes 121-27.
140. 378 F.3d at 574-75.
141. 401 F.3d at 737.
142. 256 F.3d 864, 874 (9th Cir. 2001).
143. *Id.*

allegedly being too feminine.[144] The Ninth Circuit followed the *Nichols* decision with *Rene v. MGM Grand Hotel, Inc*.[145] *Rene* is particularly significant because it held that, even if part of the motive for discrimination is based on an unprotected class, such as sexual orientation, a plaintiff may still have a cause of action if part of the discrimination was also motivated by sex.[146]

Similarly, the Second Circuit recently held that a plaintiff who was subjected to difficult tasks in order to "make a man" out of him, and who had received other insults about not being masculine enough, had alleged sufficient evidence from which a court could reasonably find that the discrimination he faced was based on gender.[147] While the spectrum of sex-stereotyping claims subject to Title VII protection seems to be growing, ambiguity still exists. Applying nonsubordination theory to sex-stereotyping claims would resolve most of the ambiguity by forcing courts to question whether the stereotype is rooted in female subordination.

B. Impermissible Sex-Stereotype Analysis Under Nonsubordination Theory

Having established that a nonsubordination inquiry will treat some sex-stereotyping as sex discrimination, the next major question is what specific types of stereotypes a nonsubordination approach may find impermissible. Applying a nonsubordination sex-stereotyping standard to the above cases would often lead to a finding of sex discrimination because cultural norms about sex differences are generally grounded in or serve to perpetuate female inferiority, either through directly affecting females in the workforce, devaluing femininity in the workplace, or exploiting female sexuality.[148]

Aggressive women and effeminate men will be protected from sex-stereotyping discrimination under a nonsubordination analysis. The stereotype that aggressive women are unsuitable for the workplace is impermissible because it can prevent women from succeeding in the workplace,[149] and because it is generally grounded in assumptions about female femininity and passivity. Similarly, discrimination against effeminate men would also be an actionable form of sex discrimination. One scholar noted that:

> [D]iscrimination against effeminate men is often a way of policing gender roles in the workplace and reaffirming gender scripts that discourage men from engaging in nurturing and caregiving activities. Such discrimination pushes men to act in hypermasculine and traditionally macho ways. While such role policing certainly confines

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144. *Id.*

145. 305 F.3d 1061, 1063-64 (9th Cir. 2002).

146. *Id.* at 1069.

147. Miller v. City of New York, No. 04-5536-cv, 2006 U.S. App. LEXIS 10730, at *2, *4-5 (2d Cir. April 26, 2006).

148. *See* Whisner, *supra* note 21, at 76.

149. *See* Yuracko, *supra* note 14, at 227.

> men, it also undermines women's ability to compete successfully in the workplace. Enforcing a code of hypermasculinity on male employees reinforces women's position as different and other. Moreover, hypermasculinity defines itself not only as different from that which is female but as distinctly superior to it.[150]

That a nonsubordination approach would protect effeminate men is significant because some argue that we must allow men to be feminine if we want to elevate femininity and respect it as much as we do masculinity. One scholar argues that "the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well."[151] A nonsubordination approach could help break down stereotypes about masculinity and femininity for both men and women.

Furthermore, a nonsubordination approach to Title VII might prohibit discrimination based on sexual orientation, just as it would protect those who do not follow sex-stereotypes. Discrimination based on sexual orientation is often founded on stereotypes that men should only like women and women should only like men.[152]

As I hope has been made clear, a nonsubordination approach would offer broader protection to individuals who do not readily conform to accepted stereotypes about the way that men and women should appear and behave than individuals currently have in most circuits. However, I want to offer one caveat here: though I have just described some conclusions about what kind of discrimination would be prohibited by my sex-stereotyping analysis, I want to emphasize that the inquiry must necessarily be particularized and specific to the circumstances surrounding the discrimination and the work environment. Though federal legislation protecting homosexuals, transsexuals, transvestites, or transgendered individuals may be desirable, I recognize that Title VII was not intended to offer that protection. It was intended to promote sex equality, and I suggest that the best way for it to do so is by focusing on sex-stereotypes. My conclusion is not that homosexuals or transsexuals or other individuals who stray from stereotypical notions about sex and gender identity are categorically protected by Title VII. Rather, I propose that such individuals are not categorically *excluded* from Title VII's protection and we should look carefully at the stereotype at issue in the particular discriminatory practice, determine whether the stereotype perpetuates female inferiority, and invalidate those stereotypes that do.

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150. *Id.* at 227-28.
151. Case, *supra* note 83, at 7.
152. Yuracko, *supra* note 14, at 232.

VI. CONCLUSION

The approach that I have suggested for resolving Title VII sex-discrimination jurisprudence is consistent with the developing jurisprudence of Title VII, and indeed mandated by sex-stereotyping jurisprudence. Although Congress probably never intended to cover homosexuals, transsexuals, and other individuals who may diverge, even radically, from sex-stereotypes under Title VII, the statutory language providing that any discrimination based on sex is illegitimate,[153] combined with the Supreme Court's insistence "that gender must be irrelevant to employment decisions,"[154] seem to mandate the approach I have taken. Admittedly, though, inserting nonsubordination analysis is at some level a choice in the principles that Title VII ought to promote and protect. However, there are advantages to articulating a specific principle in antidiscrimination law.

Some of the advantages of the nonsubordination approach relate to judicial application of sex-stereotyping jurisprudence. First, applying antidiscrimination law in a particular way forces courts to be accountable for their decisions.[155] Requiring the court to examine the sex-stereotypes behind policies and practices allows for a more frank and productive discussion about sex-stereotypes and sex discrimination in the workplace than is currently available. Even where courts have protected individuals such as transsexuals, they have done an unsatisfactory job of explaining their reasoning as to why the stereotypes at issue were unacceptable.[156] That failure can prevent the cultural dialogue that Title VII can promote.

Second, this standard encourages consistency within sex discrimination jurisprudence[157] because courts would actually have a standard to apply, rather than looking at sex-stereotyping haphazardly. To date, courts have applied a myriad of theories to either accept or reject discrimination claims, leaving the jurisprudence messy and highly inconsistent across circuits.[158]

Third, applying a specific principle will focus judicial attention on the question of what sort of transformations Title VII is meant to accomplish, and what practices need to be eliminated to accomplish that purpose.[159] It engages in a more thoughtful analysis than a strict equality approach; it will still be possible to make sex-based distinctions where those distinctions are either genuine to a particular individual (and therefore not based on impermissible sex-stereotypes) or are not rooted in female subordination.

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153. 42 U.S.C. § 2000e-2(m) (2001).

154. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

155. *See* Post, *supra* note 84, at 32.

156. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004).

157. Post, *supra* note 84, at 33.

158. *See supra* Parts II, V, and VI.

159. Post, *supra* note 84, at 36.

If it is, as I believe, Title VII's aim to "transform existing practices of . . . gender,"[160] that aim will be better served by a standard that evaluates employment practices based on whether they classify individuals in a harmful way, rather than denying classification altogether. In the end, an account of Title VII that focuses on the principle of nonsubordination may temper the divide between facially discriminatory and facially neutral rules.[161] A nonsubordination approach will further promote an analysis of whether rules are substantively consistent[162] with antidiscrimination law. Ultimately, the approach may lead to more complete economic, social, and cultural equality between the sexes in a way that existing Title VII interpretations have failed to achieve.

160. *Id.* at 38-39.
161. *Id.* at 39.
162. *Id.*