THE NEW SEX DISCRIMINATION

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ABSTRACT

Sex discrimination law has not kept pace with the lived experience of discrimination. In the early years of Title VII of the Civil Rights Act of 1964, courts settled on an idea of what sex discrimination looks like—formal practices that exclude employees based on their group membership. The problem is that sex discrimination has become highly individualized. Modern sex discrimination does not target all men or all women, nor does it target subgroups of men or women. The victims of modern sex discrimination are particular men and women who face discrimination because they do not or cannot conform to the norms of the workplace. These employees have been shut out of a sex discrimination regime that still expects employees to anchor their claims to a narrative of group subordination.

I argue that the lived experience of discrimination should determine employment discrimination doctrine and not the other way around. Accordingly, I propose a new regime for sex discrimination law. The model for the new sex discrimination regime is religious discrimination law. Unlike other areas of employment discrimination law, religious discrimination law offers a dynamic conception of identity and a greater array of different theories of discrimination. I argue that sex discrimination law can and should work this way, too.

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On a broader level, the paper makes a strong normative claim about the substance of Title VII's sex equality project. I argue that sex discrimination law needs to recalibrate its vision of equality. Difference is universal. No two women (or men) are the same, and this is a good thing. Thus the central task of sex discrimination law should be to better recognize—and, in turn, protect—the distinctive ways in which employees express their maleness and femaleness. It is these differences, after all, that shape the way employees experience modern sex discrimination.

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INTRODUCTION

In 2000, Darlene Jespersen lost a job that she loved.[1] For over twenty years, Jespersen worked as a bartender at Harrah's Casino in Reno, Nevada.[2] During her career at Harrah's, she accumulated a strong work record, earning the praise of coworkers and customers alike.[3] Things went downhill for Jespersen, however, when Harrah's adopted a new appearance code for its beverage service personnel.[4] The new policy—which Harrah's called the "Personal Best" program—required female employees to, among other things, wear makeup during their shifts.[5] The makeup requirement posed a problem for Jespersen, as she never wore makeup on or off the job.[6] Jespersen explained that wearing makeup made her feel "ill," "degraded," "exposed," and "violated."[7] She felt that makeup robbed her of her "credibility as an individual and as a person," so much so that she could not do her job well if forced to wear makeup during her shifts.[8]

Despite her many years of service and her exemplary record, Harrah's would not budge on the makeup requirement, and Jespersen soon found herself out of a job.[9] She responded by bringing a sex discrimination claim under Title VII of the Civil Rights Act of 1964 (Title VII),[10] alleging that Harrah's "Personal Best" program—specifically the makeup requirement—amounted to unlawful sex discrimination.[11] Jespersen's theory of discrimination was that the makeup requirement compelled female employees to conform to a

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1. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc).

2. *Id.* at 1106–07.

3. *See id.* at 1106–08 (describing Jespersen's work as "exemplary" and noting her favorable customer reviews and employer evaluations).

4. *Id.* at 1107.

5. *Id.* The "Personal Best" program was part of Harrah's "Beverage Department Image Transformation" program. *Id.*

6. *Id.* at 1107–08.

7. Appellant's Corrected Opening Brief at 34 n.8, *Jespersen*, 444 F.3d 1104 (No. 03-15045), 2003 WL 25859577. For a useful and comprehensive discussion of Jespersen's case, see generally Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, *in* EMPLOYMENT DISCRIMINATION STORIES 105 (Joel Wm. Friedman ed., 2006).

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

9. *Id.*

10. 42 U.S.C. § 2000e-2 (2006).

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

stereotypical standard of femininity,[12] a variation on the gender-stereotyping theory developed by the Supreme Court in *Price Waterhouse v. Hopkins*.[13] The thrust of the gender-stereotyping theory is, in the words of the Court, that an employer cannot "evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[14]

In the end, Jespersen could not sustain her stereotyping claim against Harrah's. The Ninth Circuit concluded that her injuries were too subjective to support her gender-stereotyping claim. According to the court, "The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job."[15] The court made clear that, as a general matter, an employee can challenge a grooming code on gender-stereotyping grounds[16] but that the "subjective reaction of a single employee" is not sufficient to support such a claim.[17]

There is a coming crisis in sex discrimination law, and employees like Darlene Jespersen are at the center of it.[18] Sex discrimination law has not kept pace with the lived experience of sex discrimination. When Title VII became law, most instances of sex discrimination involved overt discrimination that differentiated between men and women, almost always to the detriment of female employees.[19] And it was not uncommon for employers to justify a discriminatory practice by appealing to perceived or stereotypical differences between men and women. Consider a prominent example. The Water and Power Department for the City of Los Angeles administered a retirement benefits system for its employees, which it funded, in part, through

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12. *Id.*

13. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

14. *Id.* at 251 (plurality opinion).

15. *Jespersen*, 444 F.3d at 1112.

16. *See id.* at 1113 ("We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves.").

17. *Id.*

18. I have borrowed the phrase "coming crisis" from an influential article by Professor Ken Karst. *See* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997).

19. *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 644–46 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60, 465–68 (2001); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 167–70, 172–75 (2004).

employee contributions.[20] The Department required female employees to contribute greater monthly payments to its pension fund than male employees, which meant that female employees took home less pay than their male coworkers.[21] The Department's reason for making women contribute more than men was that, on average, women tend to live longer than men.[22] The discrimination was formal in nature, targeting women as a group.

The problem is that sex discrimination looks very different today. Sex discrimination has become highly individualized. Modern sex discrimination does not target all men or all women, nor does it target subgroups of men or women—such as women who are aggressive and men who are effeminate.[23] The victims of modern sex discrimination are particular men and women who face discrimination because they do not or cannot conform to the norms of the workplace.[24] In addition to Darlene Jespersen, it is the male truck driver who wears women's clothing;[25] it is the bus driver who cannot find a bathroom to use while she is transitioning from male to female;[26] it is the effeminate man who sticks out like a sore thumb in a rural Wisconsin factory;[27] it is the new mother who needs extra breaks during the workday to pump milk for her newborn baby;[28] it is the hairstylist who is fired from her salon because she is a butch lesbian;[29] and it is the overweight telemarketer who is told she is not pretty enough for a face-to-face sales position.[30] Time and time again, these employees, often the most marginalized employees in their respective workplaces, have struggled to find their footing in a sex

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20. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 704–05 (1978).

21. *Id.* at 705.

22. *Id.*

23. *Cf.* Yuracko, *supra* note 19, at 175–77 (describing subgroup discrimination in terms of trait discrimination).

24. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2548–49 (1994); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 299–300 (2005); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 811–13 (2002).

25. Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. Sept. 16, 2002).

26. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219 (10th Cir. 2007).

27. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1058–60 (7th Cir. 2003).

28. Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999).

29. Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005).

30. Marks v. Nat'l Commc'ns Ass'n, 72 F. Supp. 2d 322, 325 (S.D.N.Y. 1999).

discrimination regime that still views the group as the focal point of discrimination.

This Article initiates a conversation about the future of sex discrimination. It lays the foundation for a new sex discrimination regime that is tailored to the lived experience of sex discrimination as it exists today rather than as it once did. The driving force behind my argument is the idea that, when it comes to developing antidiscrimination protections, the lived experience of discrimination should determine the doctrine and not the other way around.[31] I believe that this is what Oliver Wendell Holmes Jr. had in mind when he wrote, in *The Common Law*, that "[t]he life of the law has not been logic; it has been experience."[32] The toughest obstacle facing victims of modern sex discrimination is the need to anchor their discrimination claims to a narrative of group subordination—to show, in other words, that the discrimination they faced in the workplace harms their group as a whole. My goal is to imagine a sex discrimination regime that is not tethered to group subordination.

Sex discrimination law needs to move in a new direction. And religious discrimination law provides a template for how to do that. Religious discrimination occupies a special place within Title VII thanks to two interrelated doctrinal features. The first is a dynamic conception of what constitutes a religion. Like other areas of Title VII, religious discrimination protects employees against status discrimination[33]—for instance, an employee being fired for being Jewish.[34] But what separates religious discrimination from the rest of Title VII is that it also protects employees against religious-practice discrimination[35]—for instance, an employee being fired for refusing to

31. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 176 (2006) ("[D]octrinal formulations are less important to the law's development than the cultural experience in which those laws are embedded.").

32. O.W. HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

33. The status protection for religion flows from Title VII's general nondiscrimination command. Title VII provides: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge 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) (2006) (emphasis added).

34. *See, e.g.*, Kremer v. Chem. Constr. Corp., 623 F.2d 786, 787 (2d Cir. 1980).

35. In 1972, Congress amended Title VII by adding a broader definition of "religion," which "includes all aspects of religious observance and practice, as well as belief." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j)).

work on the Sabbath.[36] What is more, religious discrimination law embraces an attitude of liberal neutrality toward the particulars of a person's religion.[37] For a belief or practice to count as a religion, all an employee needs to show is that it is religious within her own scheme of things and that it is sincerely held. The result is a body of law that recognizes a vast universe of religious practices, each as distinctive as the next.[38]

The second doctrinal feature of religious discrimination law flows immediately from the dynamic conception of religion as a protected trait. In addition to the standard prohibition against disparate treatment,[39] religious discrimination law also imposes on employers a duty to reasonably accommodate an employee's religious practice.[40] As a theory of discrimination, reasonable accommodation goes further than the standard disparate treatment protection, which

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36. *See, e.g.*, Reed v. Mineta, 93 F. App'x 195, 196 (10th Cir. 2004) (involving an air traffic controller who was fired because he refused to work on the Sabbath holiday).

37. Of course, Title VII takes a hands-off approach so as not to offend the Free Exercise Clause of the First Amendment, which allows individuals to worship as they choose free from government interference.

38. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128, 131 (1st Cir. 2004) (involving a store cashier who, as a member of the Church of Body Modification, challenged the employer's "no facial jewelry" policy); Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 473 (7th Cir. 2001) (involving an employee who, as an expression of her faith, told people to "Have a Blessed Day" when ending a conversation or written communication); Altman v. Minn. Dep't of Corr., 251 F.3d 1199, 1199 (8th Cir. 2001) (involving prison employees who were reprimanded for reading bibles during a mandatory training on lesbian and gay employees in the workplace); Rodriguez v. City of Chicago, 156 F.3d 771, 772 (7th Cir. 1998) (involving a police officer whose religious beliefs prevented him from guarding an abortion clinic); Peterson v. Minidoka, 118 F.3d 1351, 1356–58 (9th Cir. 1997) (involving a public school principal who was demoted after deciding to homeschool his children so they could receive an education in which all of their classes would reflect "an aspect of God being the creator"); EEOC v. United Parcel Serv., 94 F.3d 314, 315–16 (7th Cir. 1996) (involving an employee who wore a beard for religious purposes); Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993) (involving an employee who was fired for missing work to attend his wife's conversion ceremony); Chenzira v. Cincinnati Children's Hosp. Med. Ctr., No. 1:11-CV-00917, 2012 WL 6721098, at *1, *4 (S.D. Ohio Dec. 27, 2012) (involving an employee who refused to get a flu shot, as required by the employer's policy, because the employee was vegan).

39. *See, e.g.*, Mandell v. Cnty. of Suffolk, 316 F.3d 368, 379 (2d Cir. 2003) (involving a police officer who alleged that he was discriminated against because he was Jewish); Campos v. City of Blue Springs, 289 F.3d 546, 549–50 (8th Cir. 2002) (involving a plaintiff who practiced Native American spirituality and who alleged that he was fired because he was not Christian); EEOC v. Univ. of Chi. Hosps., 276 F.3d 326, 328 (7th Cir. 2002) (involving an Evangelical Christian Baptist hospital recruiter who alleged that she was repeatedly told to soften her religious expression).

40. *See* 42 U.S.C. § 2000e(j). Religious discrimination law's reasonable accommodation framework grows out of the Supreme Court's decision in the now-famous *Hardison* case. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75–76 (1977).

only restricts employers from introducing bias into the workplace. Reasonable accommodation, by contrast, requires employers to redesign the workplace to account for the needs of their employees, provided that doing so will not create an "undue hardship" for the employer.[41] From an organizational perspective, the advantage of an accommodation framework is that it should promote collaboration between employers and employees, the hope being that when an employee's religious practice conflicts with an employer's policy, the employee will negotiate rather than litigate to find a solution to the problem.

Taken together, these doctrinal features create a legal environment that caters to individuals rather than groups. Sex discrimination law can—and I argue that it should—work this way, too. My proposal is that the new sex discrimination law should track the doctrinal structures of religious discrimination law. First, sex discrimination law should adopt a more dynamic conception of sex as a protected trait, one that affirmatively protects sex as both a status and a practice. Of all the proposed reforms in this Article, this one should be the easiest to implement, as the gender-stereotyping theory of sex discrimination has laid the groundwork for just such a robust protection. On top of that, discrimination claimants should have greater freedom to define the nature of their sex practice, just as claimants in religious discrimination cases do.

The second major doctrinal change is that sex discrimination law should supplement disparate treatment analysis with a reasonable accommodation protection. This is admittedly a more controversial proposal, though it nevertheless dovetails nicely with a more dynamic conception of sex as a protected trait. In making this proposal, I am mindful of Professor Kenji Yoshino's warning that we should not think of reasonable accommodation as legal penicillin.[42] Reasonable accommodation is not a panacea, and I do not think it will cure all the ills of sex discrimination. But I do think that reasonable accommodation offers a better way for the law to contend with the harms of modern sex discrimination than does the legal landscape currently available to a discrimination claimant. The defining characteristic of modern sex discrimination is that it is experienced individually, and reasonable accommodation is an individualized theory of discrimination. As we look to the future of sex

41. *See Hardison*, 432 U.S. at 84.

42. YOSHINO, *supra* note 31, at 167–68, 174–75.

discrimination law, we need a framework that treats discrimination claimants as individuals, not as members of a group. Reasonable accommodation provides this framework.

For these doctrinal changes to take hold, we will also need to recalibrate the vision of equality that undergirds sex discrimination law. For most of its history, sex discrimination law has conceived of equality in terms of treating men and women, as groups, in the same way.[43] According to this view, equality is cast in neutral terms, providing formal protections for the sexes as compared against each other. But the new sex discrimination demands a vision of equality that is rooted in difference rather than sameness, a vision of equality that understands that no two women (and no two men) are the same. Going forward, the central task of sex discrimination law should be to better recognize—and, in turn, protect—the distinctive ways in which employees express their maleness and femaleness. It is these differences, after all, that shape the way employees experience modern sex discrimination.

The Article proceeds in four parts. The purpose of Part I is to put my argument in context. To that end, it outlines the three main theories of discrimination currently available in employment discrimination law and contrasts two competing visions of equality. From there, Part II tells the story of why employees like Darlene Jespersen have such a hard time raising actionable sex discrimination claims. More specifically, this Part develops a wide-ranging critique of existing sex discrimination law, challenging the doctrinal rules, historical fictions, and normative values that anchor the law to narratives of group subordination. As a part of that discussion, I also propose a new normative baseline for Title VII's sex equality project.[44] The thrust of this claim is that Title VII should not define sex equality in terms of what is good for all or even most women (or men), but rather in terms of what individual men and women need to flourish in the workplace.

Part III sketches a new framework for sex discrimination law. Modeled on the protections currently available to employees in religious discrimination cases, this new framework relaxes sex

43. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1313 (2012).

44. "Title VII's sex equality project" is my own term. It is meant to convey that, because equality is not a self-defining concept, the principal work of a statute like Title VII is to develop some vision of what equality looks like. This Article contributes to this project—the project of imagining equality—by proposing a new idea of what it means to treat the sexes equally.

discrimination law's conception of identity, making the law more responsive to the needs of employees as individuals. It also adds reasonable accommodation as a formal response to sex discrimination, which will force employers and employees to shoulder the burden, together, to accommodate differences in the workplace. Taken together, these doctrinal reforms will bring discrimination law more in line with the lived experience of discrimination as it exists today. Reimagining sex discrimination law in this way will also require that we rethink what equality means. Part III also argues that sex discrimination law needs to embrace a more holistic vision of equality, one that is sensitive to difference as well as sameness. Stepping back, Part IV considers the broader implications of my argument. The goal of this discussion is to jumpstart a conversation about the future of employment discrimination. Accordingly, Part IV raises some hard questions about where employment discrimination law has been, where it is now, and where it needs to go in the future.

I. CONTEXT

Before turning to the substance of my argument, this Part offers a brief tour of the doctrinal landscape of employment discrimination law. This discussion highlights two fundamental features of the law. First, it outlines the three main theories of discrimination that currently exist in employment discrimination law—disparate treatment, disparate impact, and reasonable accommodation. Such a discussion is helpful because my proposal, developed in detail below, is that sex discrimination law should shift from one theory of discrimination (disparate treatment) to another (reasonable accommodation). Second, it distinguishes between two competing visions of equality that undergird employment discrimination law. In terms of scope, the following discussion is purely descriptive. My goal in the immediate Section is to provide a doctrinal foundation for my normative claims about the past, present, and future of sex discrimination law.

A. Theories of Discrimination

As a body of law, employment discrimination is concerned with the "rights and responsibilities of employers and employees."[45] In

45. MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION xxvii (7th ed. 2008).

particular, employment discrimination law seeks to regulate a small slice of employment decisions. Discrimination, in the broadest sense of the term, is essential to the organization of a workplace. Employers discriminate all the time—they make decisions about whom to hire and fire, whom to assign to certain shifts and special projects, and whom to promote and transfer. Employment discrimination law only comes into play when one of these employment decisions implicates a trait that is protected by statute.[46] The primary task of employment discrimination law, then, is to determine if an employment decision is based on one of these prohibited traits.[47]

To facilitate this inquiry, employment discrimination law distinguishes between three theories of discrimination—disparate treatment, disparate impact, and reasonable accommodation. These theories are mutually exclusive, with each responding to a distinct experience of discrimination. Disparate treatment governs a situation in which an employer treats employees differently on account of a protected trait. Disparate impact addresses cases of unintentional discrimination, in which a nondiscriminatory rule has a discriminatory effect. And reasonable accommodation covers instances in which an employer fails to account for an employee's special needs. I consider these theories in turn.

1. *Disparate Treatment*. Disparate treatment is the analytical backbone of employment discrimination law. The theory rests on a principle—often referred to as an anticlassification principle—that an employer cannot make employment decisions that classify an employee (or a group of employees) on the basis of a protected trait, such as race, sex, or religion.[48] The critical feature of disparate

46. *See* 42 U.S.C. § 2000e-2(a)(1) (2006) (proscribing discrimination on the basis of "race, color, religion, sex, or national origin").

47. This is employment discrimination law's discriminatory-causation requirement. To state an actionable discrimination claim, a claimant must show that the alleged discrimination was "because of" a protected trait and not "because of" a trait that is not protected by Title VII. In a prominent age discrimination case, the Supreme Court described discriminatory causation as a situation in which "liability depends on whether the protected trait . . . actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). The Court continued, "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.*

48. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) ("Roughly speaking, this principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race."). The principle was first identified

treatment analysis is the causation requirement, which flows from the statutory command that prohibits discrimination "because of" a protected trait.[49] Consider an example. Say that two current employees—a man and a woman—apply for a promotion to be the new director of sales, and the employer promotes the male employee. To state a disparate treatment claim, the female employee must show that she was denied the promotion for an illegitimate reason—*because* she is a woman—and not for some legitimate reason, such as an inferior sales record or a spotty attendance record.

The specifics of how a discrimination claimant proves a disparate treatment claim—what kind of evidence is needed to support a claim and what evidentiary framework a fact finder will use to assess the claim—are beyond the scope of the immediate discussion.[50] But it is important to note that the touchstone of disparate treatment is discriminatory intent or motive.[51] In the previous example, the employer's decision created a discriminatory result because a man was promoted over a woman. For the female employee to state a disparate treatment claim, however, she must show that the discriminatory result was motivated by a discriminatory purpose—for instance, that the employer thought women were not cut out for managerial positions.[52]

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by Professor Owen Fiss in a classic article. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157–64 (1976).

49. *See supra* note 47.

50. For further discussion of specifics in the context of sex discrimination claims, see generally Jessica Clarke, *Inferring Desire*, 63 DUKE L.J. 525 (2013).

51. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."); *see also* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) ("A disparate treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988))); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."); *Watson*, 487 U.S. at 986 ("In such 'disparate treatment' cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive.").

52. *See generally* 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) (critiquing the "lack of interest" defense to sex discrimination).

Under a disparate treatment rule, an employer cannot inject bias into the workplace.[53] This is what separates disparate treatment from reasonable accommodation. In the latter case, discrimination is defined in terms of whether the employer has adequately adjusted the job to satisfy the needs of individual employees. By contrast, disparate treatment does not question the way an employer organizes its workplace. In the words of Professors Pam Karlan and George Rutherglen, disparate treatment "essentially takes jobs as it finds them."[54]

2. *Disparate Impact*. If discriminatory intent is the touchstone of disparate treatment, then discriminatory effect is the touchstone of disparate impact. Disparate impact captures *unintentional* discrimination, cases in which an employment policy is fair on its face but harms one group of employees more than another.[55] The least intuitive of the three theories of discrimination, disparate impact is best explained in the context of an example.

Alabama had a statute that set a minimum height and weight requirement to work in a correctional facility (five feet two, 120 pounds).[56] The female plaintiff applied for a position as a correctional counselor but was rejected because she fell short of the statute's weight requirement.[57] She challenged the policy under a disparate impact theory. At the time of the suit, women fourteen years of age or older made up 52.7 percent of the Alabama population but held only 12.9 percent of the correctional counselor positions.[58] Taken together, the height and weight requirements created a disparate impact: the rule excluded from consideration 41.1 percent of women and less than 1 percent of men.[59] Importantly, the plaintiff's claim did not allege purposeful sex segregation. Even though Alabama adopted

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53. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1359 (2009).

54. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996). Professors Karlan and Rutherglen go on to explain that Title VII "defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it." *Id.*

55. *See Teamsters*, 431 U.S. at 336 n.15 ("[Disparate impact claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

56. Dothard v. Rawlinson, 433 U.S. 321, 323–24 (1977).

57. *Id.*

58. *Id.* at 329.

59. *Id.* at 329–30.

the height and weight requirements because it was concerned for the safety of its correctional officers, the rule still violated Title VII.[60]

The full story of disparate impact is worthy of serious consideration as we think about the future of employment discrimination law. It is not, however, integral to my goal in this Article. For this reason, the remainder of this Article is focused on disparate treatment and the third main theory of discrimination, reasonable accommodation.

3. *Reasonable Accommodation*. The newest of the three theories of discrimination, reasonable accommodation, emerged on the scene as part of the Rehabilitation Act of 1973,[61] the statutory precursor to the Americans with Disabilities Act (ADA).[62] Today, reasonable accommodation is a part of only a small handful of antidiscrimination statutes,[63] most notably the ADA and Title VII's religious discrimination provision.[64]

The basic thrust of reasonable accommodation is that the employer must take steps to modify a job to fit the needs of a particular employee.[65] Take an example from Title VII's religious

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60. *Id.* at 332. The Court characterized the plaintiff's claim as follows:

> The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections.

Id. at 328–29 (footnote omitted).

61. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

62. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

63. Two other statutes that provide for reasonable-accommodation claims are worth mentioning. The first is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects military veterans against discrimination. *See* Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–4335 (2006). USERRA requires employers to make reasonable accommodations for disabilities that arose during military service or were aggravated by military service. *See id.* § 4313(a)(3). The second is President Obama's health care law, the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29, and 42 U.S.C.). A small provision of the ACA—which has been overshadowed by the more controversial parts of the law—requires employers to provide mothers who are breastfeeding with time and space to express milk. *See* 29 U.S.C. § 207(r)(1) (Supp. V 2011). Importantly, the law does not create a right of action for employees to bring a claim against employers who fall short of their obligations, which makes the provision more aspirational than enforceable.

64. 42 U.S.C. § 2000e(j) (2006).

65. *See* J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1390 (2003) ("[A]n 'accommodation' mandate requires employers to make

discrimination jurisprudence. Say that an employee, a devout Jew, is unable to work her scheduled shift on a Saturday afternoon. She explains the conflict to her employer, noting that she cannot abide by her religious beliefs if she is required to work on the Sabbath. At this point, the employer is faced with a choice: adjust the work schedule if possible, or face the threat of a lawsuit. Say that the employer cannot make the requested change to the schedule, perhaps because doing so would greatly disrupt the whole work schedule and inconvenience many employees. In that situation, the requested accommodation would pose an "undue hardship," thereby relieving the employer of any obligation to accommodate the employee.[66] By contrast, if the employer can make the change without great difficulty, the law requires the employer to reschedule the employee so as to eliminate the conflict between her work obligations and her religious practice.

Reasonable accommodation provides a more individualized protection than disparate treatment. Under a disparate treatment regime, the employer is prohibited from introducing bias into the workplace but bears no responsibility to tailor the job to the needs of its employees. Reasonable accommodation, by contrast, seeks to mold the job around the needs of the employee, when possible. Negotiation is integral to reasonable accommodation: employers and employees must come together to discuss their respective needs and expectations.[67] By fostering collaboration in this way, reasonable accommodation turns conventional antidiscrimination discourse on its head. If, as Professor Christine Jolls describes it, "[t]he canonical idea of 'antidiscrimination' in the United States condemns the differential treatment of otherwise similarly situated individuals on the basis of

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costly exceptions to their merit-based criteria in order to increase employment opportunities for individuals who otherwise would be excluded.").

66. *Compare* Weber v. Roadway Express, Inc., 199 F.3d 270, 272, 274–75 (5th Cir. 2000) (holding that the accommodation of an employee's beliefs would have imposed an undue hardship when the employee, a Jehovah's Witness, worked as a truck driver and refused to make overnight runs with a woman who was not his wife, thereby limiting the number of trips he could make), *with* Vetter v. Farmland Indus., Inc., 901 F. Supp. 1446, 1449, 1456 (N.D. Iowa 1995) (holding that an employer failed to sufficiently accommodate a Jewish employee's request to live in a city with a synagogue, when the employer required the employee to live in his assigned sales territory and proposed a city without a synagogue), *rev'd on other grounds*, 120 F.3d 749 (8th Cir. 1997).

67. In a leading case in the disability context, the Seventh Circuit noted that "[o]nce an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary." Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996).

race, sex, national origin, or other protected characteristics,"[68] then reasonable accommodation marks a significant shift in the American antidiscrimination project. Specifically, it expands the idea of antidiscrimination to cover the unique ways in which individuals express their identities.

B. Visions of Equality

The fundamental goal of employment discrimination law is to promote equality in employment. Though it lies at the heart of American antidiscrimination law, equality is not a self-defining concept. Consider the following question: What does it mean to treat employees equally? How we answer this question reveals a great deal about our normative expectations of what wrongs employment discrimination law is supposed to remedy and how it should go about doing so.

1. *Equality as Sameness*. The dominant view of equality in employment discrimination law is based on the idea of sameness. The sameness model provides that employers should treat like people in a like manner.[69] To satisfy this equality command, an employer must act as if it cannot—or at least does not—appreciate its employees' identity traits.[70] The idea that employers should blind themselves to their employees' traits is deeply engrained in American antidiscrimination law.[71] In his celebrated work *Prejudicial Appearances*, Professor Robert Post seeks to uncover the hidden logic of American antidiscrimination law.[72] Post discovers that trait blindness is crucial to the inner workings of our antidiscrimination project: "Blindness," he argues, "renders forbidden characteristics

68. Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001) (citing Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 9–12 (2000)).

69. *See* Karlan & Rutherglen, *supra* note 54, at 10 ("Under the sameness model, discrimination occurs when individuals who are fundamentally the same are treated differently for illegitimate reasons.").

70. *See* Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200 (2003) ("The central thrust of Title VII employs a 'sameness' model of discrimination, requiring employers to treat African Americans and women exactly the same as others; their race and sex must be ignored and employers must focus instead on factors related to productivity." (footnote omitted)).

71. *See generally* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) (discussing the origin and development of color blindness in antidiscrimination law).

72. ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1 (2001).

invisible; it requires employers to base their judgments instead on the deeper and more fundamental ground of 'individual merit' or 'intrinsic worth.'"[73]

Certain traits are designated off-limits as bases for an employment decision. The idea is that these traits—such as race, sex, and religion—are culturally salient and often trigger deeply held stereotypes and prejudices.[74] Employment law takes these traits off the table, in the hope that restricting their influence in individual cases will, in the long run, lead to wholesale social change.

2. *Equality as Difference*. We can contrast the sameness model of equality with the difference model of equality. Whereas the sameness model seeks to create formal equality, the difference model is interested in creating substantive equality.[75] It mandates that some people need to be treated differently to be treated equally.[76] The difference model is the animating force behind reasonable accommodation. When an employer adjusts the workplace to meet the needs of a given employee, the employer is accounting for the employee's difference—the characteristics that set the employee apart from her coworkers. Writing in the context of disability law, Professor Anna Kirkland argues that the ADA charts a new course for antidiscrimination law, specifically with respect to its conception of equality: "What is new is the turn to accommodations for difference and the acceptance that difference may be insoluble, and that ignoring it may be the height of oppression rather than the best hope for seeing past it."[77]

I want to break down the difference model into three interrelated ideas. First, employees are different. There is no such thing as a truly homogenous group: no two members of a group

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73. *Id.* at 14.

74. *See id.* at 15.

75. ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 127 (2008).

76. The best pronouncement of the difference principle comes from Justice Blackmun's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the prominent affirmative action decision: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." *Id.* at 407 (Blackmun, J., concurring); *see also* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 863–64 (2003); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 609 (2001).

77. KIRKLAND, *supra* note 75, at 127.

express a protected trait in exactly the same way. Second, these differences matter. The experience of discrimination is all about the salience of an employee's identity traits. Those who stand out—that is, those who are different from their peers—tend to be the primary targets of employment discrimination. At the same time, the thing that marks an employee as different is often integral to the employee's sense of self. Finally, the law should protect employees because of their differences, not despite them.

C. The Claim

At this point, the necessary pieces are in place to preview my claim. In terms of restructuring sex discrimination law, I propose that sex discrimination law should take a page out of religious discrimination law's playbook. Unlike the other kinds of employment discrimination prohibited by Title VII, religious discrimination adopts a vision of equality that incorporates notions of sameness and difference, blending them together to create a more holistic equality command. It can do this because it allows employees to raise reasonable accommodation as well as disparate treatment claims. Such a framework would likewise make sense in the context of sex discrimination. Like their peers in religious discrimination cases, employees experience sex discrimination both because of who they are (sex as status) and because of how they behave (sex as practice).

This last point is important. My proposal rests on the idea that sex discrimination doctrine should reflect the experience of sex discrimination as it exists today rather than how it used to be. Modern sex discrimination is not easy. It is a highly subjective experience, often targeting a single employee. It cuts across identity traits, defying traditional notions of causation. And it is a product of work culture, burdening employees who do not fit in with their coworkers. The simple fact is that existing sex discrimination doctrine is not equipped to deal with these sorts of cases. It is time for a new sex discrimination regime.

II. SEX DISCRIMINATION AND GROUP NARRATIVES

When Darlene Jespersen challenged Harrah's new makeup policy, she faced an uncertain landscape. Because Jespersen's claim focused on her appearance rather than her status as a woman, it did not fit easily among existing sex discrimination norms. The canonical case of sex discrimination is formal disparate treatment, in which an

employment policy subjects women to worse treatment than men (or vice versa). Jespersen could not allege that she was treated differently because she is a woman, as the makeup policy applied to all female employees. Nor would it have been easy for her to prove that women fared worse than men under Harrah's "Personal Best" policy, as the policy also had requirements that applied exclusively to men (for example, no makeup, no ponytails). Ultimately, what Jespersen wanted—to be free to work without having to wear makeup—is not the sort of remedy that existing sex discrimination norms can provide.

This Part tells the story of why employees like Jespersen have such a difficult time raising actionable sex discrimination claims. It starts by discussing the complicated history of Title VII's "sex" provision. Although this history is interesting in its own right, it is especially important for my purposes because courts have long used the history of the "sex" provision as a reason to narrow the reach of Title VII's sex equality project. From there, this Part considers the issue of subgroup discrimination, an experience of discrimination that has confounded the courts since the early days of Title VII. In particular, this discussion zeroes in on what has proven to be at once the most elusive and most transformative theory of subgroup discrimination: the gender-stereotyping theory of sex discrimination. I use the gender-stereotyping theory as a catalyst to rethink Title VII's sex equality project. The thrust of my argument is that, as a normative matter, Title VII should not define sex equality in terms of what is good for all or even most women (or men), but rather in terms of what individual men and women need to flourish in the workplace.

This Part concludes by considering another important gap in existing sex discrimination norms: employees who face discrimination along multiple axes of bias. As a regulatory force, sex discrimination law tends to flatten identity, forcing employees to shed part of themselves so they can squeeze into discrete identity categories. I argue that sex discrimination law should instead seek to promote a vibrant conception of identity, one that is driven not by the strictures of doctrine but by the needs of individual employees.

As a whole, this Part offers a wide-ranging critique of existing sex discrimination law, challenging the doctrinal rules, historical fictions, and normative values that anchor the law to narratives of group subordination. To develop this critique, this Part highlights the stories of victims of modern sex discrimination. Along the way, we meet transgender men and women, pregnant women, working mothers, gender-nonconforming men and women, crossdressers,

unmarried women, lesbians, and gay men, among others. These stories draw attention to a set of doctrinal pitfalls that, taken together, substantially limit the reach of Title VII's sex equality project. These stories also show that sex discrimination law's conception of identity leaves much to be desired. More than anything, though, these stories remind us that antidiscrimination law is about righting wrongs and providing relief, both in the legal and psychological sense of the term. These employees have been fired, harassed, humiliated, and otherwise disrespected. Some struggle just to get through the day, while others lose their livelihood altogether. Given what is at stake, we owe it to them, as well as to other employees who face similar circumstances, to do the work of antidiscrimination law as best we can.

A. A Troubled History

When Congress enacted Title VII, it embarked on an unprecedented journey with respect to sex discrimination. Not only was the sex provision the first of its kind, but it was seemingly boundless.[78] After all, the text of Title VII never defines "sex" or "discrimination," and the legislative history of the sex provision leaves unanswered the central question of all of sex discrimination law:[79] What constitutes unlawful sex discrimination under Title VII?

In the story that haunts employment discrimination law, Title VII's sex provision is a quirk of history. The principal evil that the Civil Rights Act sought to remedy was, of course, race discrimination.[80] Sex did not become a part of the Civil Rights Act until late in the legislative process, when Congressman Howard Smith proposed an amendment to add "sex" as a protected trait.[81] Because the amendment came so late in the process, Congress did not hold hearings about sex equality in American society, nor did any

78. By Title VII's "sex" provision, I refer to its prohibition on discrimination "because of . . . sex." 42 U.S.C. § 2000e-2 (2006).

79. As Cary Franklin explains it, "It is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history." Franklin, *supra* note 43, at 1317.

80. *See id.* ("When President Kennedy decided in the summer of 1963, in the wake of the Birmingham riots, to pursue civil rights legislation, his aim was to secure legal protections against race discrimination." (citing President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *available at* http://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-194-001.aspx)).

81. 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith).

committee issue a report about the scope of Smith's proposed sex amendment. Except for a few hours of floor debate about the new provision, Congress was otherwise silent on the issue of sex discrimination. The prevailing view is that Smith, a staunch opponent of civil rights,[82] proposed the amendment in the hope of killing the Civil Rights Act before it could become the law of the land.[83] Although the country may have been ambivalent about racial equality, there was no way people were going to support the Civil Rights Act if it also applied to sex, or so he thought. In the end, Smith's plan backfired. When the Civil Rights Act became law, sex was right there alongside the other protected traits.

This story is a trap. Like most good traps, it is attractive, luring unsuspecting victims into its clutches. It is hard not to be drawn into the idea that Title VII's ban on sex discrimination was never meant to be. Indeed, courts have taken the bait time and time again, relying on this story as a reason to narrow the reach of Title VII.[84] As Professor Cary Franklin writes in a recent article, "[C]laims about the narrow mindset and goals of the Eighty-Eighth Congress have exerted a powerful regulative influence over the interpretation of Title VII's sex provision."[85] Franklin is part of a growing chorus of scholars who have sought to correct the record on sex discrimination law's history.[86]

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82. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 84–90, 115–16 (1985); Franklin, *supra* note 43, at 1318 & n.36.

83. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 14 (4th ed. 2007) ("[Smith] proposed the addition of the word 'sex' to Title VII's list of impermissible bases for employment decisions. Smith hoped that by transforming the civil rights bill into a law guaranteeing women equal employment rights with men—thus drastically affecting virtually every employer, labor union, and governmental body in the country—the bill would become so controversial that it would fail, if not in the House, certainly in the Senate.").

84. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1220–22 (10th Cir. 2007) (relying on this story as a reason to reject a sex discrimination claim brought by a transgender employee); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084–85 (7th Cir. 1984) (same); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975) (relying on this story as a reason to reject a sex discrimination claim brought by a male employee with long hair).

85. Franklin, *supra* note 43, at 1319.

86. *See generally, e.g.*, Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997); Carl Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

Though their weapons are academic in nature, their fight has considerable real-world implications. Sex discrimination law is hamstrung by the story of a political ploy gone wrong. That Smith may have introduced the amendment to thwart civil rights does not tell us anything about why legislators ultimately voted in favor of the provision.[87] And yet the story endures, fostering a narrow vision of sex equality that constrains Title VII's capacity to respond to emerging forms of sex discrimination.

This Section considers three instances in which sex discrimination's history stands in the way of sex discrimination's future. The first is discrimination against transgender employees. By their very existence, transgender employees pose a challenge to historical conceptions of sex and sex discrimination. Their identities demonstrate that sex is not immutable, and their discrimination claims suggest that sex discrimination is not as simple as treating all men and women equally. In this regard, they are the poster children for the new sex discrimination. I also consider two other instances in which sex discrimination's past inhibits its future—discrimination against pregnant women and women who are breastfeeding. Technically distinct experiences of discrimination, the pregnancy and breastfeeding cases nevertheless belong together. Not only do both revolve around motherhood, but in both instances the doctrine rests on a suspect claim about the history of sex discrimination.

1. *Transgender Employees*. In 1981, Eastern Airlines fired a pilot who had been with the company for over a decade.[88] The reason for the termination was that the employee had undergone sex reassignment surgery without the company's knowledge.[89] Hired in

87. Smith's amendment passed by a teller vote of 168 to 133. "During a teller vote members vote by turning in signed index cards: green for yea and red for nay. Since 1993, [t]eller [v]otes may occur in the House only when the electronic voting system is broken." *C-Span Congressional Glossary*, C-SPAN.ORG, http://legacy.c-span.org/guide/congress/glossary/tellervt.htm (last visited Oct. 26, 2013).

To the larger issue of legislative intent, it is dangerous to impute one legislator's motivations to a larger deliberative body, especially when legislators are not asked specifically why they voted the way they did. The text of the statute—in this case Title VII—is a better indicator of legislative intent than one legislator's intentions, even if the legislator proposed the law under consideration. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29–36 (Amy Gutmann ed., 1997) (arguing that courts should not look to legislative history to interpret statutes).

88. *Ulane*, 742 F.2d at 1082–83.

89. *Id.* at 1083.

1968 as Kenneth Ulane, a decorated Army pilot who served in Vietnam, the pilot was fired in 1981 as Karen Frances Ulane.[90] The airline could not argue that Karen lacked the requisite experience or qualifications to fly because, despite her new appearance, Karen was the same pilot she was before the surgery. At the time, transgender discrimination was still a new issue for the courts. Yet Ulane's case presented a unique opportunity to fold transgender discrimination into sex discrimination law. After all, Ulane was her own comparator. What better example of sex discrimination than an employer who is willing to employ a man but not a woman, when the man and the woman are the same person?[91]

The court did not see it that way. The Seventh Circuit held that Title VII's prohibition on sex discrimination did not reach a claim brought by a transgender person.[92] History was not on Ulane's side. According to the court, "[O]ur responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex."[93] From there, the court surveyed the thin legislative history of Title VII's sex provision.[94] It called the sex provision a "gambit" and a "ploy" designed to "scuttle the adoption of the Civil Rights Act," which ultimately led to sex being "abruptly added to the statute's prohibition against race discrimination."[95] Taken together, the "circumstances of the amendment's adoption" and its "total lack of legislative history" led the court to the following conclusion: "Congress never considered nor intended that this 1964 legislation apply to anything other than the *traditional concept* of sex."[96]

Let us step back for a moment to consider what the court meant by the "traditional concept" of sex, as well as what it means for the

90. *Id.* at 1082–83.

91. I have always been fond of how Professors Bill Eskridge and Nan Hunter frame the issue in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984): "What could be stronger proof of sex discrimination in the firing of [a] woman for a job held by a man, than the fact that the man and the woman are the same person?" WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW: TEACHER'S MANUAL 193 (2d ed. 2004).

92. *Ulane*, 742 F.2d at 1084, 1086–87.

93. *Id.* at 1084.

94. *Id.* at 1085–86.

95. *Id.* at 1085.

96. *Id.* (emphasis added).

contours of sex discrimination law.[97] Once again, Professor Cary Franklin's writing on the history of sex discrimination is instructive. Franklin argues that the idea that there is a traditional concept of sex discrimination is problematic for two reasons. First, the traditional concept of sex discrimination is an invented tradition, not one that is deeply rooted in sex discrimination law.[98] In this regard, *Ulane v. Eastern Airlines, Inc.*[99] is part of a long string of cases that not only refer to but also directly rely on a history that never actually occurred. Second, because it appeals to an invented tradition, the traditional concept of sex discrimination serves to narrow the scope of Title VII's sex equality project.[100] We can see this at work in Ulane's case. The court rejected an emergent manifestation of sex discrimination because it did not conform to what the court thought of as the classic manifestation of sex discrimination, namely, formal rules that treat men and women differently.[101] Thus we can think of *Ulane* as part of a sustained effort to weaken the normative force of sex discrimination, an effort that is as old as Title VII itself and continues to the present day.

Now turn back to the court's reasoning in *Ulane*. In rejecting Ulane's claim, the court cited a handful of transgender discrimination cases that likewise rejected employees' sex discrimination claims on largely historical grounds.[102] Together with *Ulane*, these cases form the transgender discrimination canon. The thread unifying these cases is a concern about group narratives. The reason that these employees lost their cases was because they could not map their claims onto a narrative of group subordination—they could not, in other words,

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97. The content of employment discrimination law depends on the scope of the protected trait in question. To assess the past, present, and future of sex discrimination law, we have to decide what we mean by sex. Put simply, there is no sex discrimination without sex.

98. Franklin, *supra* note 43, at 1312.

99. Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

100. *See* Franklin, *supra* note 43, at 1315–16 (noting that courts "in the 1970s obscured [sex discrimination's] history" and "adopted the tightly circumscribed definition of sex discrimination offered by employers in the 1960s").

101. *See Ulane*, 742 F.2d at 1085–86 (explaining that "Title VII . . . in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men" and that "if Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide . . . [but] we decline . . . to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation").

102. *Id.* at 1084 (citing Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam)); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978).

show that the discrimination they faced was bad for all men or all women.[103] In the eyes of their respective courts, these employees faced a form of niche discrimination: most men and women do not take hormones and undergo sex reassignment surgery, nor do they dress and self-identify as a sex different than their birth sex. For these courts, transgender employees cease to be men and women; they are first and foremost transgender persons, wholly defined by their most marginalizing trait.[104] Once ascribed with the transgender label, these employees find themselves shut out of sex discrimination law.[105]

There are signs that judicial attitudes toward transgender discrimination may be softening, however. In recent years, two new theories of sex discrimination have emerged for transgender employees. The first allows transgender plaintiffs to raise actionable claims based on their gender nonconformity. For instance, in one prominent case, *Smith v. City of Salem*,[106] a preoperative male-to-female transsexual was suspended from her job as a firefighter after she began appearing in the workplace as a woman.[107] The court held that the employee could sustain a sex claim based on a gender-stereotyping theory[108]—a theory I discuss in great detail below.[109]

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103. *See Sommers*, 667 F.2d at 750 (explaining that "discrimination based on one's transsexualism does not fall within the protective purview of the Act" and that the defendant must also "protect[] the privacy interests of its female employees"); *Smith*, 569 F.2d at 327 (reasoning that "Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females," and that Title VII did not extend to the plaintiff's questionable situation in which he was not hired because he was "effeminate"); *Holloway*, 566 F.2d at 663 (declining to extend Title VII protection to transsexuals because Congress intended to "restrict the term 'sex' to the traditional meaning" and because the "purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally"); *Voyles*, 403 F. Supp. at 457 ("[E]mployment discrimination based on one's transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII . . . .").

104. Sociologists refer to this phenomenon as a "master status," a social identity that overshadows all other aspects of a person's identity. *See* Everett Cherrington Hughes, *Dilemmas and Contradictions of Status*, 50 AM. J. SOC. 353, 357 (1945) (coining the term "master status" in the context of race). In his work on homosexuality, sociologist Wayne Brekhus usefully describes a master status as an "identity monopoly." WAYNE H. BREKHUS, PEACOCKS, CHAMELEONS, CENTAURS: GAY SUBURBIA AND THE GRAMMAR OF SOCIAL IDENTITY 36 (2003) (emphasis omitted).

105. My earlier work describes this experience in greater depth. *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 219–20 (2009) (arguing that homosexuality, as a master status, causes lesbians and gay men to be shut out of sex discrimination law).

106. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

107. *Id.* at 569.

108. *Id.* at 572.

According to the court, "[E]mployers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[110]

The obvious upside of the court's reasoning is that it provides a viable route to recovery, one that can be followed by transgender employees in the future. But it comes at a cost. The court's reasoning effectively erases transgenderism as an identity. Although the employee was asserting a *female* identity in the workplace, to avail herself of the gender-stereotyping theory she had to take on a *male* identity, namely, as a man who wanted to participate in the workplace dressing and looking like a woman. As one commentator notes of the case, "Transsexuals or transgender people per se do not really exist in the *Smith* opinion; there just happen to be some men out there who want to wear dresses."[111]

A second case worth mentioning involves an employee who applied for a research position with the Library of Congress.[112] The employee applied in her capacity as a man and received an offer,[113] but the offer was rescinded after the employer learned that the employee planned to join the workplace as a woman.[114] The court in this case compared the employee's situation to that of an employee who is in the process of converting from one religion to another.[115] As the court noted, Title VII's prohibition on religious discrimination would certainly protect an employee who faces discrimination because of a religious conversion.[116] Like a religious convert, the transgender employee in this case was transitioning from one extant identity to another,[117] both of which fall within Title VII's prohibition against sex discrimination.[118] It thus follows that discrimination aimed

109. *See infra* Part II.B.

110. *Smith*, 378 F.3d at 574.

111. KIRKLAND, *supra* note 75, at 86.

112. Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

113. *Id.* at 296.

114. *Id.* at 299.

115. *Id.* at 306.

116. *Id.*

117. *Id.* at 295.

118. *Id.* at 306–07; *see* Oncale 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.").

at a transgender employee constitutes sex discrimination under Title VII.[119]

It is important to remember that these cases are exceptions to the prevailing rule, at once a vision of a brighter future and a reminder of how far we are from realizing this vision. A 2007 case in Utah drives home the point. The plaintiff in the case, a male-to-female transsexual, worked as a city bus driver in Salt Lake City.[120] If they needed to use the bathroom during their shift, bus drivers had to use public facilities on their route,[121] and the Utah Transit Authority made arrangements with businesses for drivers to use their restrooms.[122] The plaintiff was fired after her supervisor discovered that she was using female public bathrooms while wearing a work uniform.[123] Siding with the employer, the court framed the case in terms of group harms: the city's policy was permissible because it did not disadvantage one sex more than the other.[124] And, once again, history proved to be an obstacle, with the court explicitly citing *Ulane* and other decisions in the transgender discrimination canon as controlling authority for the rule that Title VII does not protect transsexuals as a class.[125]

2. *Pregnant Women and New Mothers*. The thinness of the sex provision's legislative history also played a major role in the outcome of the pregnancy cases in the 1970s. In the span of a few short years, sex discrimination law was turned on its head, and then back again, with respect to pregnancy discrimination. The battle over pregnancy discrimination started with the Supreme Court's 1976 decision in

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119. *Schroer*, 577 F. Supp. 2d at 308. Liz Glazer and I discuss transitional identity in greater detail in Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009).

120. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218–19 (10th Cir. 2007).

121. *Id.* at 1219, 1224.

122. Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *2 (D. Utah 2005), *aff'd* 502 F.3d 1215 (10th Cir. 2007).

123. *Etsitty*, 502 F.3d at 1219.

124. *See id.* at 1221–22.

125. *Id.* I distinguish between sex and gender discrimination below. *See infra* Part II.B. The former focuses on bodies, targeting an employee's maleness or femaleness. The latter, by contrast, focuses on an employee's masculinity or femininity. The difference between the two has proved to be one of the thorniest, and yet most exciting, areas of sex discrimination law in recent years. I argue below that, as a legal theory, gender-stereotyping paves the way for a new way of thinking about sex equality, namely, that sex discrimination law should shield employees against gender norms that seek to dampen constitutive elements of an employee's identity.

General Electric Co. v. Gilbert.[126] *Gilbert* involved a challenge to General Electric's (GE) disability benefits program.[127] As a general matter, GE's disability program covered male and female employees equally.[128] The plan did not, however, cover pregnancy and related conditions.[129] As the Court saw it, GE's disability plan divided the workforce into two groups: "pregnant women and nonpregnant persons."[130] Although the former group was made up entirely of women, the latter group included both men and women, thereby making it hard to compare how the two groups fared under the disability plan.[131]

Ultimately, the Supreme Court concluded that GE's disability plan did not run afoul of Title VII's prohibition on sex discrimination.[132] What matters most is how the Court reached this decision. It started by looking at the legislative history of Title VII's sex provision, observing that the history is "notable primarily for its brevity."[133] Without a strong statement of legislative purpose on which to rely, the Court looked for guidance in its race discrimination jurisprudence.[134] "Discrimination," according to the Court, means

126. Gen. Electric Co. v. Gilbert, 429 U.S. 125 (1976). To be exact, *Geduldig v. Aiello*, 417 U.S. 484 (1974), was the first case to raise pregnancy discrimination, in 1974. *Geduldig* involved an Equal Protection Clause challenge to a provision of the California insurance code, which exempted pregnancy from the state's disability insurance program. *Id.* at 489. The Court concluded that the pregnancy provision was constitutionally permissible because it did not differentiate between men and women. *Id.* at 496–97. So long as the state did not treat men and women differently, it could subject a subclass of women to less favorable treatment. Though it was an Equal Protection Clause case, *Geduldig* laid the foundation for the Court's decision in *Gilbert* two years later.

127. *Gilbert*, 429 U.S. at 127–28.

128. *Id.* at 130, 138.

129. *Id.* at 128.

130. *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496 n.20).

131. *Id.*

132. *Id.* at 136.

133. *Id.* at 143.

134. *Id.* at 145. Specifically, the Court relied on *Morton v. Mancari*, 417 U.S. 535 (1974), and *Ozawa v. United States*, 260 U.S. 178 (1922). *Gilbert*, 429 U.S. at 145. *Mancari* involved a due process challenge to a Bureau of Indian Affairs (BIA) rule that gave an employment preference for qualified Indians. *Mancari*, 417 U.S. at 541. Upholding the rule, the Court held that the preference was a political rather than a racial preference. *Id.* at 553–54. For a critique of *Mancari*'s racial/political distinction, see generally Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

Ozawa involved a challenge by a Japanese man to the Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (repealed 1940), which allowed "white persons" and "persons of African descent" to become naturalized citizens but made no mention of persons of Asian descent. *Ozawa*, 260 U.S. at 191–93. The plaintiff argued that he qualified as white for purposes of the

something specific, having been developed by the courts for almost a century.[135] Reluctant to break new ground, the Court refused to endorse any definition of discrimination that was "different from what the concept of discrimination has traditionally meant."[136] But what did "discrimination" traditionally mean? The answer, of course, is that "discrimination" means formal discrimination, where employers divide employees into discrete groups.

The story gets more complicated from there. *Gilbert* is that rare case that confirms that Congress listens when the Court speaks. Just two years after the Court handed down *Gilbert*, Congress passed the Pregnancy Discrimination Act (PDA).[137] The PDA explicitly overturned *Gilbert* by amending Title VII to "prohibit sex discrimination on the basis of pregnancy."[138] The statute further defines its scope as reaching discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[139] Most important for my purposes, however, was the Court's explanation—in a later case interpreting the PDA—that Congress also disapproved of *Gilbert*'s "test of discrimination."[140] This, of course, is a reference to the *Gilbert* Court's conclusion that sex discrimination be understood as the formal division of the sexes into two groups.

By all accounts, the PDA should have put *Gilbert* to rest. Yet the decision continues to play a major role in sex discrimination law, preventing Title VII from intervening in current controversies. *Gilbert* operates as what Professor Deborah Widiss calls a "shadow precedent," a case that courts continue to follow even though it is no longer good law.[141] Widiss demonstrates that lower courts act as if

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law. *Id.* at 195. The Court concluded that the plaintiff was "clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side." *Id.* at 198.

135. *See Gilbert*, 429 U.S. at 145 ("The concept of 'discrimination,' of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction.").

136. *Id.*

137. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

138. *Id.*

139. 42 U.S.C. § 2000e(k).

140. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983).

141. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 515 (2009).

Congress never enacted the PDA, sometimes even citing *Gilbert* as controlling authority.[142]

We can see this dynamic at work in cases involving discrimination against female employees who are breastfeeding. Like pregnancy, breastfeeding is a uniquely female experience. And also like pregnancy, it does not affect all female employees, which means that it creates a subclass of female employees. The breastfeeding example is especially useful because it highlights the individualized nature of modern sex discrimination, as the employee is seeking to mold the workplace around her unique needs.

Consider a prominent example.[143] The plaintiff, a news producer for MSNBC, returned to work shortly after giving birth to her son.[144] Because she was breastfeeding, the plaintiff wanted a private space where she could pump.[145] Initially, MSNBC let her use an empty editing room.[146] But her coworkers, who did not know the room was occupied, eventually tried to enter the room while she was using it.[147] Despite her requests, MSNBC was unable to provide the plaintiff with a suitable alternative space to pump.[148] This led to a larger conflict about scheduling, and the plaintiff ultimately resigned her position.[149]

She sued and lost. The district court concluded that the "drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII."[150] This tracks the Supreme Court's reasoning in *Gilbert*, limiting the reach of sex discrimination law to employment policies that divide men and women into distinct groups. The court did not stop there, however. As a means of lending historical force to its ruling, the court explained that this rule was "was made clear more than twenty years ago in *General Electric Co. v. Gilbert.*"[151] It is as if the PDA never existed.

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142. *See id.* at 553–56 (demonstrating that courts, in cases involving breastfeeding and prescription contraception, still rely on *Gilbert*).

143. Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

144. *Id.* at 306–07.

145. *Id.* at 307.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 308.

150. *Id.* at 309.

151. *Id.*

Stepping back, the larger point I want to make about history is that sex discrimination law is haunted by the ghosts of its early cases. These cases settled on a specific idea about what does and does not count as sex discrimination, and that idea has become so commonplace that courts act as if it were embedded in the DNA of sex discrimination law. I want to push back against the idea that the traditional conception of sex discrimination should continue to undergird Title VII. However entrenched it may seem, this idea is not essential to Title VII's sex equality project. There is nothing in the language of the statute—nor, for that matter, is there anything in the actual legislative history of the law—that limits Title VII to such a narrow conception of discrimination. And yet the idea persists because it is tied to a historical account of the sex provision that is suspect at best.

It has been almost fifty years since the Civil Rights Act became law, and in that time sex discrimination—and by this I mean the lived experience of sex discrimination—has evolved into something new. Sex discrimination law has not kept pace with the changing nature of sex discrimination. At its most fundamental level, antidiscrimination law is in the business of creating change—to change people's attitudes about each other, to change the way employers organize their workplaces, and to change the social structure of society at large. To bring about the kinds of change needed today, sex discrimination law must also change. It can start by moving past its own troubled history.

B. Subgroups and Stereotypes

Since the early days of Title VII, courts have been confounded by the issue of subgroup discrimination. Some of the earliest sex discrimination cases were brought by flight attendants—or stewardesses, as the job was called back then—who were challenging the airline industry's discriminatory practices toward women.[152] To cultivate the dual image of flight attendants as both potential bride and sex object,[153] the airlines went to great lengths to control their

152. In her wonderful book, *Femininity in Flight*, historian Kathleen Barry documents in great detail the early Title VII litigation involving female flight attendants. *See generally* KATHLEEN M. BARRY, FEMININITY IN FLIGHT: A HISTORY OF FLIGHT ATTENDANTS (2007).

153. Barry describes the shift of the stewardess ideal from daring adventurer to glamour icon to, ultimately, a potential homemaker for passengers, a genuine "bride school." *Id.* at 42–53. Another commentator notes that airlines eventually sought to hire stewardesses who were "young, beautiful, and single in order to attract the predominantly male customers." Toni Scott

employees' private lives. Marriage[154] and pregnancy[155] were grounds for dismissal, and the airlines forced flight attendants to retire when they reached a certain age, usually between thirty and thirty-five.[156] The airlines were not engaging in wholesale discrimination against *all* women. Rather, they were discriminating against *some* women. Within the subgroup of women who work as flight attendants, the rules drew distinctions between single women and married women, as well as between older women and younger women.

Subgroup discrimination is not always defined by job categories, however. Another prominent form of subgroup discrimination occurs when an employer targets some women (or men) because they have—or do not have—a particular trait. For instance, say an employer will hire men with school-aged children but not women with school-aged children.[157] Even though the employer may not have a policy against hiring women as a general matter, this specific rule disadvantages a subgroup of women (women with school-aged children).[158] A leading antidiscrimination scholar, Kimberly Yuracko, has coined the phrase "trait discrimination" to describe the experience of discrimination in these subgroup cases.[159] The label is especially valuable because it captures the essence of subgroup

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Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?*, 58 J. AIR L. & COM. 267, 270 (1992). She goes on:

> The stewardess, as the ultimate sales pitch, had to be the ultimate woman. Many airlines required that flight attendants be women under 25 years of age, under 115 pounds, and under 5 feet 4 inches. The stewardess became the image of the industry and the lure for air traveling businessman.

Id. (footnote omitted).

154. *See, e.g.*, Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (involving a challenge to Delta's rule prohibiting flight attendants from getting married). During the *Cooper* litigation, a Delta witness testified that single women made better stewardesses than married women for a variety of reasons: they gained better acceptance among passengers, they could easily change their schedules, and they had a lower likelihood of becoming pregnant. *Id.* at 782. Other cases involving no-marriage rules include the following: *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971); *Lansdale v. United Airlines, Inc.*, 437 F.2d 454 (5th Cir. 1971); and *Evenson v. Nw. Airlines, Inc.*, 268 F. Supp. 29 (E.D. Va. 1967).

155. *See, e.g.*, *In re* Nat'l Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977), *aff'd*, 700 F.2d 695 (11th Cir. 1982); Condit v. United Air Lines, Inc., 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977) (per curiam).

156. In *Cooper*, for example, Delta would not employ stewardesses after their thirty-fifth birthdays. *Cooper*, 274 F. Supp. at 782.

157. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971).

158. *Id.* at 544.

159. Yuracko, *supra* note 19, at 170 ("An employer may be perfectly willing to hire women or men but may simply refuse to hire women or men with particular traits. I refer to this as trait discrimination.").

discrimination: discrimination based on sex plus some other trait.[160] The other trait can be another protected trait, like race,[161] or an unprotected trait, like whether the employee has short or long hair.[162]

Within subgroup discrimination, the thorniest issue concerns the scope of the gender-stereotyping theory of sex discrimination. The gender-stereotyping theory has its roots in a 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*. The case revolved around Ann Hopkins's unsuccessful partnership bid at the consulting firm Price Waterhouse. Hopkins had worked for the firm for five years before applying for the promotion to partner.[163] Of the eighty-eight employees up for partnership that year, Hopkins was the only woman.[164] In fact, had she been successful, Hopkins would have been only the eighth female partner at the firm, out of 662 partners then affiliated with the firm.[165] As part of its review process, Price Waterhouse solicited feedback about the candidates from partners across the country, even from partners who had little to no contact with the applicant.[166]

The feedback on Hopkins revealed that the partners were conflicted about her candidacy. On the one hand, the partners viewed her work product favorably, citing in particular her work landing, almost singlehandedly, a lucrative contract with the federal

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160. Yuracko distinguishes between sex-neutral and sex-specific trait discrimination. *Id*. An example of the former would be a rule against hiring anyone with, say, a tattoo—a rule that cuts across sex lines, making it sex neutral. An example of the latter would be an employer who "may find a particular trait disqualifying only in individuals of one sex (e.g., crew cuts on women or long hair on men)." *Id.* For purposes of this paper, I am only concerned with sex-specific trait discrimination.

161. *See, e.g.*, Santee v. Windsor Court Hotel Ltd. P'ship, No. Civ.A.99-3891, 2000 WL 1610775, at *1 (E.D. La. Oct. 26, 2000) (involving an employer who refused to hire a black woman who had dyed her hair blonde); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (involving an employer who prohibited an African American female from wearing her hair in cornrows).

162. *See* Tavora v. NY Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (involving an employer who required male employees, but not female employees, to have short hair); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087 (5th Cir. 1975) (involving an employer who would employ women, but not men, with long hair); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1358 (C.D. Cal. 1972) (involving an employer who required men to have short hair but had no such rule for women).

163. Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

164. *Id.*

165. *Id.*

166. *Id.* at 232.

government.[167] On the other hand, the partners voiced concerns about Hopkins's interactions with coworkers. The partners depicted Hopkins as difficult to work with and rude to support staff.[168] It was these latter comments, about Hopkins's so-called "interpersonal skills,"[169] that raised the specter of sex discrimination. The partners said that she was "macho," that she "overcompensated for being a woman," and that she needed "a course at charm school."[170] Perhaps the most critical fact, however, was the advice given to Hopkins about how she could improve her chances for making partner in the future.[171] She was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[172]

Hopkins sued Price Waterhouse under Title VII, alleging sex discrimination. The case made its way to the Supreme Court, where the Court ultimately sided with Hopkins. In many ways, the case was easy for the Court. As Justice Brennan wrote for a plurality of the Court, "[I]f 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."[173] But the Court went deeper than that, offering a seemingly broad theory of sex discrimination. "In the specific context of sex stereotyping," Justice Brennan wrote, "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."[174] This marked a significant change in the nature of sex discrimination jurisprudence, which up until *Price Waterhouse* had been focused primarily on status discrimination, that is, discrimination against an employee in her capacity as a woman (or his capacity as a man). Recognizing that it was breathing new life into sex discrimination law, the Court bolstered its legal rule by declaring that "we are beyond the day when

167. *Id.* at 233.

168. *Id.* at 235.

169. *Id.* at 234–35.

170. *Id.* at 235.

171. *Id.* Incidentally, the man who offered this advice, Thomas Beyer, was Hopkins's mentor at the firm and the chief supporter of her candidacy for partner. *See* ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY 147–48, 213 (1996). The Court used this advice as evidence of discriminatory intent; it was more likely evidence of a supporter trying to counsel a candidate on how to navigate a tricky political situation.

172. *Price Waterhouse*, 490 U.S. at 235.

173. *Id*. at 256.

174. *Id.* at 250.

an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[175]

Note how the Court's reasoning recast the relationship between the employee and the employee's group. Rather than formally comparing men and women as groups, the Court's definition of discrimination focused on how the particular employee failed to live up to the employer's idea about how men or women are supposed to look and act. The discriminatory comparison is therefore between the employee and a stereotypical employee, a heuristic rather than a real person. Moreover, *Price Waterhouse* pushes Title VII beyond the realm of biological sex to capture the performative aspects of an employee's identity. In this regard, the decision echoes the work of feminist scholars who sought to disaggregate sex and gender[176]—the former refers to biological differences between men and women, whereas the latter describes the cultural expressions of masculinity and femininity.[177] Although Hopkins was the only woman up for partnership that year, she stumbled not because she was a woman but because of how she performed her womanhood in the workplace—what she wore, how she walked, how she talked. *Price Waterhouse* was indeed a watershed moment in the arc of sex discrimination law. After *Price Waterhouse*, writes Professor Katherine Franke, "bodies have dropped out of the equation."[178]

1. *Contested Terrain*. In practice, the gender-stereotyping theory has proven to be a mixed blessing. On the one hand, the theory has been a source of novel victories for outsider employees. For instance, lesbian and gay employees,[179] transgender employees,[180] and working

175. *Id.* at 251.

176. *See generally, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); 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 (1995); Franke, *supra* note 86.

177. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.").

178. Franke, *supra* note 86, at 95.

179. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc) (gay man); Centola v. Potter, 183 F. Supp. 2d 403, 407 (D. Mass. 2002) (same); Heller v. Columbia Edgewater Country Club, 95 F. Supp. 2d 1212, 1216 (D. Or. 2002) (lesbian woman).

180. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 733 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 567 (6th Cir. 2004); Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

mothers[181] have all used the gender-stereotyping theory as a means to remedy sex discrimination. On the other hand, other outsider employees, sometimes the very same groups of outsider employees who have had success with the theory, have found that the theory frustrated their cases, with courts concluding that such employees are trying to "bootstrap" protection for unprotected traits.[182] The doctrinal confusion over the theory—the struggle over whether it is a pioneering step for sex discrimination law or the basis for a suspicious litigation tactic—exists because the normative underpinnings of the theory remain elusive. When the Supreme Court declared that sex stereotyping violated Title VII, it never really explained why.[183]

Stepping into this void, scholars have offered different ways of thinking about the gender-stereotyping theory in particular and subgroup discrimination more generally. I want to highlight two such scholarly perspectives as a means of distinguishing my own account, which I develop in the following Section. These scholars offer competing visions of how and why the gender-stereotyping theory works, and they do so by considering the analogue to Ann Hopkins's masculine woman: a man in a dress.

The first comes from Professor Mary Anne Case, who, a few years after the Court handed down *Price Waterhouse*, wrote an influential article on effeminate men in sex discrimination law. Case argues, simply but elegantly, that "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."[184] Case's perspective is rooted in the goal of protecting "the stereotypically feminine" from

181. *See, e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 45–48 (1st Cir. 2009); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117–24 (2d Cir. 2004); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (taking judicial notice of the stereotype that women and not men are responsible for family caregiving).

182. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007); Dawson v. Bumble & Bumble, 398 F.3d 211, 217–20 (2d Cir. 2005).

183. My explanation for why the Court did not develop a normative account to go along with its doctrinal ruling is because Hopkins's case was too easy. Given the facts of her case, Hopkins clearly faced discrimination "because of" sex. She was the only woman up for partner that year, at a firm with relatively few female partners. Not only was the firm's glass ceiling visible, but the partners did little to conceal their motivations for not pursuing Hopkins's candidacy, namely, that she was not the kind of woman they wanted as a partner. Had she dressed and acted differently, there would not have been any need for litigation. Hopkins herself tells the story of her career and quest for partnership at Price Waterhouse in her autobiography. *See generally* HOPKINS, *supra* note 171.

184. Case, *supra* note 176, at 7.

becoming enshrined in law and culture as being less worthy of respect than traits traditionally coded as masculine.[185] Importantly, Case does not endorse a sameness model of sex equality, nor, for that matter, does she see her intervention as making a difference-based argument.[186] Instead, Case argues for melding the two approaches, with respect to equality of the sexes, by disaggregating gender from sex and by allowing both men and women to express both masculine and feminine behaviors and identities.[187] As she describes it, the goal of Case's project is "to make the world safe for us all, norms and exceptions, men and women, masculine and feminine, and every shade in between."[188]

We can contrast Case's view with that of Yuracko's, who articulates a different vision of the theory in her work on trait discrimination.[189] Whereas Case sees value in protecting men in "frilly pink dresses," Yuracko questions whether sex discrimination should protect such behaviors. She argues that it means something different when a woman wears a dress than when a man does.[190] "All gender norms . . . are not created equal,"[191] Yuracko argues. Therefore, she continues, "[e]mployers may recognize some norms without impeding [sex] equality in the workplace."[192] The problem with trait neutrality, Yuracko argues, is that we lose sight of the real harms of sex discrimination—norms that prevent men or women from being full and active participants in the workplace.[193] This is why she is reluctant

185. *Id.* at 3.

186. *Id.* at 102–03.

187. *Id.* at 103.

188. *Id.* at 105.

189. *See* Yuracko, *supra* note 19, at 179–204.

190. *See id.* at 188 ("In a gendered society, women and men simply cannot possess the same trait in precisely the same way."); *id*. at 196 ("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.").

191. *Id.* at 201.

192. *Id.*

193. *See id.* at 202 ("Allowing employers to act on the gender norm that makes men in dresses seem deviant does not impede the ability of men (or women) to participate fully and effectively in the work world."). Later, she proposes a vision of sex discrimination based on what she calls the "power–access approach." *Id.* at 225. The thrust of the power–access approach is as follows: "The power–access approach treats as actionable sex discrimination only those forms of sex-specific trait discrimination that are based on gender norms or scripts that inhibit the ability of individuals of a particular sex to participate successfully in the work world." *Id.*

to protect the man in the dress against discrimination. "[M]en are not disadvantaged in the work world by being forced to mimic the clothing style of the ideal male worker," she writes.[194] Though such a rule will disadvantage "some men,"[195]—namely, men who wear women's clothing—Yuracko is more concerned with the "substantive sex equality that is Title VII's goal,"[196] from which she seems to adopt a group-centric conception of equality.

2. *Rethinking Sex Equality*. The example of the man in a dress is not just some abstract hypothetical. In *Oiler v. Winn-Dixie Louisiana, Inc.*,[197] Peter Oiler lost his job as a truck driver for the grocery chain Winn-Dixie after his boss discovered that Oiler was cross-dressing during his off-hours.[198] *Oiler* is a good case with which to rethink Title VII's commitment to sex equality, specifically with respect to Title VII's antistereotyping principle. The thrust of my argument is that, as a normative matter, Title VII should not define sex equality in terms of what is good for all or even most women (or men), but rather in terms of what individual men and women need to flourish in the workplace. To make this point, I borrow an idea from Case's account of sex equality, and I disagree with one from Yuracko's account of sex equality.

Let us start, however, with the nature of the discrimination faced by Peter Oiler. Winn-Dixie did not have a formal rule prohibiting men from wearing women's clothing.[199] Instead, the company applied an ad hoc rule once it discovered Oiler's secret life as a cross-dresser.[200] In this sense, Oiler was in a class all by himself; he was targeted because of the way he, as an individual, performed his manhood. The company was, no doubt, operating on the basis of a stereotype: men should not wear women's clothing. Prescriptive in

194. *Id.* at 202.

195. *Id.*

196. *Id.*

197. Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

198. *Id.* at *2.

199. *See id.* ("[Oiler] was not terminated because he violated any Winn-Dixie on-duty dress code.").

200. *See id.* (noting that the defendants fired Oiler because the owners believed "that if Winn-Dixie's customers learned of plaintiff's lifestyle, i.e., that he regularly crossdressed and impersonated a woman in public, they would shop elsewhere and Winn-Dixie would lose business").

nature,[201] the stereotype not only dictates appropriate behavior—a "real" man wears men's clothing—but also punishes those who fail to conform to this behavior. This highlights the defining characteristic of modern discrimination. Whereas earlier forms of discrimination focused on an employee's status as a member of a group, modern discrimination has more to do with work-culture norms and the ways in which an employee's behavior violates these norms. After all, not all outsiders face discrimination in the workplace. Discriminators target particular victims because of who they are and how they act. There is no question that an employee's group membership factors into this calculus; this is unavoidable so long as marginalized traits are salient in our culture. But the critical point is that, by and large, the days of top-down discrimination are behind us.[202] Modern discrimination is the product of a complex web of work-culture norms,[203] stereotypes,[204] and unconscious biases,[205] which work together to make discrimination subtle, messy, and more personal than ever before.[206] Discrimination is no longer just about who you are; it is also about how you express yourself and whether this self-expression is welcome in your workplace.

Central to Mary Anne Case's view of Title VII's antistereotyping principle is the idea that we should look to the margins as a guide for determining the substance of sex equality.[207] When she was writing in the mid-1990s, the effeminate man resided at the margins of society.[208]

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201. For a discussion of prescriptive stereotypes, see Kwame Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CALIF. L. REV. 47, 47–48 (2000). In addition to prescriptive stereotypes, Professor Appiah also identifies two other categories of stereotypes: false stereotypes (or prejudices) and descriptive (or statistical) stereotypes. *Id.*

202. *See* Sturm, *supra* note 19, at 465–68.

203. Green, *supra* note 19, *passim*.

204. *See generally* Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133 (2010).

205. *See generally* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

206. *Cf.* DEVON W. CARBADO & MITU GULATI, ACTING WHITE: RETHINKING RACE IN "POST-RACIAL" AMERICA 1 (2013) ("Working Identity is constituted by a range of racially associated ways of being, including how one dresses, speaks, styles one's hair; one's professional and social affiliations; who one marries or dates; one's politics and views about race; where one lives; and so on and so forth.").

207. Case, *supra* note 176, at 105.

208. *See, e.g.*, Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (rejecting a claim brought by a man who charged that he was harassed because his coworkers presumed he was homosexual); Bedker v. Domino's Pizza, Inc., 491 N.W.2d 275 (Mich. Ct. App. 1992) (rejecting a discrimination claim brought by a man with long hair). Perhaps the best summary of the status of effeminate men in law and society, written right around the same time as Professor Case's

Cultural norms have since shifted and the effeminate man, once a challenge for courts, is now an easy case.[209] But he has been replaced at the margins by a cast of characters as diverse as they are stigmatized. Given its remedial nature, Title VII should steer toward the needs of these employees, the outsiders of today. This is where I disagree with Kimberly Yuracko's vision of sex equality. She argues that Title VII should prohibit only discrimination "based on gender norms or scripts that inhibit the ability of individuals of a particular sex to participate successfully in the work world."[210] Under this view, Title VII would provide relief for Ann Hopkins, the abrasive business consultant,[211] but not Peter Oiler, the man in a dress.[212] Both violated conventional gender norms, but only Hopkins faced a norm that inhibits all or most women from flourishing in the workplace. "If employers were permitted to act upon the gender script equating aggressiveness in women with bitchiness," Yuracko writes, "*all* women would be undermined in their ability to participate fully and successfully in the workplace."[213] Oiler, by contrast, violated a gender norm that affected, at most, a tiny population of men. "[E]radicating this particular gender norm is not necessary for the substantive [sex] equality of women and men in the work world," she concludes.[214]

Aside from biological attributes like being pregnant, we should be cautious about enshrining in law the idea that there are certain things that women do and certain things that men do. It may very well be that, as Yuracko points out, women who wear dresses conform to social norms while men who wear dresses buck them.[215] But the question should not be whether a particular gender norm is harmful to all or most women (or men); it should be whether the norm harms an individual woman (or man). Cross-dressing is probably not important to most men and certainly not all men. But it was very

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work, is Professor Francisco Valdes's classic article. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

209. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291 (3d Cir. 2009) (sanctioning a sex discrimination claim brought by an effeminate man); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067–68 (9th Cir. 2002) (en banc) (same); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 876–77 (9th Cir. 2001) (same).

210. Yuracko, *supra* note 19, at 225.

211. *Id.* at 226–27.

212. *Id.* at 228–29.

213. *Id.* at 226 (emphasis added).

214. *Id.* at 228.

215. *Id.* at 225–26.

important to Peter Oiler's sense of his identity, just as not wearing makeup was very important to Darlene Jespersen's identity. Sex discrimination law should foster an ethic of self-definition; it should shield employees against gender norms that seek to dampen constitutive elements of an employee's identity. After all, the universe of gender performances is vast, if not infinite, and one person's femaleness (or maleness) is no more authentic than another person's.[216]

At this point, some may question whether sex discrimination law is capable of personalizing antidiscrimination protections in this way. How, for instance, will the law distinguish between norms that strike at constitutive elements of a person's identity and other less harmful norms? I address these sorts of issues in greater detail in the following Part, in which I argue that we should remake sex discrimination law in the image of religious discrimination law. For now, however, the short answer is that it is up to each individual employee to determine the constitutive elements of her identity. The doctrinal structures of religious discrimination law—the very structures I want to import into sex discrimination law—facilitate this process of self-definition. In a religious discrimination case, the central question is not whether a particular trait or behavior is, from an objective standpoint, religious in nature. Instead, the inquiry is whether the employee, in her subjective capacity, believes the trait or behavior to be religious within her own worldview.[217] Because each employee is given room to define the contours of her own religious beliefs and practices, religious discrimination law makes accommodation, rather than disparate treatment, the centerpiece of its analysis. In doing so, religious discrimination law accomplishes something that Title VII has otherwise been unable to do: define discrimination from the

216. A colleague jokingly referred to my argument as the "snowflake theory of sex equality." Like snowflakes, no two women (or men) are the same, and sex discrimination law should foster these differences rather than squelch them.

217. In the early years of Title VII, the Supreme Court articulated a broad definition of religion. In a case involving conscientious objectors to military service, the Court concluded that a religious belief is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." United States v. Seeger, 380 U.S. 163, 176 (1965). In a later case, the Court developed this definition further, concluding that Title VII also protects a moral or ethical belief, so long as it plays a role like religion in a person's life. Welsh v. United States, 398 U.S. 333, 342–43 (1970). In addition, the Equal Employment Opportunity Commission (EEOC) has construed religion broadly: "[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (2013).

perspective of the victim rather than the discriminator.[218] Because an employee gets to determine what behaviors are central to her identity, the central task for the law is to determine whether the employer discriminated against the employee by not making accommodations for the employee's behavior.

C. Multiples

One of the hallmarks of antidiscrimination analysis is the assumption that we can organize people into discrete categories.[219] All people have a race or a sex, for instance, so the law sets out to categorize people along these lines. The problem, of course, is that modern discrimination is a messy enterprise that defies neat categorization. In its attempt to impose order on something disorderly, employment discrimination law neglects the needs of employees who face discrimination aimed at multiple parts of their identity. Writing in the late 1980s, Professor Kimberlé Crenshaw sparked a discussion about the problem of intersectionality in antidiscrimination law,[220] which prompted scholars to develop a robust conception of identity for purposes of proving discrimination.[221] Using discrimination against a black woman as her jumping off point, Crenshaw argued that the "intersectional experience is greater than

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218. Carbado & Gulati, *supra* note 24, at 1262–63 (noting that employment discrimination law does not, but should, address the way employees respond to discrimination).

219. This idea is, of course, textually based, as Title VII delineates certain traits as worthy of special protection against discrimination. In this regard, antidiscrimination law's primary thrust is to categorize people to determine if they fit within the law's protective umbrella.

220. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 [hereinafter Crenshaw, *Demarginalizing*] ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) ("[T]he intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.").

221. *See generally, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, *in* INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 124 (Emily Grabham et al. eds., 2009); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Darren Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Nancy Levit, *Theorizing the Connections Among Systems of Subordination*, 71 UMKC L. REV. 227 (2002); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991).

the sum of racism and sexism."[222] A black woman's experience cannot be compared to the experience of either a black man or a white woman. Neither of these latter examples captures the full range of stereotypes and prejudices that attach uniquely to a black woman's experience.

Because it is stuck in what Crenshaw calls a "single-axis framework,"[223] antidiscrimination law stumbles in the face of discrimination that cuts across multiple identity traits.[224] Ultimately, this is a failure of group-based analysis. The dominant method of proving discrimination today is to consider how the employer treated the claimant as compared to a similarly situated employee.[225] The closer the similarity, the easier it is to isolate the reason for the adverse employment action and, in turn, identify whether the employer was motivated by an illegitimate purpose.[226] This is discrimination by algebraic equation: cancel out the traits in common, and the trait that motivated the employer's action is left remaining.[227] Although helpful in theory, such analysis only works if the claimant has someone to compare herself to.

Take Dawn Dawson as an example. Dawson worked as an assistant and stylist-in-training at Bumble & Bumble, a high-end salon

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222. Crenshaw, *Demarginalizing*, *supra* note 220, at 140.

223. *Id.*

224. Professor Marcia McCormick offers a helpful summary of how this dynamic works:

> [I]f a black woman is fired because of stereotypes of black women, she may be found not to have suffered any discrimination at all if those stereotypes differ from stereotypes of white women or of black men. In such a situation, a decision-maker would be likely to find that the woman was not discriminated against because of her race, because other members of her race (black men) did not suffer from application of the same stereotype. That decision-maker would also likely find that she was not discriminated against because of her sex, because other members of her sex (white women) did not suffer from application of the same stereotype.

Marcia L. McCormick, *Decoupling Employment*, 16 LEWIS & CLARK L. REV. 499, 519 (2012).

225. *See generally* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (arguing against the use of comparators to assess discrimination cases).

226. The appeal of a comparator is so strong that courts have even made up hypothetical comparators as a means to test for discrimination. In *Troupe v. May Department Stores Co.*, 20 F.3d 734 (7th Cir. 1994), the Seventh Circuit considered a claim by a woman who alleged that she was fired after missing a significant chunk of work due to an unusually bad case of morning sickness. She charged that she was discriminated against because of her pregnancy, in violation of Title VII. In its consideration of her claim, the court invented "a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems." *Id.* at 738. The court went on to note that "[i]f Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it." *Id.*

227. Coleman v. B–G Maint. Mgmt. of Colo., Inc. 108 F.3d 1199, 1203 (10th Cir. 1997) (quoting Lex K. Larson, EMPLOYMENT DISCRIMINATION § 40.04 (2d ed. 1996)).

in New York City.[228] A self-described gender-nonconforming lesbian woman,[229] Dawson was fired from her assistant position and kicked out of the stylist training program.[230] The salon's reason for these actions was that Dawson had little chance of finding a stylist position except in New York City because her demeanor and appearance would frighten most people.[231] On top of that, Dawson also alleged that several of her coworkers harassed her on a regular basis, subjecting her to a steady stream of demeaning comments, often in front in clients.[232] For instance, they called her "Donald."[233] They said she should act less like a man and more like a woman.[234] They said she wore her sexuality "like a costume."[235] And they said she "needed to have sex with a man."[236] Dawson responded by bringing a sex discrimination claim under Title VII, which she lost handily.[237]

As Dawson's case demonstrates, intersectionality is a conceptual blind spot for antidiscrimination law.[238] In the eyes of the court, Dawson was first and foremost a lesbian.[239] That Dawson was also a masculine woman, and that she faced discrimination both as a masculine woman and as a lesbian, did not factor into the court's thinking. In this sense, Dawson's case confirms Professor Crenshaw's central insight into the limits of existing antidiscrimination discourse: an employee cannot inhabit more than one identity at a time. Because it saw her as a lesbian—and as nothing but a lesbian—the court viewed Dawson's sex discrimination claim as an attempt to bootstrap

228. Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005).

229. *Id.*

230. *Id.* at 214.

231. *Id.* at 215–16.

232. *Id.* at 215.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 216.

237. *Id.* at 213, 225.

238. A notable exception is the Ninth Circuit's decision in *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994), which involved a law professor who sued her university, alleging that she was denied a position as the director of the school's Pacific Asian Legal Studies Program because she is an Asian-American woman. *Id.* at 1554. In that case, the Ninth Circuit reasoned that "where two bases for discrimination exist, they cannot be neatly reduced to distinct components." *Id.* at 1562. From there, the court determined that, when a case turns on multiple traits, a fact finder must consider the "*combination* of factors" wrapped up in a person's identity. *Id.*

239. *Dawson*, 398 F.3d at 217–20.

protection for sexual orientation into Title VII.[240] Though Bumble & Bumble employed outsiders of various stripes,[241] there was no one who could serve as a comparator for Dawson. And without a comparator in sight, the court was able to recast Dawson's claim, transforming it from a hard case about gender norms into an easy case about sexual orientation.

Taking a step back, intersectionality theory highlights an important point about the regulatory force of employment discrimination law. By channeling discrimination claims into a single-axis framework, employment discrimination doctrine effectively shapes an employee's identity. We see this in Dawn Dawson's case, as the doctrine marked her as a lesbian and, in the process, erased any sense of her female masculinity. We see it in the transgender discrimination cases, as the doctrine forces a male-to-female transsexual to self-identify as a man in a dress and thereby give up her hard-fought female identity. And we see it in discrimination against a black woman—the paradigm case of intersectionality—as the law pits her blackness and femaleness against each other, forcing her to claim one identity and forego the other. As a regulatory force, employment discrimination law tends to mute difference. The time has come for a new sex discrimination regime, one that amplifies difference rather than dampens it. The next Part sets out to imagine just such a regime.

III. THE NEW SEX DISCRIMINATION

In this Part, I sketch a new framework for sex discrimination law that is modeled on the protections currently available to employees in religious discrimination cases. The defining characteristic of religious discrimination law is its elasticity. Through various doctrinal mechanisms, the law bends to the needs of employees, seeking to empower employees to practice their faith without having to sacrifice their position at work. I want to be clear at the outset, however, that I am not proposing this shift because I think it will automatically translate into more victories for employees in sex discrimination cases. Rather, I propose it because religious discrimination law offers a more sophisticated way of thinking about difference and discrimination.

240. *Id.* at 218–20.

241. *Id.* at 214.

The prevailing discourse in religious discrimination law is built around twin goals of neutrality and balance. The law takes a neutral position on what counts as religious in belief and practice, thereby giving employees plenty of room to determine for themselves what is or is not required as part of their faith.[242] At the same time, the law seeks to strike a balance between an employer's needs in organizing its workplace and an employee's needs in furtherance of her faith. On this latter point, employers clearly have the upper hand. In an at-will environment,[243] antidiscrimination protections can only go so far, and the law reaches its limit once an employer offers a reasonable accommodation or shows that no such accommodation is possible. Yet the inquiry is what really matters. The ultimate question in a religious discrimination case is whether an employer can adapt its workplace to the needs of its employee and not the other way around. Sex discrimination should follow suit. By reorganizing sex discrimination law in this way, we can advance the needs of men and women at the margins of our society while at the same time advancing the work of antidiscrimination law more generally. This, in turn, would bring us closer to the ideal of a workplace culture in which employers make decisions on the basis of merit rather than identity.

I develop this argument in three sections. The first articulates a doctrinal shift for sex discrimination, tracking the doctrinal framework currently used in religious discrimination cases. The next Section argues for a new vision of equality for sex discrimination law, one that is steeped in difference rather than sameness. Finally, the last Section sharpens my argument by responding to potential critiques.

A. A New Framework

To begin, consider a garden-variety example of religious discrimination. Abercrombie & Fitch hired Lakettra Bennett to work

242. *See, e.g.*, Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 473 (7th Cir. 2001). In *Anderson*, the employee determined on her own that communicating "Have a Blessed Day" when ending a conversation or written communication was an important part of her faith; religious discrimination law does not question that determination. *Id.*

243. American employment follows an at-will rule, meaning that either an employer or an employee can end an employment contract for any reason, or for no reason at all. Perhaps the first American court to adopt the at-will rule was *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507 (1884), in which the Tennessee Supreme Court held that employers "may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Id.* at 519–20. Antidiscrimination statutes like Title VII operate as a limitation on the at-will rule.

as a sales person—or, as Abercrombie & Fitch calls it, "model"—in one of its stores.[244] Soon after that she was promoted to a manager-in-training position and transferred to one of the company's Hollister stores.[245] At the time, Bennett followed the company's "Look Policy," which required employees to wear clothes that were consistent with the Hollister brand, namely, "ripped-up jeans, a little revealing, sporty, California beach style, laid back."[246] Female employees in particular were supposed to make themselves look sexy by wearing tight clothing that accentuated their bodies.[247]

The Hollister dress code soon became a problem for Bennett. After converting to the Apostolic religion, Bennett wanted to dress more modestly. She exchanged her short skirts for long skirts that fell below the knee, her low cut shirts for long sleeve shirts that did not show any cleavage.[248] On her first day back to work after her conversion, she wore an ankle-length denim skirt, which was unlike anything Hollister had ever sold.[249] Her new attire clearly violated Hollister policy, though the company was willing to work with her. Over the course of several meetings, the company offered a number of alternatives to resolve the conflict between Hollister's dress code and Bennett's clothing preferences. One option was to wear jeans instead of skirts.[250] Another was to wear short skirts with leggings underneath to cover her legs.[251] The final option was to look in other stores for skirts that would be consistent with both the dress code and her religious beliefs.[252]

Bennett rejected all three proposals.[253] The only accommodation she was willing to settle for was an exception to the company's dress

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244. EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie & Fitch I*), No. 4:08CV1470 JCH, 2009 WL 3517578, *1 (E.D. Mo. Oct. 26, 2009).

245. *Id.*

246. *Id.*

247. EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie & Fitch II*), No. 4:08CV1470 JCH, 2009 WL 3517584, at *1 (E.D. Mo. Oct. 26, 2009) (further describing the brand's style as "sexy, form-fitting, and designed to show off body contours and draw attention to the wearer"); *id.* ("Bennett described the length of skirts and dresses sold by Hollister during the relevant time frame as falling just below the buttocks.").

248. *Id.*

249. Defendants' Memorandum in Opposition to Plaintiff's Motion in Limine at 2, *Abercrombie & Fitch I*, 2009 WL 351578 (No. 4:08CV1470 JCH), 2009 WL 4900167.

250. Memorandum in Support of Defendants' Motion for Summary Judgment at 5, *Abercrombie & Fitch I*, 2009 WL 351578 (No. 4:08CV1470 JCH), 2009 WL 2565188.

251. *Id.*

252. *Id.*

253. *Id.* at 5–6.

code so that she could wear long skirts.[254] Unwilling to make this concession, Hollister gave Bennett two weeks to make a decision: adhere to the policy or resign.[255] She opted to resign.[256] Soon afterward she brought a religious discrimination claim under Title VII, alleging that Hollister made no effort to reasonably accommodate her religious practice.[257]

The first step in evaluating a claim of religious discrimination is to determine whether an employee's beliefs constitute a "bona fide" religious belief under Title VII.[258] This is a notably relaxed standard. There is no list of permitted religions. Nor is there any expectation that an employee's beliefs be in the mainstream of her faith. Instead, the court considers whether the belief is religious within the given employee's worldview.[259] Piercings have been held to be religious under this standard,[260] as have tattoos,[261] veganism,[262] witchcraft,[263] and even atheism.[264] In addition, an employee must show that the religious belief is sincerely held.[265] It was the sincerity requirement that may have posed the biggest problem for Lakettra Bennett in her suit against Abercrombie & Fitch. Although she claimed that her faith did not permit form-fitting clothing, she showed up to her deposition wearing a tight shirt, which she herself described as "body conscious."[266] The purpose of the sincerity requirement is to make

254. *Id.* at 7.

255. Plaintiff's Trial Brief at 2, *Abercrombie & Fitch I*, 2009 WL 351578 (No. 4:08CV1470 JCH), 2009 WL 4900158.

256. *Abercrombie & Fitch I*, 2009 WL 351578, at *1.

257. *Id.*

258. *See id.* at *2 ("In order to establish a prima facie case of religious discrimination under Title VII, Plaintiff must show that Bennett had a bona fide religious belief that conflicted with an employment requirement . . . .").

259. *See supra* note 217.

260. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 129, 134–37 (1st Cir. 2004).

261. EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *5 (W.D. Wash. Aug. 29, 2005).

262. Chenzira v. Cincinnati Children's Hosp. Med. Ctr., No. 1:11-CV-00917, 2012 WL 6721098, at *3 (S.D. Ohio Dec. 27, 2012).

263. Dettmer v. London, 799 F.2d 929, 934 (4th Cir. 1986).

264. Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003).

265. *See* EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 56 (1st Cir. 2002) ("[T]he plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held.").

266. *See* Lawrence E. Dubé, *Court Sends Religious Bias Case to Trial; Employee Quit Over Retailer's "Look Policy,"* Daily Lab. Rep., No. 211, at A-5 (Nov. 4, 2009). A helpful source for me on the *Bennett* case, as well as the Dubé piece just cited, was DIANE AVERY, MARIA L. ONTIVEROS, ROBERT L. CORRADA, MICHAEL L. SELMI & MELISSA HART, EMPLOYMENT

sure that employees do not disingenuously appeal to religion so they can avoid work obligations.[267] In one particularly memorable case, a plaintiff was unable to convince the court that his practice of eating Kozy Kitten Cat Food was a sincerely held religious belief.[268]

Once an employee satisfies these definitional requirements—and it is worth noting that, contrary to the cat-food eater, most employees do in fact satisfy these requirements—the next step in the framework is to look at an employer's response to the conflict.[269] The bulk of religious discrimination litigation focuses on this step. Title VII imposes on employers a duty to make reasonable accommodations for an employee's religious beliefs or practices. An employer is not bound to accept an employee's requested accommodation.[270] Nor is the obligation limitless. An employer does not have to make an accommodation if doing so would pose an "undue hardship."[271] In an important case, the Supreme Court defined undue hardship as a requested accommodation that would make an employer "bear more than a *de minimis* cost."[272] This standard is a boon for employers, and it also helps reign in the reasonable accommodation theory, which has the potential to cripple business if left unrestrained.

Lakettra Bennett's case highlights the important role that negotiation plays in reasonable accommodation. Rather than rejecting her requests out of hand, the company offered Bennett three different options to accommodate her faith. This is a hallmark of reasonable accommodation; it facilitates an interactive process between employer and employee, who must work together to try to fix the problem in such a way that the employee can get back to work and the employer's business will not suffer too much on account of

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DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 641–45 (8th ed. 2010).

267. *See Reed*, 330 F.3d at 935 ("[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief. Otherwise he could announce without warning that white walls or venetian blinds offended his 'spirituality,' and the employer would have to scramble to see whether it was feasible to accommodate him by repainting the walls or substituting curtains for venetian blinds." (citations omitted)).

268. *See* Brown v. Pena, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).

269. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie & Fitch II*), No. 4:08CV1470 JCH, 2009 WL 3517584, at *2–3 (E.D. Mo. Oct. 26, 2009).

270. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68–69 (1986).

271. 42 U.S.C. § 2000e(j) (2006).

272. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

the changes.[273] In this regard, reasonable accommodation upends traditional antidiscrimination discourse, and in a good way. It transforms the employment relationship into a kind of partnership. Not an equal partnership, to be sure, but these partnerships make it possible for employers and employees to have an honest conversation about difference—which differences matter, why they matter, and whether there is space in the workplace for these differences.[274] A workplace brimming with these sorts of conversations is a breeding ground for real social change, the kind of change that is felt beyond the walls of the workplace.[275]

1. *Sex as Practice*. The first step in my proposal is that sex discrimination law track the causation standard currently in use in religion cases. This would shift the analysis away from the conventional "because of sex" standard that dominates sex discrimination law today and move it more toward an individualistic standard that focuses on the employee's lived experience of discrimination. For this to work, sex discrimination law will have to embrace the idea that sex is both a status and a practice. Employees face sex discrimination both because of who they are (status) and because of how they act (practice). The new sex discrimination is all about sex as a practice, capturing the performative side of a person's identity. The critical question will be one of self-definition: Does the employee sincerely believe that the practice in question is constitutive of her identity as a woman (or his identity as a man)?

Consider two examples. Start with Darlene Jespersen and Harrah's no-makeup policy.[276] For Jespersen, wearing makeup conflicted with her own sense of her womanhood. She found it

273. Under the ADA—which serves as the model for Title VII's reasonable-accommodation mandate—the "interactive process" is an important step in the reasonable-accommodation analysis. *See supra* note 67. The "interactive process" does not grow out of the text of the ADA, but from an EEOC guideline on the statute. *See* 29 C.F.R. § 1630.2(o)(3) (2013).

274. *See* KIRKLAND, *supra* note 75, at 136–40.

275. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKFORCE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003). Professor Estlund identifies the workplace as uniquely situated to foster interconnectedness among a diverse citizenry, especially now that the importance of community and civic ties are dwindling in our culture. Specifically, that work necessitates involuntary work relationships—relationships born of necessity rather than choice—provides people an opportunity to learn from each other and, hopefully, bridge some of the divides that separate different groups in their private lives. Put simply, conversations and interactions at work have the potential to change the way people live their lives.

276. *See supra* notes 1–9 and accompanying text.

degrading, so much so that she could not do her job—a job she had done exceedingly well for over twenty years—effectively. And she sincerely felt this way. It was not the case that Jespersen immediately developed her preference when the company announced its new policy; she had not worn makeup at any time in her many years with the company, nor did she wear makeup outside work. Her stance against makeup was a deeply held conviction.

Now consider Krystal Etsitty, the transgender city bus driver who was fired for using women's restrooms along her route.[277] The critical question in the case would be to determine Etsitty's sex. Existing law defines Etsitty's sex according to her birth sex, which was male. This explains why Etsitty had to resort to a theory of sex discrimination that defined her not as a woman but as a man who faced discrimination because he wanted to wear a dress. By contrast, my proposal allows Etsitty to define her sex consistent with her transition, thereby allowing her to be a female. The sex practice in question was Etsitty's use of a women's restroom. She would have to argue—and I am confident she could establish—that using a women's restroom was constitutive of her identity as a woman. And such a belief would, no doubt, be about as sincere as they come.

2. *Accommodating Sex*. The first step is the easy part. The second step—determining whether the employer must accommodate the sex practice—is, as it should be, a harder question. To avail oneself of the reasonable accommodation protections, an employee would have to engage her employer, alerting the employer to the conflict—if the employer were not already aware of it—and opening a line of communication to try to remedy the situation. An employer's duty to accommodate would not mean that an employer has to accept *any* proposal put forth by one of its employees; the standard would be one of reasonableness. If an employer offers a reasonable solution, an employee could not reject it in favor of her own preferred solution and still state a claim under Title VII. And if no accommodation were possible, I would likewise adopt the undue-hardship safety valve. A surprisingly low standard, the undue-hardship test is far more favorable to an employer's interests than an employee's.

Two more points bear mentioning before considering some examples. The first is that reasonable accommodation is a fact-intensive inquiry, which makes sense given that reasonable

277. *See supra* notes 120–25 and accompanying text.

accommodation seeks to craft individualized remedies. As such, every case of reasonable accommodation is tailored to the needs of the employee alleging discrimination. The second point is more of a reminder: the real value of reasonable accommodation is that it facilitates a conversation between employers and employees about difference.

Now return to Darlene Jespersen's case. Jespersen wanted an exception to Harrah's makeup policy. Harrah's, by contrast, sought uniformity; it was trying to foster an image in its casinos, and makeup was an important part of that image. Jespersen's history with the company undercuts the argument that female bartenders needed to wear makeup to do their job well. Although Harrah's had long encouraged women to wear makeup,[278] Jespersen never did. And her work performance did not suffer because of it. It is simply hard to argue that her job now calls for wearing makeup. Under a reasonable accommodation standard, Harrah's would have to identify the costs of honoring Jespersen's request, as a means of arguing that accommodating Jespersen would amount to an undue hardship. This would be an uphill battle.

Krystal Etsitty's case would be harder. The employer never inquired whether certain businesses along her route would have allowed Etsitty to use their bathrooms,[279] though it is not clear that the employer would have been required to look into this possibility. If that were possible, however, that might have satisfied everyone's wishes. Another possibility is that Etsitty could have waited to use the bathroom until after completing her route, possibly until she returned to the bus station. If that worked, Etsitty would have had to bear the brunt of the costs, as she would have had to wait to go the bathroom until she finished her shift. Yet it is also possible that there are no good solutions here. Let me stress that my proposal does not mean that every claimant has to be accommodated. My hope is that Etsitty and her employer would be able to work things out without having to resort to litigation. Having an accommodation framework in place incentivizes these sorts of negotiations, making litigation a last resort when compromise is not possible.

278. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

279. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219 (10th Cir. 2007).

B. A New Vision of Equality

The backbone of the new sex discrimination regime is the idea that difference is universal. In his new book *Far From the Tree*, Andrew Solomon makes this point better than I can.[280] Solomon is writing in the context of parents who have children with different identities than their own—straight parents who have a gay child, able-bodied parents who have a disabled child, and parents of average intelligence who have a prodigy, to name a few examples.[281] Yet his claim is no less applicable to my project: "Difference unites us. While each of these experiences can isolate those who are affected, together they compose an aggregate of millions whose struggles connect them profoundly. The exceptional is ubiquitous; to be entirely typical is the rare and lonely state."[282] What Solomon has identified—and it is a point I want to stress—is that each person's search for identity is hers alone. And this search does not get put on hold when an employee enters the workplace. The idea that our work and private lives occupy separate spheres is more metaphor than reality. Employees bring into the workplace their preferences and biases, their relationships and associations, their identities and senses of self.[283] The workplace is an artificial environment, assembling an increasingly diverse set of individuals who would otherwise not interact with each other in their daily lives.[284] If anything, work magnifies the social pressures facing outsider employees, making it all the more important for outsiders to fit in among their coworkers.[285]

For the new sex discrimination regime to take hold, we need to recalibrate the vision of equality that undergirds sex discrimination law. Put simply, we need to start thinking about equality in terms of cultivating difference among employees. A helpful way to facilitate this shift would be to expand the way we talk about Title VII's protections. Title VII lists prohibited bases for employment—race, sex, religion, among others. I have made the conscious choice throughout this Article to refer to these as "protected traits" rather

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280. ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY (2012).

281. *See generally id.*

282. *Id.* at 4.

283. *See* Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627, 628 (2007).

284. *See* ESTLUND, *supra* note 275, at 4.

285. *See* Carbado & Gulati, *supra* note 24, at 1269 (discussing the lengths to which outsiders must go to fit in at work).

than "protected groups." In my experience, the latter formulation is far more prevalent than my rendering.[286] Though it may seem like a minor matter of semantics, the difference between these two formulations is actually quite meaningful, cutting to the heart of what is at stake in employment discrimination law. When we couch Title VII in the language of groups, we not only anchor the statute to the needs of groups, but we also marginalize those employees who do not fit neatly into recognized identity groups, whether because of the complexity of their identity—think intersectionality—or because they are the outsiders among other outsiders, the employees who have the hardest time fitting in. My position is that sex discrimination law needs to make a better effort to reach these employees.

I am not arguing that we should completely abandon the sameness model. What we need is a holistic vision of equality, one that is capable of pivoting between sameness and difference as the case calls for it. Group-based discrimination still occurs. Take the recent Wal-Mart litigation.[287] The plaintiffs in that case charged, among other things, that Wal-Mart discriminated against women as a group in its promotion decisions.[288] Contrast their claims with Darlene Jespersen's, Ann Hopkins's, and Karen Ulane's claims. These latter cases are all about particular women who sought a personalized remedy. Whereas the women of Wal-Mart wanted to be treated the same as men, Jespersen, Hopkins, and Ulane wanted to be treated differently than all their coworkers, men and women alike, because they had different needs than their coworkers. Each practiced her womanhood on her own terms—as a woman who refuses to wear makeup, as a woman who curses and acts aggressively, and as a woman who used to be a man. Their search for identity has carried them beyond the bounds of what our culture currently deems appropriate for women, and they suffered the consequences at work because of it. Equality is a remarkably pliable concept. In its prevailing form it works to constrain identity, discouraging marginalized employees from embracing the full range of their identities. Yet it also has the capacity to liberate identity, providing a blank canvas on which employees can sketch their own concept of

286. So engrained in our thinking about discrimination, the comparator heuristic is a part of the prima facie case for proving discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (noting that an employee must prove that she "belongs to a racial minority" to make a prima facie case for Title VII discrimination); *supra* note 226.

287. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

288. *Id.* at 2547.

who they are. It is possible for sex discrimination law to speak of equality and difference in the same breath as part of a common project. My hope is that sex discrimination law will move in that direction.

C. Concerns

My argument is sure to have raised red flags along the way. In this Section, I respond to three major objections, all of which I have faced at one point or another as I have explored this project.

1. *Groups Matter*. The first objection is that my argument has overlooked the value of group membership, especially in the realm of civil-rights practice. People benefit immensely from joining and identifying as a member of a group. Members of a group share a common history. For many outsiders, the first step in asserting a new identity is to walk the path of those who came before them. The promise of group membership is a community based on shared experience. It makes no difference where you are or where you have been, even if you are the only person around who has your identity. You can always identify with others like you. This is what makes Dan Savage's "It Gets Better Project" so powerful.[289] Savage, an influential sex-advice columnist, sought to create a vehicle to reach gay youth who are victims of bullying.[290] The immediate goal of the project was to urge gay kids not to commit suicide in the face of harassment and social ostracism. The broader aim, however, is to reassure these kids, many of whom have no gay role models in their day-to-day lives, that they are already part of a larger community of people just like them.[291]

Groups matter. I would not want to suggest otherwise. My critique of sex discrimination law is that it has lost sight of the individual at a time when the individual is more important than ever. This is not to say that sex discrimination can or should stop thinking about groups. That is why I am envisioning a two-tiered sex discrimination regime. The first tier is sex discrimination as we have always known it, taking aim at discrimination for being male or female. Such status discrimination cases revolve around an

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289. *See* IT GETS BETTER PROJECT, http://www.itgetsbetter.org (last visited Oct. 26, 2013).

290. *What Is the It Gets Better Project?*, IT GETS BETTER PROJECT, http://www.itgetsbetter.org/pages/about-it-gets-better-project (last visited Oct. 26, 2013).

291. *See id.* (describing the purpose of the website as providing a forum for communication with the lesbian, gay, bisexual, and transgender community).

employee's group membership. The second tier is focused on individualized harms. These are the cases in which the employee faces discrimination not because of who she (or he) is, but because of how she (or he) acts in the workplace. Whereas the first tier is concerned with being, the second tier is concerned with doing. The reforms I have presented would apply only to the second tier of cases. The purpose of the new sex discrimination is to supplement the old sex discrimination, not to replace it. Together, they will work in concert to strike at the full spectrum of sex discrimination as it exists today.

2. *Flood and Stretch*. The next major concern is that my proposal broadens the concept of sex discrimination far beyond anything we have seen before in American law. Consider a hypothetical to sharpen the critique.[292] Say that an employee wants to be excused from work two days a week so he can practice karate. When the employer resists—as the employer most certainly would—the employee demands an accommodation because his karate practice is an essential part of his manhood. How is it that we can still call this sex discrimination? There are traits that, even if you do not think should be protected, are clearly linked to sex in some way—refusing to wear makeup, cross-dressing, and transitioning from one sex to another are prime examples. But practicing karate is something else entirely. If the employee gets to define what practices are constitutive of identity, then the employee has a lot of room—arguably too much room—to determine the substance of sex discrimination law.

There are two ways of thinking about this objection—flood and stretch. Let me start with flood. The argument is that my proposal will lead to a deluge of sex discrimination cases, which will drain resources that would be better spent on other, more serious forms of discrimination.[293] For instance, one may argue that neither being forced to wear makeup nor being denied time to practice karate can compare to a case in which an employer discriminates on the basis of race. Though I am sympathetic to this concern, I am uncomfortable with any conception of workplace equality that subscribes to a strict hierarchy of harms. Title VII is not like the Equal Protection Clause; there are no levels of scrutiny, no differing standards depending on

292. Thanks to David DePianto for the following hypothetical.

293. *See generally* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001) (outlining this concern in the context of sexual-orientation discrimination law).

the trait at issue. Although others might see makeup as a relatively minor matter, it was not to Jespersen, and that is what matters most to the vision of sex equality I have put forth in this Article. Moreover, the flood concern assumes that a more lenient standard automatically leads to more litigation. The time, money, and inconvenience of litigating, not to mention how it disrupts their employment relationship, will dissuade most people from wasting the effort of bringing a sex discrimination case. Only those who feel strongly about the employer's decision will resort to litigation. So if the employee truly believes that his manhood is tied up in his karate practice, then sex discrimination law should care about it, even if it ultimately cannot provide the man with a remedy.

As for stretch, the argument is that if anything and everything counts as sex, then there is no limit on sex discrimination. I want to respond in two ways. The first is to emphasize that there is a limiting principle built into my proposal. Just like in a religious discrimination case, an employment decision would be sex based provided two conditions are met. First, the identity trait in question must be sex based within the employee's worldview. This may seem far too open-ended, but it will work for the same reason it already works in religious discrimination cases: individuals are in the best position to define the terms of their own identity. Second, the employee's belief that the trait under attack is sex based must be sincerely held. As is the case with religious discrimination, the purpose of the sincerity requirement is to safeguard against employees using sex discrimination as an excuse to avoid work obligations.

The second point in response to the stretch argument is that we should not think of antidiscrimination law only as a means to right wrongs. In addition to remedying specific cases of discrimination, antidiscrimination law also facilitates a critical conversation about identity and difference—a conversation that takes place in workplaces, in courts, in the media, and in people's daily lives. Although he ultimately leans away from the law as a tool for civil rights,[294] Kenji Yoshino celebrates the virtues of a "reason-forcing conversation," a conversation in which those who seek to impose a burden on an outsider must justify their reason for doing so.[295] As

294. YOSHINO, *supra* note 31, at 194–95.

295. *Id.* at 178 (emphasis omitted).

Yoshino writes, these conversations "reveal the true dimension of civil rights."[296]

Stretch is not a bad thing. Outside of biological differences, sex does not have natural boundaries. The problem with existing sex discrimination doctrine is that it tries to draw firm lines around sex. By contrast, my proposal takes a hands-off approach, leaving it up to the individual to set the boundaries for what constitutes sex. None of us is in a good position to tell the man that practicing karate is not essential to his manhood; it is something only he can decide for himself. What the law can do, however, is facilitate a conversation between the man and his employer, in the hope that they can come to some resolution of the situation. In this case, the requested accommodation seems unlikely. I do not expect that any court would second-guess the employer's decision not to let the man take off work to practice karate. But that is beside the point I want to make here. The conversation is what matters. At every turn, my proposal points toward conversation as an important means of bringing about social change. It gives the employee an outlet to express his identity. It lets employers explain what they need from their employees to maintain good order in the workplace. And, most important of all, it harnesses the power to change people's minds about difference.

3. *Religion Is Special.* Religion holds a special status in our legal culture. Under the First Amendment, the state can neither prefer nor inhibit religious practice.[297] Religion receives this special status because of the critical role that religious freedom played in the founding of our country. Yet this special status also stems from the fact that we tend to think of religion as being somehow different than the other traits protected by antidiscrimination law. This helps to explain the so-called "ministerial exception" to Title VII, a judicially created rule that allows religious institutions to engage in overt discrimination for positions related to the institution's religious mission.[298] And it also helps to explain why claimants in religious discrimination cases have access to a separate antidiscrimination regime than claimants alleging other forms of discrimination. Thus it

296. *Id.* at 195.

297. U.S. CONST. amend. I.

298. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (upholding an exception to antidiscrimination laws that applies when religious institutions hire employees).

is only fair to question whether sex discrimination likewise deserves accommodation.

This is an important objection, raising a roadblock to my proposal that is both legal and ideological in nature. Let me start with a concession: I cannot overcome the point that religion deserves special treatment for historical reasons. Employment discrimination law is structured so as to give employees a reasonable amount of space to practice their faith, space that it is not available to employees to explore other aspects of their identity. Set aside the historical and textual reasons for treating religious discrimination differently. Are there other reasons to explain why religion is different than sex (or any other protected trait under Title VII)?

The obvious point to consider is that religion is mutable and the other traits are immutable. The theory here is that religion requires special treatment because it is not a fixed identity like a race or sex. It comes down to a person's control over her identity. If a person can change her religion—or even abandon religion altogether—then the person has a greater say in who she is and how she lives her life. We do not, by contrast, get to choose our race, race being biologically determined. Sex is another story, though. Although the vast majority of people do not exercise choice over their sex, some people do, going to great lengths to change their birth sex. Indeed, the great lesson of the transgender cases is that, where there is a will, there is a way to change one's sex. At least as far as immutability is concerned, religion and sex are more alike than different.

Maybe we need a softer definition of immutability. Rather than thinking of traits as locked identities, we can define immutability as a trait that is so central to our sense of self that it would be extremely difficult to change. We see this view of immutability used in asylum law, in which courts have ruled, for instance, that sexuality and gender identity "are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."[299] Under this view, immutability is more about the effect of changing one's identity rather than the ability to change it. Yet this new definition would not resolve the problem at hand. Once again, the transgender example suggests that changeability is not a useful dividing line. Converting one's sex is no less fraught than converting one's religion; that a person wants to change his or her sex, and is

299. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005).

willing to spend the time, money, and emotional energy to do so, says a lot about how important the change is to the person's sense of self. We could say the same about converting from gay to straight, forcing oneself not to cross-dress, or wearing makeup even though it makes one's skin crawl. Forcing or expecting people to change traits that are constitutive of their identity is like asking them to be somebody else.[300] In this regard, religion is not all that different than any other important identity trait that is capable of change.

IV. THE FUTURE OF EMPLOYMENT DISCRIMINATION

Before concluding, I want to take a step back to consider some of the broader implications of my argument. My goal in this Part is to lay the groundwork for future discussions. To that end, I raise two questions about the future of employment discrimination law in light of my proposals for sex discrimination law. Because these questions provoke ideas that are each capable of sustaining an article unto itself, I simply cannot answer them in this space. Yet they are worth considering, if fleetingly, in the hope that they will stimulate future conversation about how antidiscrimination law should adapt to the changing nature of employment discrimination.

A. Beyond Sex

Sex discrimination is only a small sliver of employment discrimination law. What about the other traits protected by Title VII? Surely one could make a parallel argument about, say, race.[301] Like sex, race is both a status and a practice, a marker of both who an employee is and how the employee presents herself in the workplace. And like sex discrimination, modern race discrimination is primarily about the performative aspects of a person's racial identity. Consider a prominent case.[302] American Airlines refused to allow Renee Rogers, an African-American woman, to wear her hair in cornrows.[303] Rogers argued that the all-braided hairstyle held a special significance

300. This is reminiscent of Tobias Wolff's critique of the military's now-defunct "Don't Ask, Don't Tell" policy, which required lesbian and gay service members to present themselves as heterosexual. *See generally* Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997).

301. National origin is another good example, particularly with respect to English-only policies in workplace. For useful discussion of the language discrimination cases, see generally Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689 (2006).

302. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

303. *Id.* at 231.

for her as a black woman in America.[304] It was, in other words, critical to her sense of her own racial identity.

Rogers ultimately lost her case, with the court drawing a distinction between a natural hairstyle (such as an Afro) and one based on artifice.[305] Braids were of the latter variety, according to the court, and therefore beyond the reach of Title VII.[306] Scholars have written strong critiques of the court's decision.[307] My interest in the case lies elsewhere. Later on in its opinion, the court notes that American Airlines would have allowed Rogers to put her hair in a bun and wrap a hairpiece around the bun.[308] After trying it out, though, Rogers rejected this option because the hairpiece gave her severe headaches.[309] The court does not frame the inquiry this way, but this is textbook accommodation analysis. The employer had a rule that prevented Rogers from wearing her hair in a manner that was critical to her sense of self as a black woman. The employer proposed a solution to the conflict—wearing her braids in a bun and hairpiece. It is hard to say whether the proposed accommodation was reasonable, but that is something that could be addressed through litigation.

Renee Rogers's case further demonstrates that accommodation is a natural way of thinking about identity and difference in the workplace. Moreover, it also suggests that existing conceptions of racial identity—like existing conceptions of sex and gender—do not capture the full range of how employees perform their identity in the workplace. Thus, as we look to the future of employment discrimination law, we need to consider whether other kinds of discrimination—race, national origin, and age, among others—should likewise move toward the antidiscrimination model I have proposed for sex discrimination.

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304. *Id.* at 231–32.

305. *Id.* at 232.

306. *Id.*

307. *See, e.g.*, D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 412–14 (2011); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1090–93 (2010). *See generally* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

308. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

309. *Id.*

B. Beyond Title VII

There is a growing sense among scholars that Title VII may not be up to the task of eradicating employment discrimination as it exists today. Suzanne Goldberg writes that employment discrimination law "is in the midst of a crisis."[310] Elizabeth Glazer argues that employment discrimination law "needs help."[311] Marcia McCormick notes that employment discrimination law has effectively stalled, accomplishing little since the 1980s.[312] And Nancy Levit has shown that employment discrimination law is on the wrong side of changing workforce demographics.[313] I am likewise concerned that Title VII is ill-equipped to face the challenges raised by modern discrimination. The reforms I have proposed in this Article only go so far. Though they may improve the law's approach to sex discrimination, they do not alter the architecture of employment discrimination law as a whole.

Perhaps the time has come to adopt a new regulatory scheme for employment discrimination. The idea has intuitive appeal. After all, modern discrimination bears little resemblance to what discrimination looked like when Title VII became law. In her work on trait discrimination, Kimberly Yuracko offers Justice Sandra Day O'Connor's inability to find legal work as an attorney as a good example of what discrimination used to look like.[314] Despite graduating third in her class at Stanford Law School, the only law firm job Justice O'Connor could get was as a legal secretary.[315] Discrimination used to be about formal segregation and exclusion. Today, however, it is about not fitting in at work. The Justice O'Connors of the world have been replaced by the likes of Darlene Jespersen, Peter Oiler, and Dawn Dawson, men and women whose identities mark them as different from their coworkers. If discrimination has changed so much, why has discrimination law changed so little?

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310. Goldberg, *supra* note 225, at 731.

311. *See* Elizabeth M. Glazer, Repairing Antidiscrimination Law from the Inside Out 1 (2011) (unpublished manuscript) (on file with the *Duke Law Journal*).

312. *See* McCormick, *supra* note 224, at 500.

313. *See generally* Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463 (2012).

314. Yuracko, *supra* note 19, at 167–68.

315. *Id.*

Whether we should adopt a new regime and what that regime might look like are important questions that warrant deeper consideration than I can offer in this space. Though I may not have broken Title VII's mold, I have offered a new way of thinking about sex discrimination—and possibly other forms of discrimination, too. My hope is that, at the very least, this Article will stimulate further discussion about whether and how we can make employment discrimination law more attuned to the needs of employees as it finds them today.

CONCLUSION

In an influential sexual harassment case, Justice Scalia once wrote that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[316] Though he was writing about a particular issue in sex discrimination law,[317] I take Justice Scalia's words to be a broader statement about the scope and ambitions of employment discrimination law in general. He recognized both that discrimination will change over time and that, for it to be effective, the law must change, too. In that spirit, this Article has proposed significant structural changes to sex discrimination law. My hope is that these changes will make the law more effective in its ongoing and ever-changing fight against sex discrimination.

316. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

317. *See id.* at 79–80 (holding that employees can raise same-sex sexual harassment claims under Title VII).