

Prejudicial Appearances:  
The Logic Of American Antidiscrimination Law

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# Prejudicial Appearances: The Logic Of American Antidiscrimination Law

Robert Post<sup>†</sup>

It is a high honor for me to deliver a lecture established in the memory of Justice William J. Brennan, Jr. I clerked for the Justice, and I have ever since cherished him as a Master. I speak now not of his legendary personal qualities, of his warmth, empathy, humor, and generosity, but of his professional virtues. For Justice Brennan, the law was simultaneously an institution of great internal integrity and a powerful instrument of moral passion. These two perspectives are so often divorced, one from the other, that their union into a single coherent vision has been to me a continual source of profound inspiration.

When I was asked by the Brennan Center to deliver this lecture, I selected the topic of ordinances that prohibit discrimination on the basis of personal appearance. I had no particular thought of Justice Brennan's work in mind when I made this choice, for I had long been fascinated by the seemingly utopian aspirations of these regulations. As I worked my way through the subject, however, I found, much to my surprise, that at the end of the road I had once again come face to face with Justice Brennan's achievements.

One of Brennan's most important and most controversial opinions is *United Steelworkers of America v. Weber*,<sup>1</sup> in which he held in an opinion for a bare five Justices that Title VII did

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<sup>1</sup> 443 U.S. 193 (1979).

not prohibit affirmative action programs by private employers. Without *Weber*, we would live in a very different and less integrated nation than we do now, and yet *Weber* has always been vulnerable to intense attack for its use of legislative history and for its supposed betrayal of American antidiscrimination law. One way of understanding this lecture is as an invitation to comprehend the nature of Justice Brennan's accomplishment in that case.

## I

Before we can appreciate the exceptional nature of *Weber*, however, we must pursue a story that begins in Santa Cruz in January of 1992, when the City Council proposed an ordinance that would prohibit discrimination against persons on the basis of "personal appearance."<sup>2</sup> First advanced by a Santa Cruz group called the Body Image Task Force, the proposed law quickly became known in the media as "the 'purple hair ordinance' or the 'ugly ordinance.'"<sup>3</sup> It provoked an intense and raucous<sup>4</sup> controversy about the merits of what was called "anti-lookism."<sup>5</sup>

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<sup>2</sup> David Ratner, *Santa Cruz Gives Tentative OK to Law on Personal Appearance*, , Jan. 15, 1992, at A1.

<sup>3</sup> , 65-66 (1995).

<sup>4</sup> *California in Brief; Santa Cruz; Council Backs Ban on Looks Bias*, , Feb. 13, 1992, at B8.

<sup>5</sup> Editorial, *Santa Cruz' Weiridocracy*, , Jan. 21, 1992, at F2.

Anti-lookism cuts deeply into the social fabric. Social relationships characteristically transpire through the medium of appearances; an ability to interpret the many meanings conveyed by appearances is required for fluency in the language of social life. Balzac is said to have remarked that “[a] man’s mind can be divined by the way he holds his cane.”<sup>6</sup> The inevitable necessity for such divination is what led Oscar Wilde famously to quip that “[i]t is only shallow people who do not judge by appearances. The true mystery of the world is the visible, not the invisible.”<sup>7</sup> The presentation of appearances in everyday life is not merely a matter of the external surfaces of the self, for appearances are also connected to identity. A postmodern sensibility would be tempted to press this point very far, as for example does Susan Sontag when she observes that “our manner of appearing *is* our manner of being. The mask is the face.”<sup>8</sup>

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<sup>6</sup> Honore de Balzac, *quoted in* 159 (1980).

<sup>7</sup> , 22 (Isobel Murray ed., Oxford 1981) (1891).

<sup>8</sup> , 18 (1982). *See* , 141 (1990):

If gender attributes . . . are not expressive but performative, then these attributes effectively constitute the identity they are said to express or reveal. . . . If gender attributes and acts, the various ways in which a body shows or produces its cultural signification, are performative, then there is no preexisting identity by which an act or attribute might be measured . . .

The draft Santa Cruz ordinance proposed to render appearances invisible. It would do so not merely in the context of the state's treatment of its citizens, but also in the context of ordinary employment and housing transactions among private persons. It is no wonder, then, that the ordinance prompted cries of outrage. "If someone has 14 earrings in their ears and their nose—and who knows where else—and spiky green hair and smells like a skunk," commented Kathy Manoff, owner of a small restaurant, "I don't know why I have to hire them."<sup>9</sup> Newspaper editorials scored the ordinance as extending "the power of the state over private judgments that are perfectly normal discriminatory responses to human eccentricities."<sup>10</sup> Columnist Joseph Farah wondered, "[L]et's say you're a newspaper editor looking for someone to cover the police beat. An experienced professional journalist wants the job, but he shows up for the interview wearing a dress. Does he get a chance to be our ace crime reporter?"<sup>11</sup>

On the other side, supporters of the proposed ordinance insisted that it merely forbade superficial judgments based upon "stereotypes."<sup>12</sup> They argued that because the real worth of persons did not inhere in their external appearance, important decisions regarding employment and housing ought not to depend upon such an irrelevant characteristic, particularly when

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<sup>9</sup> Richard C. Paddock, *California Album; Santa Cruz Grants Anti-Bias Protection to the Ugly*, , May 25, 1992, at A3.

<sup>10</sup> Editorial, *Santa Cruz' Weirdocracy*, *supra* note 5.

<sup>11</sup> Joseph Farah, *Job Bias Law Is Stretched to Cover the Ugly*, , Feb. 7, 1992, at B7.

<sup>12</sup> David Ratner, *Appearance Law Faces 2nd Vote in Santa Cruz*, , Jan. 16, 1992, at A15.

decisions based upon appearance so often merely express “simple bigotry.”<sup>13</sup> The efforts of employers to “control the look of their workforce” were said to “smack of the same kind of mentality that kept blacks and other minorities out of the public eye for years until civil rights protections were enacted.”<sup>14</sup>

When carefully parsed, proponents of the proposed Santa Cruz ordinance made (at least) three distinct kinds of claims. The first concerns equality. Blinding employers and landlords to appearance was seen by some as a way of making everyone equal in that regard. Thus, Smiley Rogers, “a sales clerk at Bead It, a popular bead store, who ha[d] a full beard, tie[d] his long hair

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<sup>13</sup> Martha Groves, *Looks Won't Mean a Lot if Anti-Bias Law Is Approved*, L.A. Times, Jan. 24, 1992, at A3 (quoting Dawn Atkins, an anthropologist and member of the Body Image Task Force). One reporter quoted Sara Leonard, “who prefers to be called Sara Hell,” concerning the misleading nature of external appearances. Hell said

she had been turned away from restaurants and jobs because of the combined effect of her black leather, dangling skeleton earring and long lock of fuchsia hair on an otherwise shaved head.

The tattoo has not helped. She said that despite her bachelor's degree, she has had a hard time finding work. “Because I have a tattoo on my head, I'm treated like a cretin,” she said.

Katherine Bishop, *With a Résumé in Hand And a Ring in the Nose*, , Feb. 13, 1992, at A18.

<sup>14</sup> Stephen G. Hirsch, *Santa Cruz Law Could be Attacked for Vagueness; Proposed Ordinance Would Bar Bias Based on Appearance*, , Jan. 17, 1992, at 1 (referring to the views of ACLU attorney Matthew Coles). Opponents of the ordinance particularly resented this characterization, arguing that “[t]he focus of expanding and securing rights ought to be placed on those conditions truly irrelevant to a person's character and ability, such as race. But this puts hair color and skin color on the same moral plane.” James Lileks, *Equality for the, uh, Different*, , Jan. 19, 1992, at 25A.

in a ponytail and sport[ed] a button” reading “Proudly Serving My Corporate Masters,” expressed his “love” for the ordinance because “[i]t gets everyone down to an equal level.”<sup>15</sup>

The logic of effacing appearance to achieve equality is explored in Kurt Vonnegut’s short story, “Harrison Bergeron,” which begins:

The year was 2081, and everybody was finally equal. They weren’t only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211<sup>th</sup>, 212<sup>th</sup>, and 213<sup>th</sup> Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.<sup>16</sup>

Vonnegut postulates a world in which government officials make everyone equal in every respect: Those who are graceful must wear weights; those who are smart must be distracted to reduce their intelligence to normal levels; and those who are beautiful must wear masks. The goal is to create a society that is “absolutely uncompetitive.”<sup>17</sup>

Vonnegut envisions this world as a nightmare dystopia, in which human excellence, all that is fine and beautiful, has been brought “down to an equal level.”<sup>18</sup> He imagines a ballet in which the dancers are “no better than anybody else would have been . . . . They were burdened with

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<sup>15</sup> Paddock, *supra* note 9.

<sup>16</sup> Kurt Vonnegut, Jr., *Harrison Bergeron*, in 7 (Dell Publishing 1970) (1950). For another fictional study of equality and appearance, see (1960).

<sup>17</sup> Vonnegut, *supra* note 16, at 10.

<sup>18</sup> See *supra* note 15 and accompanying text.

sashweights and bags of birdshot, and their faces were masked, so that no one, seeing a free and graceful gesture or a pretty face, would feel like something the cat drug in.”<sup>19</sup> If everything is equal, Vonnegut implies, then nothing much matters anyway.

Equality in this stringent sense was never, of course, the aim of the proposed Santa Cruz ordinance. From its earliest draft, it specifically permitted employment decisions to be based on appearance if “relevant to job performance.”<sup>20</sup> The author of the ordinance could thus defend it on the grounds that “[p]eople ought to be judged on the basis of real criteria, their ability to perform the job or pay the rent, and that should be the sole criteria.”<sup>21</sup> “What this ordinance is really saying,” he explained, “is hire the best-qualified person.”<sup>22</sup> The Santa Cruz ordinance was therefore aimed not at equality, but at equal opportunity, at allowing all to compete on equal terms for the title of “best-qualified person.”

An alternative claim advanced by the ordinance’s proponents concerns personal autonomy. A person’s capacity to control the presentation of himself, through choices of hair color, tattoos, or clothing, is certainly an important form of self-expression, too precious, it was argued, to be

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<sup>19</sup> Vonnegut, *supra* note 16, at 8.

<sup>20</sup> Ratner, *supra* note 2.

<sup>21</sup> City Councilman Neal Coonerty, *quoted in* Paddock, *supra* note 9.

<sup>22</sup> City Councilman Neal Coonerty, *quoted in* Martha Groves, *supra* note 13.

controlled by employers or landlords.<sup>23</sup> One can recognize this theme in the attitude of a performance artist named Gabriel at the city council meeting considering the Santa Cruz ordinance:

A striking-looking woman with a partially shaved head and a thin black diagonal line drawn across her face, she said she was tired of being portrayed as an extremist.

“It’s regarded as a threat,” she said.

She rejected those who would judge her and sought to up the ante.

“I wish I had blue hair tonight,” she said. “There’s such a national fear of people having blue hair.”<sup>24</sup>

The theme of self-expression, however, rests on the seemingly paradoxical notion that persons have the right both to use their appearance to communicate meanings, including messages of “threat,” and simultaneously to require others to ignore these messages. If we

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<sup>23</sup> This theme is quite common in the numerous constitutional cases that challenge the right of the state to set standards regulating hair length. The classic statement of the position is by no less a figure than Judge John Minor Wisdom:

To me the right to wear one’s hair as one pleases, although unspecified in our Bill of Rights, is a “fundamental” right protected by the Due Process Clause. Hair is a purely personal matter—a matter of personal style which for centuries has been one aspect of the manner in which we hold ourselves out to the rest of the world. Like other elements of costume, hair is a symbol: of elegance, of efficiency, of affinity and association, of non-conformity and rejection of traditional values. A person shorn of the freedom to vary the length and style of his hair is forced against his will to hold himself out symbolically as a person holding ideas contrary, perhaps, to ideas he holds most dear. Forced dress, including forced hair style, humiliates the unwilling complier, forces him to submerge his individuality in the “undistracting” mass, and in general smacks of the exaltation of organization over member, unit over component, and state over individual. I always thought this country does not condone such repression.

Karr v. Schmidt, 460 F.2d 609, 621 (5th Cir. 1972) (Wisdom, J., dissenting).

<sup>24</sup> Jane Meredith Adams, *California City Faces Raging Dress Code War*, Feb. 16, 1992, at C4.

concentrate on employment relationships, we can see that the self-determination of the employee must be set against the autonomy of the employer to present a particular image of her business. Employers thus quite reasonably objected to the theme of self expression on the grounds that “[i]f someone looks and acts as if they don’t care what others think, they risk being rejected.”<sup>25</sup>

This line of logic was apparently convincing to the drafters of the Santa Cruz ordinance, for in April 1992, they ultimately enacted an ordinance that prohibited discrimination on the basis of “physical characteristic,” which was defined as “a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including physical mannerisms.”<sup>26</sup> As actually passed, therefore, the Santa Cruz ordinance proscribed discrimination based only on aspects of bodily appearance that were beyond a person’s control. Employers were thus free to evaluate employees based upon the messages conveyed by their choice of clothes, tattoos, or artificial hair color.<sup>27</sup>

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<sup>25</sup> Businessman Noel Smith, *quoted in id.*

<sup>26</sup> . 92-11, §§ 9.83.01; 9.83.02(13) (19??) (“An Ordinance of the City of Santa Cruz Adding Chapter 9.83 to the Santa Cruz Municipal Code Pertaining to the Prohibition of Discrimination”).

<sup>27</sup> The District of Columbia, it should be noted, does prohibit discrimination on the basis of “personal appearance,” which it defines as “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner of style of personal grooming, including, but not limited to, hair style and beards.” §§ 1-2501; 1-2502(22) (19??).

As reformulated, the Santa Cruz ordinance essentially rests on a third claim, that of fairness. Just as it is “simple bigotry” to discriminate against persons merely because of the accident of race, so it is unjust to discriminate against persons merely because of physical characteristics imposed upon them by birth, accident or disease. The case is different, however, if these characteristics are actually relevant to the requirements of a job. Thus, the ordinance forbids only “arbitrary discrimination . . . based on . . . physical characteristic,” that is, discrimination not required by “a bona fide occupational qualification.”<sup>28</sup>

To capture the full force of this logic, one need only recall the wrenching letter to Nathanael West’s *Miss Lonelyhearts*:

*Dear Miss Lonelyhearts--*

*I am sixteen years old now and I dont know what to do and would appreciate it if you could tell me what to do. When I was a little girl it was not so bad because I got used to the kids on the block makeing fun of me, but now I would like to have boy friends like the other girls and go out on Saturday nites, but no boy will take me because I was born without a nose—although I am a good dancer and have a nice shape and my father buys me pretty clothes.*

*I sit and look at myself all day and cry. I have a big hole in the middle of my face that scares people even myself so I cant blame the boys for not wanting to take me out. My mother loves me, but she crys terrible when she looks at me.*

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<sup>28</sup> , *supra* note 26, at §§ 9.83.01; 9.83.08(6) (emphasis added). The full list of the ordinance’s prohibitions reads:

It is the intent of the city council . . . to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic.

*Id.* at § 9.83.01.

*What did I do to deserve such a terrible bad fate? . . . Ought I commit suicide?*

*Sincerely yours,  
Desperate<sup>29</sup>*

If the law can't supply "Desperate" a boyfriend, at least it can make sure that frightened employers don't deprive her of the equal opportunity to obtain a job for which she is qualified.

One need not evoke extreme cases of grotesque disfigurement in order to appreciate the problem. Studies abound that attractive persons receive manifold "undeserved" benefits in life as compared to unattractive persons: juries treat them more favorably,<sup>30</sup> as do teachers<sup>31</sup> and strangers.<sup>32</sup> A recent study in *The American Economic Review* demonstrated that "lookism" exerts a powerful force on the labor market, so that for both men and women "wages of people with below-average looks are lower than those of average looking workers; and there is a

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<sup>29</sup> 170-71 (New Directions Publishing 1962) (1933).

<sup>30</sup> See Cookie Stephan & Judy Corder Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 149 (1977).

<sup>31</sup> See Margaret M. Clifford & Elaine Walster, *The Effect of Physical Attractiveness on Teacher Expectations*, 46 248 (1973).

<sup>32</sup> See Karen Dion, Ellen Berscheid, & Elaine Walter, *What is Beautiful is Good*, 24 285 (1972); David W. Wilson, *Helping Behavior and Physical Attractiveness*, 104 313 (1978). For a general discussion, see , (1985).

premium in wages for good-looking people.”<sup>33</sup> The “wage differential between attractive and ugly people is about 10% for both sexes.”<sup>34</sup>

Facts like these have led at least one legal article to argue that because “appearance, like race and gender, is almost always an illegitimate employment criterion . . . that . . . is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit,” the law should “protect people against employment discrimination on the basis of largely immutable aspects of bodily and facial appearance.”<sup>35</sup>

When the respected columnist TRB of *The New Republic* read this article, he was both intrigued and troubled. He was intrigued because he recognized that “the logic is impeccable”: “Appearance, like race and sex and physical handicap, is an immutable characteristic. Like these other disadvantages, an unattractive appearance usually has no connection to your ability to do the job. Therefore, discrimination on this basis is just as unfair and should be outlawed.”<sup>36</sup> Yet TRB was also troubled by the vague sense that this impeccable logic was somehow spinning out

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<sup>33</sup> Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 *1174*, 1174, 1192 (1994).

<sup>34</sup> Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, Mar. 16, 1998, at 18.

<sup>35</sup> Note, Facial Discrimination: *Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 *2035*, 2035 (1987).

<sup>36</sup> TRB, *The Tyranny of Beauty*, 197, Oct. 12, 1987, at 4.

of control. What about “prejudice on the basis of a whiny voice?” he asked. Or “[w]hat about ‘grouch liberation?’”<sup>37</sup>

There are, of course, many reasons to be concerned about the actual operation of laws prohibiting discrimination based upon appearance. If one asks about the enforcement of such laws, for example, the potential for oppressive state intrusion can come to seem quite ominous. But at root TRB was unsettled not because of these practical difficulties, but because of an inarticulate, nagging suspicion that laws prohibiting discrimination based upon appearance were somehow a *reductio ad absurdum* of the basic logic of American antidiscrimination law. Although powerfully compelling when applied to race or gender, that same logic seemed to lose its footing when applied to appearance.

In the remainder of this lecture, I would like to pursue TRB’s nagging doubt. It is my hope that this inquiry can expose important aspects of the fundamental logic of American antidiscrimination law that would not quite be visible when viewed from other, more normalized perspectives. I will explore these questions chiefly in the context of laws prohibiting discrimination in employment, which, like the Santa Cruz ordinance, apply to private persons. But I shall also feel free to refer to antidiscrimination principles as they appear in constitutional law.

## II.

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<sup>37</sup> *Id.*

Antidiscrimination law in America characteristically presents itself according to a very definite logic. It is a logic that springs from a firm sense of the social reality of prejudice. Antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.

The unfairness of prejudice is particularly manifest when it is directed against immutable traits, like race or sex. But prejudice can be unfair even if it is directed against traits that are within the control of a person. American antidiscrimination laws, for example, typically prohibit discrimination based upon religion and marital status, even though neither are “immutable” traits. In this regard, obesity is an interesting borderline case. It is plain that there is widespread prejudice against the obese,<sup>38</sup> so that obesity is a deeply stigmatizing characteristic. Antidiscrimination laws sometimes forbid discrimination based upon obesity when (and only when) the characteristic is conceptualized as a disability that is beyond the control of a person,<sup>39</sup>

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<sup>38</sup> See Werner J. Cahnman, *The Stigma of Obesity*, 9 283 (1968). One study in *The New England Journal of Medicine* purported to show that similarly qualified applicants to prestigious colleges were significantly less likely to be admitted if they were obese. Helen Canning & Jean Mayer, *Obesity—It’s Possible Effect on College Acceptance*, 275 1172 (1966).

<sup>39</sup> See, e.g., *Philadelphia Elec. Co. v. Commonwealth of Pa.*, Pa. Human Relations Comm’n, 448 A.2d 701, 707 (Pa. 1982); *Greene v. Union Pacific R. Co.*, 548 F.Supp. 3, 5 (W.D. Wash. 1981); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050, 1063-65 (1993).

sometimes they prohibit such discrimination if obesity is categorized as a disability, even if the disability is partially within the control of a person;<sup>40</sup> and sometimes, as in the case of the Santa Cruz ordinance, antidiscrimination laws flatly forbid discrimination based upon “weight.”<sup>41</sup> Such statutes regard prejudice against the obese as unfair even if obesity is completely within the voluntary control of a person. Although this is not the occasion to elaborate the point, I suspect that legal judgments of unfairness depend upon whether a stigmatizing attribute is viewed as somehow essential or integral to a person, like their religion.

Prejudice against a stigmatizing characteristic, like race or sex, can manifest itself through invidious judgments of the “differential worth” of persons who display the characteristic,<sup>42</sup> or it can manifest itself through “faulty” judgments about the capacities of such persons.<sup>43</sup> American antidiscrimination law understands itself as negating such prejudice by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment. The classic constitutional formulation of this perspective is Justice White’s opinion for the Court in

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<sup>40</sup> See, e.g., *Cook v. Rhode Island*, 10 F.3d 17, 23-24 (1st Cir. 1993); *State Division of Human Rights v. Xerox Corp.*, 491 N.Y.S.2d 106, 110 (N.Y. 1985).

<sup>41</sup> See , *supra* note 26. The state of Michigan prohibits employers from discriminating based upon “religion, race, color, national origin, age, sex, height, weight, or marital status.” , Title 37, § 37.2202(1)(a) (19??).

<sup>42</sup> Paul Brest, *The Supreme Court, 1975 Term: Foreward: In Defense of the Antidiscrimination Principle*, 90 1, 7 (1976).

<sup>43</sup> , 9 (1954).

*Cleburne v. Cleburne Living Center, Inc.*,<sup>44</sup> in which he writes that statutory classifications of “race, alienage, or national origin”

are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. . . .

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. “[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society”. . . . Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.<sup>45</sup>

Judicial interpretation of Title VII, which is the portion of the federal Civil Rights Act of 1964 that prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin,”<sup>46</sup> displays a similar orientation. “In passing Title VII,” the Court has said, “Congress made the simple but momentous announcement that sex, race, religion, and national

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<sup>44</sup> 473 U.S. 432 (1985).

<sup>45</sup> *Id.* at 440-41 (citation omitted).

<sup>46</sup> Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. §2000e-2(a).

origin are not relevant to the selection, evaluation, or compensation of employees.”<sup>47</sup> The point of rendering such factors irrelevant is to “target” and eliminate “stubborn but irrational prejudice.”<sup>48</sup> “In our society we too often form opinions of people on the basis of skin color, religion, national origin, . . . and other superficial features. That tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.”<sup>49</sup>

State antidiscrimination statutes are typically interpreted in a similar manner. Thus, the Michigan Supreme Court has observed that

[c]ivil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class to which the person belongs. The Michigan civil rights act is aimed at “the prejudices and biases” borne against persons because of their membership in a certain class . . . and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices or biases.<sup>50</sup>

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<sup>47</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion). Hence, Title VII’s proscription of discrimination based upon sex has been taken to mean that employers are forbidden from taking “gender into account in making employment decisions . . . . [G]ender must be irrelevant to employment decisions.” *Id.* at 239-40.

<sup>48</sup> Lam v. University of Hawaii, 40 F.3d 1551, 1563 (9th Cir. 1994).

<sup>49</sup> Donohue v. Shoe Corporation of America, 337 F.Supp. 1357, 1359 (C.D. Calif. 1972).

<sup>50</sup> Miller v. C.A. Muer Corp., 420 Mich. 355, 362-63 (1984) (footnote citation omitted).

The Michigan Court of Appeals has noted that “[c]ivil rights legislation has traditionally been enacted to enable individuals to have access to opportunity based upon individual merit and qualifications and to prohibit decisions based upon irrelevant characteristics.”<sup>51</sup>

Taken as a whole, American antidiscrimination law thus follows a simple but powerful logic. In the context of race-based discrimination, Paul Brest has authoritatively summarized this logic as an “antidiscrimination principle” that “lies at the core of most state and federal civil rights legislation,” and that “disfavor[s] classifications and other decisions and practices that depend on the race . . . of the parties affected.”<sup>52</sup> As a result, American antidiscrimination law typically requires employers, except in very exceptional and discrete circumstances like affirmative action,<sup>53</sup> to make decisions as if their employees did not exhibit forbidden

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<sup>51</sup> *Micu v. City of Warren*, 147 Mich. App. 573, 582 (1985).

<sup>52</sup> Brest, *supra* note 42, at 1. Brest writes: “The antidiscrimination principle fills a special need because . . . race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.” *Id.* at 7.

<sup>53</sup> *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Another important exception to this generalization is the line of Title VII analysis known as “disparate impact.” Following this analysis, a plaintiff need only show that a facially neutral employment practice has a disproportionately adverse impact on a protected class.

Once that threshold is reached, the burden of persuasion shifts to the employer to demonstrate that the challenged practice is job-related and justifiable as a matter of business necessity. Finally, the plaintiff has an opportunity to prove that there exists an alternative practice that would serve the employer’s objectives equally well but have a less severe adverse effect.

characteristics, as if, for example, employees had no race or sex. This is what underwrites the important trope of “blindness” that “has played a dominant role in the interpretation of antidiscrimination prohibitions.”<sup>54</sup> Blindness renders forbidden characteristics invisible; it requires employers to base their judgments instead upon the deeper and more fundamental grounds of “individual merit” or “intrinsic worth.”

In essence, the logic of American antidiscrimination law requires employers to regard their employees as though they did not display socially powerful and salient attributes, because these attributes may induce irrational and prejudiced judgments. Each time the law adds another proscribed category of discrimination, it renders yet another attribute of employees invisible to their employers. In recent years, the list of such proscribed categories has greatly expanded. The Santa Cruz ordinance, for example, prohibits “arbitrary discrimination” based upon “age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic.”<sup>55</sup>

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Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 2009, 2019 (1995). Disparate impact analysis does not require any showing that employer decisions were “based upon” a forbidden category, or had any discriminatory intent, and it may in fact require employers to take forbidden categories into account so as to ensure neutrality of impact.

<sup>54</sup> Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 235, 235 (1971).

<sup>55</sup> , *supra* note 26, at § 9.83.01.

The Santa Cruz ordinance demands that employers interact with their employees in ways that are blind to almost everything that is normally salient in everyday social life. It is not clear, however, what such blindness actually entails. We can conceive what it would mean to treat someone in a way that renders their race irrelevant; we think we know (although I have my doubts) what it would mean to treat someone in a way that renders their sex irrelevant; but I suspect that we have almost no idea what it would mean physically to encounter a person and nevertheless to treat him in a way that renders irrelevant his face, voice, body, and gestures.<sup>56</sup> In what sense does a person without an appearance remain a person?

From this perspective, ordinances precluding discrimination based upon appearance are unsettling because they seem to preclude any ordinary form of human interaction. So much has been abstracted away from the employee that, with respect to the employer, the employee is transported into something like what John Rawls has called an “original position” behind a “veil of ignorance.”<sup>57</sup> For reasons that are analogous to antidiscrimination law, Rawls employs the veil of ignorance to strip away all “accidents of natural endowment and . . . contingencies of social circumstance”<sup>58</sup> so as to remove what “sets men at odds and allows them to be guided by their prejudices.”<sup>59</sup>

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<sup>56</sup> We are, however, learning something of the deep puzzles caused by encountering bodiless persons in the virtual space of the internet. For a fascinating study, see , (1995).

<sup>57</sup> 136-37 (1971).

<sup>58</sup> *Id.* at 15.

The original position is for Rawls primarily a heuristic device to force us to focus on the “equality between human beings as moral persons,”<sup>60</sup> which is to say, “as rational beings with their own ends.”<sup>61</sup> Sometimes it is said that antidiscrimination law abstracts forbidden attributes for an analogous reason, which is to force employers to recognize the “intrinsic worth” of employees.<sup>62</sup> But the difficulty with this account is that employers must make distinctions between employees, and “intrinsic worth” is by hypothesis equal. So American antidiscrimination law must strip away prejudicial contingencies of social circumstance for a different reason.

In fact what antidiscrimination law seeks to uncover is an apprehension of “individual merit.”<sup>63</sup> That is why the author of the Santa Cruz ordinance understood it as forcing employers

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<sup>59</sup> *Id.* at 19. Behind the veil of ignorance, “no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.” *Id.* at 137.

<sup>60</sup> *Id.* at 19.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *See, e.g., supra* note 49 and accompanying text.

<sup>63</sup> *See, e.g., supra* note 51 and accompanying text; *United States v. Burke*, 504 U.S. 229, 247 (1992) (Souter, J., concurring); *University of California v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall and Blackmun, JJ., joint opinion); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994); *Martini v. Fannie Mae*, 977 F.Supp. 464, 479 (D.D.C. 1997).

to judge employees “on the basis of real criteria,” which “is their ability to perform the job.”<sup>64</sup> American antidiscrimination law pushes employers toward functional justifications for their actions. In the area of Title VII law known as disparate treatment, for example, employers’ reasons for particular decisions disadvantaging employees are scrutinized to determine whether they are a “pretext for the sort of discrimination prohibited” by the statute.<sup>65</sup> In such circumstances, employers have strong incentives to articulate “legitimate reasons” for their decisions, and these reasons are characteristically connected to the achievement of a proper “business goal.”<sup>66</sup>

In the area of Title VII law known as disparate impact, in which facially neutral selection procedures that have disproportionately adverse impacts on protected groups are assessed for bias, the law permits employers to defend procedures by demonstrating that they “are demonstrably a reasonable measure of job performance.”

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<sup>64</sup> See *supra* note 21.

<sup>65</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

<sup>66</sup> *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Of course, as a matter of technical law, “Title VII does not make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination based upon an employee’s protected class characteristics.” *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312, 1319 (10th Cir. 1992). I mean to imply only that Title VII pushes very hard in the direction of forcing employers to explain their decisions in light of rational business considerations, as these will prove to be the most plausible and convincing defenses to charges of discriminatory animus.

Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.<sup>67</sup>

In the area of Title VII law known as “bona fide occupational qualification” (“BFOQ”), in which certain forms of overt discrimination based upon sex or national origin can be justified, the Court has held that the test is whether the proposed BFOQ relates “to the ‘essence’ . . . or to the ‘central mission of the employer’s business.’”<sup>68</sup> Within the area of federal constitutional law, state classifications based upon race are acceptable only if they are “justified by a compelling governmental interest and . . . ‘necessary to the accomplishment’ of their legitimate purpose.”<sup>69</sup>

Functional rationality, whether assessed by stricter or more deferential tests, is thus broadly regarded by American antidiscrimination law as a justification for employer decisions. The longer the list of attributes excluded by antidiscrimination law from employer consideration, the more perfectly the law pushes employers toward considerations of pure instrumental reason. From this perspective, employees can come to be seen merely as means for accomplishing the

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<sup>67</sup> Griggs v. Duke Power, 401 U.S. 424, 436 (1971).

<sup>68</sup> International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991) [hereinafter “Automobile Workers v. Johnson Controls, Inc.”] (*quoting* Dothard v. Rawlinson, 433 U.S. 321, 333, and Western Airlines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

<sup>69</sup> Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (*quoting* McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

managerial purposes of an employer's business.<sup>70</sup> For this reason, John Schaar has criticized the equality of opportunity celebrated by antidiscrimination laws as resting on a conception of the person that reduces her "to a bundle of abilities, an instrument valued according to its capacity for performing socially valued functions with more or less efficiency."<sup>71</sup>

The image that most perfectly captures this thrust of antidiscrimination laws is that of the orchestra audition. Since about the 1970s, American orchestras have, in order to overcome ingrained sex-discrimination, auditioned musicians by requiring them to play behind opaque screens. Sometimes orchestras use rugs "to muffle the sound of footsteps that could betray the sex of the candidate," or sometimes a personnel manager "may ask a woman to take off her shoes and he provides the 'compensating footsteps.'"<sup>72</sup> In this way, the race, color, religion, sex, national origin, and appearance of the musician is completely masked behind a veil of ignorance,

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<sup>70</sup> It is interesting to note in this regard that Rawls explicitly argues that "the concept of rationality" appropriate to the original position "must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends." , *supra* note 57, at 14.

<sup>71</sup> , *Equality of Opportunity and Beyond*, in 203 (1981).

<sup>72</sup> n.19 National Bureau of Econ. Research Working Paper No. 5903, 1997). *See also American Orchestras: All Ears*, , Nov. 30, 1996, at 89.

so that employment decisions are made almost entirely<sup>73</sup> on the basis of the pure production of sound. The musician becomes a perfectly disembodied instrument.

The image of the orchestra audition distills the logic of American antidiscrimination law. Four aspects of that logic require emphasis. First, it is no small irony that American antidiscrimination law, which springs from the noble liberal impulse to protect persons from the indignities of prejudicial mistreatment, should in the end unfold itself according to a logic that points unmistakably toward the instrumentalization of persons. If liberalism seeks to attribute equal dignity to all persons on the basis of a pre-social and “*universal human potential*,”<sup>74</sup> American antidiscrimination law, in the context of employment, strangely imagines itself as transmuting persons at the very moment of their social manifestation into the object of Weberian rationalization.

Second, the audition screen is understood to counteract sex discrimination because it is assumed that musicianship is not intrinsically connected to gender. We use the screen because we believe that how persons make music does not depend upon their sex; some women and some men are good musicians, and some are not. The screen permits us to focus on the pure trait of musicianship, without the distraction of gender. In Europe, where “blind auditions are still anathema,” this assumption is disputed; it is claimed “that women change an orchestra’s ‘morals’

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<sup>73</sup> The screen is typically removed “in the final round,” so that the conductor can observe “bad playing habits.” See *American Orchestras: All Ears*, *supra* note 72, at 90.

<sup>74</sup> Charles Taylor, *The Politics of Recognition*, in 41 (Amy Gutmann ed., 1994).

and its ‘sound.’”<sup>75</sup> Our own use of the screen thus reflects a particular historical understanding of the relationship between job performance and gender. We tend to presume that instrumental action is, in Habermas’s phrase, “context-free,”<sup>76</sup> so that successful job performance is conceptualized within antidiscrimination law as logically and practically distinct from potentially stigmatizing characteristics, like sex or race. These characteristics are figured as superficial and fundamentally unconnected to achievement; social arrangements that are instrumentally rational are concomitantly seen as non-discriminatory.

Third, the logic of invisibility exemplified by the audition screen can have powerful and constructive consequences. Use of the audition screen vastly increased the number of female musicians in American orchestras.<sup>77</sup> Antidiscrimination law understands itself as *transformative*, as fundamentally altering existing social arrangements.<sup>78</sup> But this project requires us

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<sup>75</sup> *American Orchestras: All Ears*, *supra* note 72, at 90. Before simply discounting European sensibilities in this matter, we should recall the “perennial question” in the United States of whether the race of a jazz musician affects the quality of his music. *See, e.g.*, Henry Louis Gates, Jr., “Authenticity,” *or the Lesson of Little Tree*, , Nov. 24, 1991, at 1.

<sup>76</sup> 93 (Jeremy J. Shapiro trans., 1970).

<sup>77</sup> , *supra* note 72, at 23. In Detroit, however, controversy arose about the use of the screen because the Detroit Symphony Orchestra “felt constrained in its efforts to include more African American musicians.” *Sex Discrimination: Economists Find Switch to Blind Auditions Boosted Women’s Ranks in Major Orchestras*, , July 15, 1997, at A-2.

<sup>78</sup> On the transformative thrust of antidiscrimination law, see 4-10 (1996).

imaginatively to project ourselves into alternative social circumstances. Blindness, whether enforced by a screen or by the law, can be useful and effective in this regard.

Fourth, the audition screen itself is an essentially artificial device, serviceable only in discrete, bounded, and exceptional circumstances. It cannot be generalized. Once hired, a musician must step from behind the screen, disclose her body and her gender, and live her professional life in the full glare of social visibility. At that point, her protection from prejudice in the conditions of her employment will lie in the logic of willful blindness legally imposed by antidiscrimination law.

The 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. Yet I strongly suspect that if one were to ask those who participate in the development and application of antidiscrimination law to explain the thrust of their enterprise, something very close to the story I have sketched will emerge, whether the interlocutor is a local councilperson drafting a town ordinance or a federal judge interpreting constitutive statutes like Title VII.

In the remainder of this lecture, I shall argue that this story, which I shall call the *dominant conception* of American antidiscrimination law, 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.

To see why this is so, we need to remind ourselves that in everyday life persons mostly inhabit neither the abstractions of an original position nor the "context-free" objectification of

perfect functionality. They live instead in a social world that springs from history and that creates identities founded upon contingent facts of socialization and culture.<sup>79</sup> American antidiscrimination law singles out for special scrutiny specific categories like race, gender, or appearance precisely because in our world these categories are socially salient and meaningful. We treat people differently depending upon whether they are men or women, black or white, beautiful or ugly. We do so because we have been socialized into a culture in which these differences matter, and matter in systematic ways. We might for the moment think of these systematic differences as social practices or norms within which categories like race, gender and beauty acquire their significance.<sup>80</sup>

The law is itself a social institution. It does not spring autochthonously from an “original position” or from the discipline of instrumental reason. Law is made by the very persons who participate in the social practices that constitute race, gender, and beauty. It would be astonishing, therefore, if American antidiscrimination law could transcend these categories, if it

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<sup>79</sup> For a discussion of the relationship between identity and contingent facts of socialization and social structure, see 3-15, 51-67 (1995).

<sup>80</sup> For an unforgettable historical description of the nature of the “structure” of such practices, see 244-323, 326-27 (1998).

could operate in a way that rendered them truly irrelevant.<sup>81</sup> Yet that is exactly what the dominant conception asks us to believe.

A much more plausible picture is that antidiscrimination law is itself a social practice, which regulates other social practices, because the latter have become for one reason or another controversial. It is because the meaning of categories like race, gender, and beauty have become contested that we seek to use antidiscrimination law to reshape them in ways that reflect the purposes of the law. We might summarize this perspective by observing that antidiscrimination law always begins and ends in history, which means that it must participate in the very practices that it seeks to alter and to regulate.<sup>82</sup>

In the next section of my lecture, I would like to illustrate this conclusion by discussing the example of Title VII's prohibition against discrimination on the basis of sex. I choose this example because the subject is especially rich and because gender conventions often turn so crucially on matters of appearance.<sup>83</sup> In the fifth and penultimate section of my lecture, I will say a few words about the practical implications of thinking about antidiscrimination law in this way, as distinct from the logic of the dominant conception.

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<sup>81</sup> See Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 *1588*, 1591 (1997).

<sup>82</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *1111* (1997).

<sup>83</sup> On the question of gender and appearance, see 15-16 (1997).

Title VII forbids employment decisions that “discriminate against any individual . . . because of such individual’s . . . sex,”<sup>84</sup> and it also “prohibits sex-based classifications in terms and conditions of employment . . . that adversely affect an employee’s status.”<sup>85</sup> This language is quite sweeping, and it is often said that the object of Title VII is “to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.”<sup>86</sup> This is interpreted to include “both real and fictional differences between women and men.”<sup>87</sup> Thus, for purposes of

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<sup>84</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>85</sup> *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991). The statute reads:

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) 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.

42 U.S.C. §2000e-2(a).

<sup>86</sup> *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (*quoting City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (*quoting Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). “The Court has . . . held that employment action governed by gender stereotypes violates Title VII.” Note, *The Supreme Court: Leading Cases*, 112 . 122, 333 (1998).

<sup>87</sup> *Manhart*, 435 U.S. at 707 (1978).

Title VII, “even a true generalization about” sex differences “is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”<sup>88</sup>

“Generalizations” and “stereotypes” of this kind are, of course, the conventions that underwrite the social practice of gender. To eliminate all such generalizations and stereotypes would be to eliminate the practice. This ambition reflects the goal of the dominant conception, which is to disestablish the category of sex and to replace it with the imperatives of functional rationality.<sup>89</sup> Title VII recognizes these imperatives by providing that an employer may “discriminate on the basis”<sup>90</sup> of sex only “in those certain instances where . . . sex . . . is a bona fide occupational qualification (“BFOQ”) reasonably necessary to the normal operation of that particular business or enterprise.”<sup>91</sup>

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<sup>88</sup> *Id.* at 708.

<sup>89</sup> Title VII has been interpreted “to mean that gender must be irrelevant to employment decisions.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (Brennan, J., plurality opinion). “When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute’s legislative history.” *Id.* at 243.

<sup>90</sup> *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991).

<sup>91</sup> 42 U.S.C. §2000e-2(e)(1). The statute reads:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide

It was quickly recognized that the BFOQ exception had to be “interpreted narrowly”<sup>92</sup> or the transformative thrust of Title VII would be entirely blunted. This was accomplished by rejecting BFOQ exemptions in cases where the functional requirements of a job demanded capacities that could be conceptualized as only contingently related to sex, which is to say as statistically distributed between the sexes. The paradigmatic example is the refusal to grant a BFOQ exemption to an employer who claims that women should not be hired for particular positions because “the arduous nature of the work-related activity renders women physically unsuited for the jobs.”<sup>93</sup> Because strength can be seen to be statistically distributed between the sexes, so that some women and some men have strength, and some do not, courts hold that such a classification by sex constitutes unlawful discrimination. They explain that the purpose of Title VII is “to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work”; it is therefore a violation of Title VII “if a male employee may be appointed to a particular position on a showing that he is physically

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occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

<sup>92</sup> Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. §1604.2(a) 19??).

<sup>93</sup> *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223 (9th Cir. 1971). The Court offered as an example of a legal BFOQ the hiring of a woman “for the position of a wet-nurse.” *Id.* at 1224.

qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification.”<sup>94</sup>

This perspective marks a significant alteration of traditional gender roles. It essentially severs the connection between certain kinds of capacities and sex, and it constructs a special kind of legal subject, which is the bearer of these capacities and as to which sex is irrelevant.<sup>95</sup> This legal subject is the “individual,” who is seen as the beneficiary of the equal opportunity promised by Title VII. “The 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>96</sup> EEOC regulations provide that “[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.”<sup>97</sup>

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<sup>94</sup> *Id.* at 1225. EEOC regulations provide that a BFOQ exception should not be granted where “the refusal to hire an individual” is “based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship.” 29 C.F.R. §1604.2(a)(1)(ii) (19??).

<sup>95</sup> “Title VII’s traditional focus has been to prohibit employer policies and practices that treat workers differently based on gender-based expectations of who men and women are supposed to be.” Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Harvard Law Review* 1683, 1738 (1998).

<sup>96</sup> *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978).

<sup>97</sup> 29 C.F.R. §1604.2(a)(1)(ii) (19??).

Under the influence of the dominant conception, courts have interpreted the statutory focus on “individuals” as requiring the creation of legal subjects whose capacities bypass gender conventions and attach directly to the “context-free” logic of instrumental reason. Judicial rhetoric envisions “individuals” who exist entirely outside of the historical contingencies of received gender norms. In actual life, however, persons always inhabit historical contingency; they neither originate behind a veil of ignorance, nor do they subsist within the asocial environment of a “context-free” functional rationality. Because of the particular facts of our history, we do not encounter in everyday interactions sexless “individuals,” but rather men and women. Sex is thus pervasively important in our understanding of the capacities of persons. This is as true for those who make and apply the law as it is for those whom the law seeks to regulate. Like all legal interventions, Title VII is firmly embedded within this historical context.

It is therefore implausible to read Title VII as mandating that gender conventions be obliterated. It makes far more sense to interpret the statute as seeking to alter the particular meanings of these conventions as they are displayed in specific contexts. On this account, Title VII would in the context of employment require us to sever the connection between gender and some capacities, like strength, but not to eliminate gender as such. In contrast to the dominant conception, this way of conceptualizing the statute would not require us to imagine a world of sexless individuals, but would instead challenge us to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning. The difference between the two perspectives can be made visible by examining how Title VII deals with the question of customer preferences.

It might be said that the essential purpose of any business is to satisfy its customers and thereby to make a profit. But if customers participate in the same gender practices that Title VII seeks to modify, business decisions seeking to gratify customers will undermine the transformative thrust of Title VII. So, for example, soon after the enactment of the statute an armored car company sought to obtain a BFOQ exception for its policy of refusing to hire women courier guards on the grounds that “many of its customers would deny it business if [it] used women guards, since the customers would feel that women could not provide the degree of security needed.”<sup>98</sup> The company’s request evoked the ideal of functional rationality, because it argued that a BFOQ was necessary in order to maximize profits. Yet the request was controversial because it revealed a potential and disturbing tension between the ideal of gender blindness and functional rationality. It indicated that in a world of historically given gender conventions, functional rationality may in some circumstances actually reinforce traditional gender understandings.

We might better grasp the deep implications of the armored car company’s request by returning to our image of the orchestra audition. The company’s request suggests that the image may mislead us because it too quickly conflates the sex-blindness created by a veil of ignorance with a purified form of instrumental rationality. The whole point of the audition screen, after all, is to remove potential prejudice that might interfere with a more accurate appreciation of the quality of a musician’s performance. But if that quality were actually dependent upon a

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<sup>98</sup> EEOC Decision No. 70-11 (July 8, 1969), EEOC Decisions (CCH), ¶6025, at 4048 (1969).

musician's sex, if men in fact made better music because of their sex, then the screen would no longer serve this function. We would thus be put to a choice. Either we could continue to seek the best orchestra possible, fully knowing that this pursuit would incorporate sex-related traits, or we could sacrifice the quality of our orchestra in order to pursue a norm of sex-equality.<sup>99</sup>

In effect, the request of the armored car company was for the EEOC to adopt the first option. But notice that under either option the screen would be rendered superfluous. Under the first option, hiring the best possible orchestra would require knowing the sex of musicians, so that the ideal of sex blindness would be trumped by the imperatives of instrumental rationality. Under the second option, the goal of hiring specific numbers of female and male musicians would trump the ideal of sex blindness in the name of sex equality. In either case, the screen would have ceased to serve a useful function.

This illustrates the profound way in which both the ideal of sex-blindness and the dominant conception presuppose a certain relationship between potentially stigmatizing characteristics like sex (or race) and instrumental rationality. Sex blindness does not make sense unless these characteristics are understood to be fundamentally disconnected from functional rationality. The coherence of the dominant conception *requires* us to conceptualize the trait of musicianship as statistically distributed between the sexes, like the trait of physical strength.

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<sup>99</sup> This is essentially the holding of *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978).

Not surprisingly, the EEOC firmly rejected the exception requested by the armored car company. The Commission stated that the business had provided “no *factual* evidence, based on experience or otherwise, that would support its assertion that all or nearly all females are unfit for the position of Courier Guard.”<sup>100</sup> The armored car company, however, had never argued that women could not perform the function of a courier guard; it had instead pushed the contention that maximizing its profits required pandering to the expectations of its customers. By focusing the question of functional rationality on the narrow issue of the job-performance of courier guards, instead of on the larger issue of the success of the business, the EEOC essentially insisted that the norm of sex-blindness remain firmly attached to a concept of functional rationality.

An obvious difficulty with the EEOC’s proposed focus is that the constituent tasks of a business are significant only if the business is itself successful, so that the instrumental logic required for the maintenance of an armored car company would seem to take analytic and practical precedence over that required for the successful performance of the job of a courier guard. Regardless of whether one accepts this point, however, it is clear that the Commission’s decision renders instrumental rationality a malleable category, to be manipulated for the purpose of sustaining a correspondence between the norm of sex-blindness and functional rationality. The effect of this correspondence is to foreclose inquiry into the justification, and therefore into the reach and significance, of the law’s pursuit of the ideal of sex-blindness.

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<sup>100</sup> EEOC Decision No. 70-11, *supra* note 98, at 4048.

Yet once functional rationality and sex-blindness are analytically separated, this inquiry can not be evaded. The Commission's decision has come to stand for the black-letter rule that Title VII will not permit an appeal to customer preferences to render "nugatory the will of Congress"<sup>101</sup> that capacities conceptualized as statistically distributed between the sexes be determined on an individualized basis.<sup>102</sup> The question, therefore, is *which* capacities are to be conceptualized by the law as "sexless" in this way. If we cannot use the logic of instrumental rationality as a guide, by what alternative rationale are such capacities to be identified?

Because the dominant conception seeks completely to suppress gender stereotypes and generalizations, it would suggest that *all* capacities be conceptualized as statistically distributed

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<sup>101</sup> *Id.* The EEOC stated that the company's request "is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress." *Id.* This response is especially striking given that the EEOC could have argued, as John Hart Ely has pointed out to me, that if all armored car companies were forced to hire female guards, no particular company would be placed at a competitive disadvantage. Evidently, the EEOC was unwilling to contemplate even the possibility of a theoretical divergence between sex-blindness and functional rationality.

<sup>102</sup> *See, e.g.,* *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971):

While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

between the sexes. It would thus deny the legitimacy of all customer preferences that incorporate traditional gender conventions. Contemporary EEOC regulations essentially take this position,<sup>103</sup> which is echoed by judicial pronouncements to the effect that “stereotypic impressions of male and female roles do not qualify gender as a BFOQ.”<sup>104</sup> Yet if judicial decisions are carefully parsed, it can be seen that such pronouncements, which express the perspective of the dominant conception, do not correspond to the actual shape of the law.

Consider, in this context, the case of *Wilson v. Southwest Airlines Co.*,<sup>105</sup> in which Southwest Airlines sought to defend its policy of hiring only “attractive female flight attendants”

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<sup>103</sup> See 29 C.F.R. § 1604.2(a):

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exemption: . . .

(iii) The refusal to hire an individual because of the preferences of . . . customers except as covered specifically in paragraph a(2) of this section.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

<sup>104</sup> *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981). See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971).

<sup>105</sup> 517 F. Supp 292 (N.D. Tex. 1981).

as a BFOQ because its “sexy image” was “crucial to the airline’s continued financial success.”<sup>106</sup> It is (at present) hard to imagine a world in which sexual attraction were to be regarded as a capacity borne by individuals as to whom sex was irrelevant. Put another way, sexual attraction is so firmly attached to existing gender roles that the effort to transform such roles by dislodging the “stereotypes” presently manifested by sexual attraction seems an implausible ambition for the law.

Certainly the court in *Wilson* was not about to interpret Title VII as disestablishing such fundamental gender practices. The court cleverly solved this problem by differentiating businesses whose primary purpose is to sell sexual attraction, like Playboy Clubs,<sup>107</sup> from businesses like Southwest Airlines, where the purpose of the business does not involve sexual gratification. The court conceded that where “sexual attraction is the primary service provided,” “customer preference for one sex only . . . would logically be so strong that the employer’s ability to perform the primary function or service offered would be undermined by not hiring

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<sup>106</sup> *Id.* at 293. Southwest was known as the “love airline.” *Id.* at 294.

Unabashed allusions to love and sex pervade all aspects of Southwest’s public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hot-pants (skirts are now optional) serve “love bites” (toasted almonds) and “love potions” (cocktails).

*Id.* at n.4. “[S]ex appeal has been used to attract male customers to the airline. The evidence was undisputed that Southwest’s unique, feminized image played and continues to play an important role in the airline’s success.” *Id.* at 295.

<sup>107</sup> *Id.* at 301.

members of the authentic sex or group exclusively.”<sup>108</sup> In these circumstances, sex would constitute a BFOQ.

But the court distinguished such businesses from Southwest Airlines, whose “primary function is to transport passengers safely and quickly from one point to another,” rather than to sell “vicarious sex entertainment.”<sup>109</sup> Having defined the purpose of Southwest Airlines in this way, the court could easily conclude that the capacities necessary to ensure safe and efficient transportation could properly be attached to individuals as to whom sex was irrelevant. In effect, the court transformed the question into a simple variant of the courier guard case.

The court in *Wilson* recognized that Title VII did not seek to alter certain gender conventions. It was unwilling to imagine a world in which sexual attraction was statistically distributed among “individuals,” so that men and women would be attracted to persons regardless of their sex. But the court was nevertheless willing to intervene to shape existing practices within the airline industry. By exercising the authority to manipulate the definition of the “primary function” of the industry, the court held that sexual attraction was not a relevant capacity of flight attendants. Although this represents an important legal modification of a large industry, the court also implicitly acknowledged the limits of the law’s efforts to effect such transformations.

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 302.

The nature of these limits can be seen by contrasting *Wilson* with a case like *Craft v. Metromedia, Inc.*, in which a female TV news anchor alleged that different standards of “appearance” were imposed upon her than upon her male counterparts.<sup>110</sup> The court accepted as a fact that KMBC, the employer television station, “required both male and female on-air personnel to maintain professional, businesslike appearances, ‘consistent with community standards,’ and that the station enforced that requirement in an evenhanded, nondiscriminatory manner.”<sup>111</sup> The court also recognized, however, that KMBC imposed fashion requirements that were gender-specific, so that the plaintiff was instructed to “purchase more blouses with ‘feminine touches,’ such as bows and ruffles, because many of her clothes were ‘too masculine.’”<sup>112</sup> The court chose to accept these requirements, on the grounds that they were “‘obviously critical’ to KMBC’s economic well-being,” given the “conservatism thought necessary in the Kansas City market.”<sup>113</sup> In contrast to *Wilson*, the court in *Craft* refused to redefine the nature of the job qualifications at issue by recharacterizing the purposes of the business:

While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship

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<sup>110</sup> 766 F.2d 1205, 1207 (8th Cir. 1985).

<sup>111</sup> *Id.* at 1209-10.

<sup>112</sup> *Id.* at 1214.

<sup>113</sup> *Id.* at 1215.

between newsgathering and dissemination and considerations of appearance and presentation—i.e., questions of substance versus image—in television journalism.<sup>114</sup>

In *Craft*, therefore, the court declined to distinguish between the requirements of disseminating the news and the requirements of generating an audience. It consequently accepted the gender conventions implicit in customer preferences as a justification for gender-specific appearance regulations,<sup>115</sup> thereby sheltering these conventions from the transformative force of Title VII.<sup>116</sup> KMBC was authorized by the court to treat its news anchor as a woman, rather than as an individual for whom sex was irrelevant.<sup>117</sup> The distinction between *Wilson* and *Craft* thus marks a line in the social geography of the law's willingness to disturb existing gender roles.

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<sup>114</sup> *Id.*

<sup>115</sup> *See*, 120 (1997).

<sup>116</sup> The radical implications of the District of Columbia statute prohibiting discrimination on the basis of personal appearance have been contained by judicial interpretations that essentially follow the logic of *Craft*. *See*, *supra* note 27. The District of Columbia Court of Appeals accepts consumer preferences as constituting “a reasonable business purpose” for employer regulations of appearance. *See Turcios v. United States Serv. Indus.*, 680 A.2d 1023, 1029 (D.C. App. 1996) (finding that fear that contracts would be jeopardized was a sufficient reasonable business purpose for a no-tail hairstyle rule).

<sup>117</sup> For a critique of *Craft*, see Note, *Sex Discrimination in Newscasting*, 84 443 (1985); *see generally*, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 190 (1985).

The demarcations of this social geography are complex and responsive to many factors. Distinctions in social understandings of specific industries and enterprises are relevant; the airline industry is not equivalent to the television business. The impact of gender conventions on employment opportunities is also pertinent. *Wilson* is a case about sex-specific hiring practices, whereas *Craft* concerns sex-specific appearance codes applied to a gender-integrated workforce.<sup>118</sup> The effect of accepting gender conventions is therefore different in the two cases. Also relevant, however, is a court's independent assessment of the value of the conventions potentially displaced by Title VII.

One can see this clearly in a case like *Fessel v. Masonic Home of Delaware, Inc.*,<sup>119</sup> which involved a residential retirement home that refused to hire male nurse's aides. The responsibilities of the aides included the provision of "intimate personal care, including dressing, bathing, toilet assistance, geriatric pad changes and catheter care."<sup>120</sup> Twenty-two of the home's 30 guests were female,<sup>121</sup> and many of these "would not consent to having their personal needs

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<sup>118</sup> For a recent decision involving sex-specific hiring practices for TV anchors, see Mike Allen, *Jury Awards Anchorwoman \$8.3 Million in Sex Bias Case*, , Jan. 29, 1999, at B1. Apparently, the TV station in that case insisted on pairing male and female anchors; it had refused to renew the plaintiff's contract because they had too many female anchors.

<sup>119</sup> 447 F.Supp. 1346 (D. Del. 1978).

<sup>120</sup> *Id.* at 1352-53.

<sup>121</sup> *Id.* at 1348

attended to by . . . male nurse's aides."<sup>122</sup> The court accepted the preferences of the home's customers and held that the "the sex of the nurse's aides at the Home is crucial to successful job performance."<sup>123</sup> The Court did not deny that these preferences rested upon "sexual stereotyping," but it nevertheless explicitly accepted these stereotypes as legitimate:

As plaintiff stresses, the attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past. While these attitudes may be characterized as "customer preference," this is, nevertheless, not the kind of case governed by the regulatory provision that customer preference alone cannot justify a job qualification based upon sex. Here personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business.<sup>124</sup>

Gender is highly salient in matters of privacy. The sex of the person by whom we are seen or touched normally matters very much to us. For this reason, the court in *Fessel* did not imagine the plaintiff as an individual whose sex was irrelevant, but instead as a fully sexed

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<sup>122</sup> *Id.* at 1352.

<sup>123</sup> *Id.* at 1353.

<sup>124</sup> *Id.* at 1352. The Court's point that the privacy interests of the guests were "protected by law" is simply makeweight, since the federal requirements of Title VII would pre-empt any competing considerations of state law. In *Rosenfeld v. Southern Pac. Co.*, for example, the Court responded to the defendant's contention that "appointing a woman to the position would result in a violation of California labor laws and regulations which limit hours of work for women and restrict the weight they are permitted to lift," with the curt observation "that state labor laws inconsistent with the general objectives of the Act must be disregarded." 444 F.2d 1219, 1223, 1226 (9th Cir. 1971). See 29 C.F.R. §1604.2(b) (19??).

person. Even though the employer in *Fessel*, like the employer in *Wilson*, sought to maintain a single-sex work force, *Fessel* accepted the gender-specific stereotypes implicit in the privacy norms invoked by the nursing home, and the court incorporated these stereotypes into the BFOQ exception of Title VII.<sup>125</sup>

*Fessel* illustrates how Title VII does not simply displace gender practices, but rather interacts with them in a selective manner. The case forces us to ask *which* gender practices are to be reshaped by Title VII, in *what* contexts, and in *what* ways. These are questions that depend upon our understanding of the exact purposes and ambitions of Title VII. They are also questions that depend upon our assessment of the capacity of legal institutions to transform social practices. Any such assessment must depend upon tact and judgment. As one court put it, “The laws outlawing sex discrimination are important. They are a significant advance. They must be realistically interpreted, or they will be ignored or displaced. Ours should not be an effort to achieve a unisex society . . . .”<sup>126</sup>

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<sup>125</sup> On privacy as a BFOQ, see *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991); *EEOC v. Sedita*, 816 F.Supp. 1291 (N.D. Ill. 1993); *Local 567, AFFSCME v. Michigan*, 635 F.Supp. 1010 (E.D. Mich. 1986); *Hernandez v. University of St. Thomas*, 793 F.Supp. 214 (D. Minn. 1992); *EEOC v. Mercy Health Center*, 29 FEP Cases 159 (W.D. Okl. 1982). For critiques, see Note, *Privacy as Rationale for the Sex-Based BFOQ*, 1985 865; Note, *Sex Discrimination Justified Under Title VII: Privacy Rights in Nursing Homes*, 14 577 (1980).

<sup>126</sup> *Boyce v. Safeway Stores, Inc.*, 351 F.Supp. 402, 404 (D.D.C. 1972).

The many nuances of these inquiries are lost if Title VII is imagined simply as striking “at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.”<sup>127</sup> This ambition is merely obfuscatory. It effaces, for example, the contrast between *Fessel* and a decision like *Griffin v. Michigan Dept. of Corrections*, in which women employees of all-male maximum security institutions in Michigan challenged a policy of prohibiting women from working within residential units.<sup>128</sup> In *Griffin*, the court flatly rejected the State’s claim that the policy was necessary to protect the privacy of male inmates. It castigated the policy as “based on a stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing by a member of one’s own sex.”<sup>129</sup> *Griffin* explained that this was “just the type of stereotypical value system condemned by Title VII.”<sup>130</sup> “The implicit mandate of Title VII is that a woman should be evaluated and treated by an employer on

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<sup>127</sup> *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (*quoting* *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (*quoting* *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

<sup>128</sup> 654 F.Supp. 690 (E.D. Mich. 1982).

<sup>129</sup> *Id.* at 701.

<sup>130</sup> *Id.* at 702 (*quoting* *Gunther v. Iowa State Men’s Reformatory*, 462 F.Supp. 952, 956 n.4 (N.D. Iowa 1979)).

the basis of her individual qualifications and not on the basis of any assumptions regarding the characteristics and qualifications of women as a group.”<sup>131</sup>

*Griffin* reproduces standard Title VII rhetoric and logic. But if we were to try to explain the different outcomes in *Fessel* and *Griffin*, this logic would seem unhelpful. Instead, we would certainly begin with the fact that *Fessel* addressed the privacy rights of nursing home residents, while *Griffin* assessed the privacy concerns of convicted criminals in maximum security institutions. Although gender stereotypes are equally present in both cases, so that the generic Title VII logic of individualism is equally relevant, the courts evidently attributed less value to the gendered privacy norms of prisoners than to those of nursing home residents. This illustrates that as gender norms come to seem more fundamental to a court, it will be correspondingly more reluctant to disturb them. Norms that are fundamental are those that are significant and uncontroversial when seen from the perspective of those implementing the law.

A good example of norms that may seem superficially trivial but in fact are regarded as fundamental are those that involve the presentation of the self in matters of grooming and

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<sup>131</sup> *Id.* at 700. As a consequence of the holding and reasoning of *Griffin*, the State of Michigan subsequently authorized male guards to work in the residential units of female prisoners, and this policy resulted in charges of serious sexual harassment and abuse. See Human Rights Watch Women’s Rights Project, 242-80 (1996); Human Rights Watch, *Nowhere To Hide: Retaliation Against Women in Michigan State Prisons*, 10 2 (Sept. 1998).

dress.<sup>132</sup> Gender is pervasively constituted by norms of presentation. It should therefore be no surprise that courts have generally held “that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees [are] not sex discrimination within the meaning of Title VII.”<sup>133</sup> In the view of most courts, such regulations no more constitute discrimination “on the basis of sex . . . than a condition of employment that requires males and females to use separate toilet facilities.”<sup>134</sup>

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<sup>132</sup> For a general discussion of these cases, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 2541 (1994); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 769 (1987); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 365; Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 1395 (1992); Lynne D. Mapes-Riordan, *Sex Discrimination and Employer Weight and Appearance Standards*, 16 493 (1991); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 73 (1982).

<sup>133</sup> *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977). “[T]he Act was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers,” because Congress could not have intended “for its proscription of sexual discrimination to have [such] significant and sweeping implications.” *Knott v. Missouri Pac. R.R. Co.*, 527 F.2d 1249, 1251-52 (8th Cir. 1975).

<sup>134</sup> *Boyce v. Safeway Stores, Inc.*, 351 F.Supp. 402, 403 (D.D.C. 1972). See *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (upholding distinct hair length requirements for men and women, and mentioning sex-segregated toilet facilities as clearly outside the reach of Title VII). I should note that 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. For example, in *Aros v. McDonnell Douglas Corp.*, 348 F.Supp. 661 (C.D. Cal. 1972), the court struck

The striking authority exercised by gendered appearance norms in the interpretation of Title VII may be seen in a decision like *Lanigan v. Bartlett & Co. Grain*.<sup>135</sup> In that case the plaintiff attacked an employer's rule prohibiting women from wearing pants in its executive offices, alleging that the rule perpetuated "a sexist, chauvinistic attitude" which could not be functionally defended, because the company "could offer no excuse whatsoever as to why [a]

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down a grooming code that permitted women, but not men, to have long hair. In an eloquent summary of the dominant view, the court said:

The issue of long hair on men tends to arouse the passions of many in our society today. In that regard the issue is no different from issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII. When this Nation was settled it was hoped that there be established a society where every individual would be judged according to his ability rather than who his father was, . . . or what the color of his skin was. Since then, millions of individuals have landed on our shores in search of opportunity—opportunity which was denied them in their homelands because of rigid class structures and irrational group stereotypes. The Civil Rights Act of 1964 was born of that hope. Although the legal technicalities are many, the message of the Act is clear: every person is to be treated as an individual, with respect and dignity. Stereotypes based upon race, color, religion, sex or national origin are to be avoided. . . .

Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded. . . . Some employers argue that their professional image and reputation may suffer from hiring men who prefer to wear their hair in longer styles. Title VII does not permit the employer to indulge in such generalizations. The Act requires that every individual be judged according to his own conduct and job performance.

*Id.* at 666. *See* *Donohue v. Shoe Corp. of Am.*, 337 F.Supp. 1357 (C.D. Cal. 1972) (denying defendant's motion to dismiss under . 12(b)(6) in circumstances analogous to those in *Aros*).

<sup>135</sup> *Lanigan v. Bartlett and Co. Grain*, 466 F.Supp. 1388 (W.D. Mo. 1979).

secretary could perform a job in a more efficient manner in a skirt rather than a pantsuit.”<sup>136</sup> The court blandly replied to these stinging allegations that they “miss the point”:

An employer is not required to justify any business practice in a Title VII action until and unless the plaintiff has established a *prima facie* case of discrimination. The fact that defendant introduced no evidence on the “business necessity” of a dress code prohibiting pantsuits on women working in its executive offices proves nothing because the Court holds that the plaintiff has not established a *prima facie* case of discrimination. Accordingly, defendant was not obligated to defend its dress code policies.<sup>137</sup>

Title VII decisions distinguish between grooming and dress codes that track “generally accepted community standards of dress and appearance”<sup>138</sup> and those that do not. The former are regarded as enforcing a “neutral” baseline that negates any inference of sex discrimination.<sup>139</sup> Thus an employer who requires employees “to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community,” and hence who excludes “the employing of men (but not women) with long hair,” does not discriminate on the basis of sex in violation of Title VII.<sup>140</sup>

Employer dress codes that violate traditional standards, however, are regarded as enforcing sex discrimination. Thus the dress code of an employer who permitted men to wear

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<sup>136</sup> *Id.* at 1391.

<sup>137</sup> *Id.*

<sup>138</sup> *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975).

<sup>139</sup> *See id.* at 1092.

<sup>140</sup> *Id.* at 1087, 1092-93.

“customary business attire” but who required women to wear a “uniform” was regarded as without “justification in commonly accepted social norms.”<sup>141</sup> It was consequently rejected as “demeaning,” as embodying the “offensive stereotypes prohibited by Title VII.”<sup>142</sup> This conclusion obtains whether or not female employees can demonstrate any other material differences in their treatment (i.e., in their “salary, benefits, hours of employment, raises, employment evaluations or any other term or condition of employment”).<sup>143</sup>

These cases nicely illustrate how customary gender norms are incorporated into the very meaning and texture of Title VII.<sup>144</sup> So far from striking “at the *entire spectrum* of disparate

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<sup>141</sup> Carroll v. Talman Fed. Savings and Loan Ass’n, 604 F.2d 1028, 1029, 1032 (7th Cir. 1979).

<sup>142</sup> *Id.* at 1033.

<sup>143</sup> O’Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F.Supp 263, 265 (S.D. Ohio 1987).

<sup>144</sup> The point, of course, may be made about the law more generally. Thus in defending a judge’s policy of requiring male attorneys, but not female attorneys, to wear ties in court, a federal judge concluded:

At least until that dreadful day when unisex identity of dress and appearance arrives, judicial officers . . . are entitled to some latitude in differentiating between male and female attorneys, within the context of decorous professional behavior and appearance. . . . Because contemporary fashions are different, a judge may permissibly conclude that a male attorney appearing in court without a necktie is lacking in proper decorum, whereas a female attorney not wearing a necktie is not subject to that criticism.

Devine v. Lonschein, 621 F.Supp. 894, 897 (S.D.N.Y. 1985).

treatment of men and women resulting from sex stereotypes,”<sup>145</sup> the statute in fact negotiates the ways in which it will shape and alter existing gender norms. So long as gender conventions remain salient within our culture, Title VII must be understood as marking a frontier between those gender conventions subject to legal transformation and those left untouched or actually reproduced within the law. Of course, the frontier is a moving one, for courts are continuously re-evaluating which stereotypes should be permitted, in what contexts, and for what reasons. We can be certain, however, that to the extent that gender remains a culturally inescapable fact, it also will remain inextricably present in the application of Title VII.<sup>146</sup>

## V

It may be useful to recapitulate the argument that I have so far developed. The dominant conception of American antidiscrimination law aspires to suppress categories of social judgment that are deemed likely to be infected with prejudice. This suppression occurs within an imaginative space that figures a correspondence between pre-social individuals, on the one hand,

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<sup>145</sup> *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (quoting *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

<sup>146</sup> For an incisive formulation of this point in the context of legal interventions into matters of gender generally, see Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *1073*, 1212-15 (1994).

and “context-free” functional capacities on the other. There is thus a strong impulse within the dominant perspective to imagine the law as standing in a neutral space outside of history and of the contingent social practices of which history is comprised.

Taken to its ultimate conclusion, the utopian quality of this impulse suggests why TRB was so unsettled by the prospect of prohibiting discrimination on the basis of personal appearance. Anti-lookism ordinances abstract so severely from everyday social life that it is hard to imagine how they could possibly reconstruct any actual social practice. We might even go so far as to say that the Santa Cruz ordinance would be literally inconceivable unless one were, so to speak, in the grip of the dominant conception.

Because the dominant conception offers an implausible story about the actual shape of antidiscrimination law, I have proposed an alternative perspective, which we may call the *sociological account*, in which antidiscrimination law is understood as a social practice that acts on other social practices. According to the sociological account, antidiscrimination law must be seen as transforming pre-existing social practices, like race or gender, by reconstructing the social identities of persons.<sup>147</sup> The sociological account does not ask whether “stereotypic impressions” can be eliminated *tout court*, but rather what content the law should seek to infuse into such impressions.

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<sup>147</sup> The sociological account would thus not approach the problem of lookism by attempting to make us blind to appearances, but rather “by directing attention to” and seeking to alter “oppressive social norms of beauty.” Elizabeth S. Anderson, *What Is the Point of Equality?* 109–287, 335 (1999).

In contrast to the dominant conception, the sociological account accepts the inevitability of social practices. But precisely because of this acceptance, the account requires that principles be articulated that will guide and direct the transformation of social practices. Because the dominant conception seeks entirely to transcend and eliminate social practices, it has not fully developed such principles. Instead, it imagines a world in which the pre-social demands of an “original position” exactly coincide with the imperatives of a “context-free” functional rationality. It therefore lacks the resources to identify and analyze the many ways in which instrumental rationality can itself actually reinforce existing social practices. The sociological account, by contrast, focuses on the project of reconstructing social practices, even at the sacrifice of instrumental rationality.

Of course, the practical impact of the sociological account will depend upon the nature of the specific principles that we seek to implement through antidiscrimination law.<sup>148</sup> The insights that the sociological account offers concerning the actual operation of antidiscrimination law,

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<sup>148</sup> Much of the scholarly work on anti-subordination theory can be interpreted as advocating principles that could guide the application of antidiscrimination law under a sociological approach. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *1003, 1005* (1986); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *1331* (1988). But antistubordination theory is by no means the only source for such principles. There is a wide range of possibilities. Each of Barbara Flagg’s opposed notions of the “pluralist” and “assimilationist” interpretation of equal opportunity could, for example, potentially serve this purpose. See Flagg, *supra* note 53, at 2033-36.

however, ought to be pertinent to the adoption of these principles. In this regard, it is useful to bear in mind that although the articulation of such principles will no doubt transpire chiefly through the usual mechanisms of statutory and constitutional interpretation, larger moral values will no doubt also prove influential. The sociological account therefore need not prove intrinsically hostile to normative reasoning or even to the heuristic device of the original position. But we can learn from the sociological account that insofar as we seek to realize the conclusions of normative reasoning in law, we should do so in a way that recognizes how law functions to embody itself in history.

In this brief lecture I shall not attempt to argue for any particular set of principles that ought to guide the application of the sociological account. That is a long and complicated discussion. In my remaining time, I shall instead ask whether it makes any difference whether we substitute the understanding of the actual operation of antidiscrimination law contained in the sociological account for that proposed by the dominant conception, even on the assumption that we have not yet specified any such principles. The dominant conception, after all, tells a simple and powerful story that has successfully propelled important changes in American society. Even if it is in some ways incomplete and inaccurate, we ought nevertheless to be careful about abandoning such an effective instrument of social transformation. Four considerations seem to me especially pertinent to assessing the advisability of any such course of action.

First, I think it clear that the insights of the sociological account can create greater judicial accountability than the dominant conception. The sociological account suggests that courts will apply antidiscrimination law in ways that implicate it in the very practices it seeks to

modify. The dominant conception, however, denies that these practices have any legitimate role in the application of antidiscrimination law. If, in fact, the sociological account is correct, we can expect judicial opinions to reach conclusions accepting social practices in implicit and indirect ways. This is certainly evident in a decision like *Craft*,<sup>149</sup> where the dominant conception stripped the court of its ability to acknowledge the legitimacy of gender norms, and where the court was therefore forced to smuggle its acceptance of these norms into an instrumental logic that deferred to consumer preferences. By contrast, an approach that accepted the sociological account would have invited the court in *Craft* explicitly to state and to defend the grounds for its conclusions, and this in turn would have facilitated public review and critique. Such an approach would thus render decisions like *Craft* far more accountable for their actual judgments.

In a similar way, the insights of the sociological account would render more accountable decisions like *Wilson*<sup>150</sup> or the EEOC judgment in the courier guard case.<sup>151</sup> Each of these decisions involves contexts in which functional rationality potentially undermines the norm of gender blindness. Yet because the dominant conception lacks the resources to analyze or acknowledge such a tension, both opinions were led systematically to manipulate the category of functional rationality so as to disguise its divergence from the norm of gender blindness. As a result, neither opinion could offer a frank and helpful discussion of how such contradictions

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<sup>149</sup> See *supra* notes 110-118 and accompanying text.

<sup>150</sup> See *supra* notes 105-109 and accompanying text.

<sup>151</sup> See *supra* notes 98-102 and accompanying text.

ought to be resolved. Because the sociological account finds no particular discomfort in recognizing that the project of transforming gender conventions may sometimes require the sacrifice of instrumental rationality, it would invite a more candid appraisal of the trade-offs implicit in such situations. Accountability would thereby be increased.

Second, the insights of the sociological account would for this reason encourage greater doctrinal coherence. It is potentially damaging to the doctrinal structure of the law when judges cannot explain the actual justifications for their decisions.<sup>152</sup> The point is well illustrated by the Title VII cases involving gender-specific grooming codes. Such codes clearly regulate persons who have socially endowed gender-identities, rather than “individuals” for whom sex is irrelevant. They are for this reason anomalous within the framework of the dominant conception. Yet American judges, who tend to be quite practical,<sup>153</sup> have been unwilling to use Title VII to strike down these codes. Caught between a doctrinal commitment to the dominant conception and an instinctive apprehension that Title VII should be understood as modifying (rather than displacing) gender norms, courts have been unable to offer any coherent doctrinal explanation of their decisions.

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<sup>152</sup> I acknowledge, however, that there are sometimes important legal values to be served by judicial indirection, by the ability of courts to pursue their ends in implicit and inarticulate ways. *See, e.g.*, Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 *Calif. L. Rev.* 491, 507 (1994).

<sup>153</sup> *See, e.g., supra* note 126.

Perhaps the leading case is *Willingham v. Macon Telegraph Publishing Co.*, in which a newspaper required male but not female employees to have short hair.<sup>154</sup> *Willingham* held that the newspaper's grooming code was an example of "'sex plus' discrimination" because it was on the basis "of sex *plus* one other ostensibly neutral characteristic" (short hair) that the newspaper discriminated against some men, but not all men.<sup>155</sup> The court concluded that "'sex plus' discrimination" was not discrimination on the basis of sex for purpose of Title VII unless the "plus" factor involved "immutable characteristics" or a "fundamental right" (like the right to marry).<sup>156</sup>

This doctrine of "sex plus" discrimination is broadly framed and carries a wide range of potential applications. It has been consequential,<sup>157</sup> and yet it is entirely incoherent. If an employer imposes a grooming code that requires blacks, but not whites, to have short hair, I

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<sup>154</sup> 507 F.2d 1084 (5th Cir. 1975).

<sup>155</sup> *Id.* at 1089 (emphasis added).

<sup>156</sup> *Id.* at 1091. The court thus distinguished *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971), in which a requirement that female airline stewardesses be unmarried was found to violate Title VII.

<sup>157</sup> *See, e.g.*, *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1033 (5<sup>th</sup> Cir. 1980); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Lanigan v. Bartlett and Co. Grain*, 466 F.Supp 1388, 1391 (W.D. Mo. 1979); *Arnett v. Aspin*, 846 F.Supp. 1234, 1239 (E.D. Pa. 1994); *cf. Rogers v. American Airlines, Inc.*, 527 F.Supp. 229, 231 (S.D.N.Y. 1981); *Jarrell v. Eastern Air Lines, Inc.*, 430 F.Supp. 884, 892 (E.D. Va. 1977); *cf. Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d 1199, 1203-04 (10th Cir. 1997).

strongly suspect that no court in the country would classify the code as “race plus” and hence immune from Title VII scrutiny. *Willingham* justifies the requirement that the plus factor be either an immutable characteristic or a fundamental right on the grounds that only such factors are important enough actually to interfere with the “[e]qual employment *opportunity*” that is said to be the essential purpose of Title VII.<sup>158</sup> But this justification is plainly misconceived. If an employer requires female but not male employees to live within three miles of a factory, the requirement would affect equal employment opportunity but involve neither an immutable characteristic nor a fundamental right.<sup>159</sup>

What seems in fact to be driving the outcome in *Willingham* is the conviction that employers may reasonably impose sex-based stereotypes in matters of grooming, so long as these stereotypes conform to traditional gender conventions. That explains why courts confronting dress codes that find “no justification in accepted social norms” have struck them down, even though the codes cause no discernible adverse effects on other equal employment opportunities.<sup>160</sup> But courts never directly address the fundamental question of why the gender roles implicit in dress codes may reasonably be imposed when they reflect conventional standards.

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<sup>158</sup> 507 F.2d at 1091.

<sup>159</sup> The example is drawn from the dissenting opinion of Judge Winter in *Earwood*. See 539 F.2d at 1352 n.2.

<sup>160</sup> *O’Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F.Supp 263, 265-66 (S.D. Ohio 1987). See *Carroll v. Talman Federal Savings and Loan Ass’n of Chicago*, 604 F.2d 1028 (7th Cir. 1979).

It seems to be important that grooming and dress codes regulate voluntary behavior, for courts tend to conceptualize employees who present themselves in ways that violate established gender grooming and dress conventions as asserting a “personal preference” to flout accepted standards.<sup>161</sup> Courts therefore read claims for protection by those who deviate from gendered appearance norms as ultimately asserting a right autonomously to present oneself “in a self-determined manner,”<sup>162</sup> rather than a right to fair equal treatment.<sup>163</sup> Just as Santa Cruz employers bridled at having to accept someone who “looks and acts as if they don’t care what others think,”<sup>164</sup> so federal courts have been unwilling to require employers to ignore what they regard as willful deviations from customary norms of gender appearance.<sup>165</sup>

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<sup>161</sup> *Earwood*, 539 F.2d at 1351.

<sup>162</sup> *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1117 (D.C. Cir. 1973).

<sup>163</sup> This tendency accounts for the otherwise mysterious tendency of courts to say that gendered norms of appearance do not violate Title VII because the statute only prohibits discrimination based upon “immutable characteristics.” *Baker v. California Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974). *Cf.* *Bedker v. Domino’s Pizza*, 195 Mich. App. 725 (1992). Title VII, of course, prohibits discrimination based upon religion, which is not immutable.

<sup>164</sup> *See supra* note 25 and accompanying text.

<sup>165</sup> As the court said in *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973):

Perhaps no facet of business life is more important than a company’s place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer’s proper desire to achieve favorable acceptance. Good grooming regulations reflect a company’s

The dominant conception, however, prevents courts from explicitly articulating doctrinal rules that express this perspective. This is because the dominant conception holds that all employer decisions “motivated by stereotypical notions” about proper gender “deportment” are presumptively illegal.<sup>166</sup> We are therefore simultaneously confronted by the spectacle of

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policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.

For a defense of employee autonomy in the context of dress and grooming codes, see Klare, *supra* note 132.

<sup>166</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989) (Brennan, J., plurality opinion). In *Price Waterhouse*, a woman was denied partnership at a large accounting firm because, it was said, she “should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’” *Id.* at 235. The Court condemned the denial as based upon “sex stereotyping,” which it held was illegal because “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* at 251 (quoting *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). *Price Waterhouse* perfectly exemplifies the dominant conception. It sets forth a simple and powerful principle that would obliterate gender conventions.

How far we are from any such likelihood may be seen in cases like *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), which refused to extend Title VII protection to claims of discrimination on the basis of effeminacy. *Smith* in fact uses *Willingham’s* “sex plus” doctrine, see *supra* notes 153-55 and accompanying text, to reject the claim of a man who argued that he had been “discriminated against because . . . as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive ‘effeminate.’” *Id.* at 327. Despite *Hopkins*, *Smith* is still regarded by “courts and commentators . . . as good law.” Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist*

preposterous doctrinal formulations and deprived of the vigorous debate that would surely surround the reasons for the grooming and dress code cases were they to be explicitly defended. Not only is the law stripped of accountability, but the internal architecture and integrity of the law, which is sustained by clear and purposeful doctrine, is undermined.

Coherent doctrine is important because it is the means by which law directs courts to issues that are pertinent for legal intervention. My third observation, therefore, is that the understandings brought to bear by the sociological account will tend to focus judicial attention on what seems to me the right question, the question that ought to govern the application of antidiscrimination law. If the point of antidiscrimination law is to transform existing social practices, then courts must ask what purpose the law expects to accomplish by such

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*Jurisprudence*, 105 1, 3 n.3 (1995). See Barbara Lindemann, Paul Grossman, & Paul W. Cane, Jr., I 475-78 (3d Ed. 1996). It remains more or less standard Title VII doctrine that the statute does not prohibit employer actions enforcing stereotypic masculine roles, as, for example, by barring men from wearing earrings, on the grounds that “discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . does not fall within the purview of Title VII.” *DeSantis v. Pacific Telephone and Telegraph Co., Inc.*, 608 F.2d 327, 332 (9th Cir. 1979). See *Williamson v. A.G. Edwards and Sons*, 876 F.2d 69 (8th Cir. 1989); *Dobre v. National R.R. Passenger Corp.*, 850 F.Supp. 284, 286-87 (E.D. Pa. 1993). For an able discussion, see Case, *supra* at 36-75. For examples of similar holdings in antidiscrimination contexts other than Title VII, see *Rathert v. Village of Peotone*, 903 F.2d 510, 516 (7th Cir.) (upholding prohibition on earrings for male police officers), *cert. denied*, 498 U.S. 921 (1990); *Star v. Gramley*, 815 F.Supp. 276, 278-79 (C.D. Ill. 1993) (upholding prohibition on women’s garb and makeup for male prison inmate).

transformations. The dominant conception systematically obscures this question.<sup>167</sup> 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,”<sup>168</sup> then what is it?

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<sup>167</sup> Consider, for example, EEOC’s 1969 explication of the BFOQ standard, which states that “[j]obs may be restricted to members of one sex

For reasons of authenticity (actress, actor, model)

Because of community standards of morality or propriety (restroom attendant, lingerie sales clerk)

In jobs in the entertainment industry for which sex appeal is an essential qualification

EEOC, 5 (1969). The EEOC emphasizes, however, that “[j]obs may *not* be restricted to members of one sex” because of

Assumptions related to the applicant’s sex . . .

Preferences of co-workers, employers, clients or customers.

*Id.* We are thus instructed by the EEOC that gender discrimination is acceptable because of “propriety,” but unacceptable because of “preferences.” An employer may engage in gender discrimination to uphold “community standards of morality,” but not to sustain “assumptions related to the applicant’s sex.” These distinctions are obviously obscure; they can be illuminated only through a clear explication of the aims and aspirations of Title VII. But because the dominant conception denies these distinctions, it also suppresses any such effort at explication. As a consequence, the law is left as confused and as incomplete as this EEOC pronouncement.

<sup>168</sup> *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (*quoting* *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)) (*quoting* *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

Antidiscrimination law would be greatly advanced if it were simply to pose this question in a sharp and useful way. We could then see, for example, that the ambitions of the law vary depending upon the social practice at issue. To pick an obvious example, if the nursing home residents in *Fessel* had claimed a privacy right not to be touched by nurse's aides who were African-American, their expectations would no doubt properly and ruthlessly be overridden by Title VII. This is because antidiscrimination law seeks to exercise a far more sweeping transformation of race than of gender, as is evident in the fact that Title VII does not even contain a BFOQ exception for race.<sup>169</sup> We are evidently more determined to imagine individuals

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<sup>169</sup> The absence of a BFOQ for race was interrogated during the legislative debates over Title VII. Senator Dirksen, for example, raised the question of “[a] movie company making an extravaganza on Africa [which] may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible.” 110 . 7217 (April 8, 1964). Senator Clark, a floor manager for the statute, replied in a memorandum that “a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be a non-Negro. Therefore, the act would not limit the director’s freedom of choice.” *Id.* at 3014. Clark’s response is notable on a number of grounds. It seems to define race in some way other than as a socially constructed phenotype or “appearance,” perhaps biologically. (I am grateful to Reva Siegel for this observation.) Because Title VII also prohibits discrimination on the basis of color, Senator Clark seems also to imply some differentiation between “color” and the “appearance” of race. Finally, Clark’s emphasis on appearance should be contrasted with EEOC’s 1969 explication of the BFOQ requirement for sex, which would allow a BFOQ “[f]or reasons of authenticity (actress, actor, model).” EEOC, 5 (1969). Evidently, according to Senator Clark, the absence of a BFOQ exception for race means that employers must use “appearance”

without race than we are individuals without sex.<sup>170</sup> Although clearly grasping such differences is a prerequisite for antidiscrimination law to achieve its ends, these differences are difficult even to formulate within the dominant conception.

This brings me to my fourth and concluding observation. Within the dominant conception, explicit racial or gender classifications stand as markers of the very potential for prejudice that creates the need for antidiscrimination law. These classifications are thus rendered deeply suspect because they are incompatible with the creation of individuals for whom race and gender are irrelevant. Immanent within the dominant conception, therefore, lies an almost irrepressible impulse to eliminate such classifications.

The impulse is so powerful that even in cases where courts recognize the inevitability of such classifications, as in the gendered grooming cases, courts nevertheless cannot bring

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as a substitute for race, whereas the presence of a BFOQ exception for sex means that employers can use “authenticity” as a criterion for sex. It is noteworthy, however, that Senator Clark’s memorandum is entirely unresponsive to Dirksen’s inquiry for those who believe that race is not a biological fact but a social construction, and hence ultimately rooted in social appearance. See Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 *UCLA L. Rev.* 267, 296-97 (1990). If race is not understood as a biological fact, the absence of a BFOQ for race renders the plight of the movie company genuinely puzzling. Yet contemporary courts continue to reaffirm the Clark rationale in such cases. See, e.g., *Ferrill v. The Parker Group*, 168 F.3d 468, 474 n.10 (11th Cir. 1999).

<sup>170</sup> See Anthony Appiah, “*But Would That Still be Me?*” *Notes on Gender, “Race,” Ethnicity, As Sources of “Identity,”* 87. *UCLA L. Rev.* 493, 497 (1990) (“‘Racial’ ethical identities are for us . . . apparently less conceptually central to who one is than gender ethical identities.”).

themselves to acknowledge that they are accepting explicit gender categories. The impulse is particularly puissant in cases dealing with affirmative action, and this creates odd theoretical tensions. For example, many of the very persons who would clearly perceive the limitations of the dominant conception when manifested in the Santa Cruz ordinance, and who would dismiss the ordinance as absurd, might well also resist affirmative action on the basis of a visceral opposition to explicit racial and gender categories that no doubt flows directly from the dominant conception.

A virtue of the sociological account is that it has the capacity to tame this irresistible impulse to suppress explicit racial and gender classifications. If antidiscrimination law were to reorient itself around the project of purposively reshaping the social practices of race and gender, explicit racial or gender classifications may or may not be suspect, depending upon whether they affect race or gender practices in ways that are compatible with the purposes of the law.

This is exactly the perspective adopted by the Supreme Court when it was forced to face the difficult and controversial question of whether Title VII prohibited the use of explicit racial and gender classifications for purposes of affirmative action. In *United Steelworkers v. Weber*<sup>171</sup> and *Johnson v. Transportation Agency*,<sup>172</sup> Justice Brennan, writing for the Court, reasoned from “the historical context”<sup>173</sup> of the Act in order to analyze the relationship between such

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<sup>171</sup> 443 U.S. 193 (1979).

<sup>172</sup> 480 U.S. 616 (1987).

<sup>173</sup> *Weber*, 443 U.S. at 201.

classifications and what he took to be the Act's purpose, which was "to break down old patterns of . . . segregation and hierarchy."<sup>174</sup> Whether or not one agrees with Brennan's controversial use of legislative history, and whether or not one agrees with his characterization of the ultimate goal of Title VII,<sup>175</sup> Brennan's great achievement in these cases was to break through the usual Title VII rhetoric of "stereotypes"<sup>176</sup> in order to engage in precisely the *kind* of inquiry that the sociological account would encourage.

At the outset of this lecture, I promised that by its conclusion we would come face to face with Brennan's contribution in *Weber*. We are now in a position to appreciate that accomplishment. It lies in Brennan's ability to shake free of the dominant conception and to focus directly on the issue that ought to underlie antidiscrimination law, which is the nature of the law's aims in seeking historically to transform existing practices of race and gender. Unfortunately, however, Brennan's opinions in *Weber* and *Johnson* remain isolated instances within a jurisprudence that still speaks as though race and gender could be placed behind a screen and made to disappear.

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<sup>174</sup> *Id.* at 208; *Johnson*, 480 U.S. at 628 (quoting *Weber*, 443 U.S. at 208).

<sup>175</sup> On the controversial nature of Brennan's interpretation of Title VII, compare Ronald Dworkin, *How to Read the Civil Rights Act*, in 316 (1985), with Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 423 (1980).

<sup>176</sup> *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 707-09 (1978).

The impulse to suppress explicit racial and gender classifications is highly pronounced in decisions interpreting the Equal Protection Clause of the federal Constitution. It is fair to read the constitutional manifestation of this impulse as also reflecting (at least in part) the influence of the dominant conception.<sup>177</sup> Constitutional opinions regularly express the ambition to erase “stereotypic notions”<sup>178</sup> by requiring the state to focus upon “individual men and women”<sup>179</sup> for whom race and gender would be “irrelevant.”<sup>180</sup> The urge to transcend history is thus frequently apparent in the rhetoric of these opinions.

One possible consequence of the dominant conception within constitutional jurisprudence is the line of cases that scrutinize laws that employ racial or gender classifications on their face differently than laws that are facially neutral. It is standard constitutional doctrine that the former should receive stringent and frequently fatal judicial review,<sup>181</sup> whereas the latter should receive at best cursory consideration.<sup>182</sup> This is true even for those facially neutral laws

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<sup>177</sup> See *supra* note 45.

<sup>178</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

<sup>179</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring).

<sup>180</sup> *Id.* at 527 (Scalia, J., concurring) (*quoting* , 133 (1975)).

<sup>181</sup> See *United States v. Virginia*, 518 U.S. 515 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>182</sup> See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Such laws are scrutinized to determine if they have a discriminatory purpose. See *Hunter v. Underwood*, 471 U.S. 222 (1985).

that have significantly retrograde effects upon practices of race or gender.<sup>183</sup> This is odd doctrine, however, if the purpose of antidiscrimination law is to transform these practices.

I strongly suspect that the insights of the sociological account would soften this sharp and consequential distinction between facially neutral laws and laws that employ explicit racial and gender classifications. The sociological account both de-emphasizes the singularity of racial and gender classifications and enhances the visibility of the multiple ways in which facially neutral laws affect actually existing practices of race and gender. It thus encourages us to inquire whether these effects are consistent or inconsistent with the purposes of the Equal Protection Clause. Of course, on reflection, we might come to believe that the purposes of the Equal Protection Clause are not to modify existing practices of race and gender, but instead to reshape governmental processes of decision making in ways oblivious to their effects on these practices.<sup>184</sup> But this is precisely the kind of debate that we ought explicitly to engage.

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Because of “disparate impact” analysis, Title VII law is a good deal more sensitive than constitutional law about the effect of facially neutral regulations on practices of gender and race. *See supra* note 53.

<sup>183</sup> *See Personnel Administrator v. Feeney*, 442 U.S. 256, 270 (1979) (upholding constitutionality of state statute favoring veterans in civil service hiring despite fact that over 98% of class benefitted was male).

<sup>184</sup> Alternatively, we might also conclude that, even on a sociological account, facially neutral laws would reshape existing practices of race and gender in ways more consistent with constitutional imperatives than laws that employ explicit racial and gender classifications. *See Robert Post, Introduction: After Bakke*, in 18-20 (Robert Post & Michael Rogin eds., 1998).

## VI

We have traveled a long distance from our initial consideration of Santa Cruz's strange anti-lookism ordinance. The eccentricity of that law enabled us to register unease at the project of systematically effacing the social world. And yet we can now see that this same project also underlies the general self-conception of American antidiscrimination law. As an alternative to that project, therefore, I have offered an account of antidiscrimination law as an institutional intervention designed to transform, rather than to transcend, existing practices of gender and race. I have discussed four considerations bearing on the practical differences between these two ways of imagining the design of antidiscrimination law. These considerations sound roughly in the dimensions of accountability, doctrinal integrity, purposive clarity, and an obsessive and dysfunctional focus on explicit racial classifications.

I do not insist that these considerations compel us to abandon the dominant conception, for the latter has served us well over the years in driving important and far-reaching changes in the social practices of gender and race. The point is certainly debatable. But I do insist that the sociological account more accurately captures how antidiscrimination law actually functions. Courts have in fact been compelled systematically to disguise and contort their judgments so as to render them compatible with the surface logic of the dominant conception.

Brennan's achievement in *Weber* was precisely to have crafted an opinion which escaped this compulsion by forthrightly grounding its holding within a framework that accepts the basic understanding of antidiscrimination law advanced by the sociological account. It is my hope that

this lecture has enabled us to recognize the significance of that achievement and to pose in an intelligible way the question of whether it is an accomplishment we should desire to emulate.