

# MAKING UP WOMEN: CASINOS, COSMETICS, AND TITLE VII

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## I. INTRODUCTION: CASINOS AND COMPULSORY COSMETICS

Nevada enjoys multiple associations in the popular mind: quickie divorces, Siegfried and Roy, lawful prostitution, saloons, mining, and, perhaps more than any other, gambling. And for gambling, Las Vegas probably comes to mind above all other Nevada cities. But Las Vegas was not always the premier location for casinos. Before the Strip emerged, a vibrant gaming industry thrived in Reno. As historian David Schwartz has observed, “[t]hough it was still the closest legal gambling spot to Los Angeles, Las Vegas played second fiddle to Reno until the early 1950s – nearly twenty years after the town became nationally prominent.”<sup>1</sup> Schwartz remarks upon differences between the early casino resorts of the Strip and the facilities in Reno:

In the Strip resorts, women were confined to a small number of occupations, including waitress, change girl, and showgirl. They were unofficially but firmly barred from dealing and other gaming positions. This stood in marked contrast to Reno, where women made up the bulk of the dealing corps and handled most daily patron-casino interactions. Most contemporary accounts depicted Reno women as mundane and unglamorous.<sup>2</sup>

The glamour, or the dowdiness, of Reno’s women casino employees emerged as an important legal issue in 2000.<sup>3</sup> Before turning to that issue, let me note one of the most prominent figures in Reno gaming: William Harrah. A man who traced his

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<sup>1</sup> DAVID G. SCHWARTZ, *SUBURBAN XANADU: THE CASINO RESORT OF THE LAS VEGAS STRIP AND BEYOND* 28 (2003).

<sup>2</sup> *Id.* at 57-58.

<sup>3</sup> See *Jespersen v. Harrah’s Operating Co.*, 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002) (recounting Darlene Jespersen’s firing by Harrah’s for failure to comply with prescribed make-up regimen).

WASP family's presence in the United States to before the Revolutionary War, Harrah "parlayed a succession of gambling halls in downtown Reno beginning in the 1940s into a sizable northern Nevada casino empire."<sup>4</sup> Bill Harrah was apparently something of a perfectionist regarding the details of his operations.<sup>5</sup> And this perfectionism, sometimes obsessive, extended and still extends today – with a vengeance – to the employees of many of the casinos that bear his name.

As one student of Harrah's "Winning Secrets" reports, at that early time, "[u]nlike the competition's employees, you could always spot a Harrah's person who worked on the casino floor. Everyone was required to wear a pair of black pressed slacks and a clean white shirt. The keno girls wore black skirts, and it was imperative for their stocking seams to be straight . . . . In addition to dress codes, the notebook outlined details about hairstyle and the use of cosmetics."<sup>6</sup> Casinos and cosmetics. Cover Girl at the craps table. What could be more wholesome, more American . . . more profitable?

Well, apparently the Powers That Be at Harrah's today decided, taking a tip from Las Vegas Strip culture, that nothing succeeds like excess. And so Harrah's instituted a new "Personal Best" policy in twenty of its twenty-six properties.<sup>7</sup> The policy, instituted to regiment and "upgrade" Harrah's image, required make-overs, including make-up and hair styling for women employees, to produce a picture of the employees at their "personal best" for their personnel file. For male beverage servers, this included a ban on wearing make-up at work. Female beverage servers, in contrast, were required to wear make-up, including at least lipstick, mascara, blush, and foundation.

For some women, the prescribed make-up regimen might be largely inconsequential. Writer Amy Bloom, for example, has admitted: "Sometimes I put on lipstick when I'm tense. It makes me feel armored, less vulnerable to the world."<sup>8</sup> She might find that the "Personal Best" policy is consistent with her best job performance.

For some other women, however, "chafe" is too mild a word to capture how they might react to Harrah's make-up policy. Consider for example Daphne Scholinski, institutionalized as a teenager for "rebelliousness" and inadequate femininity. Here's some of what she had to say about compulsory cosmetics:

Every morning I lowered my eyelids and let Donna [a roommate] make me up. If I didn't emerge from my room with foundation, lip gloss, mascara, eyeliner, eyeshadow and feathered hair, I lost points. Without points, I couldn't go to the dining room, I couldn't go anywhere. Without points I was not allowed to walk from the classroom back to the unit without an escort. . . . Either choice I hated: make-up, or a man trailing in my shadow. It didn't take me long to figure out that a half-moon of blue on my eyelids was a better decision. This was how I learned what it means to be a woman.

<sup>4</sup> SCHWARTZ, *supra* note 1, at 103.

<sup>5</sup> ROBERT L. SHOOK, JACKPOT! HARRAH'S WINNING SECRETS FOR CUSTOMER LOYALTY 29 (2003).

<sup>6</sup> *Id.* at 35.

<sup>7</sup> No, this was not a plan to exploit the lesbian athletic market. *Cf.* PERSONAL BEST (Warner Studios 1982).

<sup>8</sup> AMY BLOOM, NORMAL: TRANSSEXUAL CEOs, CROSSDRESSING COPS, AND HERMAPHRODITES WITH ATTITUDE 69 (2002).

When Donna stepped back, I stared in the mirror at the girl who was me, and not me: the girl I was supposed to be.

"I like my blue eyeshadow," I said. . . . "I really like my eyeliner," I said. Ever lied to save yourself? "I love looking pretty." Ever been so false your own skin is your enemy?<sup>9</sup>

## II. ENTER THE HERO

One woman for whom Harrah's "Personal Best" program proved traumatic was Darlene Jespersen. Ms. Jespersen worked as a bartender at Harrah's Reno.<sup>10</sup> She served the company faithfully for more than twenty years.<sup>11</sup> Customers loved Jespersen, writing in to Harrah's to let management know how friendly she was, that they always came back to "Darlene's room" because she made them feel so welcome. She even received praise from men whom she'd cut off who later realized that they had in fact drunk too much and that Jespersen had done the right thing, tactfully but firmly.

Darlene Jespersen was firm. Friendly, but firm. She is not what some researchers have termed "classically feminine." Indeed, she tended bar at Harrah's wearing a tuxedo. She was always clean and well groomed. But she could not bear to wear make-up. She knew; she had tried, briefly. But it made her feel humiliated, dehumanized, awkward and naked. Jespersen was unable to perform her job well in it. So, she refused to go along with the "Personal Best" make-up regimen. She explained this to her supervisors and tried to secure an exemption from the policy for the sake of the very effective delivery of customer service said to justify the policy. But Harrah's refused, and when Jespersen persisted, she was terminated. Fired. Cut loose because of a clash between her cosmetics aversion and corporate "cookie cutter" designs.<sup>12</sup>

Our modern Modesty Blaise did not take this passively. When she was unable to prevail upon the company to change its corporate mind, Darlene Jespersen sued. Harrah's had violated the federal law prohibiting sex discrimination in employment, Title VII, by firing her for violating a requirement that it imposed only on women, her counsel argued. The federal district court, shockingly, granted summary judgment to the casino. Title VII was not meant to apply to dress codes, the court suggested, and even if it did, this was not unlawful discrimination because the burdens imposed on men and women were equal. Women were required to wear make-up, he said, but men were forbidden to, and that could be as much of a burden on a man who wanted to wear cosmetics as it was for a woman like Jespersen who did not want to wear them to have to.<sup>13</sup> I kid you not.<sup>14</sup>

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<sup>9</sup> DAPHNE SCHOLINSKI WITH JANE MEREDITH ADAMS, *THE LAST TIME I WORE A DRESS* x (1997).

<sup>10</sup> *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002).

<sup>11</sup> *See id.*

<sup>12</sup> *Cf.* Appellee's Answering Brief at 34 (9th Cir. filed July 30, 2003) (asserting that the Personal Best policy "was a comprehensive initiative to improve the overall service performance of the Beverage Department, which included the creation of a national brand standard. If one employee failed to comply, the brand standard failed.").

<sup>13</sup> *Jespersen*, 280 F. Supp. 2d at 1193.

Jespersen then took the case to the United States Court of Appeals for the Ninth Circuit. Argument was held and the decision is pending as of the writing of this Essay.

### III. THE EXTRAVAGANCE OF TITLE VII<sup>15</sup>

Surprisingly, in the forty years that Title VII of the Civil Rights Act of 1964 has been in existence, the U.S. Supreme Court has never written an opinion in a case challenging a sex-discriminatory dress code. Eventually it may have to confront the issue should a circuit split arise, and even if one does not, the Court should intervene if the lower courts remain united in allowing such discrimination to survive in Title VII litigation. Title VII is a sweepingly broad statute, and it should condemn facially sex-discriminatory dress or appearance requirements.

#### A. *Telling Text*

Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>16</sup>

This is a sweeping command, with great potential to eliminate employers' economic leverage as a factor perpetuating many types of discrimination. Indeed, by guaranteeing fair access to and compensation for gainful employment (with covered employers) the statute seemed to promise an end to much outright workplace subordination. However, Title VII also provides a narrow exception<sup>17</sup> from this anti-discrimination rule:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his [sic] religion, sex, or national origin in those certain

<sup>14</sup> Harrah's defended this outlandish claim on appeal: "the makeup requirement for women and prohibition for men is equally burdensome for men and women. On that basis alone, the makeup policy is valid and legal." Appellee's Answering Brief, *supra* note 12, at 24.

<sup>15</sup> "Consequently, Jespersen reveals her true motive, which is to accomplish an expansion of Title VII to eradicate all sex-based distinctions in employment." *Id.* at 36; *id.* at 36-37 ("She takes *Price Waterhouse* to the extreme and advocates a drastic change in the law that would create a broad independent cause of action for gender stereotyping under Title VII. ."); *id.* at 37 ("[C]reating a subtype of sex discrimination called 'sex stereotyping' . . . would create 'a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels . . . .'" Although such a proposition may seem extreme, that is exactly what Jespersen advocates when one [sic] proposes that all gender stereotypes be removed from the workplace.") (quoting *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1067 (7th Cir. 2003)) (Posner, J., concurring in the judgment).

<sup>16</sup> 42 U.S.C. § 2000e-2(a)(1)-(2) (2002).

<sup>17</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (characterizing BFOQ allowance as an "extremely narrow exception to the general prohibition of discrimination on the basis of sex").

instances where religion, sex, or national origin is a bona fide occupational qualification [or BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.<sup>18</sup>

Note that there is no BFOQ allowance for race-based discrimination. Under the logic of Title VII, a person's being of a given race is never reasonably necessary to a business's normal operation.

In contrast, sex discrimination is sometimes allowed by the BFOQ provision, and courts have relied on it to uphold sex-discriminatory dress and appearance requirements.<sup>19</sup> More commonly, however, courts have ruled that such dress codes do not even discriminate against employees "because of" their sex; that is, employers' sex-discriminatory appearance requirements are sometimes held not to be sex-based discrimination of the sort that Title VII forbids.<sup>20</sup> In my view, neither approach is correct nor should be available to Harrah's Casino in Darlene Jespersen's case.

Consider first the BFOQ provision. By rather ordinary principles of statutory interpretation, this limited allowance for sex-, religion-, and national origin-based discrimination never extends to sex-discriminatory dress codes. The BFOQ allowance extends to employers' decisions "to hire and employ" employees on the basis of sex, religion, or national origin.<sup>21</sup> This clearly corresponds to Title VII's basic ban on "fail[ing] or refus[ing] to hire or . . . discharg[ing]" individuals on the basis of sex, et cetera.<sup>22</sup> But Title VII's principal restriction extends further than that, also making it unlawful for employers to "otherwise discriminate against any individual with respect to his [or her] compensation, *terms, conditions*, or privileges of employment."<sup>23</sup> The lack of authorization in the BFOQ provision for discrimination in terms or conditions of employment shows that Title VII allows employers to hire or assign only members of one sex for a given position, if such sex discrimination meets the demanding test for BFOQs, but that an employer who hires both men and women for a position must treat them the same. Harrah's quite properly hires both men and women as bartenders; it therefore must not discriminate between them in their terms or conditions of employment.<sup>24</sup>

Fairly read, that is what Harrah's did. There is no dispute that Darlene Jespersen was fired for refusing to wear the make-up regimen prescribed for women. Harrah's cosmetic commands thus constituted a term or condition of her employment. Yet male bartenders were not subject to this term or condition. Accordingly, this is discrimination prohibited by Title VII (discrimination

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<sup>18</sup> 42 U.S.C. § 20003-2(e)(1) (2002).

<sup>19</sup> See, e.g., *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1126 (D.C. Cir. 1973) (holding sex-differential hair-length regulation satisfied BFOQ allowance under Title VII).

<sup>20</sup> See, e.g., *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249 (8th Cir. 1975); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc) (upholding restrictions on length only of men's hair as not discriminating on the basis of sex); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1335 (D.C. Cir. 1973).

<sup>21</sup> 42 U.S.C. § 20003-2(e)(1).

<sup>22</sup> 42 U.S.C. § 2000e-2(a)(1)-(2).

<sup>23</sup> *Id.* (Emphasis added).

<sup>24</sup> That is the issue here, not whether "sex is . . . a condition of employment." Appellee's Answering Brief, *supra* note 12, at 42.

on the basis of sex in a term or condition of employment)<sup>25</sup> that is never authorized by the BFOQ provision (which is limited to decisions whether or not to employ a particular sex in a given position).

This perfectly straightforward interpretation of Title VII's BFOQ provision, however, has been embraced only in one reported court decision that I have found. In *Hodgson v. Robert Hall Clothes, Inc.*, the federal district court in Delaware emphasized that the BFOQ sex discrimination allowance extends only to decisions to "hire [or] employ," and not to decisions to compensate women and men differently.<sup>26</sup> Other courts, however, have failed to address this elegant point about the narrow scope of the BFOQ provision.

It is not that my plain reading of the BFOQ allowance would render the provision meaningless. It would still allow single-sex hiring for occupations where that really is necessary. The paradigmatic example of such a position is that of wet nurse. Outside of pornographic fantasies<sup>27</sup> – or, less trivially, exceedingly rare cases where a transsexual person transitioning from female to male becomes pregnant and carries to term<sup>28</sup> – men do not lactate sufficiently to be employable as a wet nurse. Thus, sex, specifically having, or being of the, female sex, is a BFOQ for that occupation.

Courts simply – or, more likely – complexly, fail to engage with the actual statutory language. They know, and lawyers know, that Title VII allows for sex discrimination where sex is a BFOQ, and it is probably unthinkable to them that a law passed by the Congress of the mid-1960s could have forbidden employers to discriminate *at all* on the basis of sex with respect to conditions of employment.<sup>29</sup> But that *is* what Congress's enacted words would seem to say, and where someone faces the kind of sex discrimination that Darlene Jespersen did, courts should not hesitate to follow the restrictions that Congress enacted.

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<sup>25</sup> *Accord* *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 405 (6th Cir. 1977) (McCree, J., dissenting) (concluding that discriminatory "hair regulations do affect the opportunity of individuals to obtain employment on the same 'terms [and] conditions' of employment without regard to sex. The prohibition of long hair unquestionably imposes a term or condition on employment.").

<sup>26</sup> 326 F. Supp. 1264, 1270 (D. Del. 1971).

<sup>27</sup> *See e.g.*, <http://www.google.com/search?asq=&num=100&hl=en&ie=UTF-8&oe=UTF-8&btnG=Google+Search&asepq=lactating+men&asoq=&aseq=&lr=&asft=i&asfiletype=&asqdr=all&asnl=&asnh=&asocct=any&asdt=i&assitesearch=&safe=images>.

<sup>28</sup> Or perhaps liver disease or extended hormonal cancer treatments. *See* <http://www.blather.net/archives/issue1no2.html> (last visited May 6, 2004).

<sup>29</sup> *See, e.g.*, *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) ("The prohibition of sex discrimination must be interpreted in light of the purpose and intent of Congress in enacting the Civil Rights Act of 1964. Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) ("It seems clear from a reading of the Act that Congress was not prompted to add 'sex' to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required.").

## B. Resistant Courts

Instead of giving Title VII the grand effect its language would seem to command, courts resort to baroque and linguistically implausible interpretations of what it is to “discriminate” within the meaning of Title VII<sup>30</sup> in an anxious, or perhaps near completely unreflective, effort to shield employers’ “prerogatives”<sup>31</sup> regarding differential treatment of men and women in the workplace. Logically, they are quite correct that if a particular employment practice does not count as “discriminat[ion]” within the meaning of Title VII, that practice need not even be justified as serving a BFOQ.<sup>32</sup> But it does not appear even to occur to them to consider the relevance of the different scopes of Title VII’s basic prohibition on discrimination and its more limited BFOQ allowance for sex discrimination in decisions to hire or employ. The fact that Congress chose statutory text only authorizing sex discrimination in restrictive circumstances – not including in terms or conditions of employment – should certainly counsel against an interpretation of the statute that would broadly sanction sex-discriminatory employment terms as not involving discrimination. Unlike with the somewhat controversial question of the permissibility of affirmative action under Title VII,<sup>33</sup> there is no contention that requiring women to wear make-up and forbidding it to men is necessary to afford women or men equal employment opportunity with each other.

As the district court did in Jespersen’s case, some courts nevertheless assert that imposing different dress codes on male and female employees does not amount to prohibited “discrimination” within the meaning of Title VII

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<sup>30</sup> See, e.g., *Earwood v. Cont’l S.E. Airlines, Inc.*, 539 F. 2d 1349., 1351 (4th Cir. 1976) (holding that “discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate [Title VII] because they present obstacles to employment of one sex that cannot be overcome” but that even sex-based “discrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden”); *id.* at 1352 (Winters, J., dissenting) (arguing that “majority’s approach [improperly] imports constitutional notions of immutability and fundamentality into the process of statutory interpretation” with *Ano* warrant for concluding that in enacting Title VII, Congress intended to proscribe only sex discrimination which burdens persons who desire to exercise ‘fundamental rights’ or who possess certain ‘immutable characteristics’”).

<sup>31</sup> *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (“Courts have recognized that the appearance of a company’s employees may contribute greatly to the company’s image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative.”) (citing *Fagan v. Nat’l Cash Register Co.*, 481 F. 2d 1115, 1124-25 (D.C. Cir. 1973), and *La Von Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979)); *cf.* *Willingham v. Macon Tel. Publ’g Co.*, 507 F. 2d 1084, 191 (5th Cir. 1975) (en banc) (contending that “a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity.”).

<sup>32</sup> See, e.g., *Dodge v. Giant Food*, 488 F.2d 1333, 1335 (D.C. Cir. 1973).

<sup>33</sup> See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 38 n.175 (2000) (citing RONALD DWORKIN, *HOW TO READ THE CIVIL RIGHTS ACT, IN A MATTER OF PRINCIPLE* 316 (1985) and Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980)).

unless the burdens are unequal.<sup>34</sup> This construction strikes me as too facile. It's a "double for nothing" claim<sup>35</sup> – that there is no sex discrimination because different but "equal" or "comparable" burdens are imposed on men and on women, two instances of discrimination adding up to none. This kind of "indiscriminate imposition of inequalities"<sup>36</sup> does not satisfy minimal constitutional equality commands, as the Supreme Court made clear in *Loving v. Virginia*.<sup>37</sup> There the state claimed that since it imposed burdens in the form of criminal penalties equally on both black and white offenders, its antimiscegenation law did not constitute discrimination. The Court, fortunately, rejected this patently implausible interpretation of Virginia's facially discriminatory law.<sup>38</sup>

By like token, neither should courts limit the reach of Title VII's sweeping language by accepting the "equal burdens" defense for make-up policies that are facially<sup>39</sup> sex-discriminatory. For one thing, we should be skeptical of courts' ability or willingness to discern uncomparable burdens, particularly because the burdens may actually be incommensurable. That the district court in Jespersen's case concluded that Harrah's different rules about make-up for men and women imposed equal burdens strongly supports this skepticism. Even if one thought that the judge's musings about psychological burdens on the two sexes<sup>40</sup> was reasonable, the fact remains that women beverage servers were required by Harrah's to spend their money to purchase cosmetics and to spend their time to apply (and perhaps reapply) them. Men were spared these burdens, and the make-up policy thus cannot realistically be seen as imposing "equal" burdens on men and women.

Katharine Bartlett has trenchantly critiqued the "equal burdens" case law. In her eyes, courts have engaged in little or no comparative analysis of the burdens men and women, respectively, face. In some cases it has been enough that some requirements were imposed on both men and women, regardless of how burdensome or demeaning either set of requirements might be. Other courts have seemed to engage in a more qualitative review, implying that the burdens on men and women must be at least roughly comparable, by some criterion or another. Even in cases in which a stricter, more functional approach is articulated, however, courts accept as given certain community norms and thus are slow to recognize disparities in the burdens sex-specific appearance criteria impose.<sup>41</sup>

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<sup>34</sup> *Jespersen*, 280 F. Supp. 2d at 1192; *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.").

<sup>35</sup> Cf. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 441 n. 468 (2000).

<sup>36</sup> *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

<sup>37</sup> 388 U.S. 1 (1967).

<sup>38</sup> *Accord* *McLaughlin v. Florida*, 379 U.S. 184 (1964) (rejecting equal burdens argument in invalidating law punishing interracial fornication more than same-race fornication).

<sup>39</sup> No pun intended.

<sup>40</sup> See *supra* text accompanying note 29.

<sup>41</sup> Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2561 (1994) (footnotes omitted) [hereinafter Bartlett, *Only Girls Wear Barrettes*].



Those are powerful arguments against judicially importing an equal burdens defense into (or, less tendentiously, glossing “to discriminate” in equal burdens terms in) the text of Title VII. Courts’ track record with the “equal burdens” notion is not much more inspiring than the majority’s claim in *Plessy v. Ferguson* that there was nothing stigmatizing in racially segregated railroad accommodations save perhaps in black people’s eccentric subjectivities.<sup>42</sup>

Moreover, accepting the equal burdens argument here risks reinforcing social division and a view of supposedly fundamental “difference” between men and women. That view is, I have argued elsewhere, dangerous, rooted in a normative gender stereotype that the guarantee of equal protection of the laws forbids government to back up with the force of law.<sup>43</sup> And norms of make-up for women but not men have traditionally emerged out of a normative worldview that sees women as ornamental, objects of beauty to be contemplated, not agents with talents to be esteemed. This is not surprising. As Bartlett has noted, “few female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have become interwoven with their historically inferior status.”<sup>44</sup> The amicus brief of the ACLU supporting Jespersen nicely makes this point.

### C. *Chastened Academics*

Like the courts that have tried to tame Title VII, a number of scholars have advocated approaches to dress codes under Title VII that are less faithful to the statutory text and accordingly more tolerant of employers’ sex discrimination. Katharine Bartlett, Robert Post, and Kimberly Yuracko all basically seem to propose to immunize from the reach of Title VII certain forms of sex discrimination that they do not consider a problem of group subordination or, more particularly, of subordination of women to men. In my view, their efforts are misguided and should be rejected.

#### 1. *Katharine Bartlett and Community Norms*

Dean Bartlett, in her prominent and thoughtful article *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*,<sup>45</sup> purports to give more emphasis to equality concerns than to autonomy concerns, a move she takes to be justified by her insistence that Title VII is after all an anti-discrimination law.<sup>46</sup> Yet even granting that characterization, it might mean different things.

Bartlett seems to presuppose an anti-subordination understanding of Title VII’s anti-discrimination command, such that she will condemn sex-differential

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<sup>42</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1996) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

<sup>43</sup> See generally David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

<sup>44</sup> Bartlett, *Only Girls Wear Barrettes*, *supra* note 41, at 2570.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

dress requirements only if they “*subordinate* [presumably, women as a group, or, perhaps, men as a group] on the basis of sex.”<sup>47</sup> The reason for her chastened ambitions is her belief, perhaps accurate, “that no version of gender equality can accomplish substantial social change unless it is familiar enough to take root in the very conditions of subordination it is expected to eliminate.”<sup>48</sup> Thus, Bartlett’s analysis seemingly would limit Title VII to invalidate discriminatory employment terms or conditions of employment, such as sex-discriminatory dress codes, only where holding them unlawful would, or perhaps could, result in “substantial social change.”

Her motivation for this superimposition on the text of Title VII seems to stem from a view about the relationship between law and social change. “[E]quality, no less than other legal concepts, cannot transcend the norms of the community that has produced it,”<sup>49</sup> Bartlett argues, and from that premise derives the conclusion that Title VII’s prohibition on sex-discriminatory dress codes should not be as broad as the statutory text invites. I acknowledge that her prescriptions are intended to sanction *less* judicial ratification of sex discrimination than does current case law by calling on judges to be more sensitive to the ways in which discriminatory dress codes “further gender-based disadvantage in the workplace.”<sup>50</sup> This is clear in her plea that “ways must be found to *sharpen* the Act’s standards for identifying discriminatory employment practices that appear harmless and ordinary because of” “community norms [that] *subordinate women* on account of their sex.”<sup>51</sup> “The real problem with the assumptions courts make about the trivial impact of dress and appearance requirements on employees and their importance to employers . . . is that they rely on unexamined, culture-bound judgments that will tend to reinforce existing, hidden prejudices and stereotypes.”<sup>52</sup>

But given her concerns quoted earlier about judicial competence in cultural semiotics,<sup>53</sup> Bartlett’s ultimate injunction is a little puzzling: “courts should approach challenges to practices grounded in community norms by attempting to identify the cultural meanings underlying them and determining to what extent they impose burdens that disadvantage members of one sex in relation to the other.”<sup>54</sup> Her own criticisms of courts’ performance in determining whether burdens imposed on men and women by sex discriminatory dress codes are equal or unequal<sup>55</sup> might well have led her to look for doctrinal ways to reduce discrimination in the workplace without relying on judicial weighing of such practices. Perhaps she thinks that if a judge would not be able to discern unequal burdens, he (a pronoun I used advisedly here) would be

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<sup>47</sup> *Id.* at 2556.

<sup>48</sup> *Id.* at 2545.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2568 (emphasis added).

<sup>52</sup> *Id.* at 2558. *See also id.* at 2568 (“My point is that the problem with the caselaw in this area is not that it fails to transcend community norms – an impossible goal – but that the law fails to look critically enough at the extent to which these norms incorporate the type of attitudes and stereotypes about women that Title VII is meant to combat.”).

<sup>53</sup> *See supra* text accompanying note 52.

<sup>54</sup> Bartlett, *Only Girls Wear Barrettes*, *supra* note 41, at 2569.

<sup>55</sup> *Supra* text accompanying note 41.

unlikely to adopt a broad reading of Title VII such as I am advocating. Yet that kind of fatalism can be self-defeating. If prominent academics such as Dean Bartlett publish conclusions that Title VII should best be interpreted as broadly proscribing sex discriminatory dress codes, courts – including perhaps the Supreme Court that has not addressed the issue – might be more likely to adopt such conclusions.

Bartlett's chastened ambitions may also stem from what appears to me as a false or at least overstated dichotomy she draws between "the individual's interest in autonomy, freedom, and sense of self" and "the interest of women in equality with men."<sup>56</sup> Although she criticizes work on employers' sex-discriminatory dress codes by Karl Klare for supposedly privileging the former "over" the latter,<sup>57</sup> nowhere does Bartlett show that Professor Klare actually sacrifices equality in the name of liberty.

In approaching Title VII, Bartlett wants instead to emphasize inequality and virtually ignore autonomy. "The popular literature [on employer-mandated dress codes], too, stresses autonomy and choice as if that were the problem, *rather than* inequality and subordination."<sup>58</sup>

But Bartlett is seeking too much unity of purpose. Certainly, Title VII is not an all-purpose workplace liberty act. But what's wrong with insisting on a full measure of *equal* liberty? Why limit ourselves – and the broad text of Title VII<sup>59</sup> – to rectifying only some forms of inequality in employment conditions?

Now, Bartlett's limited view of Title VII may be motivated in part by concerns about what a broader view such as mine might bring about. For Bartlett, "it is not clear that mandatory dress and appearance codes are always a source of disadvantage to women; in some instances, they may even be beneficial."<sup>60</sup> If she limits herself to the fact that a dress code might be mandated, I will not disagree that it is possible that it could be beneficial for women. But having circumscribed choice in work attire could also be beneficial for men. What Bartlett does not offer, however, is any explanation of how mandatory, *sex discriminatory* dress codes would be helpful to women (or men). Bartlett contends that "[i]f a business values consistency and homogeneity and is proud of the suppression of individual differences in the service of the overall organization, as a fast-food chain or a worldwide mail delivery system might be, this message may be conveyed through uniform dress standards."<sup>61</sup> One can grant this, but suppression of individual difference for the sake of homogeneity is *undermined*, not served, by requiring sex discriminatory "uniform" appearance requirements.

Bartlett further argues that interpreting Title VII to prohibit all sex discriminatory dress codes will not provide a panacea for professional women. "If

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<sup>56</sup> Bartlett, *Only Girls Wear Barrettes*, *supra* note 41, at 2549. See also *id.* at 2558 ("Some have argued that the fact that dress and appearance are alterable does not mean they are not critical to an individual's sense of dignity and self, much as race and sex are. This argument focuses on the individual's autonomy interest to the exclusion of the individual's interest in equal treatment.") (footnote omitted).

<sup>57</sup> *Id.* at 2549.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> 42 U.S.C. § 2000e-2(a)(1)-(2) (2002).

<sup>60</sup> Bartlett, *Only Girls Wear Barrettes*, *supra* note 41, at 2545.

<sup>61</sup> *Id.* at 2554.

the cultural codes leave little or no leeway for a woman to dress so as to be understood as a competent and confident professional, she faces an equality barrier that the removal of formal employment restrictions cannot effectively address.”<sup>62</sup> Again, one could grant this, but it is an argument about the limits of law’s efficacy, not an argument that such a woman is better off working subject to sex discriminatory appearance requirements than she is if protected from them by Title VII.

There almost seems to be an undefended fatalism at work in Bartlett’s article. “[T]he abolition of employer dress and appearance requirements will not restore autonomy of self-production to the individual. It will simply eliminate one type of constraint on individual autonomy and leave more room for different, less explicit, and potentially even more insidious constructing forces.”<sup>63</sup> Even were this true, Bartlett would need to put great weight on “potentially” for this to be any sort of objection to a broader reading of Title VII. She simply has not suggested how eliminating the economic coercion of threats of job loss will *make more* room for different pernicious constructing forces, as opposed to “leav[ing] room” for forces already in play to keep operating. That is, nothing in her account shows that reading Title VII in line with its text would be anything other than a pure improvement in the situation of women in the workplace.

## 2. Robert Post and Sociological Perspectives

Like Dean Bartlett, Robert Post appears to advocate a view of Title VII that would be narrower than the statute’s text would suggest. In an important recent Brennan Lecture entitled “Prejudicial Appearances” published as an article<sup>64</sup> and then a book chapter,<sup>65</sup> Professor Post turns his considerable legal analytic skills to “American antidiscrimination law.”<sup>66</sup> Although Post’s immediate springboard is provided by “the seemingly utopian aspirations” of “ordinances that prohibit discrimination on the basis of personal appearance,”<sup>67</sup> he more broadly surveys the undifferentiated mass of “[a]ntidiscrimination law in America,”<sup>68</sup> “the internal ideal”<sup>69</sup> of all of which he says is to “require[ ] employers to regard their employees as though they did not display socially powerful and salient attributes”<sup>70</sup> such as race or sex. “Taken as a whole, American antidiscrimination law . . . requires employers, except in exceptional and discrete circumstances such as affirmative action, to make decisions as if their employees did not exhibit forbidden characteristics, as if, for exam-

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<sup>62</sup> *Id.* at 2550-51.

<sup>63</sup> *Id.* at 2550.

<sup>64</sup> Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

<sup>65</sup> ROBERT POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTI-DISCRIMINATION LAW* (2001).

<sup>66</sup> Post, *supra* note 64, at 2.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Id.* at 8. *Cf. id.* at 14 (considering both Title VII and federal constitutional equal protection doctrine).

<sup>69</sup> Robert C. Post, *Response to Commentators*, 88 CAL. L. REV. 119, 124 (2000).

<sup>70</sup> Post, *supra* note 64, at 11-12.

ple, employees had no race or sex.”<sup>71</sup> And this “logic of willful blindness”<sup>72</sup> is pernicious in Post’s view, because it “distorts and masks the actual operation of that law, and by so doing, potentially undermines the law’s coherence and usefulness as a tool of transformative social policy.”<sup>73</sup>

Post raises important questions about the aims of anti-discrimination law and the performance of the judicial actors who implement it. Yet the unity of “American antidiscrimination law” he depicts is fictive. We have many, different “laws” against discrimination in the United States, constitutional and statutory, federal and state and local. (Indeed, Post recognizes that “[t]he law, of course, is a practical, ramshackle institution, full of compromise and contradiction. It nowhere expresses as purely as I have just done the logic of fairness and equal opportunity.”<sup>74</sup>) This is not just a quibble. Only by amalgamating a panoply of legal provisions into such a stylized whole can Post plausibly offer a sole aim of such laws, something he repeatedly proffers in the singular.<sup>75</sup>

Additionally, Post’s characterization of even this one aim of antidiscrimination laws seems tendentious and misleading. For example, he asserts that the draft ordinance against appearance discrimination in Santa Cruz “proposed to render appearances invisible,”<sup>76</sup> “[b]linding employers and landlords to appearance.”<sup>77</sup> Indeed, he takes this to the extreme of suggesting that “[t]he logic of effacing appearance to achieve equality” may lead to governmental efforts to mask the beautiful, distract the brilliant, weigh down the graceful, and otherwise render all persons actually equal in their abilities and gifts.<sup>78</sup>

Of course, however, this is *not* what antidiscrimination laws do. Santa Cruz’s proposed ordinance against appearance discrimination no more “blinds” employers to people’s physical appearance than Title VII renders sex, race, or *color* “invisible.” What these laws do is forbid people to base their employ-

<sup>71</sup> *Id.* at 11 (footnote omitted).

<sup>72</sup> *Id.* at 16.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g., id.* at 10 (claiming of Title VII that “[t]he point of rendering such factors [as race and gender] irrelevant is to ‘target’ and eliminate ‘stubborn but irrational prejudice.’”) (emphasis added). (The internal quotation is from a lower court decision and thus need not limit a normative analysis of Title VII). *See also id.* at 13 (“[W]hat antidiscrimination law seeks to uncover is an apprehension of individual merit.”) (internal quotation marks omitted); *id.* at 15 (presenting aspects of “the logic of American antidiscrimination law”) (emphasis added); *id.* at 36 (posing the question, “If the aim of the law is not in fact to strike ‘at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,’ then what is it?”) (footnote omitted); *id.* at 37 (accepting singularity of “the ultimate goal of Title VII”). *But see, e.g., id.* at 26 (using the plural to observe that “which gender practices are to be reshaped by Title VII, in what contexts, and in what ways . . . are questions that depend upon our understanding of the exact purposes and ambitions of Title VII”) (emphases added); *id.* at 36 (somewhat belatedly recognizing that “the ambitions of the law vary depending upon social practice at issue.”) (emphasis added); *id.* at 37 (referring in the plural to “the purposes of the law”).

<sup>76</sup> Post, *supra* note 64, at 3.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* Post does go on to concede that “[e]quality in this stringent sense was never, of course, the aim of the proposed Santa Cruz ordinance.” *Id.* It is therefore not clear why he even bothers to bring it up, unless to discredit the ordinance by the association he only later repudiates.

ment decisions on the forbidden characteristics, not command employers to pretend not to see anything. And Post does admit this at points.<sup>79</sup> But then he turns right around and says things like, “American antidiscrimination law typically requires employers . . . to make decisions as if their employees *did not exhibit* forbidden characteristics . . . .”<sup>80</sup>

I think such formulations are a dangerous mistake. U.S. antidiscrimination laws do not require employers to try to envision a radically different social world, one in which the social divisions we have do not exist. I do not think that asking whether an employer had such a vision in mind is an inquiry judges would be well equipped to make, nor is that counterfactual scenario an easy one for employers to envision. Title VII instead simply insists, do not use your economic power as an employer to reinforce those divisions and the hierarchies that have accompanied them. Any sex-specific term or condition of employment – something by definition one is willing to fire, demote, or otherwise penalize someone for – does reinforce such divisions. Title VII really is in some sense a disestablishment mandate to private (and public) employers.<sup>81</sup>

But Professor Post is at pains to criticize (his version of) “the dominant conception of American antidiscrimination law,” on the ground that it “distorts and masks the actual operation of that law, and by so doing, potentially undermines the law’s coherence and usefulness as a tool of transformative social policy.”<sup>82</sup> For example, Post argues that while the “dominant conception” of Title VII should lead to denial of “the legitimacy of all customer preferences that incorporate traditional gender conventions,” in practice judges decide Title VII cases in ways that are not so far-reaching.<sup>83</sup> I agree with Post’s description of what lower court judges have done in Title VII cases, yet I would not assume that they are correctly interpreting the statute; in my view, they plainly are not.

Post is wrong to disparage the statutory aim to strike “‘at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes’”

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<sup>79</sup> See, e.g., *id.* at 9. (“American antidiscrimination law understands itself as negating such prejudice by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment.”).

<sup>80</sup> *Id.* at 11 (emphasis added).

<sup>81</sup> Cf. Cruz, *supra* note 43

<sup>82</sup> Post, *supra* note 64, at 16.

<sup>83</sup> *Id.* at 22-23. In *Jespersen*, Harrah’s has argued that it “is a service provider that is dependent upon meeting its customer [sic] expectations,” and that the cases clearly rejecting customer preferences as a justification for sex discrimination otherwise prohibited by Title VII “are inapposite because they involved customer preferences that excluded one gender from holding certain positions. . . . Here, Harrah’s appearance standards do not exclude women from employment, i.e., bartender positions, they exclude women who choose not to comply with valid company policies,” Appellee’s Answering Brief, *supra* note 12, at 33-35. The BFOQ provision only ever authorizes sex discrimination in hiring or job assignments. Hence, a presumed preference of customers for gender-stereotypical employees (and certainly such a preference whose existence is not demonstrated by extremely persuasive evidence, cf. Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination*, TEXAS L. REV. (forthcoming 2004) [hereinafter Yuracko, *Trait Discrimination*] (I discuss the version of this article that she published in the Social Science Research Network, available at <http://ssrn.com/abstract=544964>)) is legally irrelevant. The limited scope of the case law rejecting customer preferences thus accords with the limited scope of the BFOQ discrimination allowance, and Harrah’s efforts to minimize the case law are without merit.

as “merely obfuscatory.”<sup>84</sup> The fact that judges have in practice insulated many gendered norms from Title VII’s plain language has at best little independent normative force. Even if we must “ask which gender practices are to be reshaped by Title VII, in what contexts, and in what ways,” it is not clear that we should *limit* our interpretation of Title VII in response to an “assessment of the capacity of legal institutions to transform social practices.”<sup>85</sup> Post’s implication to the contrary, like Bartlett’s, reins in sweeping statutory language for fear that judges will not live up to its potential. Yet the hope to free individuals from employers’ gender-based discrimination is not utterly quixotic. As Post himself recognizes, “early in the history of Title VII there were a few decisions in which judges did attempt to use the law to displace gender norms of dress and grooming.”<sup>86</sup> This concession matters greatly, as it should give us grave doubts about the inevitability of Post’s pessimistically predicted outcomes, and thus of the need for his chastened doctrines.<sup>87</sup>

Post’s reasons for so cabining Title VII do not strike me as sufficiently persuasive. He “think[s] it clear” that a “sociological account, in which antidiscrimination law is understood as a social practice that acts on other social practices,”<sup>88</sup> “can create greater judicial accountability than can the dominant conception.”<sup>89</sup> How? According to Post,

the dominant conception strip[s] [courts] of [their] ability to acknowledge the legitimacy of gender norms, and [courts are] therefore forced to smuggle [their] acceptance of these norms into an instrumental logic that defer[s] to consumer preferences. By contrast, an approach that accept[s] the insights of the sociological account would [invite courts] explicitly to state and defend the grounds for [their] conclusions, and this in turn would [facilitate] public review and critique. Such an approach would thus render decisions [in dress or appearance cases] far more accountable for their actual judgments.<sup>90</sup>

Yet it is tremendously question-begging to suppose that there is ever any “legitimacy” behind gender norms, at least when employers coerce employees to comport with such norms. Instead, we might say that such a sociologically informed analysis should take place when deciding whether sex is a BFOQ for a particular position without making the further move of extending the scope of the BFOQ discrimination allowance beyond its narrow textual bounds. If one thinks that Title VII *should* be transformative, if one thinks that (sex) anatomy

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<sup>84</sup> Post, *supra* note 64, at 27.

<sup>85</sup> *Id.* at 26-27.

<sup>86</sup> *Id.* at 28 n. 134 (citing *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (C.D. Cal. 1972), and *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357 (C.D. Cal. 1972)).

<sup>87</sup> Post maintains that the dress and grooming cases nicely illustrate how customary gender norms are incorporated into the very meaning and texture of Title VII. “So far from striking ‘at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,’ the statute in fact negotiates the ways in which it will shape and alter existing gender norms.” *Id.* at 30 (footnotes omitted). But the meaning of a statute is not simply what lower court judges say it is, else it would never be possible to criticize non-contradictory decisions as mistaken interpretations of statutory language. And so Title VII does not “in fact” require preserving the gender norms that some judicial decisions have shielded from Congress’s law.

<sup>88</sup> *Id.* at 31.

<sup>89</sup> *Id.* at 32.

<sup>90</sup> *Id.*

is still too much destiny for too many people, might we not get more through insisting on a whole loaf in the work place?

As for Post's hope that his approach would encourage greater doctrinal coherence than one that demands more gender equality and freedom,<sup>91</sup> I would note simply that a body of law may be entirely coherent while simultaneously unjust and textually unauthorized. Coherence may be a virtue in law,<sup>92</sup> but it is not apparent to me that it should displace justice or even rule-of-law considerations (whereby judges are charged with interpreting the laws actually passed by legislatures, not ignoring statutory texts because of gendered discomfort). Post appears not even to consider that the dress code cases he considers might all be fundamentally illegitimate, and thus poor candidates for coherence-based ratification. Perhaps it is a good thing that the prevailing understanding of Title VII "prevents courts from explicitly articulating doctrinal rules that express" the perspective that "willful deviations from customary norms of gender appearance" are exempt from Title VII.<sup>93</sup> Maybe courts ought not be articulating such a perspective, even if it could *explain* decisions we see made in Title VII cases. They then may be forced to render disingenuous and perhaps incoherent decisions, which in turn could lead to even greater criticism. Then, perhaps, more courts will do the right thing and allow our sex discrimination statutes to protect gender-nonconforming individuals.<sup>94</sup>

### 3. *Kimberly Yuracko and Feminist Perfectionism*

Most recently, Kimberly Yuracko also takes up the problem of sex discriminatory dress codes in the article *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*.<sup>95</sup> Like Bartlett and Post, Professor Yuracko would limit the reach of Title VII in an essentially atextual fashion, and I respectfully reject her proposal.

In her well written, intelligent, likely to prove important, yet fundamentally misguided article, Professor Yuracko aims to reject what she terms, in a rhetorical move that stacks the deck in her favor, "the 'trait equality' approach" to Title VII's ban on sex discrimination.<sup>96</sup> Here, she uses the phrase "trait discrimination" to describe a practice of "refus[ing] to hire women or men with certain traits," even if "an employer may find a particular trait disqualifying only in individuals of one sex, e.g., crew cuts on women, long hair on men."<sup>97</sup> Those who would insist that an employer violates Title VII's stricture on sex

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<sup>91</sup> *Id.* at 33.

<sup>92</sup> See generally, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986) (advocating importance of "integrity" in legal interpretation).

<sup>93</sup> Post, *supra* note 64, at 34-45.

<sup>94</sup> Cf. David B. Cruz, *A Real "People" Person*, 19 *BERKELEY WOMEN'S L.J.* 7, 8 and n.5 (2004) (noting decisions from federal Courts of Appeals, from 2000 to 2002, in which courts took broad view of scope of legal principles against stereotype-based sex discrimination in Title VII, section 1983, and Equal Credit Opportunity Act cases).

<sup>95</sup> Yuracko, *Trait Discrimination*, *supra* note 83.

<sup>96</sup> *Id.* at 7.

<sup>97</sup> *Id.* at 5. Yuracko dubs such discrimination "sex-neutral" trait discrimination where employers "have a [sex-]neutral requirement against hiring anyone with a particular trait"; she calls it "sex-specific" trait discrimination in the circumstance described in the main text above. *Id.*



discrimination “any time it penalizes an employee for possessing a trait that the employer finds unobjectionable in employees of the other sex”<sup>98</sup> Yuracko characterizes as pursuing “trait equality.”

Before I touch upon Yuracko’s objections to “the ‘trait equality’ approach,” note well the occlusion effectuated by her nomenclature. The very term “trait discrimination” completely erases sex from the characterization of the employer’s practices.<sup>99</sup> The title of the article, *Trait Discrimination as Sex Discrimination* (my emphasis) itself suggests that trait discrimination is not itself sex discrimination, but might merely be treated that way some times. That certainly is the conclusion Yuracko advocates. But she might be on rhetorically weaker ground if instead she called an employer’s decision to fire only *men* who wear their hair long what it is, *sex* discrimination with respect to a term or condition of employment, and then advocated that in some such cases similar actions should be lawful sex discrimination under Title VII.

Why does Yuracko take the tack she does? Part of it may be philosophical disapproval of the liberalism animating many of the textually faithful approaches to Title VII with which Yuracko disagrees; much of her own work advocates a non-liberal, perfectionist approach to sex discrimination law.<sup>100</sup> To that extent, her rejection of broader approaches to Title VII would be persuasive if one thought that (her brand of) perfectionism was more normatively defensible than a more conventional liberalism.

Yet, Yuracko claims in *Trait Discrimination* not to be making a primarily normative argument about the virtues of perfectionism for deciding the appropriate contours of ideal sex discrimination law. Rather, she maintains that her “purpose is primarily positive and descriptive;” her argument, she says, is “one of statutory construction in which normative arguments are narrowly focused on fulfilling the law’s own purposes and goals.”<sup>101</sup>

This stance would be more persuasive if Yuracko gave the text of Title VII its due. Yet she does not. She concedes forthrightly that her account of the sex discrimination forbidden by the statute “is based not solely or even primarily on the text of Title VII.”<sup>102</sup> Instead, she invokes Title VII’s legislative history regarding the ban on sex discrimination – which she also concedes is sparse – and what she names (without ever demonstrating the existence of) “the broader anti-caste goals of Title VII’s sex (and race) provisions.”<sup>103</sup> Like Post, Yuracko seems intent on monovocalizing Title VII. For her, it is apparently axiomatic that the statute has but one purpose: in Yuracko’s hands, “Title VII’s goal” – singular – is (a certain form of) “substantive sex equality.”<sup>104</sup> By this

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<sup>98</sup> *Id.* at 7.

<sup>99</sup> Even characterizing one form of “trait discrimination” as “sex-specific” seems to reject the idea that this is *sex discrimination*; otherwise, Yuracko might have referred to “sex-discriminatory trait discrimination.”

<sup>100</sup> See generally, e.g., Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003).

<sup>101</sup> Yuracko, *Trait Discrimination*, *supra* note 83, at 6.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 53.

she apparently means *group* equality, equality between men and women taken as a group, rather than equal treatment of individual men and women.

Why doesn't Yuracko engage with Title VII's text? After all, it is commonplace in statutory interpretation to hold that the text Congress enacted is the best evidence of its intent or purposes. If Congress really did have (only) "anti-caste" goals in mind in adopting Title VII, we might expect to see that reflected in the text. As I discuss below,<sup>105</sup> however, the statutory text easily bears an individualistic equality of opportunity interpretation.

For Yuracko, the text of Title VII is "too sparse and indeterminate" to answer the question of when sex-discriminatory terms or conditions of employment are forbidden.<sup>106</sup> Yet this is simply an undefended assertion in this article; she hardly engages with the text.<sup>107</sup> She quotes the main prohibitory provision in a footnote,<sup>108</sup> fails to remark upon its repeated invocation of "individual[s]," and then<sup>109</sup> baldly claims that "Title VII . . . does not provide a framework for analyzing" sex-discriminatory terms or conditions of employment. Nowhere in the article does she fully quote the BFOQ provision of Title VII<sup>110</sup> let alone compare it to the basic prohibitory text of Title VII to see what light might be shed. Accordingly, Yuracko's exercise in statutory "interpretation" must at a minimum be understood as more normative than she concedes, if not viewed outright as an exercise in what federal sex discrimination law should be in light of her philosophical commitments.

#### D. Faithful Interpretation

Title VII can be understood as much more individual and anti-classificatory in its aims, and not just anti-group-subordination.<sup>111</sup> After all, Title VII forbids an employer to "discriminate against *any individual* with respect to his

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<sup>105</sup> See *infra* Section III.D.

<sup>106</sup> Yuracko, *Trait Discrimination*, *supra* note 83, at 6.

<sup>107</sup> Professor Yuracko does argue, in a section captioned "The Problem of Indeterminance," that there are often competing plausible conceptions about whether women and men are being treated differently or the same depending upon the choice of characterization of the trait required by the employer. While Yuracko makes an excellent case for philosophical indeterminacy there, it seems that at that level of analytic precision, all of law is indeterminate, which is not necessarily the most helpful proposition to advance before judges or legislators. Yuracko, *supra* note 83, at 32-48

<sup>108</sup> *Id.* at 6, n. 17 (quoting 42 U.S.C. § 2000e-2(a)(1)).

<sup>109</sup> Actually, the following claim of Yuracko's appears even before she ever quotes the text of Title VII.

<sup>110</sup> She quotes a truncated portion of the provision, again relegating it to a footnote, in a way that patently misstates its scope. According to Yuracko, "Title VII includes an exception to its general antidiscrimination mandate which [sic] permits discrimination on the basis of religion, sex, or national origin in 'instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'" Yuracko, *Trait Discrimination*, *supra* note 83, at 13, n. 29 (quoting in part 42 U.S.C. § 2000e-2(e)(1)(1998)). Yet, as this article has shown, the BFOQ discrimination allowance only textually applies to decisions to hire or employ, not to the full range of employment decisions subject to Title VII's restrictions on discrimination.

<sup>111</sup> Disparate impact doctrine, explicitly reinvigorated by the 1991 federal Civil Right Act, does suggest that Title VII has a group-disadvantage focus. But that need not, and, I submit, should not be read to preclude a simultaneous individual focus. See the next sentence in the main text.

[or her] compensation, terms, conditions, or privilege of employment, because of such *individual's . . . sex*.”<sup>112</sup> As the Supreme Court has stated, “[t]he statute’s focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.”<sup>113</sup>

Moreover, even some of the legislative history cited by proponents of group-based approaches to Title VII can be read to support a textually faithful,<sup>114</sup> equal individual liberty reading of the statute. For example, Professor Yuracko recounts the objection of Representative Griffiths to sex-discriminatory so-called “protective” legislation: “[S]ome protective legislation was to safeguard the health of women. But it should have safeguarded the health of men, also.”<sup>115</sup> While Griffiths may have been concerned about specious assertions of health risks, her prescription is consistent with the requirement of what Yuracko disparages as “the trait equality approach” – men and women must be subject to the same terms and conditions of employment, including the same “protective” policies.

Couple Title VII’s text and legislative history with the anti-classificationist turn in recent Supreme Court discrimination law, especially equal protection law.<sup>116</sup> While many critics have challenged this development on grounds that this trend makes ill sense of the greater vulnerability of subordinated populations to discrimination,<sup>117</sup> as a descriptive matter our equality doctrines are individual and anti-classificationist.<sup>118</sup> If, then, an individual woman such as Darlene Jespersen suffers an injury from a given employment practice because she is a woman, Title VII should not simply be deemed inapplicable if one thinks the practice does not generally constitute much of a burden on women *as*

<sup>112</sup> 42 U.S.C. § 2000e-2(a)(1) (2002) (emphases added). *See also* City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (making this very point about the statutory text).

<sup>113</sup> *Manhart*, 435 U.S. at 708.

<sup>114</sup> I believe that “textually faithful” is a less distorted characterization of such approaches than the subtly disparaging ‘literalist’ used by Yuracko. *See, e.g.*, Yuracko, *Trait Discrimination*, *supra* note 83, at 18 (characterizing approaches of Mary Anne Case and Taylor Flynn). *Cf. id.* at 38-39 (“One could, for example, name the trait at issue in the sexy dressing case [of an employer who refuses to hire *women* who wear sexy clothes to work] in a narrow, literalistic way as wearing particular types of clothes, i.e. [sic] low cut blouses and tight skirts.”).

<sup>115</sup> Yuracko, *Trait Discrimination*, *supra* note 83, at 4, n. 13 (quoting United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3219).

<sup>116</sup> *See, e.g.*, Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2002-09 (2000).

<sup>117</sup> *See, e.g., id.*

<sup>118</sup> Kimberly Yuracko maintains that in cases deciding whether sex is a BFOQ on gendered privacy grounds or for businesses wishing to provide (male) customers with sexual titillation, “an individualistic conception of equality of opportunity . . . offers no leverage with which to understand the courts’ decisions.” Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 152 (2004). I, however, am not greatly interested in providing an external account of this particular body of case law. I aim to offer an account of how courts *should* decide cases involving employers’ attempts to impose sex-discriminatory terms or conditions of employment. In this endeavor, particularly since the Supreme Court has not spoken to the issue, I am not constrained to accept any of the improper approaches to Title VII taken by some lower courts.

*a class*.<sup>119</sup> Title VII does not make an exception for, and we should not trust courts to determine that sex discriminatory dress requirements are, *de minimis*. If employers discriminate between their employees on the basis of sex in such fashion, that should be held unlawful regardless of whether a particular court might be inclined to conclude that the discrimination would not do much to subordinate women (or men) as a class to men (or women) as a class.

This is especially so because the sex-based imposition of differential treatment of women and men in ways that do not serve to ameliorate disadvantage (as Harrah's make-up rules cannot sensibly be said to do) can and I would argue does reinforce fundamental problems of the legal treatment of men and women: the tendency to view them as different types of persons and/or to reinforce social sex divisions (which themselves tend to be predicated upon the insisted-upon radical difference between men and women).

### CONCLUSION

There is no good reason that bartenders who are women should have to present themselves as girly. This is especially so because they are indeed expected to refuse to serve drunk customers, including ones who may be male and larger than them. While justice might best be served by a stronger autonomy-protecting rule than employees currently enjoy under federal law, it is an important step toward *equal* justice if the law can be interpreted to protect individual women from employer demands not imposed on men (and vice versa), regardless of how a majority of women (or men) might view the requirement.<sup>120</sup> Indeed, we might come to learn better what free women actually prefer, if law reduces employers' ability to use their economic power to impose markers of femininity on women.<sup>121</sup> We might come to see that many of our notions about women are made up, much like Harrah's tried to make up Darlene Jespersen.

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<sup>119</sup> It is therefore no objection to Darlene Jespersen's suit "that Jespersen has made an individual choice to not wear makeup . . . ." Appellee's Answering Brief, *supra* note 12, at 28.

<sup>120</sup> Thus, even were Harrah's correct, it would be far from dispositive if "[i]t [were] axiomatic that in modern society many women wear makeup, and that makeup is an accepted social norm." Appellee's Answering Brief, *supra* note 12, at 26.

<sup>121</sup> Cf. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1420 (1992) (contending that "this part of civil rights law has the significant social function of delegating to employers the power and authority to police and reinforce gender lines. Appearance law is disciplinary – it enforces (usually indirectly, through employer power) social norms regarding proper behavior. In particular, the law empowers employers to insist that employees conform to socially constructed norms and expectations about how the sexes should act and look") (footnote omitted).