

VIVE LA DIFFÉRENCE? A CRITICAL ANALYSIS OF THE JUSTIFICATION OF SEX-DEPENDENT WORKPLACE RESTRICTIONS ON DRESS AND GROOMING

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I. INTRODUCTION

Suppose there are several employees in a particular workplace who regularly engage in some behavior, *x*. The employer decides to terminate one of these employees, *P*, citing the fact of *P*'s *x*-ing. Recognizing that the employer's rationale is insufficient to explain the decision to terminate *P* while not terminating the other *x*-ing employees, *P* challenges the employer to justify this differential adverse treatment.

A logically satisfactory response would require the employer to identify some way in which *P*, or *P*'s *x*-ing, is different—i.e., some argument by which *P*'s *x*-ing provides sufficient reason for *P*'s termination, while not providing comparable reason for terminating the other *x*-ing employees. Of course, the employer may not be required legally to have any good reason at all for terminating *P*, so no such response may be necessary, let alone forthcoming. But there is, presumably, at least one important constraint on the reasons to which the employer can lawfully appeal in order to explain why *P* was singled out for his *x*-ing: those reasons cannot be discriminatory ones.

But what does this mean? It is tempting to think that it must mean, at least, that the employer cannot lawfully justify *P*'s differentially adverse treatment relative to other *x*-ing employees simply by appealing to the fact of *P*'s race, color, religion, sex, or national origin.¹ For example, if the behavior in question (*x*-ing) was arriving late to work, the employer surely could not justify terminating *P* while not terminating other similarly tardy employees simply by citing the fact that *P* is, say, of Asian descent. As a matter of law, *P*'s race simply cannot be a consideration that provides reason for treating *P*'s *x*-ing differently from that of other employees.

But is it really true—for all *x* and for all *P*—that the employer in our simple hypothetical case could not lawfully justify the differential adverse treatment of *P* by appealing to the fact of *P*'s race, color, religion, sex, or national origin? Even without resorting to elaborately concocted counterexamples, we can assign

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1. Cf. 42 U.S.C. § 2000e-2(a)(1) (2000).

at least one value to x that puts the answer into doubt: Let x be “wearing frilly pink dresses”;² let P be a man; and let the other x -ing employees be women. Imagine, now, that the employer responds to P ’s demand for a justification of his being singled out for his x -ing by declaring, “I am firing you and not them because you are a man, and they are women.”

We may or may not be inclined to credit this unvarnished response as adequate from the perspective of a progressive understanding of sex or gender discrimination. Yet, we would surely hesitate to assert—at least as a descriptive claim about the current law—that the employer’s explicit appeal to P ’s sex as the reason for treating him differently establishes *ipso facto* the fact of intentional discrimination. On the contrary, it is likely that most courts would decline to find actionable sex discrimination here. This implies that there are at least some circumstances in which an employer can legally maintain a policy under which certain behaviors can provide reason to take adverse action against men but not women, and vice versa. In other words, an employer’s differentially adverse treatment of one employee as compared to another can sometimes be justified by appeal to the employee’s sex, to the effect that—as in our hypothetical—the employer can take adverse action against employees of one sex for engaging in behavior that is deemed acceptable for employees of the other sex.

This implication is at the same time unsurprising and deeply puzzling. It is unsurprising inasmuch as, at some level, one wants to say that *of course* current employment discrimination law recognizes a legally relevant difference between men and women in the context of regulations governing the way they present themselves in the workplace. Is it not stating the obvious to observe that the law does not require employers to ignore all social norms tied to sex? Would it not be an exercise in absurdity even to entertain the notion that an employer unlawfully discriminates against male employees by restricting their entry into the women’s washroom, or vice versa?³

Yet, as appealing as this sort of deflating, bullet-biting response may be, it does not answer the deep—or at least nagging—question that remains. My simple hypothetical suggests that we cannot say, as a general rule, that an employee’s sex is always irrelevant to the standards of evaluation that justify the employment actions that affect him or her. This seems particularly evident in

2. I borrow the figure of the man in the “frilly pink dress” from Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 7 (1995).

3. *Boyce v. Safeway Stores*, 351 F. Supp. 402, 403 (D.D.C. 1972) (finding that the defendant’s beard and hair-length policies, applicable only to male employees, “are not shown to discriminate on the basis of sex any more than a condition of employment that requires males and females to use separate toilet facilities, or bars males but not females from wearing skirts”); see also *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973); Robert Post, *Prejudicial Appearances: the Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 28 (2000) (describing the standard view that regulations requiring men to dress and groom themselves differently from women “no more constitute discrimination ‘on the basis of sex . . . than a condition of employment that requires males and females to use separate toilet facilities’” (quoting *Boyce*, 351 F. Supp. at 403)); cf. *Doe v. Boeig Co.*, 846 P.2d 531 (Wash. 1993) (holding that employer was not required to permit gender-dysphoric biologically male employee to wear women’s clothing or use women’s restrooms); *Goins v. W. Group*, 635 N.W.2d 717 (Minn. 2001) (holding that designation of separate restrooms based on biological sex was not in violation of state antidiscrimination statute).

cases involving restrictions concerning the manner in which an employee may present the appearance of his or her physical body to others in the workplace. But if we presume that there is some legal principle that says that an employee's sex can—at least as to those kinds of restrictions—determine whether a particular employment action is legally justified with respect to him or her, then how can that principle be reconciled with the general legal prohibition of discrimination because of sex? In other words: Suppose it is true that at least some differential treatment based on sex is legally permitted (regarded as non-discriminatory) in the context of workplace restrictions on dress and physical appearance. Then what, if any, is the more general principle that allows us to distinguish action that depends on consideration of sex, or “sex-dependent” action, in *that* context from sex-dependent action that is objectionable as discrimination in *other* contexts?

I argue that the primary doctrines of employment discrimination law do not themselves draw a satisfactory distinction between sex-dependent restrictions on dress and grooming and actions that uncontroversially qualify as sex discrimination in other contexts. I contend that supplementary strategies that courts have used to carve out such restrictions as an area of separate concern are either inconclusive or question-begging. I then consider whether the law's seemingly *sui generis* approach to sex-dependent restrictions on dress and grooming can be explained or justified on the grounds that they do not implicate the main concerns of equality that the legal prohibition of sex discrimination might be thought to embody. I offer some observations as to what those concerns might be and discuss how sex-dependent restrictions on personal presentation in the workplace might be thought to implicate such concerns. I conclude with a suggestion that the justifiability of the law's current approach to sex-dependent dress and grooming restrictions implies a substantive claim about the possibility and the positive value of preserving a social state of affairs in which men and women enjoy economic equality but adhere to sex-dependent social norms in respect of the outward presentation of their bodies to others.

II. ON THE PROBLEM OF REDESCRIPTION

I begin my analysis with a discussion of a persistent and thorny problem relating to the main issue raised by the hypothetical case presented in the introduction. One might argue that my characterization of the employer's termination of the male employee—for wearing a frilly pink dress—as an action depending on consideration of sex is problematic at the outset. If my objective is to determine whether restrictions on personal presentation can be analyzed as sex discrimination, is it not impermissible question-begging to characterize the employer's action in my hypothetical as sex-dependent? After all, the employer's action could, with equal plausibility, be described as a sex-neutral restriction on “inappropriate attire” or as a response to indecorous behavior in the employer's workplace,⁴ or perhaps as a sex-neutral effort to protect customer or client sensibilities. The objection, then, is that if I am going to construct an

4. Cf. *Devine v. Lonschein*, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (characterizing a judge's requirement that a male attorney wear a necktie as a matter of “decorous professional behavior and appearance” dictated by “current fashion,” which did not constitute sex discrimination).

argument about whether workplace restrictions on an employee's mode of personal presentation constitute objectionable sex discrimination, I cannot simply help myself to the characterization of such restrictions as actions based on consideration of sex.

This difficulty is an important one. But I regard it not so much as an objection to my treatment of my opening hypothetical than as an alternative way of stating the very same question that I seek to address in this article. It is surely true that the employer's termination of our hypothetical cross-dressing male employee could be described in facially sex-neutral terms—e.g., as the enforcement of a general requirement of “appropriate” workplace attire or of “professional” behavior. And we might even re-imagine the original hypothetical to suppose that this sex-neutral characterization could be substantiated with evidence that female employees had been fired for comparable infractions (whatever those might be).⁵

I have no interest in denying the potential plausibility of these characterizations. The fact that an employer's termination of a cross-dressing male on account of his cross-dressing can be described in alternative, facially sex-neutral terms does not preclude our asking whether that action constitutes objectionable discrimination. For however *else* the employer's action might be described, it will remain subject to description as the firing of a male employee on account of his wearing a frilly pink dress. And so long as the employer would not regard the wearing of a frilly pink dress as a reason for firing a female employee, the male employee will be able to articulate a simple claim of differential treatment: he was terminated for an action that would not have been regarded as grounds for termination with respect to a female employee. Since this consideration was regarded as grounds for termination only because he was male, it follows that he was terminated because of his sex.

I want to be clear that I do *not* argue that it follows from the availability of the sex-dependent characterization of my hypothetical employer's action that the action is discriminatory. My point is that the availability of the sex-neutral characterization shows no more and no less than the availability of the sex-dependent one. Let me put it another way. A skeptic might argue that since we do not have any reason (in the absence of further facts) to privilege the description of the employer's action as a sex-dependent termination over its description in more neutral terms, any attempt on my part to analyze the action as sex discrimination will be based on a hopelessly unstable premise.⁶ But this objection misconstrues the nature of my inquiry. To repeat, I do not mean to suggest that the possibility of describing an action in sex-dependent terms

5. It is possible that there is nothing a female employee could do that would be precisely analogous to a male employee wearing a frilly pink dress. But this is beside the point of the objection I am considering, which is simply that the firing of a cross-dressing male could very plausibly be described in sex-neutral terms as the firing of an employee for wearing attire that was inappropriate for the workplace.

6. This skeptical viewpoint is related to one that has been given voice by Kimberly Yuracko. See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 188–98 (2004).

proves that the action constitutes sex discrimination.⁷ By the same token, however, the availability of a sex-neutral redescription of my hypothetical male employee's termination is not necessarily preclusive of a description of that same action as a sex-dependent one.

So, although one might think that an analysis of whether restrictions on dress and grooming constitute sex discrimination requires a threshold inquiry regarding how we are to adjudicate between competing sex-dependent and sex-neutral characterizations of the same action, what I am suggesting is that such an inquiry is really just an alternate formulation of precisely the question that motivates this article. The question of how to choose between such competing characterizations of sex-dependent restrictions on dress and grooming is the same as the question of whether there exists any coherent, non-arbitrary basis for exempting such restrictions from the ambit of objectionable sex discrimination.

III. TWO DEFINITIONS

In the interest of avoiding potentially tendentious characterizations, I begin my analysis by offering a pair of definitions. In this article, I shall use the term "sex-dependent workplace restriction" to refer to workplace requirements or proscriptions, however they might be characterized, whose application or enforcement with regard to a particular employee is predicated on, or cannot be determined without consideration of, that employee's sex.⁸ Thus, for example, a restriction that specifically instructed all and only female employees to conform to a certain dress requirement would obviously be a sex-dependent restriction. A policy that required all employees to wear "appropriate business attire" might also be a sex-dependent restriction to the extent that determinations of what was "appropriate" depended upon consideration of the sex of the subject employee. A policy that required all employees to wear a hat would be a sex-independent restriction. A requirement that short-haired employees wear caps while long-haired employees wear hair nets would also be sex-independent—even if, as a practical matter, this meant that the hair-net requirement applied only to female employees.⁹ Similarly, an appearance code requiring all employees to keep their beards trimmed would be a sex-independent restriction, not a sex-dependent one, even though (presumably) it would affect only male employees, because its application to any employee would not require consideration of that employee's sex.

7. Indeed, I do not even suggest that the particular action described in my opening hypothetical should necessarily be regarded as objectionably discriminatory.

8. I prefer the term "sex-dependent" to the phrase "sex-differentiated" just because it seems to more naturally encompass not only those restrictions that are explicitly formulated in sex-differentiated terms, but also those restrictions that might be given a neutral formulation but whose application is still predicated on consideration of sex. Nothing of substance, however, should be thought to turn on my choice of terminology.

9. If we varied the facts a bit such that it turned out that the requirement, although sex-independent on its face, was actually applied in practice such that only women with long hair were required to wear hair nets while men with long hair were permitted to wear caps, then the requirement would be a sex-dependent one under my nomenclature, insofar as its actual application was predicated on the subject employee's sex.

Second, I shall use the locution “workplace restriction on personal presentation” to refer to employment requirements and policies that restrict the manner in which an employee is permitted to present the surface of his or her face, head, hair, and body to others in the workplace. Thus, restrictions on personal presentation include all policies that traditionally are grouped under the rubric of “appearance standards” or regulations regarding “dress and grooming,” such as policies governing workplace attire, uniforms, hair length, beards, jewelry, makeup and cosmetics, and so on.¹⁰

IV. INTENTIONALITY

Current employment discrimination law already provides a test that determines when an action that is susceptible to alternative characterizations should be regarded, for legal purposes, as differential treatment “because of” one of the factors that is excluded from consideration by Title VII, including sex.¹¹ We must view the action as discriminatory, even if a non-discriminatory characterization of the action is possible, when a forbidden consideration forms part of the intention or motivation of the actor who is alleged to have acted discriminatorily.¹² One might argue, therefore, that there is a perfectly straightforward way of deciding whether the employer in my opening hypothetical engaged in sex discrimination: If the employer acted with a discriminatory motive or intent, then we should regard the termination of the cross-dressing male employee as discriminatory. However, if the employer acted with no such motive or intent, then we should regard the termination as a non-discriminatory enforcement of a workplace dress code (“appropriate attire required”) that applies equally to men and women alike.

To be sure, there is no denying that, under current approaches, the intention of the alleged discriminator is the nominal focus of the legal inquiry, at least in a disparate treatment action.¹³ But if our purpose is to work toward a

10. Policies that speak to a person’s build, stature, or physical conditioning—such as height and weight restrictions or strength and endurance requirements—do not fall under my definition of restrictions on personal presentation. I separate the latter restrictions from the former because they do seem to me to be of a slightly different character, which is not to say they are any more or less objectionable. By and large, however, I think that my analysis with regard to restrictions on personal presentation will apply equally to restrictions on physical build, stature, and conditioning. And indeed, I treat some of the case law regarding the analysis of such restrictions under the discrimination laws as directly relevant to the proper treatment of restrictions on personal presentation.

11. See 42 U.S.C. § 2000e-2(a)(1).

12. See, e.g., *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (“The ‘factual inquiry’ in a Title VII case is ‘whether [sic] the defendant intentionally discriminated against the plaintiff.’” (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981))).

13. See *Id.* Of course, even under current approaches, the intent of the alleged discriminator is not the focus of inquiry in disparate impact cases arising under Section 703(k)(1) of Title VII, which permits a plaintiff to establish discrimination by proving that the employment practice in question unjustifiably created differentially adverse burdens as between men and women. See 42 U.S.C. § 2000e-2(k)(1) (2000); see generally Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 953–67 (2005) (explaining the distinction between claims of disparate impact and disparate treatment). However, as I explained above, the question underlying the inquiry of this paper is whether, or in what circumstances, restrictions on personal

theoretical understanding of how to analyze sex-dependent workplace restrictions on personal presentation under the employment discrimination laws, to say that the classification of a particular presentational restriction as discriminatory or non-discriminatory depends on the employer's intent is like saying that negligence liability depends on the defendant's fault, or that criminal liability depends on *mens rea*. Accepting the truth of the general proposition does not help us move toward an understanding of the specific considerations that are relevant to the requisite analysis.

Suppose, for example, that my original hypothetical employer, after firing a male employee for wearing a frilly pink dress, were to concede that the decision to terminate the employee was motivated by a belief that it is inappropriate for men to wear dresses to work, and that it was relevant to—indeed, dispositive of—the termination decision that the employee was in fact a man. Would these admissions be sufficient to establish that the employer acted on a discriminatory motive?

If the answer were yes, it would be difficult to see how we could possibly avoid the conclusion that *all* adverse employment actions based on sex-dependent workplace restrictions on personal presentation constitute sex discrimination. For in every case in which adverse action is taken against a male (or female) employee on the basis of a judgment that the employee's personal presentation was inappropriate for a man (or woman) in the relevant workplace, it will be trivially true that the employer's action will have been based on an explicit consideration of the employee's sex. It will also be true that the employer would not have taken that same action if the employee's sex had not been taken into account.¹⁴ This, arguably, would be sufficient to satisfy common formulations of what it means to act on a discriminatory motive¹⁵ and hence for an action to be characterizable as *prima facie* discrimination.¹⁶ Yet, under current legal approaches, it is simply not the case that all sex-dependent restrictions on personal presentation constitute sex discrimination.¹⁷

presentation whose conditions of compliance are different for men and women should be analyzed as disparate treatment “because of . . . sex” within the meaning of Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000).

14. In my original hypothetical, the employee presumably would not have been fired for wearing a frilly pink dress if the employer had ignored the fact that the employee was male. Of course, “but for” causation will not be present in cases where an employee is fired for conduct that would have been equally inappropriate for an employee of the opposite sex. In such cases, however, the action in question would not be based on a sex-dependent restriction or policy, by definition.

15. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (stating, in the context of a mixed motives case, that proof of non-discriminatory motive requires showing that the employer “would have made the same decision even if it had not taken the plaintiff's gender into account”).

16. *See* Healey v. Southwood Psychiatric Hosp., 73 F.3d 128, 131–32 (3d Cir. 1996) (observing that proof of the employer's “open and explicit use of gender” as a basis for action is sufficient to establish a *prima facie* case of discrimination).

17. *See, e.g.,* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (“We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits.”).

Thus, if we hold fixed the proposition that adverse employment actions done with discriminatory intent constitute discrimination,¹⁸ then it would appear to follow—as a matter of positive law—that explicitly taking into account an employee’s sex for purposes of making a judgment about the workplace-appropriateness of his or her mode of personal presentation does not necessarily constitute discriminatory intent or motive. But if express consideration of an employee’s sex as part of the basis for taking adverse action against him or her does not constitute discriminatory intent or motive, then it becomes unclear what does.¹⁹

What becomes apparent, instead, is that the notion of “discriminatory intent” in this context is itself a notion that is in need of explanation, and not one that can explain the permissibility of sex-dependent restrictions on personal presentation. In other words, even assuming that discriminatory intent has some discernible, independent meaning²⁰ in this context, it is going to take some theoretical work to flesh out the content of that notion and to justify its relevance to the determination of sex discrimination *vel non*. Certainly, the notion of discriminatory intent in this context is too opaque to help us distinguish between discriminatory and non-discriminatory sex-dependent restrictions on personal presentation. It explains nothing to say that such a restriction should be regarded as an objectionably discriminatory policy, rather than a neutral one, whenever its enforcement involves an intent to discriminate.

V. STEREOTYPING

Courts often say that it constitutes impermissible sex discrimination to take adverse action against an employee on the basis of impermissible sex or gender

18. Even recent cases upholding sex-dependent presentational restrictions against sex discrimination challenges have stated that proof of discriminatory intent is sufficient to establish a *prima facie* case. *See, e.g., Id.* at 1109.

19. The question becomes even more puzzling if we consider how the legal assessment of discriminatory intent might change in a case that presented an analogous question concerning discrimination on the basis of race, rather than sex. Imagine, for example, that instead of firing the male employee for wearing a frilly pink dress, my hypothetical employer had fired an Asian employee for dying his hair blond, while not taking any action against non-Asian employees who had exhibited the same behavior. The employer claims that the termination was based on a race neutral requirement that all employees maintain a professional and business-like appearance in the workplace. Now, if the employer were to concede that the termination was motivated by a belief that it is unprofessional for Asians to wear blonde hair in the workplace, and that it was relevant to the termination decision that this employee was in fact Asian, how might we suppose a court would come out on the question whether there remained a genuine issue of discriminatory intent? I would think that the employer’s admissions should establish discriminatory intent beyond peradventure. *Cf. Post, supra* note 3, at 34 (expressing a “strong[] susp[icion]” that every court would regard as discriminatory “a grooming code that require[d] blacks, but not whites, to have short hair” (alterations added)). And I would think so, despite at least one court’s apparent conclusion to the contrary. *See Santee v. Windsor Court Hotel*, No. Civ.A.99-3891, 2000 WL 1610775 (E.D. La. 2000) (finding no racial discrimination where employer prohibited African-American woman from wearing blonde hair).

20. The more likely story, I believe, is that acting on discriminatory intent in this particular context has no meaning other than acting on the basis of considerations that are legally unfit to justify the employment action in question. Obviously, if this is the case, then the notion of discriminatory intent is completely derivative of the substantive question of justification.

stereotypes.²¹ I argue in this section that the prevailing attitude of tolerance with regard to certain sex-dependent restrictions on dress and grooming is difficult to square with the general prohibition of stereotyping discrimination, at least under one of two alternative understandings of that concept.

I find it helpful to distinguish between two different kinds of behavior that seem to fall under the rubric of stereotyping, which I will refer to as (1) prescriptive stereotyping and (2) epistemic stereotyping.²² Prescriptive stereotyping on the basis of a protected group classification (race, sex, national origin, etc.) occurs when an agent acts adversely²³ toward an individual or set of individuals on the basis of a judgment that the individual's behavior is inappropriate, socially unacceptable, or disfavored in virtue of the individual's membership (or apparent membership) in the group defined by that classification.²⁴ Thus, an employer engages in prescriptive stereotyping when, for example, the employer's refusal to promote a female employee is motivated by a judgment that her aggressive personality is inappropriate for a woman,²⁵ or (at least in the Sixth Circuit) when the employer's adverse action against a male employee is rooted in a judgment that his manner is too "effeminate."²⁶ Epistemic stereotyping on the basis of a protected group classification occurs when an agent acts²⁷ based on an unreasonable belief²⁸ about an individual's

21. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion); *Jespersen*, 444 F.3d at 1111; *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 572–73 (6th Cir. 2004); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215–16 (8th Cir. 1985); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1033 (7th Cir. 1979).

22. A similar distinction has been drawn by Professors Carbado, Gulati, and Ramachandran. See Devon Carbado, G. Mitu Gulati & Gowri Ramachandran, *Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 140–44 (Joel Wm. Friedman ed., 2006). Likewise, Anthony Appiah has distinguished between "statistical stereotypes," "false [belief] stereotypes," and "normative stereotypes." See K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 48–49 (2000). For Appiah, statistical and false stereotypes "involve intellectual error—either misunderstanding the facts . . . or misunderstanding their relevance," while "there is no reason to suppose that normative stereotypes as such must be wrong, or that public actions grounded on them are to be criticized." *Id.* at 49.

23. Some might want to say that it is possible for an actor to engage in stereotyping by adopting a certain belief or harboring an attitude without taking action. I have no objection to such a view but limit my discussion of stereotyping to cases of action, since employment discrimination claims necessarily presuppose adverse action.

24. One might broaden my definition of prescriptive stereotyping actions to include actions that are *beneficial* to an individual when such actions are based on a judgment that the individual's behavior is socially exemplary in virtue of the individual's membership in some protected group. I would have no objection to this broadened definition. For purposes of this article, however, I use "prescriptive stereotyping" to refer primarily to adverse employment action.

25. Cf. *Price Waterhouse*, 490 U.S. at 235. Notice that an employer can act on a judgment that an employee's behavior is inappropriate, but not inappropriate in virtue of the employee's membership in any particular class. Thus, an employer who fires a female employee for having an aggressive personality does not engage in what I am referring to as prescriptive stereotyping if the employer's action was based on a judgment that the employee's behavior was inappropriate in virtue of the nature of her job (say, customer service) and not because she is a woman.

26. See *Smith*, 378 F.3d at 572–73; see also *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (following *Smith*).

27. Again, it might be better to allow that the adoption of a belief or attitude might constitute epistemic stereotyping. My limitation of stereotyping to cases of action simply reflects the legal requirement of adverse action as an element of a discrimination claim.

attributes that is predicated on that individual's membership in that protected group. An example of epistemic stereotyping is an employer who refuses to hire women to do a particular job based on a belief that, say, men generally work harder than women.²⁹ Thus, whereas prescriptive stereotyping based on a group classification involves acting in a way that expresses disapproval of an individual's failure to conform to certain expectations about how members of that group should behave (or about what behavior is appropriate for them),³⁰ epistemic stereotyping involves acting on a belief based on the inferred attribution of some matter of fact to members of that group because of their membership in that group.³¹

Do sex-dependent restrictions on personal presentation—such as a proscription against male cross-dressing or a requirement that women wear makeup—involve stereotyping in either the prescriptive or epistemic sense? The most natural answer is that such restrictions do not generally involve stereotyping in the epistemic sense but do involve stereotyping in the prescriptive sense. I believe, however, that they can involve stereotyping in both senses.

The case for prescriptive stereotyping is straightforward. Consider again my hypothetical case of the cross-dressing male employee. Assume that the employee's termination was based on a judgment that it was inappropriate for him to be wearing women's clothing in the workplace. We presume that the employer would not have come to that judgment if the employee had been a woman; the employer would not have thought it inappropriate for a female employee to wear that identical attire in the same workplace. The termination of the cross-dressing male employee thus seems clearly predicated on a judgment that his behavior was socially inappropriate because he was male.³² It follows from my definition that the employer's action in that hypothetical case constitutes prescriptive stereotyping. A similar account could be given of

28. Some may disagree with my decision to define epistemic stereotyping as unreasonable. This definition seems to me consistent, however, with the common legal usage of the term in the sense I am trying to identify. An alternative to my approach would be to define epistemic stereotyping in more neutral terms and then distinguish as necessary between reasonable epistemic stereotyping and unreasonable epistemic stereotyping. Once again, nothing of substance should be thought to turn on this terminological choice.

29. Cf. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 353–54 (1980) (reviewing social science research showing how generalizations about women's abilities and capacities can affect hiring and promotion decisions).

30. Here, my understanding of "prescriptive stereotyping" departs significantly from Appiah's understanding of action based on a "normative stereotype." See Appiah, *supra* note 22, at 49.

31. Some instances of discrimination might involve stereotyping in both the prescriptive and epistemic senses. An example of such double-barreled stereotyping might be the hiring of a man over a woman for a job requiring long hours on the basis of a belief that it is socially preferable that women maximize the amount of time they spend at home supporting their families, and that familial obligations would make it difficult for women to put in an extended work day. Cf. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS 123* (Simon & Schuster 1979) (recounting story of Chief Justice Burger's explanation to his law clerks of why he refused to hire a female clerk); see also MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 82–83 (6th ed. 2003) (quoting same).

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

Jespersen v. Harrah's Operating Co.,³³ in which a female employee was terminated for refusing to wear makeup.³⁴ There, the employee's termination was based on her violation of a sex-dependent requirement governing the presentation of female employees in the workplace. Insofar as that requirement was based on a judgment that it is socially unacceptable for women not to wear makeup (or socially preferable that they do), the termination in that case could be regarded as based on a judgment that the employee's behavior was socially unacceptable or disfavored because she was a woman.³⁵ In any event, it should be clear that many sex-dependent workplace restrictions on personal presentation—and most particularly, those that reinforce or are parasitic on social conventions of gender performance—will involve prescriptive stereotyping.³⁶

It is less clear whether such restrictions generally involve what I have referred to as epistemic stereotyping. One might plausibly argue that employment actions taken on the basis of such restrictions tend to be based on dubious or at least debatable factual premises. For example, a common rationale for the enforcement of such restrictions is that they are important to the company's public image and are, thus, a matter of business necessity. But courts passing on the permissibility of garden-variety restrictions on employee dress and grooming—such as attire or hair-length requirements—have typically been willing to accept an employer's say-so as to the business-relevance of the restrictions in question.³⁷ One wonders what sort of empirical evidence there really could be for a belief that a company's business reputation could be materially affected in one way or another by whether its female employees keep their fingernails a certain length or style their hair in a certain way.³⁸

But a policy that has a bad factual basis is not necessarily a policy that relies on sex stereotypes. In order to conclude that sex-dependent dress and grooming requirements depend as a general matter on epistemic sex stereotypes, we would have to say that such requirements are based on the epistemically unreasonable attribution of some trait or characteristic to particular individuals in virtue of their being male or female.

33. 444 F.3d 1104 (9th Cir. 2006) (en banc).

34. I discuss the *Jespersen* case in fuller detail below.

35. Even if the employer did not consciously hold a view that it was socially undesirable for women not to wear makeup, the employer's action could still constitute prescriptive stereotyping (as I have defined it) if the action could be causally traced to an unconscious bias that was itself rooted in a social preference that women wear makeup. Cf. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59–61 (1st Cir. 1999) (holding that acting on subtle, even unconscious, cognitive biases can constitute discriminatory stereotyping in violation of Title VII).

36. On the other hand, it should also be clear that sex-dependent restrictions that are more idiosyncratic in nature—imagine, for example, a requirement that male employees wear green shirts while female employees wear blue shirts—might not involve prescriptive stereotyping at all.

37. See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032 (7th Cir. 1979); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1116 (D.C. Cir. 1973).

38. See *Fagan*, 481 F.2d at 1124–25 (taking “judicial notice” of the importance of employee appearance to a company's public image); see also *Carroll*, 604 F.2d at 1031 n.15 (expressing reluctance to second-guess an employer's business needs with regard to regulating employee appearance). But cf. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985) (noting district court's finding that termination of female news anchor had been based in part on results of a viewer survey concerning the anchor's appearance).

The employer who insists on sex-dependent restrictions on personal presentation in the workplace may hold a variety of beliefs, including unreasonable ones, about the attributes of men and women who violate those restrictions. More specifically, the employer may hold beliefs based on inferences from heterodox gender behavior to negative conclusions about the character, traits, capacities, and fitness for employment of those who engage in such behavior. An employer might believe, for example, that employees who engage in cross-dressing or otherwise refuse to perform their gender in an orthodox way are employees who are generally prone to violating rules, being disruptive, defying authority,³⁹ or more broadly, do not share the community's sense of what is reasonable.⁴⁰ To the extent that such inferences are warrantless, attitudes and actions that depend upon them will be open to serious objection.⁴¹

When I first began to think about this issue, the objection most directly relevant to these sorts of inferences seemed different from the objection to epistemic sex stereotyping. It seemed to me that if an employer fires a man for wearing a dress to work based on the belief that men who wear dresses are prone to defy managerial authority, the relevant objection would be that the action may be predicated on an unsound inference about men who wear dresses, not that it entails any epistemically unreasonable beliefs about *men* in general. On that basis, my initial skeptical view was that we should say that the action might involve epistemic stereotyping of men-who-wear-dresses, but not epistemic stereotyping of men in general, and it is only the latter kind of stereotyping that implicates the prohibition against sex discrimination.⁴²

39. Cf. Catherine Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1119 (2006) (observing that “when an employer insists upon conformity, the struggle quickly becomes as much about maintaining discipline and controlling deviance as it is about enforcing particular norms of . . . gender”).

40. Note the distinction between firing a cross-dressing man on the grounds that cross-dressing is disruptive to the workplace and firing a cross-dressing man on the grounds that a man who cross-dresses is likely to engage in (other) disruptive behavior. Cf. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 n.1 (9th Cir. 1977) (reporting employer's claim that “transitional” male-to-female transsexual's choice of women's clothing and makeup was “very disruptive” and “embarrassing to all concerned”). The present discussion concerns how we should think about the latter kind of inference. Obviously, however, if courts were to hold that it constitutes sex discrimination to take adverse action against a man for wearing women's clothing, such action presumably could not then be indirectly justified on a rationale that cross-dressing behavior would be disruptive or “embarrassing.”

41. I think that these inferences could be objectionable in at least two ways. First, they might simply be empirically unfounded. For instance, there might be no correlation at all between choosing an unconventional mode of personal presentation and any other aspect of an individual's values or attitudes toward rules and authority. Second, there is a certain circularity in drawing inferences that support adverse employment action against an individual from the fact that the individual violated restrictions relating to dress and grooming, since the permissibility of such restrictions is precisely the issue under investigation. If we were to conclude that sex-dependent restrictions on dress and grooming based on conventional social norms are impermissible, we would presumably want to regard as illegitimate the drawing of negative inferences about an individual's fitness for employment from the fact that the individual violated such norms.

42. In the specific case of male cross-dressing, employers might tend to see that behavior as an epistemic proxy for being gay or transsexual, in which case the termination of male employees for cross-dressing might fairly be considered tantamount to actions motivated by a sexual-orientation

On further reflection, however, it seemed to me that my initial skeptical view suffered from essentially the same error that I charged to the strategy of “redescription” described earlier.⁴³ The skeptical claim—namely, that sex-dependent restrictions on personal presentation do not involve epistemic sex stereotyping because such restrictions rest on beliefs about individuals who engage in unconventional behavior, not beliefs about men or women in general—is not much different from the claim that firing a male employee for wearing a dress is not sex discrimination because it is based on a judgment about the appropriateness of men-in-dresses, not about men in general.

My rejection of the latter claim cannot be consistent with my acceptance of the former. I said that the characterizability of a sex-dependent restriction in neutral terms does not settle the question whether the restriction is objectionable, because (by definition of a sex-dependent restriction) it will necessarily also remain characterizable as being predicated on consideration of sex.⁴⁴ Similarly, even accepting that employers who enforce conventional sex-dependent restrictions on dress or grooming may typically do so on the basis of a belief that individuals who defy such conventions tend to have a problem with accepting authority (or are otherwise unfit for employment), the relevant question is whether the belief that *P* is unfit for employment by virtue of behavior *x* depends upon consideration of *P*’s sex. And it is clear that it does. That is, it may be true that the employer who fires the male employee for wearing a dress does so due to a belief that such individuals have trouble accepting authority; but that belief is nevertheless predicated on the fact of the employee’s sex, assuming that the employer does not hold the same belief about female employees who wear dresses. I make no claim here that sex-dependent restrictions always depend upon unreasonable beliefs about individuals who defy conventional social norms governing how they present themselves to others.⁴⁵ The conclusion I draw is that to the extent that they do, they should be recognized as objectionable on the grounds of epistemic sex stereotyping.

In summary, sex-dependent restrictions on personal presentation—particularly those that reinforce or piggyback on social conventions of gender—

based animus. *Cf. Dobie v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Penn. 1993) (attempting to distinguish between sex discrimination and discrimination based on transsexuality).

43. See *supra* Part II.

44. My conclusion, to reiterate, was that the question whether sex-dependent restrictions are discriminatory cannot adequately be resolved by simply choosing one redescriptive strategy over another.

45. I believe that the question whether such beliefs are reasonable or unreasonable will be inextricably linked to the question of whether the law should regard sex-dependent restrictions as discriminatory. If we conclude that sex-dependent restrictions on personal presentation should constitute sex discrimination, then we would probably also conclude that there is good reason to regard as legally illegitimate any drawing of inferences running from the fact of behavior that would violate such restrictions to conclusions about an individual’s character or fitness for employment. In other words, if it constitutes sex discrimination to fire a man for wearing a dress, then it should also constitute sex discrimination to use the fact of such conduct as a proxy for *other* attributes rendering him unfit for employment. On the other hand, if we think that firing a man for wearing a dress does not constitute sex discrimination, we have no more reason to legally proscribe acting on unreasonable inferences running from such conduct than we would have to proscribe acting on unreasonable inferences in general.

do seem to involve sex stereotyping in the prescriptive sense and may also involve sex stereotyping in the epistemic sense. But, if adverse employment actions based on sex stereotyping constitute sex discrimination under current antidiscrimination law, we seem to be even farther than when we started from an answer to the question under investigation: how is it possible that sex-dependent restrictions on personal presentation do not at least presumptively constitute impermissible sex discrimination?

VI. THE UNEQUAL BURDENS ANALYSIS

The Ninth Circuit has recently held that sex discrimination challenges to workplace restrictions on personal presentation depend upon a determination of whether the restrictions at issue create “unequal burdens” as between the men and women to whom they apply.⁴⁶ More specifically, under the Ninth Circuit’s approach, a plaintiff can establish that a sex-dependent restriction constitutes sex discrimination only by demonstrating that it imposes an unequal, greater burden for members of the plaintiff’s sex.⁴⁷ Moreover, according to the *Jespersen* court, proof of unequal burdens is a *necessary* element of the plaintiff’s case, not merely evidence that could be incrementally probative of discrimination.⁴⁸ In this section, I consider whether the Ninth Circuit’s unequal burdens approach provides an adequate answer to the question whether sex-dependent restrictions on personal presentation constitute sex discrimination.

The basic problem with the unequal burdens test is in providing a non-circular account of the relevance of this analysis.⁴⁹ First, we must bear in mind

46. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108–11 (9th Cir. 2006) (en banc).

47. See *id.* at 1110.

48. See *id.* at 1111 (affirming grant of summary judgment for defendant on grounds that plaintiff had “failed to create a record establishing that [the grooming restrictions at issue were] more burdensome for women than for men”); see also *Schroer v. Billington*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) (discussing and following *Jespersen*).

49. The three cases cited by the *Jespersen* court in support of its invocation of the unequal burdens test are *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001), *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982), and *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977). It is not completely obvious that any of those cases provides unequivocal support for *Jespersen*’s understanding of the unequal burdens test. The language in *Gerdorn* that arguably supports that understanding is clearly *dicta*, insofar as the allegedly discriminatory restriction in that case (a maximum weight requirement for flight attendants) was applied exclusively to female employees, see *Gerdorn*, 692 F.2d at 605, and hence was held to be discriminatory on its face, see *id.* at 608. In *Frank*, which involved a policy enforcing maximum weight requirements for flight attendants that were different for men and women, the court stated that “[a]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment,” *Frank*, 216 F.3d at 854 (alteration added), but after assuming *arguendo* that the differential weight requirements could be regarded as an “appearance standard,” the court held that the weight standards at issue were themselves differentially burdensome on their face, see *id.* at 855, and left open the question whether the very fact that there were separate standards for men and women could establish discriminatory treatment, see *id.* Finally, in *Fountain*, the court held that it was not sex discrimination for the defendant to insist that the male plaintiff don a necktie even though it had waived similar requirements for its female employees, see *Fountain*, 555 F.2d at 755–56, but the court seemed to ground its decision on an expansive view of an employer’s prerogative to maintain separate dress and grooming requirements in accordance with “what its particular business requires,” *id.* at 756. Thus, although there may have been hints of the approach in

that the *Jespersen* court invoked the unequal burdens test to evaluate a basic claim of disparate treatment under section 703(a) of Title VII,⁵⁰ not a claim of disparate impact under section 703(k).⁵¹ The claim that I have been attempting to analyze is that such restrictions are objectionably discriminatory because they impose standards of evaluation that are directly dependent upon consideration of sex—and *not* primarily because such standards have differentially adverse consequences as applied.

But if the issue is whether sex-dependent dress and grooming codes constitute discrimination within the disparate treatment paradigm, how could the unequal burdens test be relevant at all? If we assume that a challenged restriction involves intentionally adverse treatment on the basis of sex,⁵² then proof of unequal burden should be unnecessary, because a claim of intentionally differential treatment does not ordinarily depend upon evidence of differentially

Fountain, Gerdorn, and Frank, the unequal burdens test was not doctrinally crystallized until the en banc majority's opinion in *Jespersen*.

50. 42 U.S.C. § 2000e-(2)(a) (2000).

51. 42 U.S.C. § 2000e-(2)(k) (2000).

The plaintiff herself clearly intended to assert a disparate treatment claim. See Reply Brief of Appellant Darlene Jespersen at 4, *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076, No. 03-15045 (9th Cir. Aug. 14, 2003) ("This is a classic Title VII case about the firing of a high-performing, long-term female employee based on a burdensome appearance rule that required only women to wear makeup."), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/360.pdf. The court's understanding of the claim as invoking a disparate treatment theory is evidenced by its citation of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) as setting forth the requirements of the plaintiff's prima facie case. See *Jespersen*, 444 F.3d at 1108–09. It is arguable, furthermore, that a disparate impact analysis would fundamentally misconceive the charge of discrimination that is most immediately relevant to sex-dependent dress and grooming codes. See *Zahorik v. Cornell Univ.*, 729 F.2d 85, 95 (2d Cir. 1984) ("The disparate impact theory has been used mainly in the context of quantifiable or objectively verifiable selection criteria which are mechanically applied and have consequences roughly equivalent to results obtaining under systematic discrimination." (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Dothard v. Rawlinson*, 433 U.S. 321 (1977)); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (distinguishing between disparate impact and disparate treatment claims). Cf. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003) (arguing that disparate impact theory "conceptualizes discrimination solely at the institutional level" and that it tries to limit racial or gender stratification by "reducing employer reliance on practices that have an unintended adverse and unnecessary effect on particular groups"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1231 (1995) (arguing that courts have used disparate impact theory to address issues properly labeled disparate treatment). But cf. Sullivan, *supra* note 13, at 968 (disagreeing with Krieger and Green).

Indeed, it is doubtful whether a plaintiff challenging an adverse employment action arising out of a voluntary refusal to comply with an employer's dress or grooming policy could state a legally viable claim of disparate impact at all, at least in some jurisdictions. See *Lanning v. Se. Penn. Transp. Auth.*, 308 F.3d 286 (3d Cir. 2002) (holding that a physical conditioning requirement that disadvantaged female applicants did not constitute disparate impact, where most female applicants would be able to meet the requirement with a moderate amount of training). But see Sullivan, *supra* note 13, at 971–72 (asserting that the so-called "volitional exception" to disparate impact is "scarcely well established").

52. As discussed above, sex-dependent restrictions on dress and grooming necessarily involve action that is "motivated," at least in part, by the sex of the employees to whom they apply.

burdensome consequences.⁵³ On the other hand, if we assume that the challenged restriction does *not* involve treatment that is based on sex, then evidence of unequal burdens should be entirely immaterial, because absent proof that the differential treatment in question was intentionally made to depend on sex, there can be no claim of discrimination under a disparate treatment theory.⁵⁴ In either case, the question of unequal burdens seems entirely beside the point. It has the character of a doctrine invented to deal with a category of restrictions that are presupposed as requiring *sui generis* treatment. But, of course, whether sex-dependent restrictions on personal presentation really ought to be treated as *sui generis* is an aspect of the very question under investigation!

This difficulty is worth some elaboration. The unequal burdens test effectively creates a rule under which sex-dependent restrictions on personal presentation are to be regarded as non-discriminatory in the absence of proof that the challenged restrictions create different burdens as between men and women. This means that even if an adverse action against an employee is directly predicated upon the employee's being a man or woman, we are not justified in classifying that action as "because of" sex unless the action's consequences are more burdensome for one sex than the other. So, for example, even though our original hypothetical employer's decision to fire the male employee for wearing the frilly pink dress was undisputedly predicated upon consideration of the employee's sex, under the unequal burdens approach, we cannot regard that decision as differential treatment based on sex unless we can first establish that the policy under which the employer's action was taken is more burdensome for men than for women.

The problem lies in stating a coherent basis for this gloss on the definition of disparate treatment without begging the central question under investigation: how is it possible that sex-dependent restrictions on personal presentation do not constitute objectionable discrimination based on sex? Ordinarily—that is, outside the context of matters relating to dress and grooming—if an adverse employment action against an employee is the result of a policy that expressly sets different standards for men and women, then the action is *prima facie* discriminatory,⁵⁵ and the only question that remains is whether the action or policy is nevertheless justifiable as a bona fide occupational qualification (BFOQ).⁵⁶ Indeed, even in the absence of an expressly sex-dependent policy, the

53. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000) ("An employer's policy amounts to disparate treatment if it treats men and women differently on its face."); see *id.* at 854 n.9 (stating that there was no need to reach plaintiffs' disparate impact claim, because defendant's policy was facially discriminatory and hence plaintiffs were entitled to summary judgment on a theory of disparate treatment).

54. In other words, proof that a sex-independent grooming or appearance restriction creates unequal burdens would not, as a general rule, suffice to establish that the restriction was *prima facie* discriminatory.

55. See *Frank*, 216 F.3d at 853; see also *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) ("When open and explicit use of gender is employed . . . discrimination is in effect 'admitted' by the employer . . .").

56. *Frank*, 216 F.3d at 853–54; see also 42 U.S.C. § 2000e-2(e)(1) (2000) (setting forth the BFOQ exception).

dispositive question for liability under a Title VII disparate treatment claim is whether the employer's action was based (at least in part) on consideration of the employee's sex.⁵⁷ Proof of facts giving rise to such an inference suffices to establish a *prima facie* case of discrimination.⁵⁸ Certainly, it is not usually the case—outside the context of challenges to restrictions on personal presentation—that an employer could avoid disparate treatment liability by *admitting* that it subjected male and female employees to differentially adverse workplace requirements and then calling upon the plaintiff to prove that the different requirements created burdens of unequal *magnitude* (under some undefined metric) as between men and women. Yet this is precisely the justificatory strategy that the unequal burdens test seems to endorse in the context of employer restrictions on personal presentation.

Let us take a closer look at *Jespersen*.⁵⁹ The case involved a set of sex-dependent restrictions on personal presentation—the “Personal Best” policy⁶⁰—that applied to various beverage servers and bartenders employed by Harrah's Casino.⁶¹ The policy required, *inter alia*, that women wear “eye and facial makeup,”⁶² style their hair in a particular way, and wear nail polish,⁶³ while it required men to wear their hair short and prohibited the wearing of facial makeup, “faddish hairstyles,” or colored nail polish.⁶⁴ Jespersen's objection to Harrah's “Personal Best” policy was that the requirement that women wear makeup⁶⁵ was itself *prima facie* discriminatory because it applied only to women.⁶⁶ It was not disputed that, under the policy, whether an employee's failure to wear makeup provided the basis for adverse employment action was predicated solely and expressly upon the employee's sex. Yet, characterizing the casino's sex-dependent requirements as being part of “an appearance policy that applied to both male and female bartenders [that] was aimed at creating a professional and very similar look for all of them,” the *Jespersen* majority asserted that the “material issue” was whether the policy *as a whole* was more

57. 42 U.S.C. § 2000e-2(m) (2000) (“[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice . . .”). For purposes of simplifying discussion, I set aside the question of whether the “motivating factor” test of discrimination applies in cases that do not involve “mixed motives.” See Sullivan, *supra* note 13, at 933–34.

58. See *Thomas v. Eastman Kodak*, 183 F.3d 38, 56–57 (1st Cir. 1999) (explaining the plaintiff's burden); see generally Sullivan, *supra* note 13, at 925–33.

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

60. See *id.* at 1107 (describing the program).

61. See *id.*

62. *Id.*

63. See *id.*

64. *Id.*

65. The makeup policy applicable to female employees provided as follows: “Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary [sic] colors. Lip color must be worn at all times.” *Id.* (quoting from the policy) (emphasis omitted). The policy applicable to male employees, on the other hand, stated: “Eye and facial makeup is not permitted.” *Id.*

66. See *id.* at 1109 (“ . . . Jespersen argues that the makeup requirement itself establishes a *prima facie* case of discriminatory intent . . .”).

burdensome for women than for men.⁶⁷ Then, noting that Jespersen had failed to provide any evidence supporting such a conclusion (e.g., “evidence of the relative cost and time required to comply with the grooming requirements by men and women”⁶⁸), the court upheld the district court’s grant of summary judgment to the casino on the question of whether the Personal Best program imposed unequal burdens on women.⁶⁹

The *sui generis* character of the equal burdens approach to workplace restrictions on personal presentation becomes obvious when we consider how absurd it would be to apply that test in other contexts. Suppose, for example, that a plaintiff brought a disparate treatment challenge to her employer’s practice of firing female employees who failed to arrive at work by 8 a.m., but not taking the same action as to male employees who arrived comparably late. I do not want to deny that a court might be justified in holding that, without further evidence, the fact that only women were fired for arriving at work after 8 a.m. would be insufficient to create a triable issue of discrimination. The employer might have had reasons for the ostensibly differential treatment that had nothing to do with the sex of the employees who were fired. If, however, the employer *admitted* that it had a policy of firing all and only female employees who arrived at work after 8 a.m., that would surely be sufficient to establish that the plaintiff’s termination for arriving at work after 8 a.m. was in turn predicated upon her sex and therefore *prima facie* discriminatory.⁷⁰ And would it not be absurd for the employer to rebut the claim of discrimination by asserting that the 8 a.m. arrival requirement for women was part of a general “Personal Punctuality” program that applied to all employees and that this program *also* required all and only *male* employees to *stay* at work until 6 p.m.?

Furthermore, even if the employer really did maintain a separate 6 p.m. departure policy that was applicable only to male employees, any issue as to whether the burdens created by the dual policies were greater for women than men would strike me plainly as irrelevant. The plaintiff’s complaint, after all, is that the 8 a.m. arrival requirement is itself discriminatory, *not* that the “Personal Punctuality” program as a whole is discriminatory.⁷¹ Yet, if the *Jespersen* unequal burdens test were applied in this context, it is precisely the latter conclusion that the plaintiff would be *required* to establish in order to prevail on her claim of discrimination. In effect, application of the unequal burdens test would require a procrustean transformation of the plaintiff’s original complaint—that the 8 a.m. arrival policy is objectionably discriminatory because it applies only to female employees—into the patently distinct claim that the employer’s arrival and

67. See *id.* at 1110 (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854–55 (9th Cir. 2000); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755–56 (9th Cir. 1977)) (alteration added).

68. *Jespersen*, 444 F.3d at 1110.

69. See *id.* at 1111.

70. See, e.g., *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996).

71. See Reply Brief of Appellant at 6–7, *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076, No. 03-15045 (9th Cir. Aug. 14, 2003), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/360.pdf (“Harrah’s . . . tries to recast Jespersen’s challenge to the makeup policy as a test of the casino’s appearance requirements as a whole, much as the trial court did. But Jespersen has challenged only one aspect of the policy, the makeup requirement, and has no quarrel with its other elements.”).

departure policies, taken together, are objectionably discriminatory because the overall burdens created by those policies are greater in magnitude for female employees than they are for males.

What we should really want to say about the Personal Punctuality program is simply that it is, by the employer's own admission, discriminatory in two respects: the 8 a.m. arrival requirement discriminates against women, and the 6 p.m. departure restriction discriminates against men.⁷² Any comparison of the burdens created by these ostensibly paired restrictions should seem beside the point.

So what happened in *Jespersen*? The court simply sidestepped the problem of justifying the relevance of comparative burdens by assuming, without argument, that the Personal Best policy had to be evaluated as a whole, rather than “pars[ed]” into its component requirements.⁷³ With this *ipse dixit*, the court flatly rejected even the possibility that *each* of the two components of the policy—the one imposing various restrictions on women and the other on men—might have been independently discriminatory,⁷⁴ which left as the only remaining theory of liability the claim that the Personal Best policy was discriminatory in respect of the comparative magnitude of the burdens that it created.

The evident implausibility of applying the equal burdens test in the case of my hypothetical disparate punctuality policy shows that the use of the test in the context of sex-dependent restrictions on personal presentation presupposes that there is something special about dress and grooming restrictions that warrants a *sui generis* approach.⁷⁵ Thus, the fact that a set of sex-dependent

72. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 246–47 (2004) (describing the unequal burdens approach as endorsing a “double for nothing” claim whereby “two instances of discrimination add[] up to none” (alteration added)).

73. See *Jespersen*, 444 F.3d at 1112. In support of this assumption, the court cited a decision in which the Eighth Circuit had upheld a hair-length restriction that was applicable only to male employees against a Title VII challenge, because Congress likely did not intend for the statute to have such “sweeping implications” and the male hair-length restriction at issue was part of a reasonable and “comprehensive personal grooming code applicable to all employees.” *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975). The Eighth Circuit, however, provided no more of an explanation than the *Jespersen* court as to why the hair-length restriction itself could not be discriminatory, even assuming that the policy of which it was a part was applied evenly to all employees.

74. Judge Pregerson in his dissenting opinion resisted this move. See *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting) (“The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny.”). Interestingly, Judge Kozinski in his separate dissent stated his agreement with the majority’s insistence that the challenged makeup requirement be evaluated in the context of the Personal Best policy as a whole but argued that it was obvious that the policy did in fact create a greater burden for women than for men. See *id.* at 1117–18 (Kozinski, J., dissenting).

75. Doubts about the relevance of unequal burdens analysis to disparate treatment claims are only further accentuated when one considers how impertinent such an analysis would be in a case involving restrictions on personal presentation that involved a forbidden classification *other* than sex, such as race or national origin. Suppose, for example, that a restaurant owner tried to enforce a workplace rule that required, say, all and only Asian employees to wear conical rice-field hats secured with a chin strap. In a discrimination challenge by the Asian employees, would it not be outrageous for a court to entertain seriously the restaurant owner’s claim that the requirement was not discriminatory because an equally burdensome requirement—say, the wearing of a cowboy

restrictions might—considered as a single policy—create burdens of equal magnitude for male and female employees does not adequately answer the question whether we should regard such restrictions as objectionable discrimination, absent some account of why equality of burdens should be given such prominence of consideration in this context.

VII. CONCERN FOR EQUALITY

So it seems, once again, that we still have made little progress in understanding why sex-dependent workplace restrictions on personal presentation should receive special and distinctive consideration under the laws governing sex discrimination. To make headway, we must consider the basic concerns and commitments that we take to be embodied in Title VII's prohibition of discrimination because of sex.

A useful place to start is with an argument that can be traced back to the well-known case of *Willingham v. Macon Telegraph Publishing Co.*⁷⁶ There, the Fifth Circuit majority reasoned that it was not objectionably discriminatory for an employer to require male employees to wear their hair short, while allowing female employees to wear their hair at any length.⁷⁷ This, as the Court explained, was because the purpose of Title VII is to ensure equality of employment opportunities among men and women and “to give all persons equal access to the job market.”⁷⁸ Title VII's purpose is *not* to abolish every sex-dependent practice from the workplace, no matter how significant the effect of a particular practice on the equal availability of employment opportunities.⁷⁹ The Court quoted favorably from the D.C. Circuit's per curiam opinion in *Dodge v. Giant Food*, in which that court had characterized sex-dependent grooming restrictions as workplace regulations “which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex.”⁸⁰ The *Dodge* court had noted that “[n]either sex is elevated by these regulations to an appreciably higher occupational level than the other.”⁸¹

We can grant that Title VII's proscription of sex discrimination should be interpreted as aiming to ensure that men and women enjoy formal equality of

hat—was imposed on non-Asian employees? I assume that most courts would analyze this sort of race-dependent workplace restriction on dress as facially discriminatory, and that any further examination of whether it creates an equal burden for employees of all races would be entirely immaterial. *Cf. Wiseley v. Harrah's Entm't, Inc.*, 2004 U.S. Dist. Lexis 14963 (D.N.J. 2004) (holding that an otherwise unobjectionable restriction on male hair length stated a claim for discrimination where the restriction's application was alleged to depend on consideration of race). Again, we are left to ask why matters should be different in the case of sex-dependent dress and grooming restrictions.

76. 507 F.2d 1084 (5th Cir. 1975) (en banc).

77. *See id.* at 1092.

78. *Id.*

79. *See id.*; *see also* *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (making a similar argument).

80. *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (footnote omitted).

81. *Id.*

opportunity.⁸² But the argument of *Willingham* and *Dodge*—that sex-dependent restrictions on dress and grooming should not be regarded as objectionably discriminatory simply because they do not affect the overall balance of opportunities or positions formally available to women relative to men—surely proves too much. For, on that reasoning, an employer could, consistent with Title VII, enforce whatever sex-dependent workplace restrictions it wanted with impunity, as long as it kept all of its positions open to members of both sexes. Clearly, this is not the way that we would want to understand Title VII's proscription of sex discrimination, and courts have not limited the application of Title VII in that way. Thus, for example, a workplace restriction can constitute sex discrimination even if its application is limited to a highly sought-after position that is filled predominantly by members of the sex to whom the restriction applies (and hence could not be regarded as diminishing the opportunities available to them).⁸³ Even an employer who satisfies the requirements of providing equality of opportunity to men and women can run afoul of the sex discrimination laws if it applies conditions of employment that are expressly tied to an employee's sex.⁸⁴ Moreover, the decisional law concerning the impermissibility of employer enforcement of sex stereotypes makes clear that Title VII not only mandates equality of opportunity, but also places substantive limits on an employer's ability to require that those employees conform their behavior to certain types of sex-dependent norms as a condition of employment.⁸⁵

That puts us back to where we started. For we are left again asking why sex-dependent restrictions on personal presentation should not be regarded as per se discriminatory conditions of employment, and why they should be excluded from the ambit of norms that are legally regarded as ones that reinforce sex-based stereotypes.

Let us think about the purpose of Title VII's proscription of sex discrimination in a somewhat more general way than the *Willingham* court had occasion to do. Everyone agrees that Title VII as it relates to sex should be interpreted as having the aim of ensuring that men and women enjoy a certain kind of equality.⁸⁶ But we can understand the equality that the statute fosters as

82. Ironically, the inclusion of "sex" as a protected classification in Title VII of the Civil Rights Act of 1964 reportedly resulted from an amendment introduced by a conservative congressman who was believed to be opposed to the legislation as a whole but who thought that the amendment would hinder its passage. See *Willingham*, 507 F.2d at 1090 (citing Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1973); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971)).

83. See *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 606–08 (9th Cir. 1982) (rejecting airline's argument that its maximum weight requirements for female flight attendants were not discriminatory because the position was regarded as highly desirable in spite of that requirement).

84. See, e.g., *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 131–32 (3d Cir. 1996).

85. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion); *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 571–74 (2004); *Thomas v. Eastman Kodak*, 183 F.3d 38, 59 (1st Cir. 1999).

86. Cf. Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 897, 908 (2005) ("Most explanations of antidiscrimination laws support the view that the aim of the legislation is to promote some conception of equality.").

comprising at least three separable ideas. First, antidiscrimination laws in general express a commitment to what might be called a principle of substantive moral equality or anti-subordination,⁸⁷ teaching that all individuals are entitled to equal moral and legal respect and, more specifically, that an individual's moral and social standing cannot depend on the individual's race, color, sex, religion, or national origin. Second, Title VII mandates a certain *formal* equality of treatment in the employment context, meaning (roughly) that male and female employees who are alike should be treated alike.⁸⁸ And third, it promotes a degree of *distributive* equality, meaning (roughly) that male and female employees should enjoy some measure of substantive equality in certain kinds of goods⁸⁹ they receive in relation to any given employment situation.⁹⁰ If we accept these three basic postulates, we have a slightly more focused way of framing the question at hand. To wit: do sex-dependent workplace restrictions on personal presentation give rise to objections from any of these notions of equality; and if so, can those objections be overcome?

Consider, first, the objection of formal inequality. The principle of formal equality is commonly expressed through the maxim "like cases ought to be treated alike."⁹¹ To be a bit more fussy, we might say that the principle of formal equality is potentially violated, and a possible objection of formal inequality arises, whenever some consideration is treated as sufficient reason to take adverse action with regard to a person *P*, yet that same action would not be taken with regard to some person *Q* as to whom that same consideration was equally applicable.⁹²

Understood in terms of this simple schema, a potential objection of formal inequality could arise in virtually every case involving a sex-dependent restriction on personal presentation. That is, in every case in which an adverse action is based on an employee's violation of a sex-dependent restriction, the affected employee will be able to assert that the same adverse action would *not* be taken with regard to some other employee (*viz.*, an employee of the opposite sex) who engaged in that same conduct. In *Jespersen*, for example, an objection

87. See generally Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (explaining the anti-subordination principle in the context of the Equal Protection Clause).

88. See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1777 (2002) (observing that "formal equality arguments dominate antidiscrimination caselaw" and discussing critically why this might be so).

89. I am using "goods" to refer not only to property and income but also employment opportunities, job security, access to positions of power, and so forth.

90. See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); cf. Sarah E. Burns, *Apologia for the Status Quo*, 74 GEO. L.J. 1791, 1795–96 (1986) (book review) (distinguishing distributive inequality and formal inequality of treatment as "dual mechanisms" of sex discrimination).

91. See Patrick S. Shin, *Compelling Interest, Forbidden Aim: the Antinomy of Grutter and Gratz*, 82 U. DET. MERCY L. REV. 431, 452–53 (2005); see generally Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

92. Actually, my own view is that the principle of formal equality has a slightly more complex structure than this, but I do not think further elaboration would be helpful here. I develop a comprehensive account of the principle of formal equality elsewhere. See Patrick S. Shin, *The Formal Interpretation of Equal Treatment* (June 2006) (unpublished manuscript, on file with the author).

from formal inequality could be articulated as follows: Darlene Jespersen was fired for refusing to wear facial makeup, yet at the same time, male bartenders who did not wear facial makeup were not subject to termination.⁹³ In this way, Jespersen—like any employee aggrieved by a sex-dependent restriction—could raise a potential objection of formal inequality.

Of course, as is often observed, objections of formal inequality are all too easy to sidestep. The claim that the ostensibly different treatment of individuals violates the principle of treating like cases alike is almost always readily met with an obvious response: the differential treatment in question is not, after all, objectionable because the individuals in question were not similar in relevant respects. Thus, as to *Jespersen*, if the charge of unequal treatment is understood to be that Jespersen was treated differently from male bartenders, the employer's ready response is that she was not "similar" to those other employees in all relevant respects.

There is a temptation to dismiss formal equality objections because they are vacuous in the sense just demonstrated, absent some specification of what counts as a "relevant" difference or similarity. But arriving at this specification is precisely the value of working through an objection from formal inequality. Such objections force us to think about the substantive principles to which we would have to commit ourselves in order to regard particular differences between individuals as relevant or not; they force us to specify some institutionally legitimate principle under which the ostensibly differential treatment at issue could be regarded as rationally consistent.

The question implicated by the formal inequality objection, then, is whether there is such a principle—a principle that is consistent with antidiscrimination law as a whole, that would allow us to say that Darlene Jespersen was in some sense relevantly different from her male counterparts. I will return to this question—which I take to be of central importance—at the end of this discussion. Before doing that, though, let us consider the other objections from inequality that I mentioned. For even if the formal inequality objection can be met, the defender of sex-dependent dress and grooming restrictions must still answer objections from the principle of substantive equality (the anti-subordination principle)⁹⁴ and objections from distributive inequality. I now turn to these objections.

Sex-dependent restrictions on personal presentation may be objectionable under the principle of substantive equality to the extent that they depend upon or express a judgment that women are in some way less worthy of respect than men (or vice versa), or have a lesser legal, moral, or social standing and hence are less entitled to object to unfavorable treatment. One might argue that all sex-dependent restrictions of the sort we have been discussing are objectionable in this way—that all such restrictions applicable to women depend on or express a judgment that women are morally or legally inferior to men, and all such restrictions applicable to men depend on or express the opposite judgment. But

93. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107–08 (9th Cir. 2006).

94. I am indebted to my colleague Jessica Silbey for urging me to consider this objection explicitly.

this claim seems too strong.⁹⁵ No such judgment would seem to be implied, for example, by a workplace uniform policy that required women to wear blue caps and men to wear green ones. Yet, it would be hard to deny that *some* sex-dependent presentational restrictions could be objectionable under a principle of substantive equality. A policy that required women to wear a demeaning costume while permitting men to wear ordinary attire, for example, would rather starkly evince the attitude that women are subservient to (heterosexual) men as objects of desire and sexual gratification rather than agents who share co-equal social, moral and legal standing. Whether the same could be said for a policy that required female employees to wear makeup (while forbidding males from doing so) is perhaps more open to argument. If such an argument could be made, the policy would be objectionable under a principle of substantive equality or anti-subordination. Assuming that the sex discrimination provisions of Title VII embody such a principle, it would follow that the policy should be of potential statutory concern. More generally, sex-dependent workplace restrictions on personal presentation seem to me potentially, but not necessarily, objectionable under a principle of substantive equality or anti-subordination.

A similar account can be given with regard to the objection from distributive inequality. There are at least three potential ways in which sex-dependent workplace restrictions on personal presentation might be thought objectionable from the viewpoint of distributive equality. First, one might argue that such restrictions tend, on the whole, to create distributive inequalities between men and women regarding employment-related economic goods and opportunities such as job positions, opportunities for advancement, employment-based income, etc. Second, it could be argued that such restrictions may tend to produce distributive inequalities between men and women with regard to less tangible (non-economic) and psychic goods such as inequalities in social standing, psychological well-being, or self-respect. Third, one might argue that sex-dependent restrictions produce distributive inequalities between men and women with regard to the *options* they have as to their mode and manner of presenting themselves in the workplace.

Whether any of these potential objections have any force seems a largely empirical matter. Offhand, it is not obvious that the enforcement of sex-dependent restrictions on dress and grooming within the workplace should, simply by virtue of being sex-dependent, tend to produce inequalities between men and women with respect to job opportunities, desirable positions, income, or other economic goods. I want to make clear, however, what I am suggesting here. To this end, it might be useful to distinguish between restrictions that simply reinforce conventionally gendered social norms and restrictions that are artificial, contrived, or synthetic. Insofar as the actual history of conventionally gendered norms governing dress and grooming is entangled with our social history of sex and gender inequality, it seems plausible that some sex-dependent

95. In a sense, workplace restrictions that require employees to dress and groom themselves in a manner specified by the employer are inherently subordinating: they subordinate the employee to the employer. See Fisk, *supra* note 39, at 1119–20. But the question of concern here is whether such restrictions have a tendency to subordinate women to men (or vice versa) in a way that depends on or expresses a judgment of legal, moral or social inferiority.

restrictions reinforcing such norms might perpetuate such inequalities, including various forms of distributive inequalities.⁹⁶ It is less obvious that artificial sex-dependent restrictions could have such effects.⁹⁷ (Consider again a silly rule requiring women to wear green and men to wear blue.) The point is that the merit of the first objection from distributive inequality cannot be determined *a priori*: whether sex-dependent restrictions on personal presentation tend to create distributive economic inequalities is an empirical question that depends, *inter alia*, on the nature of the restriction in question. Some probably do, and some probably do not.⁹⁸

Similarly, as to the second potential objection from distributive inequality, it would be difficult to say, without due empirical investigation, that sex-dependent restrictions on dress and grooming in general tend to produce sex-based inequalities in social standing, psychological well-being, or self-respect. Yet it also seems true that *some* such restrictions could be expected to have precisely that tendency.⁹⁹

96. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1432 (1992) (arguing that laws that endorse conventionally gendered norms of dress and grooming “legitimate the existing allocation of gender roles and expectations . . . [and] therefore reinforces gender inequality, male domination, and the subordination of women”); cf. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2569 (1994) (arguing that we should be wary of even apparently “trivial” norms such as the rule that women wear skirts and so should “ask whether there is something in the cultural coding of skirts that disadvantages their wearers by making them seem, say, less professional and more ornamental or vulnerable than those who wear pants”).

97. Thus, from the perspective of the first distributive inequality objection, the usual legal attitude of permissiveness toward conventionally gendered restrictions and skepticism toward artificial ones, cf. Post, *supra* note 3, at 29–30 (arguing that the case law tends to regard restrictions that “track” conventional norms as nondiscriminatory and those that “violate” traditional standards as discriminatory), seems in some ways completely backward.

98. If we include leisure time (time not expended on employment-related activities) as a relevant category of goods, one might argue that the makeup requirement at issue in *Jespersen* provides a straightforward example of a presentational restriction that tends to produce a distributive economic inequality. This point was taken by Judge Kozinski to be perfectly obvious. See *Jespersen*, 444 F.3d at 1117–18 (Kozinski, J., dissenting).

99. Thus, for example, a workplace policy requiring men but not women to wear a necktie might not give rise to the second distributive inequality objection (at least not in any immediately apparent way), see *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755–56 (9th Cir. 1977), but a policy requiring female employees to wear a demeaning uniform that increased the potential of sexual harassment would be seriously problematic for the reasons embodied in the second distributive inequality objection—viz., in virtue of its tendency to result in a differential diminishment of the social standing of women or in an erosion of the social foundations of their ability to enjoy self-respect. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (finding sex discrimination where female employee was required to wear revealing uniform that led to her being sexually harassed); see also *Marentette v. Mich. Host, Inc.*, 506 F. Supp. 909 (E.D. Mich. 1980) (similar, but dismissing complaint on other grounds). I do not deny that restrictions on dress and grooming might, *in general*, tend to have an adverse effect on *everyone's* psychological well-being or self-respect insofar as such restrictions tend to inhibit personal expression and may force some individuals to present themselves in a manner that is at odds with their self-image or practical identity. But one would not think—although this is little more than conjecture—that such restrictions by their nature would affect men or women differentially, thereby producing inequalities in the distribution of psychic goods or self-respect. Of course, the *unequal* application of sex-dependent restrictions might produce such inequalities; any policy that called for such uneven application might very well be objectionable on the basis of this second objection from distributive inequality. See *Carroll v. Talman*

The third potential objection based on distributive inequality argues that sex-dependent restrictions are problematic not just to the extent that they indirectly give rise to inequality in the distribution of economic goods or psychic goods (such as the social bases of self-respect), but because they *directly* affect the distribution of valuable goods: the options available for choosing one's manner of personal presentation in the workplace. It seems to me perfectly plausible to say that these options are of real value to us. Being employed, after all, often means spending the majority of one's waking hours in the workplace, and insofar as we have reason to care about how we present the surface of our physical bodies to others in that context, we have reason to care about the options available to us for such presentation. By the same token, gross inequalities in the distribution of such options should raise cause for concern, either because they are inherently unjust or because such inequalities might be symptomatic of other unjust conditions in the particular institutional contexts in which they arise.¹⁰⁰

Thus, one might object to a requirement forcing female employees to wear contact lenses instead of glasses while allowing male employees the option of wearing either on the straightforward grounds that such a requirement would reduce the options available to women relative to men in respect of the overall number of permissible modes of personal presentation.¹⁰¹ In contrast, one might think that a policy that female employees wear makeup, if *paired* with a policy that prohibited male employees from doing the same, would not give rise to an objection from inequality of presentational options, insofar as the paired requirements would not create any inequality in the *overall number* of such options available to men versus women.¹⁰²

There are some obvious problems with reading Title VII to encompass a concern for distributive equality with respect to presentational options in the workplace. First of all, the case law to date has not seriously attempted to read any such concern into the statute. Indeed, many cases are hard to reconcile with such an interpretation. For example, there is a long line of decisions that refuse to regard as actionably discriminatory sex-dependent hair-length restrictions that require men to wear their hair short while not imposing any similar

Federal Savings & Loan Ass'n of Chi., 604 F.2d 1028, 1032–33 (7th Cir. 1979) (holding that employer's requirement that all and only women wear a particular uniform while men were allowed to choose their own attire was "demeaning to women" and constituted disparate treatment in violation of Title VII); *see also* O'Donnell v. Burlington Coat Factory Warehouse, 656 F. Supp. 263 (S.D. Oh. 1987) (finding sex discrimination on similar grounds, where female employees, but not males, were required to wear a "smock").

100. For example, if a particular workplace had a prevalence of sex-dependent restrictions on the options for personal presentation available to female employees that were unpaired with comparable restrictions on males, then that might be thought symptomatic of deeper conditions of inequality within that workplace.

101. *See* Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 789–90 (D.D.C. 1973) (concluding that precisely such a policy was discriminatory), *vacated in part on other grounds*, 567 F.2d 429 (D.C. Cir. 1976); *see also* Carroll, 604 F.2d at 1032–33. Note that I argued above that the outcome in *Carroll* might also be explained in terms of the second objection from distributive inequality. Thus, any given particular sex-dependent restriction might be objectionable on more than one ground, and my arguments should not be understood to suggest otherwise.

102. This sort of argument would of course tend to support the outcome in *Jespersen*.

limitation on women.¹⁰³ Similarly problematic is my simple hypothetical case of the employer who terminates the male employee for wearing a frilly pink dress. One would think that such unpaired, sex-dependent restrictions should provide straightforward examples of sex discrimination if the statute were read to encompass a concern for distributive inequality with respect to presentational options. But those particular restrictions are *not* considered discriminatory under current case law.

A further and more fundamental skeptical worry about the equality of options rationale is whether the right way to measure the aggregate value of a set of options is simply to count them. There is substantial reason to doubt whether we should be content to regard any *paired* set of sex-dependent restrictions as non-discriminatory simply on the assumption that the pairing will ensure that the restrictions do not create any distributive inequality with respect to presentational options, because the *value* of the options eliminated by the paired restrictions might be very different. For example, it might be true that a restriction requiring women to wear makeup while forbidding men from doing so would not create any inequality across sex in the total number of options held. However, one wonders whether something important is being missed if we ignore the possibility that the option to wear makeup might not have the same value for men (whether in the aggregate, or in particular cases) as the option *not* to wear makeup might have for women.¹⁰⁴ In other words, counting the total *number* of presentational options affected by a particular restriction might not be the best, or even a useful, way of measuring distributive inequalities.

I am doubtful that this difficulty can be adequately resolved. If it cannot, then it likely spells doom for the usefulness of thinking about distributive equality with respect to presentational options at all, unless a systematic method can be developed for assigning values to particular options regarding personal presentation. Still, it is worth being aware of the equality of options rationale, because for all its problems, I think it has sufficient surface plausibility to help explain the tendency of courts like *Jespersen* to presume the permissibility of *paired* sex-dependent restrictions on workplace presentation.

To summarize, there are at least three ideas of equality under which sex-dependent workplace restrictions on personal presentation might be regarded as objectionable: the principle of formal equality, the principle of substantive equality (or of anti-subordination), and various notions of distributive equality. To the extent that these precepts of equality describe the fundamental purposes of Title VII, one strategy for justifying the permissibility of sex-dependent workplace restrictions on personal presentation might be to show that such restrictions—either in general, or in particular cases—do not raise serious

103. See, e.g., *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996); *Barker v. Taft Broad. Co.*, 549 F.2d 400 (6th Cir. 1977); *Earwood v. Cont'l Se. Airlines*, 539 F.2d 1349 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp.2d 1254 (N.D. Ind. 1998).

104. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1117–18 (9th Cir. 2006) (Kozinski, J., dissenting) (making a similar point).

concerns under any of these principles. If one could show this, one might succeed in establishing that such restrictions should be regarded as being outside the ambit of Title VII's prohibition of discrimination because of sex.

The majority's opinion in *Jespersen* seems to me best understood as an inchoate attempt at this kind of argument. The trouble is—and perhaps this is why *Jespersen* is ultimately so unsatisfying—the court's unequal burdens approach seems to presuppose that the *only* potential equality objection implicated by the casino's "Personal Best" policy was that it might lead to an inequality of distribution with regard to the burdens of compliance with the policy as a whole. But that presupposition requires a peculiarly narrow view of the types of inequalities that are of potential concern to Title VII. The *Jespersen* majority was surely right to assume that dress and grooming restrictions that create unequal burdens of compliance are potentially objectionable as sex discrimination, but it failed to take seriously the possibility that the Personal Best policy or its individual components might be objectionable under other notions of equality that are central to the statute.

In particular, the *Jespersen* court completely ignored the potential objection of *formal* inequality to the casino's makeup requirement. So let us now return to the discussion of that objection that I earlier postponed.¹⁰⁵ The formal inequality objection, again, is that the casino's makeup policy suffered from a sort of rational inconsistency: it called for adverse action against Jespersen on the basis of her refusal to wear makeup, while not calling for adverse action against her male counterparts even though they also did not wear makeup. As I conceded above, that claim of inequality is not especially interesting in itself, because the response is so obvious: Jespersen's differential treatment under the makeup policy was justified because she was relevantly different from her male counterparts.

Here, however, is the rub. A purported difference between individuals that might otherwise rationalize their different treatment cannot be considered relevant if there is some institutionally authoritative principle saying that the purported difference *cannot* provide sufficient reason for the type of action at issue.¹⁰⁶ For example, if an employer fires *P* for doing *x* yet fails to fire *Q* for doing the same thing, the employer could not defeat a claim of formal inequality by citing the fact that *P* was Asian, while *Q* was Caucasian. Obviously, the antidiscrimination laws tell us that this purported difference cannot provide a legitimate reason for treating *P* and *Q* differently. Thus, the employer could not answer the objection by appealing to that particular difference.

In *Jespersen*, just what is the relevant difference between Jespersen and her male counterparts? The claim implicit in the formal inequality objection—the *substantive* claim that gives the formal objection its moral significance—is that the only difference between them was their *sex* and that there is no institutionally legitimate principle under which *that* consideration could have provided a permissible reason for treating Jespersen differently. This last claim, I contend, is the real crux of the formal inequality objection. It is a claim that cannot go unaddressed, because it seeks to dislodge the hidden linchpin of

105. See *supra* p. 513.

106. See Shin, *supra* note 91, at 453–55.

Jespersen—the assumption that it is *not* per se illegitimate (i.e., discriminatory) to make workplace restrictions on presentation depend on consideration of sex, and that is only impermissible to do so if such restrictions create distributive inequalities or subordinate one sex to the other.¹⁰⁷

So, what would it take to overcome this challenge? What would have to be true in order for Jespersen's objection to fail? The answer is straightforward: in order for Jespersen's objection from formal equality to fail, there must exist some institutionally legitimate principle under which the very fact that Jespersen is a woman could provide sufficient reason to treat her differently from her male counterparts.

Is there such a principle? One thing is certain: if my analysis is correct, the existence of such a principle is necessarily implicit in the current decisional law permitting sex-dependent restrictions on personal presentation to survive discrimination analysis. In other words, if those decisions are regarded as consistent with principles of formal equality,¹⁰⁸ we must also regard them as committed to the existence of some institutionally legitimate principle that allows an employee's sex to be a relevant reason for holding her to one presentational standard while holding employees of the opposite sex to different standards. If there is no such principle, then those cases must be wrongly decided.

But, again, if there is such a principle, what could it be? Any answer here is bound to be controversial, but it would have to be founded on a notion that we, as a society, have reason to value and therefore preserve a state of affairs in which certain types of behaviors relating to the manner of presenting oneself to others are engaged in predominantly by members of one sex but not the other.¹⁰⁹ To put it another way, the rationalizability of sex-dependent workplace-presentation rules must depend on the idea that, even granting that sex and gender or gender-performance can be conceptually disaggregated,¹¹⁰ we nevertheless have reason to maintain a state of affairs in which sex and gender remain linked as a matter of fact—i.e., a state of affairs in which biological males behave in masculine ways and biological females behave in feminine ways. Insofar as that idea could be considered institutionally basic,¹¹¹ one could posit, as an institutionally legitimate principle, that employees have no right to demand that adverse employment actions based on the manner of their personal presentation be justified in terms that do not appeal to consideration of sex. The

107. The need to consider the formal equality objection (and, more importantly, the substantive principles that such an objection implicates) can be seen most clearly in a case of paired restrictions that do not produce any substantive or material inequalities—e.g., a requirement that female employees wear blue caps and that male employees wear green ones. Ignoring the formal equality objection would ignore the possibility that such a restriction could be objectionable *even absent* any proof of associated substantive or material inequalities.

108. On my view, principles of formal equality ultimately reduce to requirements of rational consistency, and we ordinarily presume that the law on the whole is itself rationally consistent.

109. My remarks here are limited to the context of conduct relating to personal presentation in the workplace.

110. See *generally* Case, *supra* note 2.

111. By an institutionally basic value, I mean a value that determines the institution's principles of justification but cannot itself be justified in institutional terms.

real upshot of the formal inequality objection to sex-dependent restrictions on personal presentation, then, is a challenge to this substantive principle and the basic values it embodies. The thrust of the formal objection is that we are *not* justified in valuing a state of affairs in which the linkage of sex and gender persists.¹¹²

At this juncture, I offer no view as to whether the value being imagined here—the social value of a linkage between sex and gender—is defensible;¹¹³ nor do I offer any argument as to whether such a value could ultimately be consistent with a general commitment to substantive and distributive equality among the sexes, or to antidiscrimination law generally. My claim is only that a commitment to this value must be presumed to underlie the body of law that says that sex-dependent workplace restrictions on personal presentation do not constitute sex discrimination. As we have seen, much of the surface logic that courts have employed to uphold sex-dependent presentational restrictions against challenges of discrimination turns out to be, on the whole, inconclusive at best and at times little more than exercises in question-begging. In the end, perhaps the doctrinal confusions and tangles those decisions seem to engender are best understood as the result of trying to reconcile a commitment to ensuring that men and women enjoy a meaningful parity of economic, social, and psychic well-being with a desire to preserve a social decorum that keeps them behaviorally distinct: Let substantive and economic equality obtain, but vive la différence.

112. It could be possible, of course, that we might not be morally justified in seeking to enforce a linkage of sex and gender even if the value of such a linkage was institutionally basic. In that case, the further question would be the extent to which antidiscrimination law could be regarded as aiming at the transformation of that basic value. *Cf.* Post, *supra* note 3, at 31–32 (arguing in favor of a conception of antidiscrimination law that recognizes some social practices as “inevitable” and even constitutive of categories such as race and gender while at the same time seeking to transform or reshape such practices).

113. What would have to be proved in order to defend this value is not that there is a social value attributable to the fact that men and women present themselves differently in the workplace, but that—and this is in my view a more difficult proposition—whatever it is of value that subsists in sex-differentiated behavior in respect of dress and grooming could not be preserved (or would be diminished) if gender differences were *not* tightly linked to sex.