"Looking and Feeling Your Best": A Comprehensive Approach to Groom and Dress Policies Under Title VII

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I. INTRODUCTION

Employers use groom and dress policies to broadly regulate the appearance of employees, dictating all aspects from the most basic appearance requirements, such as cleanliness and proper attire, down to the minutest details, including hair style, nail length, and even lipstick color.[1] However, when an employer differentiates between male and female employees in appearance policies, the employer runs the risk of violating Title VII, a federal statute that prohibits sex discrimination in the workplace.[2] Title VII was enacted to eradicate the discriminatory treatment of men and women resulting from sex stereotypes, and to eliminate the traditional obstacles faced by women entering the workforce.[3] The Supreme Court has held that Title VII prohibits an employer from differentiating between men and women in a wide variety of employment settings, including application qualifications,[4] promotion decisions,[5] and retirement plans,[6] but has not yet addressed whether policies that regulate aspects of an employee's *appearance* fall within the ambit of Title VII. In the absence of Supreme Court guidance, circuit courts have developed multiple, often conflicting tests to determine whether an employer runs afoul of Title VII when it imposes different appearance requirements upon male and female employees. This Comment proposes a comprehensive framework for analyzing groom and dress

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1. For example, see Harrah's "Personal Best" policy as detailed in *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc), which heavily regulated the appearance of female employees by allowing only specific nail polish colors and hair styles while mandating makeup in "complimentary" colors. *See infra* text accompanying notes 16–20.

2. *See* 42 U.S.C. § 2000e-2 (2000).

3. The U.S. Supreme Court once noted:

> "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. [Title VII] subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past."

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

4. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (holding that an employer's policy of refusing applications from women with school-aged children while accepting applications from men with school-aged children violated Title VII).

5. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (holding that an employer's refusal to promote an employee, motivated by stereotypical notions about a woman's proper demeanor, violated Title VII), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

6. *See Manhart*, 435 U.S. at 711 (holding that an employer's requirement that women make larger contributions into the company's pension fund than men violated Title VII).

policies under Title VII that will ensure consistency among the circuits, remain faithful to Supreme Court precedent, and restore focus on the original intent of Title VII.

Part II of this Comment introduces *Jespersen v. Harrah's Operating Co.*, a controversial Ninth Circuit opinion that illustrates both the myriad problems encountered in existing groom and dress tests as well as the advantages of this Comment's proposed approach. Part III explores the Supreme Court's broad interpretation of Title VII to prohibit both blatant and subtle forms of employment discrimination arising out of sex stereotypes.[7] Despite this expansive precedent, many courts have utilized theories that impose limitations on the protections of Title VII against discriminatory groom and dress policies.[8] For example, one of these tests is the mutability doctrine, which bars any consideration of appearance policies under Title VII by asserting that Title VII prohibits discrimination only on the basis of immutable characteristics.[9] Another is the offensive stereotype analysis, which further limits the application of Title VII by allowing courts to impose or withhold statutory protection based on subjective views of the permissibility of certain gender stereotypes.[10] The unequal burdens test also undercuts the strength of Title VII by only looking to the financial and temporal costs of complying with a groom and dress policy, thus failing to consider the psychological burden of being forced to conform to an oppressive sex stereotype.[11] As Part IV of this Comment asserts, the mutability doctrine, the offensive stereotype analysis, and the unequal burdens test all serve

7. Title VII prohibits intentional discrimination as well as discrimination resulting from a general practice or policy. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

8. Indeed, these limiting tests may have developed as a method to balance the apparent breadth of the statute with employer prerogative. Though there is considerable merit in the notion of balancing the rights of employers with those of employees, this Author believes that the existing circuit court tests unduly limit the ability of employees to use Title VII for its intended purpose—to fight sex discrimination—in favor of a nearly unrestrained right of employers to impose discriminatory appearance policies.

9. The mutability doctrine was widely adopted in the decades following the passage of the Civil Rights Act by courts in the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits and the D.C. Circuit. *See infra* Part IV.A.

10. The offensive stereotype analysis has been applied to groom and dress polices by courts in the Sixth, Seventh, and Eighth Circuits and the D.C. Circuit. *See infra* Part IV.B.

11. The unequal burdens test was developed and is used primarily by courts in the Ninth Circuit. *See infra* Part IV.C.

to limit the effectiveness of Title VII by creating various exceptions and loopholes within the statute's blanket prohibition against sex discrimination. Ironically, these theories often result in allowing employers to promulgate groom and dress policies that reinforce the very stereotypes and employment obstacles that Congress intended to eliminate with the passage of Title VII. Thus, in Part V, this Comment urges the Supreme Court to address the inconsistencies among the circuits by implementing a new, two-pronged approach to groom and dress policies under Title VII.

This new framework rejects the mutability doctrine as a misinterpretation of Title VII language and Supreme Court precedent, but it retains and refines aspects of the offensive stereotype analysis and the unequal burdens test. The first step in the proposed approach asks the Court to consider whether the policy relies upon stereotypes that tend to reinforce gender subordination in the workplace, rather than simply focusing on whether the Court deems the policy subjectively offensive. The second step of the test requires the Court to engage in an expanded unequal burdens analysis by examining a broader variety of factors—including the financial, temporal, physical, and emotional costs of the policy—to determine whether the policy imposes a heavier burden on one sex over the other. This new approach remains faithful to legislative intent and Supreme Court precedent by addressing and eradicating the special barriers and disadvantages faced by women in the workforce. Properly applied, the two-pronged test harmonizes employee and employer interests by targeting policies that further gender inequality while still allowing employers to maintain reasonable discretion over groom and dress requirements.

II. DARLENE JESPERSEN

Imagine a woman faced with this distressing ultimatum: conform to her employer's stereotypical notions about the way women should look and compromise her self-dignity, or stand her ground and lose the successful career that she has cultivated for nearly twenty years. This was the situation in which Darlene Jespersen found herself when her employer, Harrah's Casino, informed her that she would be terminated if she refused to comply with the extensive new makeup requirements that applied to female employees only.[12] Jespersen had worked as a bartender at

12. Defendant's Motion for Summary Judgment at 2, Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006) (No. CV-N-01-0401-ECR-VPC), 2002 WL 32980097 ("Consequently, Ms. Jespersen refused to comply with the makeup requirement, and, she was terminated.").

Harrah's in Reno, Nevada, for almost two decades.[13] Over the course of her career, she received performance appraisals ranging from "successful" to "exceptional" and emphasizing her reliability, positive attitude, and ability to remain calm in the high volume, fast-paced atmosphere of Harrah's Sports Bar.[14] By all accounts, Jespersen was a valuable and popular employee. She was abruptly terminated, however, due to her strong objection to and refusal to comply with Harrah's newly instituted "Personal Best" appearance policy.[15]

The policy imposed a variety of groom and dress requirements on employees, some that applied to all employees, regardless of sex, and some that applied only to male or female employees.[16] All employees were required to wear the specified uniform—consisting of a white shirt, black pants, a black vest, and a black bowtie—and to appear "well groomed."[17] As to the gender-specific requirements, male employees were prohibited from growing their hair below the collar and wearing makeup or nail polish, while female employees were required to wear stockings, adorn colored nail polish, and wear their hair "teased, curled, or styled."[18] Harrah's later amended the "Personal Best" policy to require female employees to apply a daily facial uniform of makeup, including face powder, blush, mascara, and lipstick in complimentary colors.[19] Under the policy, supervisors monitored female employees daily, comparing their appearances to photographs taken after the company-hired image consultants performed a "makeover" on every woman.[20]

Jespersen had never worn makeup in either her personal or professional life. On a personal level, she refused to wear makeup because it "conflict[ed] with her self-image" and she found it "offensive."[21] On a professional level, she felt so uncomfortable wearing makeup at work

13. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106–07 (9th Cir. 2006) (en banc).

14. Opposition to Motion for Summary Judgment, Exhibit B, Employee Evaluations, *Jespersen*, 280 F. Supp. 2d 1189 (No. CV-N-01-0401-ECR-VPC), 2002 WL 32980105.

15. *Jespersen*, 444 F.3d at 1106.

16. *Id.* at 1107.

17. *Id.*

18. *Id.*

19. *Id.*

20. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 (9th Cir. 2004), *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006).

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

that she found it interfered with her job performance.[22] She stated that she felt "sick, degraded, exposed, and violated" when forced to wear makeup to work.[23] In addition, Jespersen found that wearing makeup actually impaired her ability to be an effective bartender because her customers, especially the drunken, unruly ones, viewed her as less credible and authoritative when she was "dolled up."[24] Although Harrah's had promised that the new policy was about "looking and *feeling* your best,"[25] it demanded that she comply with the makeup requirement or she would lose her job.[26] Despite increasing pressure from Harrah's management, Jespersen refused to wear the required makeup uniform.[27] After twenty years of "exemplary" service, Harrah's terminated Jespersen for her decision not to comply with the makeup requirement.[28]

Unfortunately for Jespersen, the courts provided no relief. After exhausting her administrative remedies,[29] Jespersen filed suit against her former employer in district court, alleging that the Personal Best policy constituted sex discrimination in violation of Title VII.[30] Title VII prohibits discrimination in employment on the basis of "race, color, religion, sex or national origin," unless the discriminatory policy is a

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22. *Id.*

23. *Jespersen*, 392 F.3d at 1077.

24. *Id.*; Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285, 298–99 (2007).

25. Defendant's Motion for Summary Judgment, *supra* note 12, Exhibit C, Beverage Department "Personal Best" Program (emphasis added).

26. Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006) ("Defendant told her that compliance [with the policy] was mandatory. When Plaintiff still refused to comply . . . . Defendant thereafter terminated Plaintiff's employment.").

27. Brief of Amici Curiae American Civil Liberties Union of Nevada et al. in Support of Plaintiff/Appellant at 4, *Jespersen*, 444 F.3d 1104 (No. 03-15045), 2003 WL 24133171 [hereinafter *Amicus Brief*].

28. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106–07 (9th Cir. 2006).

29. *Amicus Brief*, *supra* note 27; *Jespersen*, 444 F.3d at 1108. Under Title VII, a plaintiff seeking relief pursuant to the statute's provisions must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1) (2000). If, however, the plaintiff first institutes proceedings with a state or local agency "with authority to grant or seek relief from such practice," the time for filing a charge with the EEOC is extended to 300 days. *Id.* Here, Jespersen first filed suit with the Nevada Equal Rights Commission and then filed her Title VII discrimination claim with the EEOC. *Jespersen*, 444 F.3d at 1108. For further discussion of the procedural requirements of filing a Title VII discrimination claim, see EEOC, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION: QUESTIONS AND ANSWERS (2002), http://www.eeoc.gov/facts/qanda.html. *See also* Russell Specter & Paul Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Acts*, 21 AM. JUR. *Trials* § 1 (1974).

30. *Jespersen*, 280 F. Supp. 2d at 1189.

"bona fide occupational qualification."[31] In court, Jespersen asserted two theories of sex discrimination. First, she argued that the policy imposed an unequal burden on female employees by requiring a daily facial uniform of makeup, while male employees had no equivalent facial requirement.[32] Second, Jespersen argued that the makeup requirement was impermissibly based on sex stereotypes.[33]

The U.S. District Court for the District of Nevada granted Harrah's motion for summary judgment, finding that the Personal Best policy imposed equal burdens on both male and female bartenders and that the policy was not impermissibly based on sex stereotypes.[34] On appeal, the Ninth Circuit dismissed Jespersen's Title VII challenge to the Personal Best policy twice: first in 2004 before a three-judge panel,[35] and again in 2006 following a rehearing en banc.[36] In the rehearing, the Ninth Circuit rejected Jespersen's unequal burden claim due to her failure to develop a record regarding the financial and temporal cost of complying with the makeup requirement,[37] and it rejected her sex stereotyping claim due to her failure to prove that the Personal Best policy was impermissibly motivated by offensive sex stereotypes.[38] Applying these standards, the Ninth Circuit put an end to Jespersen's legal battle.

With the facts of *Jespersen* and other circuit authority as a backdrop, this Comment will illustrate that the theories and tests relied upon by courts across the country misinterpret the language and intent of Title VII and undermine Supreme Court precedent.

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31. 42 U.S.C. § 2000e-2(a), (e)(1) (2000). Title VII permits an employer to discriminate on the basis of sex in those instances in which sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise. § 2000e-2(e)(1). The BFOQ defense is a very narrow statutory defense and turns on the particular facts and circumstances of the job at issue. *E.g.*, Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). Here, because Harrah's did not argue that the "Personal Best" policy constituted a BFOQ, this Comment will not engage in a comprehensive analysis of the BFOQ. For information and sources regarding the BFOQ defense, see *infra* note 114.

32. *Jespersen*, 444 F.3d at 1107–08.

33. *Id.* at 1108.

34. *Jespersen*, 280 F. Supp. 2d at 1192–93. Regarding Jespersen's sex stereotyping claim, the district court specifically held that the policy did not violate Title VII because it did not discriminate on the basis of immutable characteristics, such as race, sex, or national origin. *Id.* at 1192–94. This theory will be addressed *infra* Part IV.A.

35. Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006).

36. *Jespersen*, 444 F.3d at 1104.

37. *Id.* at 1110.

38. *Id.* at 1112–13.

III. TITLE VII: LEGISLATIVE HISTORY AND THE SUPREME COURT

Congress passed the Civil Rights Act of 1964 to prohibit discrimination in a broad variety of settings, including voting rights, public accommodations, schools, government agencies, and employment.[39] Title VII of the Act specifically prohibits an employer from discriminating against any individual in "compensation, terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex or national origin," unless the discriminatory policy fits into the bona fide occupational qualification defense.[40] However, the initial draft of Title VII did not include sex as a protected category, and the last minute addition of sex to the bill left courts and commentators with little legislative history to help guide the statute's interpretation.[41]

One prevalent theory is that congressional opponents of the civil rights legislation proposed the addition of sex in order to load down the bill with politically unfavorable features in an effort to defeat the entire Civil Rights Act.[42] However, others assert that this theory fails to adequately explain the strong, repeated support for the sex amendment in the House and Senate.[43] Despite any questionable motives of the members who

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39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

40. 42 U.S.C. § 2000e-2(a), (e)(1) (2000). For example, Title VII prohibits an employer from taking tangible actions, such as termination, demotion, or reduction in pay or benefits, based on discrimination against a protected class. More specifically, the Supreme Court established that the statute's provision on sex discrimination also prohibits sexual harassment in the workplace, based on either a hostile work environment claim or a quid pro quo claim of sexual extortion. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–66 (1986). However, the Court has not yet spoken directly regarding whether a groom and dress policy may violate the Title VII sex discrimination provision.

41. *See, e.g.*, *Vinson*, 477 U.S. at 63–64 ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. . . . [T]he bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

42. *See* Arthur B. Smith, Jr., *The Law and Equal Employment Opportunity: What's Past Should Not Be Prologue*, 33 INDUS. & LAB. REL. REV. 493, 504 (1980) ("The sex discrimination prohibitions of Title VII have no legislative history: the provision was added as a tactic by Southern congressmen to secure defeat of the civil rights bill's race discrimination provisions."); *see also* Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453 (1981) ("The conventional view is that sex was added as a protected class to the employment discrimination title of the Civil Rights Act of 1964 . . . for the purpose of defeating it by making it unacceptable to some of its supporters or by laughing it to death.") (footnote omitted).

43. For further discussion on why the conventional explanations of the sex amendment fail, see Gold, *supra* note 42. Gold argues that the conventional explanations are inadequate because they are inherently unlikely, especially considering Congress does not often pass laws based on a "joke"; they provide no assistance in construing the sex

initially proposed the sex amendment, both the House and Senate approved the amendment with the requisite majorities,[44] and Congress passed the Civil Rights Act without a single change to the sex discrimination provision.[45] Further, legislative reports issued in the wake of the Civil Rights Act and Title VII spoke forcefully against sex discrimination, and emphasized the importance of enforcing the sex discrimination provision of Title VII with the same vigor and seriousness as the rest of the protected categories.[46] Today, most courts, including the Supreme Court, have come to agree that by adding sex as a protected category under Title VII, Congress intended to eradicate the offensive and outmoded sex stereotypes that limit employment opportunities for women.[47] Thus, when employers use discriminatory groom and dress

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discrimination ban; and "they do not account for the remarks of Representatives who spoke in favor of the amendment." *Id.* at 460. Gold's close examination of the congressional record on that day in fact reveals a serious debate about the amendment, primarily focusing on whether white women would be left without protection unless the sex amendment passed. *Id.* at 463–67.

44. *See* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 176–77 (1991) (describing how, on February 8, 1964, the House approved the "sex" amendment 168 to 133); Gold, *supra* note 42, at 461 (noting that, on February 10, 1964, the House approved the amendment again on a revote).

45. *See* 110 CONG. REC. 2804 (1964); *see also* Gold, *supra* note 42, at 457.

46. For example, after the Civil Rights Act was passed in 1964, Senators Clifford Case of New Jersey and Joseph Clark of Pennsylvania, the bipartisan comanagers of the Act, issued an interpretive memorandum of the bill, which provided broad support for the prohibitions of Title VII. *See* 110 CONG. REC. 7212–14 (1964). The memorandum encouraged the use of an expansive definition of discrimination. *Id.* at 7213. Moreover, the Supreme Court has often relied on the Clark-Case Memorandum to clarify legislative intent behind Title VII. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 454 (1982); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 350–51 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 434–36 (1971). A few years later, in 1972, the House Committee on Education and Labor also issued a report on Title VII that specifically addressed sex discrimination. The report stated:

> Women are subject to economic deprivation as a class. . . . Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . . Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. REP. NO. 92-238, at 4–5 (1971).

47. *See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); Rodriguez v. Bd. of Educ.,620 F.2d 362,

policies to impose stereotypical image—policies that ultimately hinder women in achieving professionalism and respect in the workplace—those employers effectively undermine Congress's goal of dispelling sex stereotypes.

Although the Supreme Court has not specifically addressed the implications of Title VII for groom and dress policies, the Court has applied Title VII sex discrimination in the analogous contexts of employment qualifications and employer decisionmaking. Two landmark decisions provide crucial guidance to lower courts. The first decision, *Phillips v. Martin Marietta Corp.*, established what many courts and commentators call the "sex-plus" doctrine, which expands Title VII to prohibit the more subtle method of discrimination on the basis of sex *plus* an otherwise neutral characteristic.[48] In *Phillips*, an employer refused to accept employment applications from women with preschool-aged children, but it had no similar restriction against employing men with young children.[49] The Supreme Court first noted that Title VII requires "that persons of like qualifications be given employment opportunities irrespective of their sex," and thus held that maintaining one employment standard for females and another for males constituted Title VII sex discrimination.[50] Although significant for its application of Title VII to employment qualifications, the majority opinion in *Phillips* was extremely brief and did not explain the Court's reasoning. Justice Marshall's more demonstrative concurrence, however, has since gained regard as the opinion that created the sex-plus doctrine.

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366 (2d Cir. 1980) ("[S]ex stereotyping may once have been a virtually unquestioned feature of our national life, [but] it will no longer be tolerated."); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1256 (N.D. Ind. 1998) ("The legislative history accompanying the passage of the 1972 amendments makes clear that the primary thrust of Title VII was to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.").

48. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971). One observer noted:

> Although the *Phillips* Court's terse opinion did not offer any detailed explanation for its conclusion that the plaintiff at least had made a *prima facie* showing that she had been subjected to a sex-based employment practice, it did not take the lower courts long to draw an ill-conceived doctrine out of the Court's sparse text. . . . A facially sex-differentiated policy that excluded a sub-group of women could, in the absence of a BFOQ-based justification, violate the statutory ban on sex-based discrimination. . . .
>
> The lower courts promptly fashioned a broad limitation to the Court's ruling in *Phillips*—the doctrinally misleading "sex-plus" theory.

Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 207 (2007) (footnotes omitted).

49. *Phillips*, 400 U.S. at 543.

50. *Id.* at 544.

In his concurrence, Marshall first asserted that by adding the prohibition against sex discrimination to Title VII, "Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes."[51] Marshall then wrote that where "performance characteristics" of employees or applicants are concerned, "employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant."[52] Thus, an employer may not condition performance characteristics on gender. As lower courts applied and interpreted the *Phillips* opinion, the sex-plus doctrine came to stand for the principle that discrimination against a subclass of one sex violates Title VII as much as discrimination against the entire sex.[53] In other words, an employer may not discriminate on the basis of sex *plus* an otherwise neutral characteristic—for example, being female plus having young children.

In 1989, the Supreme Court issued another significant Title VII sex discrimination opinion in *Price Waterhouse v. Hopkins*.[54] For the first time, the Court acknowledged that an employer violates Title VII when it relies upon sex stereotypes in making employment decisions. In *Price Waterhouse*, the plaintiff, a senior manager at an accounting firm, was denied partnership despite her great success with the firm, and then told by a partner to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for reconsideration.[55] Other partners described her as "macho," told her that she "overcompensated for being a woman," and advised her to take "a course at a charm school."[56] The Court broadly stated that Title VII required that "gender must be irrelevant to employment decisions," and thus, "[t]he critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made."[57] The Court then held that the partnership decision was

51. *Id.* at 545 (Marshall, J., concurring) (citations and footnotes omitted).
52. *Id.* at 547.
53. *See* Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1390 (W.D. Mo. 1979) ("[The sex-plus] line of cases rests on the theory that disparate treatment of a male or female subclass violates Title VII since the employer has added a factor for one sex that is not added to the other sex as a condition of employment.").
54. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).
55. *Id.* at 235 (citation omitted).
56. *Id.* (citations omitted).
57. *Id.* at 240–41 (emphasis omitted).

impermissibly motivated by stereotypical notions about a woman's proper demeanor and by the plaintiff's apparent failure to conform to gender stereotypes.[58] Further, the Court noted, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."[59] This deceptively simple statement paved the way for a new method of attacking sex discrimination in the workplace: the sex stereotyping claim.[60] This claim allows plaintiffs in Title VII cases to introduce evidence that an employment decision was made, at least in part, due to a sex stereotype.[61]

Contrary to the Supreme Court's expansive interpretation of Title VII in *Phillips* and *Price Waterhouse*, circuit courts have responded to groom and dress challenges by creating various limitations and exceptions to Title VII's broad prohibition against sex discrimination. As Part IV will explain, these theories are unsound because they contradict Supreme Court precedent, misinterpret the purpose of Title VII, and allow employers to perpetuate the same sexist stereotypes that Title VII intended to eradicate.

IV. A CROSS-CIRCUIT ANALYSIS OF GROOM AND DRESS POLICIES UNDER TITLE VII

A. The Mutability Doctrine: An Absolute Right to Discriminate?

The mutability doctrine imposes a tremendous limitation on Title VII by interpreting the statute to prohibit discrimination based only on immutable characteristics that cannot be changed, such as sex, race, and

58. *Id.* at 256.

59. *Id.* at 251.

60. The sex stereotyping claim has met some success in Title VII groom and dress challenges. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (requiring women to wear uniforms but allowing men to wear business attire was based on "demeaning" stereotypes about women); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (requiring female sales clerks at a retail store to wear smocks, while allowing male sales clerks to wear a shirt and tie, perpetuated sexual stereotypes); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055, 1057 (N.D. Ohio 1971) (holding that employer may not base its regulations on gender stereotypes, such as "women are the weaker sex," without violating Title VII). *But see* Craft v. Metromedia, Inc., 766 F.2d 1205, 1215–16 (8th Cir. 1985) (requiring female news station anchors to appear feminine and soft on the air was not based on impermissible stereotypes); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402, 402–03 (D.D.C. 1972) (requiring short hair for males was not an attempt to stereotype employees). For further discussion of the sex stereotyping claim, see *infra* Part IV.B.

61. *Price Waterhouse*, 490 U.S. at 250–51.

national origin.[62] Under this doctrine, groom and dress policies could never violate Title VII because an employee's appearance is alterable. Thus, under the mutability doctrine, a policy that discriminates between men and women based on appearance does not, and indeed cannot, constitute sex discrimination.

The view that groom and dress policies cannot violate Title VII is most strongly expressed in the first notable group of groom and dress challenges brought after the passage of Title VII. Known as the "haircut cases," these cases involved a male employee challenging an employer's appearance policy that prohibited long hair for males but had no equivalent hair length restriction for females.[63] A majority of federal courts upheld the hair length policies,[64] reasoning that Congress intended

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62. The mutability doctrine was widely adopted by courts in the decade following the passage of Title VII, including the Fourth, Fifth, and Ninth Circuits and the D.C. Circuit. For example, the Fourth Circuit held:

> [D]iscrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate the [Civil Rights] Act [of 1964] because they present obstacles to employment of one sex that cannot be overcome. . . . [However,] discrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden.

Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976). *See also* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that Title VII only prohibits discrimination on the basis of "immutable characteristics, such as race and national origin"); Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974) (holding that Title VII addresses discrimination based on characteristics that "the applicant, otherwise qualified, ha[s] no power to alter"); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973) ("Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification."); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373, 375 (N.D. Tex. 1975) (holding that distinctions in employment practices between men and women on the basis of something other than immutable characteristics or legally protected rights do not inhibit employment opportunities in violation of Title VII); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 145 (E.D. Mich. 1974) ("Rules and regulations of employers based on personal, mutable characteristics of men, used by the employer to choose one or more men over other men in the various aspects of employment, do not discriminate against men on the basis of sex.") (emphasis omitted).

63. For an examination of the historical and legal issues involved in the haircut cases, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 75–80 (1995).

64. *See, e.g.*, Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham*, 507 F.2d at 1092; *Baker*, 507 F.2d at 898; Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973); *Fagan*, 481 F.2d at 1126. *But see* Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 666 (C.D. Cal. 1972) (holding that a hair length restriction for male employees violates Title VII: "A dress and grooming code . . . must

for sex to be interpreted in the same way as the other protected categories of race, color, and national origin. In doing so, these courts interpreted Title VII to forbid discrimination only on the basis of immutable characteristics.[65] Because hair length is a mutable characteristic, policies regulating hair length for men simply do not implicate the rights and protections of Title VII.[66]

The mutability doctrine should be discarded because it directly contradicts Supreme Court precedent. In *Phillips*, the Court invalidated an employer's policy against hiring women with school-aged children, holding that employers could not have one hiring policy for men and another for women.[67] Justice Marshall's concurrence further instructed that "[w]hen performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant."[68] This case suggests that a policy based on mutable characteristics may be found to violate Title VII, as having children of a certain age is not an immutable trait, but was still considered by the Court to be a discriminatory criterion. Correctly interpreting the *Phillips* opinion, the Seventh Circuit in *Sprogis v. United Airlines, Inc.* invalidated an employer policy that required only female employees to be unmarried.[69] The court held that enforcing the no-marriage rule against women but not men constituted sex discrimination.[70] Although marriage is a mutable trait, the court deemed it to be a discriminatory distinction, which again undermines the central premise of the mutability doctrine.

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be applied equally to everyone. It may not establish different standards for males and females; it may not discriminate on the basis of sex").

65. *See Baker*, 507 F.2d at 897 ("Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects."); *see also Willingham*, 507 F.2d at 1092 ("Private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights.").

66. *Willingham*, 507 F.2d at 1091 ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin.") (emphasis omitted).

67. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

68. *Id.* at 547 (Marshall, J., concurring).

69. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). The court noted that Congress specifically rejected an amendment to Title VII that would have limited the prohibition to discrimination based "solely" on sex, and reasoned that Congress intended to prohibit discrimination that adversely affects only a portion of a protected class. *Id.* at 1198 & n.4. Thus, distinguishing between married women and unmarried women was discriminatory. *Id.* at 1198.

70. *Id.* at 1198.

The inherent contradiction between these cases and the earlier haircut cases demonstrates that the mutability doctrine cannot be salvaged.

Perhaps predicting this criticism, the Fifth Circuit attempted to conform the mutability doctrine to Supreme Court and other circuit court precedent by holding that *Phillips* and *Sprogis* dealt with "fundamental rights"—the fundamental right to have children and to marry, respectively—and thus expanded its interpretation of Title VII to prohibit discrimination based on immutable characteristics *or* fundamental rights.[71] However, this expansion only serves to illustrate the weakness of the mutability doctrine, as the exceptions and inconsistencies nearly swallow the rule itself. Fundamental rights is a relatively broad category that includes far more rights than simply the rights to marry and have children, while the mutability doctrine is a narrow rule that limits Title VII to prohibiting sex discrimination only when it is based on immutable traits. Thus, the mutability doctrine loses clarity and credibility when courts expand the theory to include other more expansive categories.

Beyond its inconsistency with precedent, the mutability doctrine should be rejected because it fundamentally misinterprets the language of Title VII. A cursory examination of the text rebuts the central principle of the mutability doctrine because religion is one of the protected categories under Title VII.[72] Although some persons might consider their religious beliefs inalterable, the possibility of conversion or lapse and the strong behavioral component of religion support the assertion that religion is a mutable trait.[73] If this assertion is accepted,

71. *Willingham*, 507 F.2d at 1091. In this seminal "haircut" case, an employer refused to hire a male applicant because his shoulder length hair violated the employer's appearance policy, which required male employees, but not female employees, to keep their hair short. *Id.* at 1087. The court declared that Congress's main intent in enacting Title VII was to ensure equal employment opportunity, and that such a goal would be achieved when employers were prohibited from discriminating against employees on the basis of immutable characteristics, such as sex, race, color, and national origin. *Id.* at 1091. Thus, the hiring policy did not violate Title VII because hair length is a mutable characteristic. *Id.* In light of the *Phillips* and *Sprogis* opinions, however, the court was forced to admit that a policy based on fundamental rights may also violate Title VII. *Id.* Yet the court remained steadfast in its holding because hair length is neither an immutable trait nor a fundamental right. *Id.*

72. 42 U.S.C. § 2000e-2(a) (2000).

73. *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (noting that protection of religious beliefs and marital status is an inherent contradiction in American antidiscrimination law because neither is immutable); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375,

the mutability doctrine necessarily fails in its inability to account for the protection of religion under Title VII. As noted by Judge McCree's dissent in *Barker v. Taft Broadcasting Co.*, if Title VII were limited to immutable characteristics, the prohibition against religious discrimination would be meaningless.[74]

The mutability doctrine also wrongly assumes that the only purpose of Title VII is to provide equal access to the job market, and thus, where the employer's policy allows the employee to accept or reject the grooming requirement along with the job, Title VII is not violated.[75] This line of reasoning misunderstands the intent behind Title VII. The mere fact that the employee has the ability to change his or her appearance to comply with the policy should be irrelevant under the statute.[76] Title VII is not concerned with whether the employee could have *chosen* to conform to the policy.[77] If this were true, a policy of promoting only men to management positions would be considered lawful because female employees could simply choose to accept the promotion policy along with the job. This result would be illogical under a statute that was intended to proscribe such discriminatory policies. Thus, Title VII's protections do not turn on whether the employee had

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403–04 (1995) (arguing that religion is not immutable because it is not genetic, one can change religions, and religion is usually defined by behaviors—when and where one prays, how one lives, and if one wears religious garments).

74. Barker v. Taft Broad. Co., 549 F.2d 400, 403 n.3 (6th Cir. 1977) (McCree, J., dissenting) ("It is difficult to understand how such a limitation could be consistent with the proscription, also within [Title VII], of discrimination because of an employee's religion. An employee's religion is certainly not immutable.").

75. *See Willingham*, 507 F.2d at 1091 ("If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."); *see also* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 847–48 (1987).

76. Bayer, *supra* note 75, at 848 ("The fact that the discriminatee may alter behavior to conform with the policy is immaterial because, under the statute, the discriminatee does not have to tolerate making such a choice.").

77. *Id.* ("Rather, the single appropriate inquiry is whether the alleged discriminatee has been subjected to a policy, term, or condition based on an impermissible criterion. If the answer is yes, and if the policy cannot be substantiated by a statutory exemption or defense, the employer is liable."). Bayer also provides an interesting hypothetical to illustrate this point:

> Indeed, if the courts subscribing to this line of reasoning are correct, Title VII would allow a wide variety of policies that contemporary case law has held illegal. For instance, an employer's policy refusing to promote blacks from menial positions might be held lawful. To paraphrase the [*Willingham*] Court: "If the [black menial] employee objects to the [promotion] code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference [for opportunity for promotion] by accepting the code along with the job."
>
> Surely, the above result is anathema to Title VII policy and practice.

Id. (citation omitted) (second, third, and fourth alterations in original).

the choice or ability to conform to the policy, but rather whether the policy discriminates on the basis of a protected category.[78]

Finally, the mutability doctrine should be eliminated because it assumes that Title VII only prohibits discriminatory policies that the court deems sufficiently important or worthy of judicial review. To avoid dealing with policies that regulate mutable characteristics, such as groom and dress standards, courts applying the mutability doctrine have often asserted that such policies are so frivolous and unimportant that they do not merit Title VII review.[79] For example, in *Baker v. California Land Title Co.*, the U.S. District Court for the Central District of California, subsequently affirmed by the Ninth Circuit, instructed that:

> [Title VII] was never intended . . . [to] be used to interfere in the promulgation and enforcement of the general rules of employment, deemed essential by an employer . . . [and] it certainly should not be used, as the defendant asks us to do here, to compel the continued employment of an employee who persists in affecting some *whim of style* which his employer deems to be inappropriate to the business image which the employer is attempting to create.[80]

There, the district court adopted a de minimis approach to the employee's Title VII challenge, asserting that the statute was not intended to address such minor issues.[81] The Sixth Circuit invoked a similarly dismissive tone when refusing to consider the implications of Title VII for an employer's appearance policy, stating that "[e]mployer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."[82] In other words, because mutable characteristics such as hair length are easily changeable, a grooming and dress policy, even one that discriminates on the basis of sex, does not achieve the requisite level of importance for Title VII review. However, Title VII's protections do not turn on whether a judge deems the interests at stake sufficiently important; Title VII simply looks to whether the policy discriminates on the basis of a protected category.[83]

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78. *See id.* at 854–55.
79. *See id.* at 854.
80. Baker v. Cal. Land Title Co., 349 F. Supp. 235, 238 (C.D. Cal. 1972) (emphasis added), *aff'd*, 507 F.2d 895 (9th Cir. 1974).
81. *See id.*
82. Barker v. Taft Broad. Co., 549 F.2d 400, 401(6th Cir. 1977).
83. Bayer, *supra* note 75, at 854–55 ("Certainly, limits have been set on Title VII's scope; but Congress established those limits to reach far beyond the narrow interpretation of mutability analysis. Title VII should not be constrained by a judge's

Thus, the de minimis argument dangerously relies upon subjective judicial attitudes about the relative importance of appearance regulations, rather than focusing on whether the policy impermissibly discriminates against individual employees.

Illogically, the de minimis argument allows courts to trivialize personal appearance while at the same time legitimizing its regulation.[84] In the specific context of groom and dress policies, men's interest in wearing their hair long has been repeatedly dismissed as minimal, while employers' interest in forcing male employees to keep their hair short has been lauded as significant.[85] In *Baker*, for instance, the district court described the employee's refusal to cut his hair as "persist[ing] in affecting some whim of style" while simultaneously emphasizing the importance of the employer's ability to enforce appearance rules and have complete control over its "business image."[86] However, Title VII's protections should not turn on whether the employee has a worthy reason for refusing to comply with the policy.[87] The statute does not place a higher value on an employer's interest than on an employee's.

Although judges serve an important gatekeeping function by ensuring that court dockets are not bogged down by frivolous or unsupportable lawsuits, there are effective civil procedures, such as the motion to dismiss for failure to state a claim, already in place to help judges

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concept of what is reasonable. Either a policy discriminates or it does not."). In a discussion of the legislative history of Title VII, the Supreme Court also noted that "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978).

84. Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 73–74 (1982) (discussing the courts' tendency to trivialize personal appearance while at the same time legitimating its regulation). For example, in *City of Seattle v. Buchanan*, five women appealed convictions of lewd conduct for swimming topless in public. 584 P.2d 918 (Wash. 1978). The Washington Supreme Court dismissed the women's claims about the right to regulate their own appearance as unimportant, *id.* at 921, but by upholding the convictions, actually affirmed the importance of city's ability to regulate women's appearance. Whisner, *supra*, at 74.

85. *See* Whisner, *supra* note 84, at 74, and sources cited therein.

86. *Baker*, 349 F. Supp. at 238. For further discussion on the conflict between dismissing employees' interests and emphasizing employers' interests, see Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1401 (1992). Klare argues:

> There is . . . a tendency to denigrate and demean appearance claims, a faint suggestion that courts have better things to do with their time than adjudicate grooming standards. Suddenly the tone becomes somber and the message almost eerily apocalyptic when judges get to the part of their opinion where they uphold, as they usually do, the power of employers, school administrators, and others to visit severe penalties on people who wear nonconforming dress or hairstyles.

Id. (footnote omitted).

87. Bayer, *supra* note 75, at 854–55.

determine whether a particular lawsuit is appropriate for adjudication.[88] The mutability doctrine, however, goes beyond these existing procedures to effectively bar the application of Title VII to any groom and dress policy, based solely on the assertion that appearance is mutable and thus not sufficiently important to merit judicial attention.

Accordingly, this Comment recommends the rejection of the mutability doctrine because it contradicts Supreme Court precedent, misinterprets the language and purpose of Title VII, and forecloses the possibility that a groom and dress policy could violate Title VII. As long as courts continue to utilize the mutability doctrine, groom and dress plaintiffs will be systematically dismissed, regardless of whether the challenged policy is rooted in sex stereotypes or imposes a heavier burden upon female employees. Thus, the Supreme Court should eliminate this doctrine in order to allow the courts to consider each groom and dress challenge on its merits.

B. The Offensive Stereotype Analysis: Community Norms Versus Normative Judgments

The offensive stereotype analysis provides that an appearance policy violates Title VII if the policy is motivated by demeaning or offensive sex-based stereotypes.[89] Although groom and dress plaintiffs have achieved some limited success with the offensive stereotype analysis,[90] the analysis is rendered nearly ineffective by the court-created distinction between offensive stereotypes and commonly accepted social norms. Because commonly accepted social norms arise out of mainstream society, they are inevitably informed by the society's entrenched sexist

88. *See* FED. R. CIV. P. 12(b)(6).

89. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979) (holding that a rule that requires only women to wear uniforms violates Title VII because "it is based on offensive stereotypes prohibited by Title VII."). The offensive stereotype analysis has been applied to groom and dress polices by courts in the Sixth, *see infra* note 90, Seventh, *see Carroll*, 604 F.2d at 1033, and Eighth Circuits, *see infra* note 102.

90. *See Carroll*, 604 F.2d at 1032–33 (describing a rule requiring women to wear uniforms but allowing men to wear business attire as "demeaning to women"); *see also* O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987) (holding that a rule requiring that female sales clerks at a retail store wear smocks, while male sales clerks were allowed to wear a shirt and tie, perpetuated sexual stereotypes and violated Title VII); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055, 1057 (N.D. Ohio 1971) (holding that an employer may not base its regulations on gender stereotypes, such as "women are the weaker sex," without violating Title VII).

and patriarchal attitudes, the mitigation of which spurred the passage of Title VII in the first place.[91] Thus, by immunizing a category of stereotypes that find justification in the values and images held in the community, this distinction improperly allows courts to withhold Title VII protection based on subjective beliefs about whether certain gender stereotypes are permissible.[92] Further, upholding appearance policies by reference to social norms actually incorporates and legitimizes the very stereotypes that Title VII intended to eliminate.[93]

The distinction between offensive stereotypes and community norms first arose in *Carroll v. Talman Federal Savings & Loan Ass'n*.[94] In *Carroll*, an employer's dress code required female employees to wear a uniform, consisting of either a color-coordinated skirt or slacks and either a jacket, tunic, or vest, but allowed men in the same position to wear business suits or business-type sport jackets, pants, and ties.[95] By way of explanation, the employer expressed his concern that female employees would not have the proper business judgment to choose appropriate attire:

> [T]he selection of attire, of clothing, on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm . . . problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent.[96]

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91. Klare, *supra* note 86, at 1417–18.

92. *See* Bayer, *supra* note 75, at 868 ("Only a court's subjective predilections can explain a ruling that requiring women to wear uniforms is unlawful, but requiring men to cut their hair is not.").

93. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 (1994). For an extensive discussion of how legal institutions and civil concepts, like equality, are rooted in the patriarchal and sexist attitudes that dominated legal scholarship from the birth of the United States, see Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991). MacKinnon argues, in part, that the core of our political and legal system is inherently patriarchal because it was founded during a time when women had no voice or representation in government. *Id.* at 1282–85. She states that "laws developed when women were not allowed to learn to read and write, far less vote, enunciated by a state built on the silence of women, predicated on a society in which women were chattel, literally or virtually." *Id.* at 1285. For an introductory examination of how women's movements have worked to combat sexism and patriarchy in the law and society generally, see ROSEMARIE PUTNAM TONG, FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION (2d ed., 1998). For example, an early movement called liberal feminism seeks to end female subordination and systematic sex discrimination by working within the system to obtain political, civil, and economic equality for women. *Id.* at 11. On the other hand, radical feminism rejects the entire sex–gender system as inherently oppressive towards women, and instead desires an androgynous or female emphasized society. *Id.* at 45–47.

94. 604 F.2d 1028.

95. *Id.* at 1029.

96. *Id.* at 1033 (internal quotation marks omitted) (omission in original).

The Seventh Circuit held that the employer's comments revealed that his dress code was improperly motivated by an offensive stereotype—that women cannot be trusted to choose appropriate business apparel—and that this was the very kind of "offensive stereotype" that Title VII intended to eliminate.[97]

Although the Seventh Circuit strengthened the concept of sex stereotyping for Title VII plaintiffs by properly recognizing that the employer's dress code violated Title VII,[98] the *Carroll* opinion also limited the ability of Title VII plaintiffs to successfully utilize evidence of sex stereotyping by stating that "[s]o long as [appearance policies] find some justification in *commonly accepted social norms* . . . such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women."[99] This sentence, although dicta, opened the door for other courts to justify discriminatory groom and dress policies by holding that such policies are based on commonly accepted social norms rather than offensive stereotypes.[100] In doing so, courts rely upon norms and images that are necessarily informed by the patriarchal and sexist attitudes that Congress sought to mitigate when it passed Title VII. In this sense, the offensive stereotype analysis may actually work against the statute's goals.

The distinction between offensive and commonly accepted stereotypes should be avoided because it improperly allows courts to permit or withhold Title VII coverage based on subjective judgments about the permissibility or worthiness of certain gender stereotypes.[101] This problem is exemplified in the Eighth Circuit's analysis of the forced feminization of a local news anchor.[102] In *Craft v. Metromedia, Inc*., a female anchor alleged that she was demoted to the position of reporter due to her failure to appear sufficiently feminine.[103] The court held that she failed to prove that the station's appearance policies were impermissibly

97. *Id.*
98. *Id.*
99. *Id.* at 1032 (emphasis added).
100. *See* Bartlett, *supra* note 93, at 2543–44 (noting that "[e]mployers have traditionally assumed substantial prerogatives with respect to the dress and appearance of their employees," and that "[f]or the most part, courts have rationalized dress and appearance requirements by reference, directly or indirectly, to community norms").
101. *See* Bayer, *supra* note 75, at 868 ("Only a court's subjective predilections can explain a ruling that requiring women to wear uniforms is unlawful, but requiring men to cut their hair is not.").
102. Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985).
103. *Id.* at 1207.

motivated by "stereotypical notions of female roles and images,"[104] despite ample evidence that the station expected all of its female employees to appear soft and feminine when on the air. For example, Craft was told to purchase blouses with "feminine touches," such as bows or ruffles, because her clothes were "too masculine,"[105] and the station's appearance consultants took Craft on shopping trips to help her pick out appropriately feminine clothing.[106] The Eighth Circuit noted that dress policies that violate Title VII are generally based on "demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness."[107] The court then concluded that the station's feminization of Craft was not demeaning, but simply a result of "the greater degree of conservatism thought necessary in the Kansas City market."[108] But, as discussed below, Title VII does not allow discrimination in order to meet customer preference. Further, the court's explanation clearly reveals that the court withheld the protections of Title VII because the stereotypes, which informed the station's policies that women should appear soft and feminine, were not considered sufficiently offensive to constitute sex discrimination. In this sense, the dichotomy between community norms and offensive stereotypes incorrectly assumes "that Title VII only proscribes treatment based on unusual or extreme stereotypes."[109] Such an assumption undermines Title VII because the statute is rendered ineffective if the only forms of discrimination it fights are "those which . . . [a court decides] are no longer socially worthwhile."[110] Title VII's blanket prohibition on sex discrimination does not allow for selective enforcement,[111] and thus courts must implement a broader method of discerning which stereotypes violate Title VII.

The offensive stereotype analysis also fails to fulfill the purpose of Title VII by allowing courts and employers to justify discriminatory policies by reference to customer preference.[112] As mentioned above, in *Craft*, the Eighth Circuit also upheld the station's appearance policy by asserting that television is a visual medium and that the station's economic well-being depends in part on ensuring that the news anchors appeal to the customer audience.[113] However, Title VII does not permit

104. *Id.* at 1215–16.
105. *Id.* at 1214.
106. *Id.* at 1208–09.
107. *Id.* at 1215 n.12.
108. *Id.* at 1215.
109. Bayer, *supra* note 75, at 868.
110. *Id.*
111. *Id.* at 855–56.
112. *See id.* at 872.
113. *Craft*, 766 F.2d at 1215.

discrimination when the employer can prove that his or her customers prefer the stereotypical image.[114] To the contrary, Title VII makes no distinction between businesses that serve a small group of customers with little or no personal contact with employees and businesses that involve contact with millions of customers, such as a television news station.[115] Moreover, the customer preference argument would allow courts to apply Title VII inconsistently, basing the statute's protections on each jurisdiction's particular level of acceptance for sexist stereotypes. Such an approach would only result in more confusion and uncertainty for both employers and employees under the statute. Title VII's unambiguous language and sweeping protections do not provide an exception for employers that discriminate because their customers prefer a stereotypical image, and thus, the customer preference argument must be rejected.

Finally, the dichotomy between offensive and commonly accepted should be further rejected because community norms are necessarily informed by the discriminatory atmosphere that Congress sought to eradicate with the enactment of Title VII.[116] Therefore, courts that apply this analysis actually empower employers to reinforce stereotypical notions about sex and gender through the regulation of appearance.[117] By definition, commonly accepted stereotypes arise out of "mainstream

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114. As discussed *supra* note 31, Title VII allows an employer to prove that a discriminatory policy is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2000). However, the bona fide occupation qualification (BFOQ) statutory defense is extremely narrow and imposes a heavy burden of persuasion upon the employer. In particular, several lower courts have rejected the "customer preference" argument as a valid basis under the BFOQ defense. *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) ("BFOQ ought not be based on 'the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers.'"); Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (holding that male customers' preference for attractive female flight attendants does not give rise to BFOQ exception to sex discrimination). For further discussion of the limits of the BFOQ defense, see Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493 (1999).

115. Bayer, *supra* note 75, at 872.

116. Bartlett, *supra* note 93 (noting that courts have rationalized dress and appearance requirements by reference to community norms, an approach that some scholars criticize as "constitut[ing] an acceptance or legitimation of the very gender stereotypes that Title VII was established to eliminate").

117. *See* Klare, *supra* note 86, at 1419–20 ("This body of law is obviously based upon and reinforces stereotypical, gendered views about appearance. To put it another way, this part of civil rights law has the significant social function of delegating to employers the power and authority to police and reinforce gender lines.").

or conventional norms, which in our society are thoroughly sexist and patriarchal."[118] Thus, when courts allow employers to punish employees for deviating from commonly accepted norms, courts facilitate the sexist ideas and images that Title VII was meant to eliminate. As one legal scholar noted, "When 'commonly accepted social norms' disadvantage women, the countenancing of an employment practice that takes its justification from those norms defeats the purpose of a statute proscribing sex discrimination."[119] Indeed, Title VII was not enacted to follow the current trends, but rather to eliminate trends when they impermissibly rely upon sexist notions of the proper roles for men and women.[120] When courts allow employers to force their employees to conform to community norms that are based on harmful sex stereotypes, such stereotypes thrive and the pervasive sexism in mainstream society prevents the central purpose of Title VII from being realized.[121]

C. The Unequal Burdens Test: A Legal Loophole to Discriminate?

The unequal burdens test compares the relative burdens imposed by an appearance policy upon employees of each sex, and if the court determines that one group of employees has a more onerous or stringent burden than the other, the policy violates Title VII.[122] This analysis has been used to strike down facially discriminatory policies,[123] as well as

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118. *Id.* at 1417–18.

119. Whisner, *supra* note 84, at 84 (footnote omitted); *see also* Klare, *supra* note 86, at 1415 ("Indeed, in some respects, Title VII powerfully reinforces gender stereotypes and makes socially constructed gender differences appear to be natural and unchangeable.") (emphasis omitted).

120. Similarly, the passage of Title IX of the Educational Amendments of 1972 required schools to end sex segregation in vocational programs. *See* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 21–26 (2002). Prior to Title IX, the vocational education system was purposefully sex segregated. *Id.* ("Schools routinely denied girls the opportunity to take classes in shop, manufacturing, architectural drafting, and ceramics or to attend certain vocational schools.") The passage of Title IX meant that schools could no longer discriminate on the basis of gender in these educational and vocational programs. *Id.* Thus, equal rights legislation like Title VII and Title IX must be viewed as affirmative tools to *change* social values when they disadvantage one sex.

121. William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357, 1370 (2006).

122. Bartlett, *supra* note 93, at 2561 ("Other courts have seemed to engage in a more qualitative review, implying that the burdens on men and women must be at least roughly comparable, by some criterion or another.").

123. *See, e.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (holding that an airline's policy of requiring only flight hostesses to comply with strict weight requirements as a condition of their employment was discriminatory on its face because it applied only to women, not to men). In *Gerdom*, the Ninth Circuit distinguished that case from the haircut cases, noting that "no significantly greater

policies that regulate both men and women but treat one sex less favorably than the other.[124] Although the comparative framework of the unequal burdens test is appealingly simple, courts should carefully scrutinize the individual requirements to determine whether the burdens are equal and should not simply dismiss the claim if the policy has *some* requirements for both men and women. Further, the factors most courts consider when comparing the burdens are generally limited to the financial, temporal, and occasionally the physical costs of compliance.[125] These factors ignore a key element of the burdens analysis: the emotional cost of complying with a discriminatory policy.

Courts should examine the policy in its individual restrictions and requirements, rather than as a whole, to avoid an oversimplified, ledger-style inspection of the policy. In other words, considering the policy as a whole allows courts to simply add up the number of requirements for each sex and ensure that the number is equal, whereas examining each requirement of the policy individually allows courts to determine whether any specific requirement is more burdensome for one sex than the other.[126] For example, in *Jespersen*, the Ninth Circuit stated that the makeup requirement should not be considered individually but in light of the policy as a whole.[127] Because the policy imposed sex-differentiated requirements regarding each employee's hair, hands, and face, the court held that the policy imposed equal burdens upon both sexes.[128] However, had the court examined the requirements individually, it would have

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burden of compliance was imposed on either sex; that is the key consideration." *Id.* at 606. *See also* Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) (holding that an airline can require all flight attendants to wear contacts instead of glasses, but it cannot require only its female flight attendants to do so).

124. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000) (holding that an airline's weight restrictions violated Title VII because the weight limits for men corresponded to "large" body frames while the weight maximums for women corresponded to the "medium" body frames, and thus the policy imposed a heavier burden of compliance upon female flight attendants).

125. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc). The Ninth Circuit's analysis of Jespersen's unequal burdens claim considered only the time and financial cost of compliance.

126. Bartlett, *supra* note 93, at 2561. Recognizing this very problem, Bartlett noted: "Courts have engaged in little or no comparative analysis of the burdens men and women, respectively, face. In some cases it has been enough that some requirements were imposed on both men and women, regardless of how burdensome or demeaning either set of requirements might be." *Id.* (emphasis omitted).

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

128. *Id.* at 1109.

found that each requirement for men corresponded to a requirement that was at least as, if not more, burdensome for women.[129] For example, men were required to keep their hair "short," while women were required to keep their hair "teased, curled or styled" and worn down every day.[130] As to the hands, men were merely required to have neat, trimmed nails, while women had nail length and polish color requirements.[131] Finally, and most noticeably, men were only required to come to work with a clean face, whereas women were required to wear face powder, blush, mascara, and lip color in complimentary colors.[132] Once the individual requirements are broken down, it becomes apparent that the Personal Best policy imposed a heavier burden upon female employees.[133] Thus, courts should apply a qualitative analysis of an appearance policy's individual requirements, rather than a facile quantitative analysis that only ensures that each sex is subject to approximately the same number of restrictions and rules.

Further, courts should broadly consider the financial, temporal, physical, and emotional costs of complying with the policy when evaluating the relative burdens upon employees. Courts have already considered the physical costs of compliance with groom and dress policies. For instance, in *Frank v. United Airlines, Inc.*, a class of female former flight attendants alleged that United Airlines' weight restrictions violated Title VII by imposing a heavier burden upon women.[134] The weight restrictions were based on a table of desirable weights and heights published by the Metropolitan Life Insurance Company, but a closer inspection revealed that the weight limits for men corresponded to "large" body frames and those for women corresponded to "medium" body frames.[135] In holding that the policy violated Title VII, the Ninth Circuit took into consideration the physical costs of the policy, noting that many of the female flight attendants had jeopardized their health in order to stay within the weight

129. *Id.* at 1117 (Kozinski, J., dissenting).

130. *Id.* Although Judge Kozinski agreed with the majority that the makeup requirement should be considered in light of the entire policy, he still found that the policy imposed a greater burden upon women and analyzed the policy by breaking it down into individual requirements. *Id.*

131. *Id.* at 1107 (majority opinion).

132. *Id.*

133. *Id.* at 1117 (Kozinski, J., dissenting). Even without a record of the money and time required to comply with the Personal Best policy, Kozinski found it "perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men" by breaking down the individual requirements and examining each for the burden it imposed on the employee. *Id.*

134. Frank v. United Airlines, Inc., 216 F.3d 845, 848 (9th Cir. 2000).

135. *Id.*

requirement by severely restricting caloric intake, using diuretics, and purging.[136]

Financial and temporal costs are also significant factors when considering the burdens imposed upon employees. These costs are easily quantifiable as the tangible indicia of time and money required to comply with the policy.[137] For example, in *Laffey v. Northwest Airlines, Inc.*, the district court found that the defendant's appearance policy violated Title VII by forbidding women, but not men, from wearing eyeglasses.[138] The court noted that the policy imposed a heavier burden on women because contact lenses "are substantially more expensive than eyeglasses with lenses of comparable quality."[139] However, by limiting the unequal burdens analysis to the temporal, financial, and physical costs associated with appearance policies, courts ignore the emotional cost of complying with a discriminatory policy. As the next section explains, the emotional cost of compliance with an appearance policy is an important factor for courts to consider because it may indicate that the policy is impermissibly based upon sexist stereotypes.

V. A NEW APPROACH: RETURNING TO TITLE VII AND THE SUPREME COURT

Turning to this Comment's proposed approach, courts should begin by considering whether the groom and dress policy at issue relies upon stereotypes that tend to reinforce gender inequality in the workplace. This analysis avoids the quagmire of attempting to distinguish offensive stereotypes from community norms and returns the court's focus to the original intent of Title VII: eliminating the traditional barriers and disadvantages faced by women entering the workforce. Feminist and legal scholar Katherine T. Bartlett writes that although it is true that community norms are "too discriminatory to provide a satisfactory benchmark for defining workplace equality . . . . [E]quality, no less than other legal concepts, cannot transcend the norms of the community that has

136. *Id.*

137. Jespersen did not have such an easy time of proving the financial and temporal costs of complying with the Personal Best policy. Because she did not keep a record of such matters and the Ninth Circuit refused to take judicial notice of the cost and time of makeup application, she failed to create a triable issue of fact for her unequal burdens analysis. *Jespersen*, 444 F.3d at 1106.

138. Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 790 (D.D.C. 1973).

139. *Id.* at 774.

produced it."[140] Courts will never be able to provide an objective answer to whether a certain appearance requirement is offensive or acceptable, because courts are necessarily informed by the sexist and patriarchal attitudes that permeate our society. The offensive stereotype analysis offers what appears to be a clean, objective inquiry—asking whether the stereotype is offensive—but if considered in a broader social context, the analysis is embedded in and undermined by sexist societal expectations and images.

On the other hand, a blanket prohibition on sex-based distinctions in appearance policies is unrealistic. As one author noted, "In a sexist society, nothing done by men and women has precisely the same meaning. Traits are not understood or viewed as isolated technical attributes. They are necessarily viewed in relation to all of the other traits an individual possesses and through a systematically gendered lens."[141] For instance, in *Price Waterhouse*, the same behavior—aggressiveness and competitiveness—was interpreted in very different ways according to the gender of the person performing the behavior.[142] Any sex-based distinction in appearance policies arguably relies upon sex stereotypes, and the meaning accorded to behavior and appearance is necessarily shaped by society. Thus, it is illogical, and unrealistic, to demand sex blindness in employment when sex blindness does not exist in greater society.

Rather than banning all sex-specific appearance policies, courts should focus on whether the stereotype reinforces gender inequality and limits employment opportunities for women. In doing so, courts must examine the historical and cultural roots of the subordination of women. If the appearance requirement at issue is based on a stereotype that has been used to disempower, stigmatize, or oppress one sex, the stereotype is impermissible and the policy violates Title VII. This analysis will allow courts to invalidate groom and dress policies that serve to reinforce women's lesser status in the workplace while leaving alone the

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140. Bartlett, *supra* note 93, at 2544–45.

141. Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857, 889 (2006).

142. As Yuracko noted:

> It is simply not the case that Hopkins was fired for exhibiting the same behavior that her male coworkers exhibited. Social meanings are real. Aggressiveness in women is bitchy in a way that aggressiveness in men is not. Competitiveness in women is threatening in a way that competitiveness in men is not. Vulgarity in women is shocking and disturbing in a way that vulgarity in men is not. Even if Ann Hopkins had engaged in the same types of conduct as her male colleagues, her behavior would not have been socially the same.

Id. at 890.

harmless—or even beneficial—sex-specific groom and dress policies. The comparison of two seemingly equivalent appearance requirements, that men must wear business suits and ties and women must wear skirts, provides a useful illustration of this new approach. Both requirements are admittedly based on sex-specific stereotypes. However, because business attire traditionally communicates professionalism, confidence, and respect, a requirement that men wear suits and ties does not degrade the male employee.[143] If anything, the suit-and-tie requirement benefits the male wearer by allowing him to fit the role of a successful, powerful employee.[144] On the other hand, the stereotype that women must wear skirts has deep historical and cultural significance to a variety of demeaning or disempowering beliefs, including the notions that women are weak, are passive, and should maintain their sex appeal.[145] Both stereotypes are, to a degree, limiting, in that some men may prefer to wear skirts and some women may prefer to wear pants, but both groups would be prevented from doing so by a stereotypically sex-based dress code. However, the skirt stereotype clearly poses a distinct disadvantage for women seeking to be taken seriously in a business environment by adding a sexual component to the job. Thus, under the new approach advocated by this Comment, the skirt requirement would violate Title VII because it is impermissibly based on a stereotype that reinforces female subordination, while the suit-and-tie requirement would be left alone as harmless, or perhaps even empowering, to male employees.

Of course, courts may not be able to completely transcend many of the patriarchal norms and images built into contemporary social, political, and legal systems. But by moving the court's focus from the subjective concept of offensiveness to historical and sociological studies of gender subordination and inequality, the proposed approach commands a more objective review of the policy's requirements. The goal of this new approach is not to strip any mention of sex or gender from appearance policies or impose sex blindness on every aspect of employment, but simply to recognize and eliminate those policies that compel compliance with stereotypes that strengthen the traditional inequalities between men and women in the workplace.[146]

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143. Miller, *supra* note 121, at 1367.
144. *Id.*
145. *Id.*
146. Of course, an appearance policy that imposes gender-neutral requirements and restrictions—that all employees wear their hair neatly or that no employee reveal their

Given the recent strides women have made towards equality in the workforce, some may assert that the historical connection between gender inequality and feminine appearance—or more specifically for Jespersen, the forced application of makeup—is no longer relevant. However, as noted feminist author Naomi Wolf writes, it is precisely this progress that requires society to pay further attention to the methods and forms that gender subordination takes.[147] The more progress women make in work outside the home, "the more strictly and heavily and cruelly images of female beauty have come to weigh upon us."[148] Wolf asserts that the advancement in gender equality has resulted in a backlash against feminism "that uses images of female beauty as a political weapon against women's advancement."[149] In the groom and dress context, the imposition of burdensome and demeaning sex stereotypes through appearance policies may be viewed as a response to the increasing number of women gaining expertise and importance in the workforce. Thus, as women continue to work towards equality with men in all aspects of employment, the solution is not to back away from or ignore potentially discriminatory policies, but instead to take up the goals of Title VII with renewed vigor, and to carefully scrutinize those policies for requirements that rely on gender inequality.

Had the Ninth Circuit employed this new approach when considering Jespersen's sex stereotyping claim, Jespersen would have likely prevailed. Perhaps assuming that Title VII only prohibits extreme or unpopular policies, the Ninth Circuit deemed the Personal Best policy to be "reasonable" and adopted a dismissive attitude toward Jespersen's claim, noting that a single employee's aversion to wearing makeup cannot serve as the basis of a Title VII challenge.[150] However, applying the approach advocated in this Comment, the court would have examined the Personal Best policy in light of extensive historical and sociological studies of the connections between makeup and the subordination of

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midriff—would still pass muster under the proposed approach. Further, an appearance policy that permits but does not require employees to conform to sex stereotypes would also be found lawful under the proposed approach. For instance, if Harrah's had permitted but not required its female employees to wear makeup, the policy would not be found to violate Title VII. Again, this Author's goal is not to prohibit any mention of sex in appearance policies but simply to prevent employers from reinforcing gender inequality by forcibly imposing sex stereotypes upon its employees.

147. NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 13–19 (1991).

148. *Id.* at 10.

149. *Id.*

150. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

women.[151] Over the centuries, makeup has signified a variety of ideas from promiscuity and immorality, to economic wealth, to political and sexual oppression, and even to racism.[152] Here, the forced feminization of the Personal Best Policy added an unnecessary and uncomfortable sexual component to Jespersen's job function, impairing her ability to maintain authority in the tense atmosphere of gambling and alcohol.[153] Although some women may personally enjoy wearing makeup, when an employer forces its female employee to wear makeup in an environment that requires the employee to maintain the respect of her unruly customers, that policy should be found to reinforce the subordination of women in the workplace.[154] As the dissent in the en banc rehearing of *Jespersen* affirmed, one need not condemn makeup as inherently offensive to conclude that forcing female bartenders to wear a full uniform of makeup to work is based on an impermissible stereotype.[155]

The second step of the proposed approach requires courts to engage in an expanded unequal burdens analysis by examining the financial, temporal, physical, and emotional costs of the policy. As discussed above, courts already consider the temporal, financial, and physical

151. The Supreme Court has long been willing to look outside the realm of law for scientific, economic, historical, and sociological information to help guide decisions in new or uncharted areas and to aid statutory interpretation. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (relying on scientific and sociological studies about the psychological development of teenagers in determining that the execution of individuals who were under the age of eighteen at the time that they committed the capital crime was prohibited by the Eighth and Fourteenth Amendments); Sec. Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 170 (1984) (O'Connor, J., dissenting) (utilizing historical studies of the U.S. market and financial and banking encyclopedias to determine that commercial paper was not intended to be treated as an investment security under the McFadden and Glass-Steagall Acts); Tilton v. Richardson, 403 U.S. 672, 686 (1971) (drawing upon sociological studies regarding the susceptibility of college students to religious indoctrination and the degree of academic freedom at church-related universities in holding that the Higher Education Act did not violate the Establishment Clause of the First Amendment); Brown v. Bd. of Educ., 347 U.S. 483, 494 & n.11, 495 (1954) (relying on social science studies about the psychological effect of segregation on black students in rejecting the "separate but equal" doctrine in public schools).

152. *See* Kathy Peiss, *Making Up, Making Over: Cosmetics, Consumer Culture, and Women's Identity*, *in* THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE 311 (Victoria de Grazia & Ellen Furlough eds., 1996); *see also* Kathy Peiss, *Feminism and the History of the Face*, *in* THE SOCIAL AND POLITICAL BODY 161 (Theodore R. Schatzki & Wolfgang Natter eds., 1996).

153. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004), *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006).

154. *See Amicus Brief*, *supra* note 27, at 11.

155. *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting).

effort required to comply with appearance policies, but the emotional costs of compliance are important to consider in an unequal burdens analysis because they may indicate that the policy is impermissibly based upon sexist stereotypes. As one critic noted, "By weighing only time and cost burdens, courts ignore the feelings of degradation that accompany grooming standards based on harmful prejudices and stereotypes."[156] In this sense, the unequal burdens test—as it is currently applied—is an artificial solution because it fails to address the persistence of sex stereotypes within a seemingly equal policy.[157] Demanding rigid conformity with gender stereotypes, even if enforced with equal vigor against both sexes, imposes a heavy burden upon employees because the stereotypes themselves are harmful.[158] For example, the psychological burden inherent in the notion that women must comply with "artificial, exacting, and extensive" makeup requirements in order to appear professional, whereas men are apparently acceptable without any enhancement, makes it clear that the Personal Best policy in *Jespersen* imposed unequal burdens upon the sexes.[159] By considering the emotional cost of complying with an appearance policy, courts will be better able to determine whether a particular policy is unduly burdensome to employees because it is based on sexist stereotypes, thus closing the gap between the unequal burdens analysis and the offensive stereotype test.

The emotional costs of complying with an appearance policy may seem to be an overly subjective factor for courts to consider, but it would surely not be the first time a court has been required to evaluate intangible harms. Emotional distress claims are recognized in a variety of settings, most notably in tort law.[160] Plaintiffs may even recover for emotional distress in employment discrimination cases, such as wrongful termination.[161] In the groom and dress context, courts would simply be required to evaluate the emotional cost of complying with the discriminatory policy and incorporate that factor in the unequal burdens analysis. Given the extent to which intangible harms are incorporated in other bodies of case law, this would not be an overly burdensome task.

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156. Miller, *supra* note 121, at 1364.
157. *Id.* at 1360.
158. *See Amicus Brief*, *supra* note 27, at 26–27.
159. *Id.* at 26.
160. *See, e.g.*, Jeffrey Hoskins, *Negligent Infliction of Emotional Distress: Recovery is Foreseeable*, 39 J. MARSHALL L. REV. 1019 (2006); Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805 (2004).
161. *See, e.g.*, Jennifer R. Gowens, Comment, *You Hurt My Feelings, Now Pay Up: Should Objective Evidence Be Required to Support Claims for Emotional Distress Damages in Employment Discrimination Cases?*, 54 CASE W. RES. L. REV. 633 (2003).

Another potential criticism of the evaluation of emotional costs might be that, as the Ninth Circuit in *Jespersen* opined, the subjective reaction of a single employee is not enough to provide a basis for a Title VII challenge.[162] The apparent reasoning of this statement is that if the rest of the employees choose to accept the policy, the policy must be acceptable. However, as previously noted, Title VII's protections do not turn on whether the employee is given a choice to accept the discriminatory policy along with the job, but whether the policy itself is discriminatory.[163] Thus, if one employee challenges the policy and the court determines that the policy violates Title VII, that victory is no less important than if an entire class of employees had done so. Finally, this criticism ignores the fact that the unequal burdens analysis is a relative comparison of the entire burden a policy imposes upon each sex, and the emotional cost of the appearance policy is just one factor in the analysis.

Had the Ninth Circuit applied the second step of the proposed approach in *Jespersen*, Jespersen would have had a much stronger case for arguing that the Personal Best policy imposed a heavier burden on women. Although the Ninth Circuit dismissed Jespersen's unequal burdens claim in part because she failed to submit records regarding the time and cost of complying with the makeup requirement,[164] those were not the only costs at stake. For Jespersen, the true cost of the Personal Best policy was not the time it took to apply a full face of makeup everyday before work, or even the money spent on foundation, blush, mascara, and lipstick—though these costs are not insignificant—but the emotional toll of being forced to fit a stereotype of femininity that "made her feel sick, degraded, exposed" and "took away [her] credibility as an individual and as a person."[165] In order to comprehensively evaluate the relative burdens imposed by the Personal Best policy, the Ninth Circuit should have weighed Jespersen's emotional response to the policy and its corresponding impact on her job performance.

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162. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc).

163. *See supra* text accompanying notes 75–78.

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

165. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004) *aff'd on reh'g en banc*, 444 F.3d 1104 (9th Cir. 2006) (alteration in original) (internal quotation marks omitted).

VI. OBSTACLES TO IMPLEMENTATION: THE HAIRCUT CASES

The so-called haircut cases broadly affirmed the employer's right to restrict male employees' hair length because hair length is an easily altered characteristic, and Title VII was not intended to take away an employer's right to regulate employees' appearance.[166] As explained above, these cases are unsound because the holdings are based on the mutability doctrine, which contradicts Supreme Court precedent and misinterprets the language and purpose of Title VII.[167] It is important to note that most of the haircut cases took place in the 1970s during an era of great social and political change. In their zeal to protect employers' ability to regulate employees' appearance, presiding courts may have been influenced by this social context and the kinds of ideas that "long-haired youths"[168] may have represented. Today, the courts' and employers' fervent insistence that male employees' keep their hair short might seem unnecessary and unreasonable. Nevertheless, the haircut cases serve as valid precedent within circuit courts across the country. Thus, a Supreme Court ruling is necessary to bring about the much needed changes. Moreover, the myriad problems in the treatment of groom and dress policies under Title VII arise not out of the statute, but out of lower courts' misguided interpretation of the statute. The text of Title VII sets out a clear and succinct definition of discrimination. Yet circuit courts have imposed several broad limitations upon enforcement of Title VII violations. These court-created restrictions have thwarted Congress's intent in enacting Title VII.

VII. CONCLUSION

This Comment's proposed two-pronged approach for groom and dress policies under Title VII will return the focus to the statute's original purpose of eliminating the traditional barriers to women in the workplace by discerning whether the policy at hand is rooted in stereotypes that reinforce gender inequality. This new method will also comport with existing Supreme Court precedent from *Phillips* and *Price Waterhouse*

166. *See supra* Part IV.A.

167. *See supra* Part IV.A.

168. Indeed, the seminal haircut case, *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), illustrates this point. In *Willingham*, the Fifth Circuit noted that an "International Pop Festival" had recently been held in a neighboring village and was attended by 400,000 to 500,000 young people. *Id.* at 1087. "Bearded and long-haired youths and scantily dressed young women flooded the countryside. Use of drugs and marijuana was open." *Id.* Thus, the employer was entitled to consider that the business community of Macon was "particularly sour on youthful long-haired males at the time of Willingham's application." *Id.*

because it interprets the protections of Title VII broadly and without any of the false limitations imposed by circuit courts.

This new approach rejects the mutability doctrine because it conflicts with Supreme Court precedent and fundamentally misinterprets the language and purpose of Title VII. Moreover, the mutability doctrine must be discarded in its entirety because any application of the doctrine would deny Title VII review over groom and dress policies, due simply to the fact that they regulate mutable characteristics. Meanwhile, this new approach combines and refines aspects of the offensive stereotype analysis and the unequal burdens test to mitigate some of the limitations and weaknesses produced by the tests in their existing format.

First, the court should determine whether the policy is motivated by or relies upon stereotypes that tend to reinforce gender inequality in the workplace. The court should examine the policy in the context of the historical and cultural roots of the subordination of women, and if the appearance requirement is based upon a stereotype that has been used to demean, stigmatize, or oppress women, the stereotype is impermissible and the policy violates Title VII. If, however, the appearance requirement is benign, or even beneficial, to the sex upon which it is imposed, the policy does not violate Title VII.

At the second stage of the analysis, the court should inquire whether the policy in question imposes a heavier burden of compliance on one sex over the other. The court should examine the individual restrictions and requirements of the policy, rather than the policy as a whole, and it should consider a wide range of factors, including the temporal, financial, physical, and emotional costs of compliance. If the policy is found to impose a more stringent or burdensome standard against one sex over the other, the policy violates Title VII.

Darlene Jespersen risked a successful, twenty-year career by refusing to conform to an appearance policy that she believed to be unlawful, unnecessary, and even harmful to her job performance.[169] She stated that the makeup requirement made her feel "very degraded and very demeaned," and impaired her ability to command the respect of her unruly customers.[170] Under the approach advocated by this Comment, Jespersen would have likely been successful in her Title VII claim.

169. *Jespersen*, 392 F.3d at 1077–78.

170. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc) (internal quotation marks omitted); *Jespersen*, 392 F.3d at 1077.

Under the first prong of this approach, the Personal Best policy at Harrah's Casino violates Title VII because it is based on historically sexist stereotypes that portray women as passive, decorative sex objects,[171] and thus impermissibly reinforces gender inequality in the workplace. Even if a court upheld the policy under the first prong, the policy's makeup requirement imposes a heavier burden on female employees by requiring them to apply a complicated and expensive palette of makeup while men have no comparable requirement.[172] Thus, despite Jespersen's disappointing loss before the Ninth Circuit, this Author hopes that women like Jespersen continue to bring their groom and dress challenges before the courts. The publicity and controversy surrounding such cases[173] may encourage the Supreme Court to implement a new and more comprehensive method for analyzing groom and dress policies under Title VII, emphasizing an approach that will remain faithful to legislative intent and Supreme Court precedent by eradicating the harmful stereotypes faced all too often by women in the workforce.

171. *See supra* note 152 and accompanying text.

172. *See Jespersen*, 444 F.3d at 1107.

173. *See, e.g.*, Jon Christensen, *Rouge Rogue*, MOTHER JONES, Mar./Apr. 2001, at 22, *available at* http://www.mother jones.com/news/hellraiser/2001/03/hellraiser.html; Jackson Lewis LLP, *Harrah's Policy Requiring Women to Wear Makeup Upheld by Federal Appeals Court*, DAILY RECORDER, Feb. 23, 2005, *available at* http://www.jacksonlewis.com/legalupdates/article.cfm?aid=731; Judith A. Moldover, Maddened by Makeup, Law.com (Aug. 25, 2006), http://www.law.com/jsp/article.jsp?id=1156425446367.