

Protecting Transgressive Identities: A Contemporary Challenge for Antidiscrimination Law

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Note to seminar participants: The text below is a preliminary sketch of an argument that I plan to develop during the coming months into a more rich and backed-up paper. I hope, however, that it manages to convey the basic problem that I try to tackle, as well as my suggested way out of it. Your thoughts and comments would be very welcome.

And a technical note: If you are reading the paper directly from your computer screen (rather than a printed copy), please be sure that the “reveal formatting” command is on “hide” and not “show.”

I. Introduction

Current antidiscrimination doctrine produces inconsistent and unsatisfactory answers regarding the scope of antidiscrimination law. It is unclear whether distinctions based on performative or “plus” elements of protected identities are recognized as discrimination based on those identities. For example, does the ban on sex-based discrimination include transsexuals? Or does race-based discrimination protect people of color who are treated differently because of their racially associated hairstyle or name? This paper suggests a new approach to such questions, which, if adopted, could lead to a more convincing and accountable legal response to discrimination. Discrimination often occurs not because of one’s race or sex as such, but because of the discriminator’s discomfort with the way one performs his or her race or sex. The social unease towards non-hegemonic groups is often prompted by and aimed at physical gestures and external markers of identity: i.e., at the conception of how the member of a protected identity group “over-does” or “under-performs” his or her identity.

I propose to understand the ban on treating people differently because of their race, sex, age, disability, etc., as including different treatments that are based on *how people perform protected identities*. Many of the discrimination claims that courts are unsure about are incidences in which the plaintiff suffered different treatment because he or she blurred the allegedly stable line between the races or sexes through his or her performance or conduct. At work in these cases is not a negative attitude towards the protected identity as such, but towards the performances and practices related to it, or towards the ways in which the identity in question is signified and perceived socially. My proposal is to include within antidiscrimination law also people who are perceived as transgressing the conventions of race, sex, disability, or age. Negative treatment based on the perceived performance of a protected identity (e.g. race) would be considered discrimination based on that identity (e.g. race based discrimination).

Importantly, my concern in addressing these questions is *not* with equality alone, but primarily with liberty, or more specifically, with allowing legal subjects the optimal conditions of freedom to develop and embody their personhood through appearance and practice. This paper examines a specific aspect of a larger issue of autonomy of personhood, namely the autonomy of protected groups to perform their identity as they see fit (or as “comes naturally” to them). I elaborate on this point in Part III.B below.

"Thou shall not discriminate on the basis of race, sex, national origin (etc.)": This or a similar formula of antidiscrimination measures is common in American law, and in Western legal systems in general (It can be found, for example, in federal legislation such as Title VII, the Americans with Disabilities Act, the Age Discrimination Employment Act of 1967 (ADEA), and in numerous state law and municipal ordinances).

The "antidiscrimination formula" typically enumerates categories of identity that should be excluded from the way a decision-maker such as an employer perceives others. That is, it commands that an employer (or another legally recognized decision-maker such as a federal loan officer or a landlord) does not consider a candidate's race, sex, or other suspect classifications when assessing whether he or she is qualified for the job. In other words, race, sex, and other protected categories should be excluded from the decision-maker's epistemology. The rationale behind narrowing the employer's epistemology is as a society, we do not think it just that people would be trapped and limited by their racial, sexual, ethnic or physical traits such as age or physical ability. Such characteristics must not play a role in the allocation of social goods such as employment opportunities, housing, credit, and so forth.

But the risk in defining which identity categories would be protected is in reifying them; in making them real by repeatedly invoking them as meaningful in the process of legal reasoning. Like scholars in the social sciences and the humanities, legal scholars have been grappling with the challenge of finding ways to keep racial and sexual identities meaningful without essentializing them. One of the most central projects in the last half century since the civil rights movement and the rise of identity politics has been a search for a way to give room in the public sphere for expression and presence of racial, sexual, ethnic and other identities, while not trapping members of these social groups in their race, sex, etc., and while avoiding from reductionist, simplistic understandings of such identities.

My contention in this paper is that US antidiscrimination law has not been particularly successful in meeting this challenge: in deciding discrimination cases, courts and jurists participate in a problematic project of entrenching a narrow understanding of identity as composed of contrasted ideal types only: males versus females, Black versus White, straight versus gay, etc. This dichotomous map of identity reifies differences and does not leave room for the different hues and ways of being a person of a particular sex, race, ability, or sexuality. In other words, the scales of the legal discourse have tipped too much toward the side of treating identities as ontologically sound entities, while neglecting the important sense in which identities are constructed and fluid, products of ever-changing social interaction and cultural practices.

In a way, the legal discourse is captivated in a modernist and structuralist conception of identities in society. My project aims to incorporate some insights from postmodern,

post-structuralist critique, while remaining committed to humanist, liberal notions of freedom, equality, and experience.

As a result of the unfortunate way in which antidiscrimination law has evolved, we are now faced with a legal system that protects from discrimination only those members of a protected group that are perceived as the group's ideal type: as I show below, it is only those who are socially and judicially perceived as "real women," "true blacks,"¹ or "actually disabled" that are recognized by the law as entitled to protection from discrimination on the basis of their sex, race, or disability. By contrast, legal subjects *who blur the lines of the allegedly stable identity category* find it difficult to fit into the existing framework of antidiscrimination law. Feminine men, masculine women, blacks who act either "too white" or "too black," Asian gay women (who may be perceived as not submissive enough for their race)² or Latin disabled men (who similarly evade easy classification according to their race or physical ability)—individuals with intersecting identities or with affiliations that are not easily decipherable and who are discriminated exactly because they are undecipherable to other social actors—are not recognized in antidiscrimination law.

Success in a discrimination claim is today intertwined with the price of being typologized by the judicial gaze as being of a clear-cut identity category. The discourse and doctrine of antidiscrimination law produce a covert—yet powerful—apparatus of classifying identities. This must raise some concern about the classifying power of law: in what ways does the legal discourse serve and legitimate the political, social, and cultural "will to know"? Contemporary legal theory lacks the conceptual framework to provide adequate protection to those who defy classification without simultaneously effacing their liminal or subversive social position.

Rather than abolishing racial and sexual typology, then, the legal antidiscrimination discourse preserves and reproduces it.

Legal subjects wishing to make a discrimination claim first have to demonstrate that they occupy a stable identity category. They have to position themselves on a dichotomous axis of identity; they have to declare what they are "speaking as": speaking as a woman or as a man, as Black or as White, as old or as young. Only from such an ontologically stable identity-position can they speak and convey their discrimination claim, because only from such a place can they argue that the opposite group, the one in the other side of the dichotomy, is treated better than they are.³

¹ A powerful example perhaps is Philip Roth's protagonist in *The Human Stain* (2001), a Black college professor passing as White, who was fired because he made a remark in class that was understood as racist.

² See, e.g. Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. Rev.* 1467 (2000) 1473 (discussing a common perception in Black community that gays are not Black).

³ For example, if a woman wants to argue that she was discriminated on the basis of sex, she has to show that similarly situated people who do not belong to her identity category would have been treated better. In other words, she has to show that *men* would have been treated better.

Described from a different angle, the problem is this: one of the most extensively debated questions in Title VII doctrine has been to define who is covered under the categories of race, sex, nationality, etc. For example, should discrimination against homosexuals or transsexuals be considered discrimination based on sex? Or should distinction on the basis of language and pronunciation (e.g. of Black English) be considered discrimination based on race? Or, still, should a refusal to hire a person based on his or her accent be considered discrimination based on nationality? In short, what is the scope of categories such as sex, race, or nationality for the purpose of antidiscrimination law?

The case law's answer to these questions has been inconsistent. For the most part, however, courts have been interpreting sex, race, and other identity categories narrowly: women and men are covered under the category of sex, but homosexuals or transsexuals are not; Blacks are covered, but people who are treated differently because they talk in a Black-associated manner are not covered under the ban on race based discrimination.

In this paper I suggest and develop an alternative framework for Title VII and other antidiscrimination legislation, according to which the ban on discrimination would cover people who are *perceived as blurring the seemingly stable lines* between the sexes, races, sexualities, etc. For example, in the context of race, I would argue that Title VII should recognize not only acts of discrimination against Blacks, Latinos, or Asians because of their race *per se*, but also (and perhaps mainly) acts of discrimination against the embodied, habitual, or semiotic significations of race. That is, the ban on race-based discrimination would cover individuals who suffer negative treatment because they are perceived as blurring the seemingly stable racial lines due to their hair, dress, name, language, or pronunciation. Similarly, individuals who are perceived as blurring the seemingly stable lines between the sexes because they do not conform to the gendered behavior expected of them would be protected under the category of sex-based discrimination. This protection against sex-based discrimination, as I show below, should include homosexuals, transsexuals, and anybody along the gender continuum who is exposed to different treatment because of his or her gender. This suggested new interpretation applies also to the rest of the protected categories in Title VII, the ADA, ADEA, etc. That is, people who are perceived as not conforming to behavior expected from their age group, or people who are not “the right kind of disabled” will be covered under the bans on age or disability discrimination.

My call for a broad interpretation of Title VII is bound to raise slippery slope concerns, urging me to clarify the limits of the scope of the expressions of identity that I wish to protect. This indeed is the hardest question of all. I try to deal with it in part IV.D

Implied in that process, then, is the argument that she is speaking *as a woman*. This might seem simple and unproblematic enough, but this requirement to speak from a place of a comfortably positioned identity (in this case, one's sex) is the source of much of what has been going wrong in the case law.

below. I will say now, however, that while I agree that this is an important difficulty with my argument, the difficulties that I point to here are still more pressing and severe.

The aspects of identity that concern me here have been discussed in the scholarship under four different (but related) rubrics. First, as the “*plus*” element of a protected identity (e.g. “sex plus” arguments such as that discriminating against pregnant women or against women who are mothers is still discrimination based on sex⁴). Second, as *proxy* discrimination, arguing that signifiers of race, such as names, or signifiers of sex, such as height, are also used to discriminate on racial or sexual grounds, and thus using proxies to make distinctions on the basis of protected identities should be legally recognized as forbidden discrimination.⁵ Third, as the *intersectionality* argument (i.e., the notion that to understand the social circumstances and constraints of black women, it is not enough to add sex to race, but rather requires a particular insight into the way sex and race uniquely intersect)⁶. And fourth, as *performative* aspect of identity (the argument that appearance, language, and behavioral practices are constitutive of the identity and should be protected as such)⁷.

While the analyses based on these concepts enriched our understanding of the problem of identity and discrimination, they haven’t been successful in designing the doctrinal change that they call for. My project can thus be seen as emanating from these analyses, trying to take them a step further so that their insights are applied in actual law making.

Part II of this paper analyses discrimination cases and demonstrate how courts find it difficult to conceptualize discrimination against people who blur the line between the races, sexes, or ages. Part III is normative: it provides a new way to interpret discrimination claims that has thus far been unrecognized. Part IV addresses potential objections to my argument, and part V concludes. But first, a note about my selection of cases.

⁴ Add articles in sex plus ##

⁵ See. e.g., Debra Hellman, Two Types of Discrimination: The Familiar and the Forgotten, 86 Cal. L. Rev. 315, 316-9 (1998) (arguing that... ##); Kevin R. Johnson & George A. Martinez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 33 U.C. Davis L. Rev. 1227, 1247-63 (arguing... ##); Michele Goodwin, Race as Proxy: An Introduction, 53 DePaul L. Rev. 931 (2004) (##)

⁶ add intersectionality articles ##

⁷ Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277 (2005); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299 (2005); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875 (2002); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004).

A. Methodological Note: What the Remarkable can Teach about the Mundane

The cases analyzed in this paper might give the impression that my concern is with the rare oddities; with legal subjects who are exceptionally unique in their divergence from common identity classifications. This impression is wrong. Importantly, the cases I discuss are the extreme instances that tease the deeper issue with which I am concerned from its extreme edges. These cases are the available ones, the ones that reach the courts, and the ones that enable us to see the way in which identity is regulated and normalized. But they are merely more illustrative than the more mundane, everyday practices of people who fail to perform sex, race, (dis)ability, or age according to the expected code. The heart of the issue, then, is cases such as *Jerspersen* (discussed below), of “ordinary women” who find it difficult to wear makeup, not that of the man with the dress, or the member of a religion who commands nudity in public. The phenomenon I am pointing to is much more “lukewarm” and much less curious than it is tempting to assume. I am concerned with the almost invisible adjustment that we all do in order to fit into the identity categories that the culture “naturally” assigns to us.

II: Antidiscrimination Law’s Preoccupation with the Stable Ontology of Identity

For a plaintiff’s story to be accepted by courts as a story of discrimination based on a protected identity, the story needs to be perceived not as a personal story of contingent circumstances, but as the sort of narrative (even meta-narrative) that can represent the experience of the entire identity group. In what follows, I will demonstrate my claim on several areas of antidiscrimination law, namely race, sex, disability, and age.

A. Blurring Race Lines: Transgressing “the Gender of Race”

“One is not born a woman, but becomes one.” This famous phrase by Simone de Beauvoir is an accurate depiction of the notion of gender. Gender is the set of roles and characteristics associated with sex. Femininity is the gender expected of biological females, and masculinity is normatively expected from biological males. In other words, the term “gender” related to the ways in which females are expected to have the qualities associated with womanhood, and males are expected embody the characteristics associated with manhood.

The feminist project could be described as an attempt to break the linkage between sex and gender: women’s roles, abilities, and potential are not defined by their biology, and similarly, men can and should explore roles and modes of being that are traditionally associated with femininity.

In the field of antidiscrimination, American law has repeatedly stated that it accepts this claim: according to the prevailing doctrine, it is considered sex-based discrimination to

require that women behave femininely.⁸ In fact, courts today use “gender” and “sex” interchangeably, such that the former is considered equivalent to the latter.

I propose the notion of the *gender of race*. Paraphrasing de Beauvoir, I aim at highlighting the notion that “one is not born Black (or Latino, or Asian), but becomes one.” Numerous accounts of people of color arriving at the consciousness that they are “raced” confirm this de Beauvoirish realization. Famously, Franz Fanon describes the gaze of a child in the train and the way his racial difference was reflected to him by the fear and repulsion with which his appearance was perceived.⁹

Legal scholars have been exploring the implications of this notion that in the grammar of racial identities, there are certain rules of usage that are hard to transgress, and that race has a set of social expectations attached to it. Professors Devon Carbado and Mito Gulati, for example, urge us to think about the “identity work” that racial minorities need to do in the workplace in order to be perceived as professional colleagues. Professor Kenji Yoshino explores the way in which requirements to cover one’s racial or sexual differences are in fact requirements to assimilate, because performance is constitutive of identity. Professor Angela Onwuachi-Willig explores the ways in which members of minority groups can pass differently (e.g. pass as Black or pass as White), depending on whether they are with other group members or with outsiders.¹⁰

I submit that just as antidiscrimination law recognized that females and males should not suffer reprimands if they do not conform to the norms associated with their sex, so should people of color be legally protected from social expectations that they perform their race in a manner that is perceived as acceptable. The conclusion for antidiscrimination law is to treat distinctions based on the “gender of race,” i.e. on assumptions based on stereotypical notions of race, as race-based discrimination.

A 1999 case provides us with an example to this point. When Eunice Hollins, an African-American machine operator at an Ohio plant, came to work with “finger waves” hairstyle, her foreman told her that this hairstyle was “too different” (p. 655).¹¹ Furthermore, the plant manager told the foreman that the hairstyle was “too eye catching” and therefore inappropriate (p. 1098). Although the hairstyle “was neat, well groomed, and did not present a safety hazard” (p. 1098 of lower court decision) as required in the company grooming code, it was still defined as not meeting company

⁸ More on this in Part II.C. *infra*.

⁹ Frantz Fanon, *Black Skin, White Masks* ((1952) Grove Press 1991) 111-12. See also: “[T]he problem of colonialism includes not only the interrelations of objective historical conditions but also human attitudes towards these conditions.” *Id.* at 84.

This constructionist approach to race or other identities does not entail that the experiences of minority identities are not real. See generally *in* IDENTITY POLITICS RECONSIDERED 96, 97-98 (Linda Martín Alcoff et al. eds., 2006).

¹⁰ Angela Onwuachi-Willig, *Undercover Other*, 94 Cal. L. Rev. 873, (2006) (arguing against the notion that Blacks cannot pass while gays can).

¹¹ *Hollins v. Atlantic Company, Inc.*, 188 F.3d 652 (6th Cir., 1999).

policies. A few months later, the plant manager told Ms. Hollins that she should seek company approval of her hairstyles in advance, by bringing in pictures of the types of hairstyles that she would like to wear. Ms. Hollins did exactly that, and brought in a picture of "a hairstyle with braids that she wanted to wear," but her manager told her that the style was unacceptable. When she later brought in a book with pictures of different hairstyles, her manager pointed to some braided and finger-waved hairstyles that he approved of.

Our story continues for two more years with no remarkable events, until one winter day, Ms. Hollins came to work wearing her hair in a ponytail. Since this was a hairstyle that many other (white) female employees wore, Hollins did not think she needed prior permission for this style. But her manager reminded her that she was "required to inform the company before changing her hair style, and said that her ponytail was 'too drastic.'" (p. 1099) He warned her that this would affect her good working relationship with him, and implied that she might be fired. A few months later she moved back to a braided hairstyle that was previously approved by her plant manager. Although he knew it was pre-approved, her foreman said that "'it would be nice' if she would let them know when she was going to change her hairstyle." (1099).

Hollins decided to file a complaint to the Equal Employment Opportunity Commission, in which she stated that she was not allowed to wear a ponytail.¹² When the foreman left the plant and a new foreman came in, the ponytail drew attention again. One day, while she was wearing a ponytail, the new foreman told Ms. Hollins that he was aware of the civil suit claim, and that he needed to address the problem. Despite acknowledging that this style was neat, well groomed, and presented no safety hazards, he convened all the supervisors and managers in order to "discuss Ms. Hollins's hair style and the 'intent' of the grooming standard. At that meeting, they all agreed that "our grooming standards are such that an [employee's] hair should not in itself call attention to [the employee]." 1099.

The new foreman subsequently "informed Ms. Hollins that her ponytail was unacceptable because it was more than two or three inches above her head and because it called attention to her. This was the first time that [the employer] imposed a height requirement on her ponytail." 1099. In her affidavit, Hollins stated that the white women's ponytail were exactly the same height as hers, not lower.¹³

Ms. Hollins sued her employer for raced-based discrimination under Title VII of the Civil Rights Act, arguing that "the grooming policy was applied differently to white people than to African-American people.. [and that] white women who wore identical or equally 'eye catching' hairstyles were not subject to the same treatment." (6th circ. 657).

¹² Her Manager, reading the complaint, told her that "he never said she could not wear a ponytail." (1099). Following this exchange, Ms. Hollins wore a ponytail with no interruption on several occasions.

¹³ In her following performance review, Hollins was rated lower than she usually does, the reasons being "both her personal appearance and her cooperativeness because of her January 20, 1997 ponytail." 1100.

The Ohio Magistrate Court, followed by the Ohio District Court on appeal, both found that Hollins did not make a *prima facie* case of race-based discrimination, because there was no direct evidence to support her claim. The comparative element in every discrimination claim dictates that the plaintiff shows that similarly situated white women with ponytail would have been treated differently. In order to do this, both courts asserted that Hollins needed to show that a supervisor actually found a white woman's ponytail to be comparable to hers. "The Plaintiff needs to present any evidence that the non-protected employees with whom she compares her treatment were similarly situated in all respects." 1102. Hollins presented "no evidence that any supervisor ... determined that a non-protected employee wore a comparable hairstyle and was not notified of being in violation of the ... policy." (1102), therefore there was no evidence that the white employees' hairstyles were incompatible with the grooming policy.

On appeal, the Sixth Circuit found that this last requirement, namely that Hollins needed to show that the employer found that the white women's hairstyles were comparable, was unnecessary, and that the lower courts erred in requiring it. (660) The Court thus remanded the case, reasoning that "a jury could reasonably infer that [the employer] applied its grooming policy to Hollins in an unlawfully discriminatory manner." 661 As an indication of discrimination, the Sixth Circuit noted that the rule forbidding eye-catching hair was not introduced before or after its application towards the Plaintiff.

The Sixth Circuit reached the right outcome, but in my view, its reasoning could (and should) have been richer, particularly in addressing the sociology of racial discrimination. There is room to fill this gap by discussing some elements of this case that were not addressed by any of the courts treating it. More specifically, I think we should pay attention to the interplay between race and the embodied manifestation of it (here, embodied through hairstyle).

I would like to suggest that with her ponytail hairstyle, Hollins was perceived as *transgressing the division between the races*. By saying that her ponytail calls attention to her and that it was "too drastic," the supervisors were saying something about the permissible gender of race, or about the boundaries that one cannot cross in performing one's race. The supervisors can be read as conveying their sense that one cannot be both White *and* Black; that Hollins cannot be *that*, a hybrid Black woman, who by her "relaxed" hair and typically white hairdo, blurs the race lines so that the two races are no more easily cognizable and readily identifiable.¹⁴

Indeed, Hollins was also reprimanded for wearing or wanting to wear typically African American hairstyles, such as "finer waves" and braids. This should not undermine the interpretation that I offer here. As Professor Kenji Yoshino observes, there is not much difference between a requirement to cover (here, asking Hollins not to flaunt her racial

¹⁴ See *Sanders v. District of Columbia*, No. 88-3641 SS, 1991 U.S. dist. LEXIS 7448 (D.D.C. June 4, 1991) (accepting the claim that having a darker skin than other Blacks might prompt forbidden race-based discrimination). ##

identity by typically Black hairstyles) and a requirement to "reverse cover" (here, asking Hollins not to look "too White" by adopting a typically White hairstyle).¹⁵ In both cases, then, Hollins was performing race in a way that was unacceptable to her bosses. In other words, asking a Black woman to avoid from wearing a hairstyle associated with White women (ponytail) is just as much a racial stereotyping as asking her to avoid from wearing a "typically black" hairstyle (braids or finger-waves).

Hollins's discrimination was not a case of animosity towards a black employee solely because she is black. Rather, it was based on a rigid, ontological understanding of race, by which one cannot be Black while trying to pass as white or while appearing as "too white." Hollins's ponytail was not forbidden in itself, as a hairstyle. It was banned to the extent that a Black woman wore it. Her hairdo confuses the neat visual order of allegedly distinct racial essences. My contention is that an antidiscrimination standard which truly aims to discard race as a significant social factor would entail that people should be allowed to perform race as they please, rather than abide by conventions of race.

It is important to pause and make this point because from the Sixth Circuit's decision it might be inferred that the issue here was just racial animus, not necessarily related to appearance, but rather having more to do with making Black employees' lives more difficult in general. I think such a narrow interpretation of the case misses one of its most significant components.¹⁶

Courts have repeatedly refused to recognize the relationship between race and hair. In the much discussed case of *Rogers v. American Airlines*,¹⁷ for example, the court could not see why firing an African American employee because she wore cornrows amounted to discrimination based on race.¹⁸ The Court noted that since the ban on cornrows was applied equally to both races, it was not discriminatory.¹⁹ In the more recent case of *McBrid v. Lamstaf* (1996), a white woman working in a staffing service for paralegals, was

¹⁵ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 870-1, 911 (2002)

¹⁶ My sense that racial transgression is the unstated motivation behind the treatment of Hollins is reinforced by the fact that in her argument, Hollins enumerated other instances in her workplace in which black people suffered disciplinary measurements because of their hairstyle. For example, a black male employee was told that his haircut was not to the company's standard when he came to work with a haircut that was "v shaped" in the back. When the employee replied that "[t]his is how black people wear their hair," he was told that he is in danger of being walked... out the door. (p. 20, Amended Final Reply Brief of the Appellant).

¹⁷ *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

¹⁸ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Lauren Berlant, *National Brands/National Body: Imitation of Life*, in *THE PHANTOM PUBLIC SPHERE* 173 (Bruce Robbins ed., 1993) (providing a cultural analysis of imposed "covering" in the public lives of Black women); Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, in *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* 85, 90 (Austin Sarat & Thomas R. Kearns eds., 1999) (arguing that white conventions of appearance shaped Rogers' employer's notion of business-like image, and critiquing the court's rejection of the cultural context in analyzing the plaintiff's claim).

¹⁹ *Rogers* at 232.

specifically instructed not to place women with "braided hair" in any job. When she protested that practice as discriminatory, she was fired. In her claim that she was fired in retaliation of her complaint, the court found that this policy was not race-based discrimination, but even more strikingly, that the Plaintiff did not have and could not have a reasonable ground to believe that this practice was discriminatory.²⁰

Now, let us suppose for a moment that the grooming regulations at Hollins's workplace specifically specified in advance that "eye catching" or "too different" hairstyles were not permitted. Indeed, the Sixth Circuit indicated that this was crucial in its decision: it specifically noted that the employer did not have a grooming standard forbidding too different an appearance prior or after applying such a standard to Hollins alone. Had such a standard existed before Hollins, then it would allegedly not be problematic that her employer required that she does not wear ponytail, while permitting this style to white women: after all, a ponytail on a Black is eye catching, and a ponytail on a White woman is not. Notice that the "no eye-catching hair" requirement is similar to a professional appearance requirement that was introduced by the employers in *Rogers* and in *McBrid*. Not eye-catching or professional are seemingly neutral grooming standards, but they operate discriminatorily, because in a society in which the White appearance norms prevail, and in which, at the same time, Whites and Blacks are expected to be easily recognized as such, Blacks who deviate from the way that they are expected to appear are indeed "eye catching."

I have been arguing that contemporary courts would not find a "no eye catching" grooming standard to be discriminatory, even if it meant that employers could ban braided hair or ponytail on Black women. My conclusion is supported by the fact that this type of logic, one that is based on keeping appearance within group-based convention, has gained judicial approval even when, like here, it worked to limit only one group's appearance and not the other. A notable example is the well-established case law according to which it would not be considered sex-based discrimination for an employer to forbid men from wearing long hair, while permitting it for women.²¹ This, like the "no eye catching hair" standard, is a standard that is seemingly neutral but limits one group more harshly than the other. Why is such a rule acceptable, and have not been judicially struck down as discriminating men?

The answer, in my opinion, lies in the social and judicial expectations for a stable ontology of identity. Courts confirm the prevailing social notion that women are markedly different than man. If so, then requiring that men look differently than women is simply treating likes alike, and treating different differently.²² Going back to

20 *McBride v. Lawstaf, Inc.* 1996 U.S. Dist. Lexis 16190. Empirical research confirms that employers often disregard, as a matter of policy, the vitas of applicants with African American sounding names. See *Onwuachi-Willing & Barnes* at 1300.

²¹ Add long hair cases ##.

²² The other explanation for courts' acceptance of such a rule is that they see matters of hair as trivial, and ones that do not call for judicial intervention: courts have a hard time understanding what hair has got to

Hollins, if Blacks are different than Whites, then it is reasonable that the same hairstyle that is not eye-catching when worn by a White woman, becomes eye catching when worn by a Black woman. The Seemingly neutral appearance standard limits members of the dominant group much less than it limits protected groups.

According to the approach developed in this paper, if a "no eye-catching hair" grooming rule is applied such that White but not Black women can wear ponytails, such application should be struck down as discrimination based on race. In fact, one of the main motivations behind my project is that I am quite certain that present day courts would not find any legal justification to regard such a rule as discriminatory. My aim is to develop an account that would enable courts to see how hairstyle could be tied to race because of the socio-cultural function of race in our culture. It is pivotal that we develop a thicker and richer understanding of the social dynamic regarding individuals whose appearance or practice challenge the simplistic assumptions by which races or sexes are easily distinguishable and that the lines between them are stable (and should remain stable). Today's courts, perhaps unwittingly, play a role in affirming this essentialist ontological assumption. There is a need for a new understanding of antidiscrimination; one that would prompt the courts not to participating in the essentialist assumptions reflected in employers' policies.

So how do we do that? How should a judge interpret Title VII or similar antidiscrimination formulas so that they cover a case such as *Hollins*, even in its hypothetical, milder form described above, under which the employer did introduce in advance a "no eye catching hair" rule?

The answer should be this: Whenever an antidiscrimination formula forbids discriminating on the basis of race, the interpreter of the formula should understand it as including also acts of discriminating individuals who blur the race lines and transgress the conventions of performing race. To continue interpreting race narrowly, as courts do at present, simply provides an unconvincing response to the social dynamics of race discrimination. If the "no eye catching hair" rule was applied as a way to regulate raced appearance so that it does not transgress the imagined line between the bodies of the White and Black races, then such application should be considered race based discrimination.

Similarly, in *Rogers* (the case of the African American airport agent who was fired for wearing cornrows) and in *McBrid* (the employment agency who refused to place women with braided hair), the courts should have seen cornrows or braids as embodied,

do with sex, and they see their role is protecting what they understand to be the severe and really serious cases of sex based discrimination, not the ones that involve "petty" claims about hairstyle. I stand with those who believe that hair and other semiotic elements of identity are of fundamental importance to our sense of personhood, and that arguing that interfering with hair is a minor interference is simply unconvincing. We should also notice that the "de minimis" argument about hair can always be turned on its head against those who invoke it: if hair is that insignificant, and does no work of conveying meaning, then why is it so important for the employer to regulate it?

symbolic aspect of racial identity. The employers' sense that these hairstyles were not sufficiently "professional-looking" has an underlying story of hegemonic White culture behind it, and this story should be incorporated into the understanding of race-based discrimination.

1. The "Richard Ford Objection"

At this point some readers may have a concern that my argument, despite its anti-essentialist intent, is in fact re-essentializing race, in that it gives room to stereotypical racial practices: if the law recognizes the right of Blacks to wear cornrows as part of their race equality, then this might result in confining the meaning of race to a limited set of prescribed stereotypes. Professor Richard Ford recently provided an extensive account of this concern, in his book "Racial Culture: A Critique".²³ Just as diversity should not be the leading justification to race-based affirmative action, writes Ford (because this justification would place an expectation that people of color provide different, "authentic" perspective that might burden them with being the token representatives of their group), so should the law refrain from recognizing external markers as related to race. Although heart is with plaintiffs that seek legal recognition for their hair as part of their race, continues Ford, "antidiscrimination law need not 'protect group traits' in order to prohibit discrimination on the basis of group status"²⁴ because "the celebratory discourse of group difference does not simply react to or even mirror majority group bigotry—in many cases it employs precisely the same description of group difference that the bigots employ."²⁵ Therefore, "even if there are [racial cultures], on balance the risks of attempting to acknowledge them in policy and law outweigh any potential benefits."²⁶

I agree with many of Professor Ford's concerns, but I think that my suggested model opens-up a way to avoid the pitfalls at which Ford rightfully points. Ford's objection is to claims such as that Black people should be allowed to wear cornrows. In my framework, however, this is not the emphasis: Blacks should be allowed to either wear cornrows or wear a typically White hairstyle: they should be allowed to perform their race as they see fit, even if it is perceived as "under-performance" of that race. My emphasis is not on allowing space for cultural differences per se (which are the focus of Ford's critique) but on the liberty of each individual to perform his racial or sexual identity as he or she pleases.²⁷ Permitting this liberty of performance of identity, if my reading of Ford is correct, is one of his main concerns.

²³ Princeton University Press, 2005.

²⁴ *Id.* at 125.

²⁵ *Id.* at 3.

²⁶ *Id.* at 13.

²⁷ On liberty and equality as underlying my argument see *infra*, part III.B.

B. Identity: From Stable Ontology to Careful Epistemology

My suggested interpretation for Title VII is based on the understanding that discrimination does not occur in the abstract. Its loci are the micro-exchanges, the everyday interactions between embodied social actors, with concrete appearances, gestures, and other external markers. Given this approach to discrimination, the main concern of antidiscrimination law should be the social meaning of race (and other protected identities), as well as its specific manifestations. The law should grapple with what it means to be of a certain race or of a specific sex; with the perceptions and stereotypes associated with age; and with the semiotics of physical (dis)ability.

Racist practices against individuals do not only originate from “animus towards their racial group as defined by phenotype, but also because they are perceived, whether consciously or unconsciously, as belonging to a particular racial group and as having the negative qualities linked to stereotypes of that group.”²⁸ Racist acts are not always (and perhaps even not mostly) based on one’s race per se, but on the perception of that race. That is, they are based on “racial stereotyping due to a trait, factor, or quality that is considered to belong to persons or a particular race.”²⁹

Whereas the focus in contemporary antidiscrimination law is on the ontology of the plaintiff’s identity (that is, he or she need to show that they belong to a protected group), the focus should shift to the epistemology of identity—how was the plaintiff *perceived*; was he or she subject to stereotypical assumptions about his or her race, sex, nationality, age, or disability, that resulted in discriminatory practices?

When the discriminator reacts negatively towards an individual that he or she perceives as Black, then it usually not the discriminator’s concern to verify that the lineage of the individual indeed leads back to an African origin. Negative social responses are much more visceral, almost automatic.³⁰ Similarly, an employer who discriminates a man who behaves femininely is not concerned with whether this employee is really gay:³¹ even if his sexual partners were always from the opposite sex, the animus towards him would still exist. What’s at work is not the gay identity in itself, but its semiotics: it is the cultural meaning associated with gayness that prompts the negative treatment of the employer, not the actual identity of the employee.

²⁸ Angela Onwuachi-Willing & Mario L. Barnes, “By Any Other Name?: On Being ‘Regarded as’ Black, and Why title VII Should Apply Even If Lakisha and Jamal are White”, 2005 Wis. L. Rev. 1283, 1325 (2005).

²⁹ Id. at 1324.

³⁰ See Iris Marion Young, *Justice and the Politics of Difference*, p. ## (1990).

³¹ Whatever “Really gay” could mean. The medical, biological, and psychiatric models which purport to propose a stable typology of sexual orientations have been repeatedly proven insufficient, in being unable to capture the wide array of sexual practices and identities.

Stereotypical negative assumption about the characteristics of a given race or sex are sometimes prompted unwittingly.³² To invoke semiotic terminology, even when we think that the discrimination is aimed at one's signified identity, it in fact prompted by and occurs in the level of the signifiers of this identity. "[D]iscrimination against racial minorities, Blacks in particular, is not merely the result of an aversion to dark skin in itself, but to what that dark skin signifies."³³ The discriminator relies on how race or sex is read through myriad of identity signifiers, from body language to pronunciation³⁴ from name to dress style.³⁵

By demanding that the plaintiff stably locate him or herself in a clear identity category, the legal discourse reflects an image of the social world in which the unremarkable person, the one whose identity is readily decipherable, is the natural and neutral and thus the acceptable. Any diversion from the easy decipherability becomes the remarkable, that which is marked with difference, and by this re-delineate and reinforces the scope of normative identity. By rejecting the claims of legal subjects with remarkable or divergent identities, courts signify the boundaries of normativity—be it sexual, racial, etc.

C. Blurring Sex Lines

It is well established in the case law that "sex" in Title VII also means gender. For example, the Supreme Court found that a woman that was denied promotion in an accounting company because partners believed that she was not feminine enough, was subject to sex-based discrimination that is forbidden by Title VII.³⁶ The Court reasoned that similarly situated men would have not been subject to such pressures, and that the requirement to be both feminine and successful on the job (which requires traits associated with masculinity) presented the employee with an unfair "catch 22."

This recognition that sex is also gender is of immense significance, because it reflects a judicial readiness to understand sex as inherently related to the performance of sex and thus concerns sex's epistemology, and not just its ontology: in *Price Waterhouse*, the Supreme Court reflected the notion that being a woman does not only mean having xx chromosomes, but entails certain constraints and conventional expectations, which, like

³² See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 329-44 (1987) (##).

³³ Onwuachi-Willing & Barnes, p. 1295. See also Taunya Lovel Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. Rev.* 1705 (2000) (##). See also Jean Shin, *The Asian American Closet*, 11 *Asian L.J.* 1 (2004) (##). Randall Kennedy, *Racial Passing*, 62 *Ohio St. L.J.* 1145 (2001) (##).

³⁴ See Jill Gaubling, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 *U. Mich. L.L. Reform* 637 (1998).

³⁵ Cite Appiah on the assumption of sex. ##

³⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

sex itself, should not burden women.³⁷ The logic of *Price Waterhouse* was that to expect particular gendered behavior is to stereotype based on sex, and, as the decision asserts: “[t]he Supreme Court has long made clear that Congress enacted Title VII in part to combat differential treatment based on sex stereotypes.”³⁸

However, an examination of the case law since *Price Waterhouse* reveals that courts have been reluctant to accept sex discrimination claims on grounds of gender based distinctions. The realization that sex is part of gender, then, has not really been internalized by courts and does not reflect in the doctrine.³⁹ A notable example is the case of *Jespersen v. Harrah’s Operating Co.*⁴⁰ Plaintiff Darlene Jespersen worked as a bar tender in a Casino for 21 years, during which she received excellent reviews by her managers. Among other things, she was good with drawing the boundaries with costumers who drank too much, and being nicely assertive in refusing to serve them more drinks.

The problems began when a new management introduced a new dress and grooming code, by which female employees were required to wear makeup. Ms. Jespersen, who was not accustomed to wearing makeup, tried it on for a few days, but she felt that she was not herself. Her authority with costumers was compromised, because she felt that she was too feminine, and could not assert her authority and stature as she used to. She therefore refused to comply with the makeup requirement, and was fired as a result.

In court, she argued sex-based discrimination under Title VII of the Civil Rights Act. Antidiscrimination doctrine dictates that in order to establish her argument, the plaintiff needs to show that a similarly situated male would be treated better than her. That is, she needs to make her claim as a woman, or else there would be no basis for comparison, and she would have no claim.

The court could not see the problem in this case: the standards for grooming were different for each sex, but they placed a similar, or proportional, burden, on each of them, and thus were not discriminatory. Men's grooming policy banned them from wearing makeup, nail polish, etc. So, as a woman, Jespersen was treated symmetrically to men. She was not discriminated on the basis of sex, but rather, her sex had been taken into account in a legitimate way.

I suggest that the reason that the Court did not accept Jespersen's claim is that, like in the cases discussed above, it used a logic of stable ontology of sex identity: it looked for the identity of the claimant—the claimant was a woman—and because she was a woman, then there was nothing wrong with asking her to look feminine. In other

³⁷ The same is true of men, of course.

³⁸ 490 U.S. 228 (1989).

³⁹ See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 160-161 (Random House 2006) (discussing the inadequacy of the “catch 22” reasoning in *Price Waterhouse*, and observing that the broad interpretation of its ruling has not been followed by federal courts).

⁴⁰ 392 F.3d 1076 (9th Cir. 2004), *aff’d* 444 F.3d 1104 (9th Cir. 2006) (en banc).

words, had Jespersen been a man required to wear makeup, the Court would have identified that there was something wrong with such a requirement: men should look like men. But because the Court accepts the basic intuition that there is an essential difference between the sexes, and that there is nothing wrong with employers' wish to reflect and maintain this difference, it could not recognize the way in which Jespersen's plight was unfair treatment based on sex.

Here is another way to phrase my argument: Antidiscrimination doctrine has no room for *trans individuals*—for individuals who, like Jespersen, blur the line between the sexes because they won't conform to the conventional gendered behavior expected of their sex.

Jespersen's sex identity was located between femininity and masculinity, and thus between female and male. Following her employer, the Court conveyed to Jespersen that "She cannot be that!" It was effectively stating that there should be no legal implications for discriminating people transgressing the division between the sexes. Only "real women" (real women here means women who perform femininity appropriately) and real men can argue sex-based discrimination.

The legal understanding of sex discrimination should encompass not just women who can easily speak from a subject position of women, but also women who are positioned in an intermediate, not easily classifiable place on the sex divide.⁴¹

By refusing to wear makeup and reinforce the easy visual distinction between the sexes Jespersen transgressed the lines between the sexes, and presents a threat to the neat, seemingly natural and neutral ontology of sex identities.

Jespersen as indeed not clinically identified as transsexual or transgender,⁴² but this is

⁴¹ Commentators have suggested various explanations for why the holding of *Price Waterhouse* has not really "caught." See, e.g. Gowri Ramachandran, Intersectionality as "Catch 22": Why Identity Performance Demands are Neither Harmless nor Reasonable, 69 Alb. L. Rev. 299 (2005) (hypothesizing that in *Price Waterhouse*, there was an element of "catch 22", which lacked in the claims that followed: Hopkins, the plaintiff in *Price Waterhouse*, faced an impossible and unfair dilemma: either she adopts the male behavior and culture in the accountant world and gains more professional achievements, or she behaves femininely and pays a professional price. As Rachamendardn notices, the other type of cases in which gender was recognized as sex based discrimination was when there was an element of harassment. When there is harassment, courts find it easy to recognize the price that the plaintiff is paying for his or her diversion from gender norms. Otherwise, courts do not see what is the cost for a person to change their gender appearance and performance so that they fit with their biological sex and conform to prevailing norms). In my opinion, the reason that the notion that gender is part of sex for the purpose of sex based discrimination has been rejected is the judicial world view that I have been dubbing ontological: Courts see males and females as essentially different, and thus fail to see what is wrong with an employer asking women to reinforce this difference visually, through their makeup.

⁴² Some transsexuals and transgender people received recourse to their claim under the sex-based discrimination rubric, but this was only in the price of determining whether they speak as women or as man. See *Rosa v. Park West Bank & Trust*, 214 F.3d 213 (1st Cir. 2000), and my analysis of it in Tirosh, *Adjudicating Appearance: From Identity to Personhood* 19 YALE J. L. & FEMINISM 49, at 64-9 (2007). On the same token, transsexuals who claim sex-based discrimination are rejected because they are

exactly my point: the next step should not be to include transsexuals and transgender as a new category in Title VII,⁴³ but rather to recognize that transsexuals, transgender people, and mundanely masculine women or “regular” feminine men should be covered under the ban on sex-based discrimination.

1. Sexual Harassment between Same Sex Individuals

It has been long established that that sexual harassment is a form of sex-based discrimination, and thus forbidden under Title VII. Accordingly, if a woman is subject to remarks or actions of sexual nature, then she is entitled to argue that she was discriminated on the basis of sex. Less than a decade ago, in the 1998 case of *Oncale*, the Supreme Court also came to terms with the idea that sexual harassment can occur between individuals of the same sex, and this would also amount to sex based discrimination.⁴⁴ Initially, courts refused to recognize male-male harassment as sex based discrimination because they worried that such ruling would in effect widen the protection of Title VII to include discrimination based on sexual orientation.⁴⁵

But the case law following *Oncale* reveals reluctance to recognize every male-to-male sexual harassment as based on sex discrimination. Rather than asking about the act of harassment and whether it was based on sex, the focus in the case law turns to the sexual identity of the parties involved in the harassment (the harasser and the harassed parties). If one of the parties is homosexual, then judges worry that the harassment is not based on the plaintiff's sex (or gender), but on his or her sexual orientation. Since sexual orientation is not a protected category in Title VII, harassment based on homosexuality should not be recognized as sex discrimination.

This, again, reflect my observation that courts rely on a stable ontology identity in deciding discrimination cases. The focus of the fact-finding process in such cases is centered *on the ontology of identity of the plaintiff*: if he was *a* homosexual, he could not receive Title VII remedy against sex based discrimination, but if he was merely feminine acting or perceived as not masculine enough by his colleagues or bosses, then his harassment was based on sex.

unsuccessful in convincing the court that they were discriminated on the basis of sex. See, e.g., *Patricia Underwood v. Archer Management Services, Inc.*, 57 F.Supp. 96, 98 1994) (Plaintiff, a male-to-female transsexual, failed “to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against because of her status as transsexual—that she transformed herself into a woman—but alleges no facts regarding discrimination because she is a woman.” However, the Court recognized that she was fired because as a woman, she “retain some masculine traits”. *Id.*, *id.*

⁴³ This has been the recent focus of campaigns for legislative proposals such as ENDA (The Employment Non-Discrimination Act), which seeks to federally ban discrimination based on homosexuality or gender identity.

⁴⁴ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998) (finding that harassment between two males or two females could amount to harassment “because of sex.”)

⁴⁵ See Justice Scalia's review of the case law, *id.* at 79.

The 2002 case of *Rene v. MGM Grand Hotels, Inc.*⁴⁶ illustrates the tricky and inconsistent state of the legal thinking on sex-based discrimination. Rene, a hotel butler in the VIP floor, in which all the other employees were also male, was repeatedly subject to remarks referring to him as a "babe," and to acts such as fingers inserted to his anus and aimed at his testicles. Two lower courts denied Rene's sex-based discrimination claim, reasoning that he was discriminated because he was gay, not because of his gender.

On appeal the Ninth Circuit, in a plurality opinion, ruled that Rene had a sex based discrimination claim because the harassment was of sexual nature, and because it did not matter what was the motivation of the harassers—whether their hostility against him was based on his sexual orientation or on his feminine manner [hereinafter: “the first plurality”]

Other judges joined this outcome, but with a different reasoning [hereinafter: “the second opinion”]. According to their approach, establishing that the harassment was of sexual nature was insufficient. What needs to be established is that the motivation of the harassers was gender. Here, the facts indeed indicated that Rene was harassed because he was perceived by his colleagues as feminine, and thus was discriminated on the basis of gender.

The dissent [hereinafter “the dissent”] essentially agreed with the second opinion on the law, but disagreed on the facts: in their view, the facts indicated that Rene was discriminated because of his sexual orientation, and not because of his feminine behavior. The dissent explained that Rene never argued that he was harassed because he was feminine, but rather kept maintaining that he was harassed because he was gay. These dissenting judges agree that had the facts been different, and it were established that Rene was harassed because of his feminine manners, then he would have had a claim of sex discrimination.

In terms of the legal holding, then, 6 of the 11 judges in this case thought that the law is that recognizing a sex-based discrimination claims depends on the harassers' perception of the harassed party's identity. If the harassers saw the harassed as a gender non-conformist, then the harassment is sex-based discrimination, but if the harassers perceived the harassed as homosexual, then the harassment is discrimination based on sexuality and not on sex.

My position on the law differs from both the first plurality opinion on the one hand, and from the second opinion and the dissent on the other hand.⁴⁷ My position is that

⁴⁶ 305 F.3d 1061 (9th Cir. 2002).

⁴⁷ The first plurality opinion had erred in its reasoning because, as the dissenting opinion puts it, "Harassment for other reasons, for example, because a person is short, fat, bald, disfigured, belongs to an unpopular social group, belongs to a particular political party, or engages in other activities outside the work-place, including sexual activities, that the harasser disfavors, is not actionable under Title VII." (1071) In other words, harassment of sexual nature can be based on many other identity categories that are not protected by Title VII. The second opinion got it almost right: It reflected an understanding that even if the Plaintiff argues that he was discriminated due to his gayness, the harassment also had to do

according to the letter and spirit of Title VII, if a man was perceived as gay, he was also perceived as blurring the boundaries between the sexes. Therefore, he was subject to sex-based discrimination. Accordingly, the fact-finding process should concentrate not on the question “what identity did the Defendant took the Plaintiff to be.” Rather, the question should be whether the plaintiff was discriminated on the basis of gender. Again—a plaintiff that is harassed because he is perceived as gay, is harassed because of gender.

It therefore does not matter whether Rene’s colleagues perceived him as feminine or as gay. Even if they thought he was gay, this meant that he was not conforming to the gender norms required of “real men.” From the comments of his colleagues it becomes clear that they view real men as men who desire women and who act in a masculine manner. He was referred to in female pronouns: she, her, and "female whore." Additionally, they teased him because he walked like a woman (1069).

If the legislative goal underlying Title VII is for a work environment free from assumptions based on biological sex, then we must conclude that discrimination based on *attitudes about the sexes*, attitudes that narrow the scope of the permitted social roles of members of each sex and the scope of behavior and appearance opportunities of each sex, are also sex-based discrimination.

My conclusion does not pertain only to gay men who are perceived as feminine. Even masculine gay men, by their very identity as gay, threaten the imaginary clear dividing line between the sexes: they are perceived as objects of desire for other men rather than for women; they challenge the sexual contract, the fundamental familial and societal divisions of labor. They are perceived as "not real men," and thus they are discriminated on the basis of gender and sex.

In sum, if we agree that the sex-based discrimination claim of the plaintiff in *Price Waterhouse* (the woman who was denied partnership because she was too masculine in appearance and behavior) should have indeed been received (as it was), then we must agree that men who are perceived as feminine, be they straight or gay, should be protected under the ban on sex based discrimination.

The following 2003 case from the Seventh Circuit further explicates the troubled relationship between the ontology of identity and discrimination. In *Hamm v. Weyauwega Milk Products*,⁴⁸ the Plaintiff, a worker on a milk product factory, suffered harassment by his fellow employees, some of it with sexual content (for example, name calling such as "fagot, bisexual, and girl scout" 1060, or warning to fellow employees that they shouldn't bend over with their back to his face).

Plaintiff argued that his harassment amounted to sex-based discrimination. Again, the

with his gender, with his being perceived as too feminine. The wrong element in this opinion is that it still required explicit factual evidence in order to be convinced that Plaintiff was perceived as feminine, and was discriminated because of his femininity, and not because of his sexual orientation.

⁴⁸ 332 F.3d 1058.

question the court grappled with was the motivation behind the harassment: the Seventh Circuit conveyed its stand that it was compelled to determine whether the harassment suffered by the plaintiff, was a result of gender stereotyping, or whether it was prompted by the assumption that he was gay.

Hamm lost the case because the Court determined, as a matter of fact, that his coworkers harassed him not because of his feminine behavior (i.e. because of his gender) but rather either because of their disapproval of his work performance or because of "their perception of Hamm's sexual orientation." 1062.

"Even Hamm's claim that (a coworker) referred to him as "girl scout," the strongest factual allegation he makes that his coworkers actions were linked to his nonconformance to sex stereotypes, does not establish that he was discriminated against because of his sex." 1064.

I contend that the two motivations for sexual harassment—the Plaintiff being perceived as feminine and the Plaintiff being perceived as gay—cannot be separated.

The fact-finding energy was therefore wasted on an unanswerable question. Perceptions of homosexuality are tied into and prompted by perceptions of gender stereotypes, and vice versa: perceptions of non-normative gender performance are tied into and prompted by perceptions of homosexuality. The judicial attempt to find an analytical framework to separate the two reflects too narrow an understanding of identity (in this case, sexual identity). Being a man, just like being a woman, is an embodied experience; it does not occur in the abstract. And if it is the purpose of antidiscrimination clauses such as Title VII to protect men or women who are subject to treatment based on their sex, then this should include protecting them against gender stereotyping—including when this stereotyping is prompted by one's sexual orientation.

In a concurring opinion that her wrote separately, Judge Posner rightfully observed that the distinction between protecting against sex stereotyping and not protecting homosexuals from discrimination based on their sexual orientation is "curious." (p. 1066).

"To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy." 1067.

Like I do in this paper, Judge Posner observes that such judicial approach leads to a futile game of finding the plaintiffs' "true" identities:

"Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual... and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individual's sexual preferences—to what end connected with the policy of

the statute I cannot begin to phantom." 1067.

To demonstrate this point, he asks rhetorically: "If a court of appeals require lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual against whom it is free to discriminate?" 1067.

While I never expected to agree so wholeheartedly with Hon. Judge Posner, here I couldn't agree more. I am identically concerned by the longing to find out the real identity of the plaintiff in an antidiscrimination case.

I part ways with Judge Posner, however, on the implications of these troubling observations. Judge Posner contend that the futile attempt to find out whether the plaintiff is gay or just feminine must lead us to the conclusion that Title VII does not protect all act of sex stereotyping, only ones that serve as a clear axis for discrimination based on sex:

"Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometime . . . be evidence of sex discrimination. In most cases—emphatically so in a case such as this in which, so far as appears, there are no employees of the other sex in the relevant job classification—the 'discrimination' that results from such stereotyping is discrimination among members of the same sex." 1068.

And in a more playful phrasing:

"[T]here is a difference . . . between, on the one hand, using evidence of the plaintiff's failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called 'sex stereotyping,' as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather." 1067.

According to this position, only if the sex stereotyping introduces an extra burden on one sex, then it should be considered sex-based discrimination. Judge Posner gives as an example a fire department that refuses to hire mannish women to be firefighters. "[T]his would be evidence that it was discriminating against women, because mannish women are more likely than stereotypically feminine women to meet the demanding physical criteria for a firefighter." 1068. Judge Posner contends that it is impossible to equate sex stereotyping to sex-based discrimination. In the case of an all male workplace, he

explains, if there is "discrimination against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate." 1067⁴⁹

It is hard to identify the analytical line between the cases that Judge Posner would see as sex-based discrimination, and those that would not enter this category. In my mind, it seems that both the refusal to hire masculine women firefighters and the refusal to hire feminine men to an all-male workplace amount to sex based discrimination. Otherwise, we are left with a legal regime that is based on a foundation that its subjects are "real," or normative, men and women.

The result of Judge Posner's interpretation is that if a woman wants to argue hostility towards her as a masculine woman, she'd better be employed in a workplace where there are not many other women. Otherwise, the employer could always argue in defense that it is not hostile towards women, just towards gender nonconformist women.⁵⁰ In my view, if a man is sexually harassed because he is gay, he is harassed because of gender: gay men, by their very presence, convey a nonconformist story about gender, no matter whether they are masculine or feminine. And this is a form of gender stereotyping that Title VII aims to target.^{51 52}

2. The Plaintiff, Compared to Whom?

Antidiscrimination cases contain a comparative element: the plaintiff needs to demonstrate that similarly situated people who do not belong to the protected group

⁴⁹ Moreover, Judge Posner expresses an understanding of the complexity of identity, and of its naturally embodied nature. "Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter... Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true -- effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men." 1067. It is remarkable for me that the conclusion drawn from this is that we should only protect a narrow group of people who suffer what Judge Posner sees as actual sex based discrimination, rather than protect gays and straight, whatever their sexuality is, if they suffer because they don't conform to gender norms. Again, a man discriminated because he is effeminate is discriminated because of his sex. An effeminate woman would not receive such treatment.

⁵⁰ We have been through this type of discussion in debating the "sex plus" doctrine. Courts identified already that discriminating only pregnant women, or only women with children, still amounts to sex based discrimination, even if it is not aimed towards all women. If a woman is discriminated against because she is a mother, an employer that would argue that he has many women in the workplace (albeit all non parents) would not prevail. Discriminating mother is discriminating because of sex. Similarly, discriminating masculine women is discriminating because of sex.

⁵¹ See Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 Harv. C.R.-C.L. L. Rev. 1 (2000).

⁵² Mare A. Fajer, A Better Analogy: "Jews," "Homosexuals, and the Inclusion of Sexual Orientation as a Forbidden Characterization in Antidiscrimination Laws, 12 Stan. L. & Pol'y Rev. 37 (2001). ##

were treated better than he or she. Should a feminine man arguing sex-based discrimination be compared to women in his workplace, or should he be compared to other men who conform to masculine gender norms and thus are not treated adversely? Should the fact that there are other Black employees in the workplace serve to protect the defendant against a Black woman's claim that she was discriminated because she did not perform her race correctly?

The answer provided by the case law is still mixed and unclear. This section will argue that it is crucial that the group to which the plaintiff is required to compare him or herself is not always simply members of the opposite group. Sometimes, the appropriate object of comparison should be members of the plaintiff's group who perform their protected identity differently.

3. Men with Long Hair

In a long line of cases, including very recent ones, courts have been repeatedly saying that it was okay for an employer to require that male employees only wear short hair, while permitting long hair for female employees. The law is that grooming standards can be different for each sex as long as they place a similar burden on both sexes. Different grooming standards for men and women have been struck down only when one sex is presented with more hardship (for example, when only female flight attendants were required to abide by maximum weight requirements, or when only women were required to wear uniform, while men were allowed to wear "business attire.")

It seems to me that hidden in this logic is an assumption about some fundamental difference between the sexes. Just as our intuition about justice requires that we treat the likes alike, it also dictates to treat different groups differently. As long as the grooming rules merely reflect their difference, there is no reason to treat them as discriminatory.

We are again witnessing the law's participation in affirming social norms and beliefs about the differences between dichotomous axes of identity. But more importantly, this preliminary classificatory act undermines the spirit and purpose of Title VII. If we want to do away with sex based discrimination, why would it be reasonable for an employer to be able to tell men from women? Even more fundamentally, why do we need to know the sex of the plaintiff that is arguing that they have a right to wear their hair long, before we can tell whether this is sex based discrimination?

D. Example from Disability

E. Example from Age

III. A Normative Proposal

This Part summarizes the theoretical framework within which my analysis operates, and lays out my suggested interpretation to Title VII and other antidiscrimination legislation.

A. Theoretical Background: The Dangers Entailed in Transgressing Identity

All the cases discussed in this paper concern negative social responses towards performance of identities that are viewed as blurring identity lines. I have been arguing that social actors suffer adverse treatment not only because they are members of stigmatized or underprivileged groups, but because their identity resists clear location on the protected axes of sex, race, nationality, and so forth.

The observation that Western culture privileges clear categories and that which is easily categorizable has been made by scholars from diverse disciplines and from different perspectives. That the classifiable is privileged is not a mere philosophical point: it has particular significance in the context of identity. The stranger, or that which belongs neither here nor there, is viewed as a dangerous threat to the social order. Anthropologist Mary Douglass described the ways in which ambiguous or unclassifiable phenomena are perceived as polluting, disgusting, and dangerous because they interrupt the order of things.⁵⁴ Sociologist Zigmunt Bauman writes about the ways in which unclassifiable members of society, notably Jews in Europe, threaten the entire cultural system of classification.⁵⁵ Jacques Derrida explores the ways in which “the undecidable” is both paralyzing and productive in its ambivalence and lack of definite, single meaning.⁵⁶

Yet from another direction, namely the field of cognition, we find that the human need to classify and categorize is a basic tool for orientation in the world. This inclination towards categorization may be based, therefore, on our cognitional characteristics. Some

⁵³ Sutton, 527 U.S. 4 ##...

⁵⁴ Mary Douglass, *Purity and Danger* ((1966) Routledge 2002). “A polluting person is always in the wrong. He has crossed some line which should not have been crossed and this displacement unleashes danger for someone... Pollution can be committed intentionally, but intention is irrelevant to its effect—it is more likely to happen inadvertently.” (140). “Danger lies in a transitional state, simply because transition is neither one state nor the next, it is undefinable. (119). Additionally, anthropologist Victor Turner talks about the liminal stage in a group member’s life in which the roles and rules are open ended—a dangerous time for the subject as well as for his or her society. See V. W. Turner “Betwix and Between: The Liminal Period in Rites de Passage” (London, 1960).

⁵⁵ ZYGMUNT BAUMAN, *MODERNITY AND AMBIVALENCE* 58 (1991).

⁵⁶ Jacques Derrida, “Plato’s Pharmacy” in *Dissemination* (Barbara Johnson trans. Chicago 1983).

scholars have suggested a link between discrimination and the instability of categories.⁵⁷

These rich accounts provide tools for understanding the magnitude of the experience of people perceived as challenging the basic order of identity, and makes it easier to see why it is so important to protect from discrimination those who are perceived as out of the ordinary and thus out of order.

B. Poetic Personhood: The Meeting Point between Equality and Liberty

Scholarly analyses of the type of cases discussed here generally suggest that characteristics such as hair, names, gestures or language be conceived as part of the protected minority identity. Thus, cornrows should be legally understood as part of Black identity, and speaking Spanish should be legally conceived as part of Hispanic identity.

As I showed elsewhere,⁵⁸ these accounts fall into the same trap that they wish to critique: they reproduce a stable account of identity, by relying on an allegedly stable nexus between signifiers and signifieds of identity. Since signs can, by definition, be used to mislead (e.g. a White woman can wear cornrows, or a person who has no Spanish background can adopt a Spanish accent), we cannot hope to rely on signs as stable proxies of identity). Rather, we should understand negative social responses towards personal markers (hair, dress, etc.) as an issue that raises not equality concerns alone, but equality combined with liberty. I developed the idea that much of what we convey about ourselves through markers should be understood as *poetic elements of personhood*.⁵⁹ I.e., that the way we wear our hat or the way we sip our tea should not be understood as an argument or assertion that has clear, definite meaning about our identity, but rather, like poetry, as a much more suggestive expression, working through connotation rather than denotation, through allusion and experimentation rather than clear premeditated assertions.

I further argued that claims about socially perceivable attributes such as appearance, manner of speaking, or names, should be understood by the law first and foremost through the notion of *personhood*, and not, as they have been thus far, through the prism of *identity*. Therefore, when an African-American woman loses her job because she refuses her employer's requirement to change her cornrows hairstyle, we should ask whether the cornrow play a role in her personhood: when she claims race-based discrimination, the court should ask not whether cornrows are a stable signifier of race

⁵⁷ See, e.g. Marybeth Herald, Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes, 41 U.S.F. L. Rev. 299 (2007). And see, more generally, Igor Stramignoni, "Review Essay: Categories and Concepts: Mapping Maps in Western Legal Thought, 1 International Journal of Law in Context 411 (2005) (discussing the potential and limit of classifications in law).

⁵⁸ Yofi Tirosh, Adjudicating Appearance: From Identity to Personhood, 19 YALE J. L. & FEMINISM 49 (2007).

⁵⁹ Id. at 104-08.

(since no sign is stable, by its very nature as a sign) but whether the cornrows are a matter of personhood for her. And since race is an identity loaded with cultural significance, history and power, it is reasonable to conclude that indeed signifying her race is an essential part of her dignity and autonomy.

To clarify, according to my approach there are other cases in which appearance should be protected as part of personhood, even when the issue does not involve identities that are traditionally protected by civil rights.⁶⁰ However, when the appearance or practice in question is related to race, sex, disability, and other protected identities, it gives us a pretty good proxy that they concern an unwarranted intervention in the freedom of personhood.

If the plaintiff is a member of a protected group, and the constraint in question is related to his or her over-doing or “under-doing” the protected identity, then it is probably a matter of personhood and should be defined as discrimination.⁶¹

It would be useful to continue using this notion of the poetics of personhood in the present discussion as well. I suggest that we think of social demands regarding how one performs his or her race, sex, age, or nationality as requirements that are conceptually located in the *intersection between liberty and equality*. Posing limitations on how one signifies his or her self externally (through hair, clothes, manners of speech or names) is compromising one’s freedom to develop, express, and inhabit his or her personhood. By this, such requirements raise a concern about *liberty*. Then the question of *equality* comes in: if the requirement is related to the way one signifies an identity which is protected by antidiscrimination law, then such requirements should be viewed as discriminatory. The discrimination conclusion is reached not because a given characteristics (say, hairstyle) is a secure signifier of a given protected identity (say, race), but because racial identity is probably so intimate to the self, is such a core and vulnerable aspect of personhood, that its embodiment and signification should not be interfered with.

Enabling social actors to perform their identity as they choose (or as “comes naturally” to them) is, in my mind, an important aspect of liberty.⁶² It becomes particularly important, however, when the identity in question is loaded with history of oppression, marginalization, and social stratification. If we want to provide a serious legal response to discrimination, we should allow legal subjects to embody and perform their sex, race, age, or nationality in any way that they choose. Presenting constraints on this aspect of personhood is a form of discrimination.

⁶⁰ See *id.* at 99-119.

⁶¹ As Professor Yoshino puts it, discussing gender requirements: “The problem is not that both [covering and reverse-covering requirements] cannot be met, but that neither (absent a justification) should be made at all.” *Covering* [book] p. 158.

⁶² In his book (as distinct from the article with the same title) Prof. Yoshino seems to go in a similar direction, viewing questions of covering as regarding liberty, or at least viewing the formulation through liberty more useful and applicable in American law today. See *Covering* [book], at 184-196.

C. Suggested Legal Framework

Simply put, whenever a judge reviews a claim of discrimination based on sex, race, nationality, or other protected identity, she should check whether the plaintiff was discriminated because he or she blurred the racial lines, challenged the sex lines, or transgressed the nationality lines.

The ban on sex discrimination, for example, should be interpreted so that it includes:

1. Discrimination based on gender stereotyping.
2. Discrimination based on homosexuality (because it is aimed against people who challenge the stable line between the races).
3. Discrimination against transgender, transsexuals, cross dressers, and simply feminine men or masculine women with no clinical diagnosis regarding their gendered or sexed identity.
4. Discrimination based on how people perform other protected identities (nationality, disability, age etc.) will be similarly protected.

[This section will also include a critique of the burden-shifting procedure established in *McDonnell-Douglas*,⁶³ by which the first thing that a plaintiff needs to show is that he or she belongs to a minority group. This is an expression of the romantic longing for stable ontology of identity, and should be altered].

IV. Possible Objections

A. Statutory Meaning

This section will tackle the argument that Congress did not mean that gays would be protected from discrimination under Title VII?

For example, the dissenting opinion in *Rene* contends: "If sexual orientation is to be a separate category of protection under Title VII, this is a matter for Congress to enact. Over the years since the passage of Title VII, numerous bills have been introduced to include sexual orientation as a protected classification. None has passed." 1076. Footnote omitted.

For now, it is enough to indicate that some courts have been willing to accept a more generous interpretation of Title VII. For example, in a case that recognized a transsexual's claim for sex based discrimination, the opinion says:

⁶³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

“It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against bisexual men and women; against men and women who are perceived, presumed, or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the [state’s anti-discrimination statute] includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”⁶⁴

B. Institutional Arguments: Are Courts the Right Venue?

Another objection for my argument would surely be that courts are not the right forum to deal with these questions, which belong to the social arena and to cultural conventions, and should not and cannot be resolved through litigation. The argument would be that while we should indeed endorse tolerance towards expressions of protected identities, including the manifestation of them through appearance and conduct, we cannot expect courts to determine when is a person discriminated against because he crosses lines of sex, race, or nationality.

My reply is simply that courts deal with those questions anyway: claims regarding hairstyle and race, dress style and gender, constantly arrive before courts. Legal subjects are discriminated due to the embodied manifestations or their race or sex all the time, but when they bring their claims to court, there is a troubling lack in conceptual tools to understand their plight and respond to it effectively.

C. Labor Considerations: Employers’ Freedom

Another objection to my argument could be that my suggested interpretation entails undue intervention in the freedom of contract of the employer, which goes far beyond what Congress meant in enacting Title VII. In other words, while I extend much care to the equality and freedom of employees, my approach does not take enough into account the freedom of employers.

My reply is that my interpretation to widen the scope of Title VII is in harmony with its rationales and legislative purpose, and is not different in principle from the drastic

⁶⁴ *Enriquez v. West Jersey Health Sys.* 342 N. J. Super. 501, 515 (2001), *Cer. denied by v. West Jersey Health Systems*, 170 N.J. 211, 785 A.2d 439 (N.J. Oct 30, 2001) (TABLE, NO. C-319SEPT.TERM2001, 51,818).

intervention in employers' freedom that Title VII is already recognized as doing. That is, if we accept that it was legitimate to coerce employers to hire and promote people of color, women, or people with disabilities, then we must accept that it is legitimate to demand from the employers to realize that these identities cannot exist in the abstract, but true integration and genuine equality of opportunity means accommodating concrete people with raced and sexed bodies, appearances, and habits.

D. Limits and Scope of My Argument: What's In and What's Out

My proposal for broad conception of discrimination, so that it includes the way traditional civil rights group perform their identity, may raise concerns about its potentially endless scope. Would my approach entail that employers cannot ask their employees to wear uniform? And what about a Black man seeking to wear low baggy pants as a way to express his racial culture? Furthermore, would I support a White woman's claim that her cornrows should be protected as part of her refusal to conform to hegemonic White appearance norms? And further still, should Title VII accommodate processes of experimental identity formation (for example, a Black woman's interest in trying out cornrows to see how that feels for her, or a Jewish progressive woman seeking to experiment with wearing a yarmulke)? After all, if identities are constituted through performance and signification, why not allow protected groups to play with those performance and significations?

Surely, these are important questions that will need to be addressed. At this point, however, I can offer only these thoughts: First, the fact that the courts might be flooded with difficult cases and that employees might articulate the ways in which they are required to conform to the gender of their identity does not mean that we should refrain from touching this issues. As Kenji Yoshino writes, this approach reveals "the perversity of making the magnitude of a social injustice a reason for letting it stand."⁶⁵ Second, the case law demonstrates that the real-life plaintiffs, as opposed to the hypothetical ones, bring to the courts stories of actual pains; of hard negotiations between occupying their identity, body, and culture while keeping up with social or professional expectations. The stories told by plaintiffs are neither absurd nor too litigious; they do not reflect a victim-consciousness, or a mindset that seeks to do away with hard work or personal responsibility for one's life trajectory. Darleen Jespersen and Rene Rogers were prepared to lose their jobs because of the deep violation of personhood that they experienced.⁶⁶ With all the difficulties in application, I still think that we should face those questions directly and openly, rather than be left with the unsatisfactory replies that the law has been giving plaintiffs such as Jespersen and Rogers. Surely there is a possibility of absurd claims or of hard, borderline cases. But this has been the case with every new way of legal thinking. For instance, as Professor

⁶⁵ Yoshnio, *Covering* [book], at 181.

⁶⁶ I analyze these cases through the lens of personhood in Tirosh, *Adjudicating Appearance*, pp. 70-74, 79-89.

Ariella Gross shows, for example, even the seemingly clear legal category of race can introduce difficult challenges to judges who are required to use it.⁶⁷ So a bottom-up or a case-by-case approach would be appropriate for an effective judicial tackling of this subject.

V. Conclusion

This paper argued that the rationales for antidiscrimination law entail protecting against a type of discrimination, which has not been sufficiently recognized thus far. Namely, discrimination against people whose identity defies clear classification on bases such as sex, race, age, religion, etc. I claimed that individuals who blur the lines between male and female often suffer discrimination based on sex, and that individuals who are hard to classify as either native or alien (e.g. second generation immigrants who maintain language and practices of their parents' home country) suffer discrimination based on national origin.

The reality of being of a certain race, sex, or age, is an embodied reality. For courts to interpret the meaning of sex, race, or age in antidiscrimination legislation while excluding the concrete manifestations of the suspected class is to misunderstand the dynamics of discrimination.

It is rarely the case that people occupy their identity categories neatly. Identities and affiliations are not clear-cut. Complex identities, with multiple centers and crossing axes, and with dynamic focal points that develop and change over time are common in today's global and multicultural world. However, the legal thinking about equality reflects a romantic, fantastic longing for a stable and easily decipherable cultural order. The courts expect from plaintiffs in discrimination cases to produce sound and unified narratives about who they are, with no multiple affiliations, no complications, no contradictions. In fact, the account of identity that emerges from the case law is one in which identity is an abstract category, disembodied and dis-embedded from social context, history, and practices. As such, present antidiscrimination doctrine reinforces exactly that which antidiscrimination rules seek to do away with--an essentialist account of the social world as one that is composed of neatly defined and clearly visible identities.

In the fifties and sixties, when the major federal antidiscrimination rules were framed, they were framed around ontological concepts of identity. The motivation was to protect blacks, women, etc. This is not surprising. In the first stages of achieving equal access to social goods to all groups, it is important to let them in, to work on the level of "body count". But today, about half a century later, we know that discrimination

⁶⁷ See, e.g., Ariella Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South." 108 *Yale Law Journal* 109 (1998).

takes many shapes and forms, and we also know that it works on a visceral level, through unwitting, almost automatic reactions that social actors experience when interpreting each other. Antidiscrimination legislation was meant to do away with stereotypes based on race or sex. Therefore, not recognizing the role of *signifiers* or race or sex (hair, manner of speaking, name, physical gestures) goes against the grain of Title VII.

Around its formation, then, Title VII's struggle against discrimination was a struggle against the obvious, blatant forms of excluding blacks or women. It is time incorporate into the law the realization that racial and sexual identities work in more complex ways, that they are embodied experience, that they exist through signification.