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ABSTRACT:

Sex-stereotypes are of perennial concern within antidiscrimination law and theory, yet there is widespread disagreement about what constitutes a "sex-stereotype." This article enters the debate surrounding the correct understanding of "stereotype" and posits that the concept is too thin to serve as a criterion for distinguishing "discriminatory" gender generalizations from non-discriminatory probabilistic descriptions of behavior. Instead, "stereotype" is a heuristic that has been used by courts and commentators to crudely capture judgments about the justness of applying sex-respecting rules.

In this light, the article argues for abandoning the stereotype heuristic in favor of a rule-centered analysis of sex-respecting generalizations. Arguing that courts and commentators have not objected to gender generalizations because they are *descriptively* inaccurate (as the stereotype heuristic suggests) but because they also exert unique *prescriptive* force, the article provides a new understanding of the theoretical basis for subjecting gender generalizations to antidiscrimination scrutiny.

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GENDER RULES

Meredith Render*

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Men, as a rule, do not wear dresses.[1] Whether this should be so lies outside the scope of this piece, but *that* this is so is a kind of phenomenon: it is a widespread convergence of behavior that is predicated on a broadly observed social rule.[2] An authoritative formulation of this rule is difficult to

[1] This statement should be qualified: in dominate American culture men do not wear dresses publicly outside of performance contexts. Also, even within the preceding qualification, *some* American men do wear dresses in mainstream and non-performance contexts – hence, although the rule applies prescriptive force to the behavior of most men, it is not universally observed. However, the lack of universal observation does not undermine its status as a rule. No prescriptive rule is universally observed. *See* FREDERICK SCHAUER, PLAYING BY THE RULES 1-3 (Clarendon Press, 1991) (hereinafter RULES). This article does not offer a novel account of rule-following. Instead it relies upon descriptive accounts of the structure of rules and the phenomenon of rule-following advanced by others, and begins from a conditional premise: *if* these ideas about the structure of rules and phenomenon of rule-following are correct, then these insights should inform our understanding of the gender generalizations that form the predicates of sex-respecting legal and employer rules. In particular, the arguments presented here rely upon an account of rule structures and rule-based decision-making offered by Frederick Schauer in his 1991 PLAYING BY THE RULES, and to a lesser degree his 2003 work PROFILES, PROBABILITIES AND STEREOTYPES (hereinafter PROFILES). However, it is important to be clear that the phenomenology of rule-following has long been a subject of intense interest and debate among and between both philosophers and social scientists. This article does not pretend to enter or even capture the essence of this conversation, but instead relies on a modest set of fairly simple and fairly well-settled ideas about the nature of rules, as these ideas have been outlined by others. For sample of some of the more influential literature relating to rule-following, *see* H.L.A. HART, THE CONCEPT OF LAW 9-11, 19-25, 125-154 (Oxford University Press, 1961); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, (1953); G.W.F. HEGEL, THE PHENOMENOLOGY OF SPIRIT (1807); SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (Harvard University Press, 1982); Max Black, *The Analysis of Rules* in MODELS AND METAPHORS (Cornell University Press, 1984); GARY EBBS, RULE-FOLLOWING AND REALISM (Harvard University Press, 1997); Karsten R. Stueber , *How to Think About Rules and Rule Following*, PHILOSOPHY OF THE SOCIAL SCIENCES (2005) 35 (3); Lorenzo Bernasconi-Kohn *How Not to Think About Rules and Rule Following: A Response to Stueber*, PHILOSOPHY OF THE SOCIAL SCIENCES 36 (1); GORDEN P. BAKER & P. M. S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY (Blackwell, 1985); David Bloor, WITTGENSTEIN, RULES AND INSTITUTIONS (Routledge, 1997); Norman Malcolm, *Wittgenstein on Language and Rules*, PHILOSOPHY 64 (January 1986) 5-28; David Landy, *Hegel's Account of Rule-Following*, INQUIRY (2008) 51 (2):170 – 193.

[2] This kind of social rule is described by Hart as a "conventional social rule" in which the rule (*i.e.* men do not wear dresses) applies normative force by virtue of its conventional acceptance which provides an independent reason (or at least part of the reason) that members of the regulated community act in conformity with the practice the rule prescribes (*i.e.* men not wearing dresses). HART, *supra* note 1 at 56-57, 256-257. It is important to distinguish at the outset the "gender rules" at issue here from what Hart identified as "social habits" which he describes as "mere convergences in behavior between members of a social group" that does not create pressure to act in accordance with the convergence. *Id.*

Moreover, to be clear, the proposition "men do not wear dresses" might be understood to be purely descriptive – or, at most, to be what Frederick Schauer has described as a

articulate, and justifications for the rule are even more elusive.[3] But when men *do* wear dresses we understand this act to bear a significance that is distinct from the significance attached to a woman wearing a dress, and we know this without being explicitly instructed about the propositional content of the rule, without knowing *why* the rule exists, and without believing it to be justified. Instead, we understand the rules of gender the way we understand the rules of English: we are conversant in them.

To explore on an introductory level the degree to which we are conversant in "gender rules," recall the iconic train station scene in the 1959 film *Some*

"descriptive rule." SCHAUER, RULES, *supra* note 1 at 1-2. We might mean simply to communicate an observed regularity that lacks normative force. Schauer distinguishes descriptive rules, which he understands to merely describe regularities (*i.e*. it rains more in Mobile than Birmingham) from what he terms "mandatory rules" which he describes as rules that "when accepted, furnish reasons for action simply by virtue of their existence *qua* rules, and thus generate normative pressure even in those cases in which the justifications (rationales) underlying the rules indicate a contrary result." *Id*. at 5. The propositional content of the "gender rules" at issue in this piece are comprised both of generalities that exert normative force (*i.e.* apply pressure directly to behavior) and generalities that (accurately or inaccurately) describe gendered regularities – which then form the factual predicate of other regulatory rules (*i.e.* legal rules or employers' rules). The phrase "men do not wear dresses" is distinguishable from a purely descriptive generalization. While it may also be understood to describe a nonuniversal regularity of behavior, but as is described *infra* in Section II the *fact* that men do not wear dresses suggests that a *prescriptive* force is guiding this behavior. If the fact that men do not wear dresses becomes a reason not to wear a dress, and that reason in fact replaces independent reasons one might have to wear a dress (comfort, preference to exhibit femininity, etc.), then "men do not wear dresses" is a prescriptive rule. For a discussion of how rules provide a reason for action *see* JOSEPH RAZ, PRACTICAL REASON AND NORMS Sect. 4 (Hutchinson & Sons, Ltd., 1975); SCHAUER, RULES, *supra* note 1 at 6. Of course, this is not to say that purely descriptive gender generalities are impossible. The proposition "men tend to be taller than women" is an example of a purely descriptive gender generalization.

[3] The gender rules discussed here are principally *unformulated* rules– meaning that there is no authoritative source (*e.g.* a statute, signpost or scripture) that definitively or canonically articulates the rule. However, most social rules are unformulated, and unformulated rules retain the same principal features and normative forces as formulated rules. Moreover, unformulated rules can be formulated (albeit not authoritatively). We can say "men do not, as a rule, wear dresses," but we might also say "men should not wear dresses" or "if a man wears a dress he will be subjected to ridicule or social opprobrium." We do not know which of these (or any number of other plausible renderings) is the rendering that "correctly" captures the prescription that exerts pressure on behavior such that men refrain from wear dresses, as we have no authority to mediate plausible alternative formulations. But we need not have an authoritative or canonical formulation to either apply the rule in various contexts *(e.g.*, by understanding how an employer rule forbidding male employees from wearing dresses is not arbitrary) or to observe its *(e.g.* by not wearing a dress). *See*, SCHAUER, RULES, *supra* note 1 at 63-64, 71. *See also* discussion of formulated and unformulated rules *infra* at Section II A.

Like it Hot.[4] When Jack Lemon dons make-up, stockings and a dress and wobbles down a train platform the audience understood the joke just as easily as it had when Stan Laurel wore a dress twenty years earlier and when Robin William wore one forty years later.[5] Yet the joke relies on a non-obvious and in fact somewhat sophisticated understanding of sex roles: stockings, make-up and dresses are not funny on the women standing on the platform (Lemon's co-star, Marilyn Monroe, in particular), but a dress is funny on Jack Lemon because he is a man. The vestiges of femininity do not accompany maleness, *as a rule*, and it is the departure from this rule that provokes reaction, which, in this instance, is humor.

The joke in the film relies upon a non-obvious understanding of the following proposition: men do not wear dresses.[6] But the film does not instruct the audience that men do not wear dresses. The audience enters the theatre already versed – trained, even – in whatever knowledge is requires to get the joke.[7] The audience demonstrates its knowledge by grasping the joke, but it is misleading to characterize the knowledge that the audience demonstrates in grasping the joke as *knowledge of* a particular proposition.[8] After all, the audience does not have to *believe* the proposition to be true (*i.e*. men, in reality, do not wear dresses) to get the joke, nor does the proposition need to *be* true (indeed it is not true in the film).[9] Thus, to grasp the joke it is not sufficient to know a fact about the world (*i.e*. men do not usually wear dresses) because a fact about the world, even if true (and/or

[4] SOME LIKE IT HOT (United Artists, 1959).

[5] Stan Laurel dressed in drag in 1927's WHY GIRLS LOVE SAILORS (Pathé Exchange); Robin Williams dressed in drag in 1993's MRS. DOUBTFIRE.(20th Century Fox).

[6] Or the proposition might just as easily be: "men do not usually wear dresses." These formulations are used interchangeably through this piece; *see*, discussion, *supra*, note 3; SCHAUER, RULES, *supra*, note 1 at 71 .

[7] For a philosophical discussion of the criteria which must be met for one to "get" a joke, *see*, Ted Cohen, JOKES (University of Chicago Press, 1999).

[8] For a treatment of the difference between having propositional knowledge as opposed to knowledge of how to do something (so-called "knowledge how" - which is the kind of knowledge at issue here), *see* Gilbert Ryle, THE CONCEPT OF THE MIND (University of Chicago Press, 1949).

[9] It is unclear what "true" means in this context, but it may mean that the proposition expresses a statistically sound generalization. *See*, SCHAUER, PROFILES, *supra*, note 1 at 1-25.

understood probabilistically), does not explain what is funny about this instance in which a man does wear a dress.[10]

Similarly, the joke is not predicated on or dependant upon a particular normative belief about the relationship between men and dresses. To understand the joke, the audience need not believe that Jack Lemon *should* refrain from wearing a dress. In other words, the generalization that "men do not wear dresses" does not function in this situation as a proposition that the audience adopts a uniform attitude towards or belief about - instead, it is a predicate, a foundation upon which other understandings are built.[11] Thus, the audience does not simply demonstrate knowledge of the underlying proposition, it demonstrates the ability to apply the generalization (men do not usually wear dresses) in a way that makes sense of the scene.[12] The ability the audience demonstrates is much more sophisticated than a mere understanding of the proposition that underlies it. In laughing at Lack Lemon, the audience demonstrates that it knows the rules of a particular gender game, and that it has mastered the technique of applying them.[13]

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[10] *See* Cohen, *supra* note 7. What is funny about the scene is something more than the depiction of the unusual – something must bridge the fact that what we see is usual to the conclusion that it is funny. Even knowing a fact about the world (that men do not usually wear dresses) does not tell the audience how to apply that fact here, to Jack Lemon on the train platform.

[11] As is discussed in more detail *infra* at Section II, the description offered here suggests that the audience has mastered the constitutive rules of the particular gender game portrayed in the film. Constitutive rules are rules that constitute social practices and thereby permit us to determine when and whether we are engaging in the practice as well as enable us to make "moves" that have significance within the practice. *See*, John Searle, SPEECH ACTS (Cambridge University Press, 1969) (stating that when a rule is constitutive "behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist.") 33. Here, the significance of the act of wearing a dress is constituted by the rules of the gender game being played. Because both the filmmaker and the audience is versed in the rules of the game, the filmmaker is able to make a "move" that has gendered significance (here, humor) the same way that the rules of chess permit a chess-player to make a move that signifies checkmate.

[12] It is important to be clear that the ability to "correctly" use a rule is a different ability than the ability to *explain* the correct use of a rule. We may be able to apply gender rules without knowing *how* we know how to apply them, and without being able to explain the criteria for their correct application. *See* Gorden P. Baker and Peter Michael Stephan Hacker, Wittgenstein: Understanding Meaning, Vol. 1, 41 (observing, in the context of the correct application of the rules of English, that "[t]hough correct use and correct explanation are…connected, they do not entail one another.").

[13] For an interesting, if controversial, discussion of what it means to master the application of constitutive rules *see*, Ludwig Wittgenstein, PHILOSOPHICAL GRAMMAR (University of California Press, 1978).

Moreover, we rely on our mastery of gender rules in confronting all manner of sex-respecting distinctions. Consider, for example, an employer's rule that allows female but not male employees to wear dresses to work. The employer rule draws a distinction between men and women – is the distinction arbitrary?[14] If we do not find it arbitrary, it is because we implicitly understand the factual predicate of the rule (*i.e.*, "men generally do not wear dresses") even though it is not explicit in the rule itself.[15] It is the same generalization that renders the *Some Like it Hot* scene sensible, but in the context of the employer's rule, it serves as a factual predicate which makes the distinction drawn (men versus women) sensible.[16] Absent an understanding of the predicate, the employer's rule is arbitrary. Indeed, the employer's rule can only be justified (as non-arbitrary) in light of the behavioral expectations that are generated by the widespread observation of the social rule that forms the factual predicate of the employer's rule.[17] In this light, the employer's rule is a particularized instantiation of the social rule's general prescription: *given* that men do not wear dresses *generally*, men cannot wear dresses *here*.[18]

This relationship between gender generalizations ("men do not wear dresses")[19] and sex-respecting rules ("men cannot wear dresses here, at this

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[14]It is important to be clear that the question of whether the distinction is arbitrary is a different question from whether the distinction is morally justified. *See,* John Rawls, *Two Concepts of Rules*, THE PHILOSOPHICAL REVIEW, Vol. 64, No. 1, 3-32. (Jan., 1955).

[15] SCHAUER, RULES, supra, note 1 at 23 explaining that every rule has a factual predicate and that a rule's factual predicate "may not be explicit at all."

[16] *Id.*

[17] "Justified" here does not connote *moral* justification. *See* Rawls, *supra* note 14. When we speak of a rule being justified, we usually mean either that imperative of the rule is justified in light of its purpose, or we mean that the purpose of the rule is justified. For example, a rule that poor citizens must live in a particular district may be justified in light of its purpose (if the purpose is ghettoizing poor people), but we may still describe the rule as unjustified. In this, we mean the purpose of the rule (or having a rule at all) is not morally (or otherwise normatively) justified. On the other hand, if the evil we seek to avoid is drunk-driving, a rule that "no skateboards are allowed on the street" may not be justified in light of that purpose. SCHAUER, RULES, *supra* note 1 at 23. When a rule is described as "unjustified" in this discussion, the reader should assume the former connotation: that is, that the imperative of the rule is not justified in light of the rule's purpose unless otherwise specified.

[18] SCHAUER, RULES *supra,* note 1 at 47-52 (discussing rules as entrenched generalizations).

[19] The phrase "gender generalization" as it is used throughout the piece is intended to include generalizations that are based in or cognizant of sex or gender or gendered

workplace") has long been a subject of antidiscrimination law inquiry, and has generated a body of analysis that has principally revolved around the concept of "stereotypes."[20] Courts and commentators have long recognized that the Equal Protection Clause and Title VII both embody a commitment to a conception of equality that is inconsistent with the legal enforcement of sex-respecting classifications that are premised on "overbroad generalizations"[21] or "fictional" assumptions [22]about men and women.[23]

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qualities. There are distinctions to be made between sex-based generalizations, gender-based generalizations, sex-cognizant generalizations and so forth, but these distinctions do not alter the arguments presented here. Therefore, in the interest of simplicity, the phrase "gender generalization" is used to capture all of the foregoing permutations.

[20] The treatment of sex-stereotypes in legal analysis is the subject of a diverse literature. For a representative sample, *see, e.g.*, SCHAUER, PROFILES, *supra* note 1; Mary Ann Case, "*The Very Stereotype The Law Condemns": Constitutional Sex Discrimination Law As A Quest For Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000); Robert Post, *Prejudicial Appearances: The Logic Of American Antidiscrimination Law*, 88 Cal. L. Rev. 1 (2000); Katharine Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality* 92 MICH. L. REV. 2541 (1994); 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, 1360- 62 (2006); Deborah A. Widiss, Elizabeth L. Rosenblatt, Douglas NeJaime , *Exposing Sex Stereotypes In Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461 (2007); Dianne Avery and Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, And The New Face Of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007); Allegra C. Wiles, *More Than Just A Pretty Face: Preventing The Perpetuation Of Sexual Stereotypes In The Workplace*, 57 SYRACUSE L. REV. 657 (2007); Ann Bartow, *Some Dumb Girl Syndrome: Challenging And Subverting Destructive Stereotypes Of Female Attorneys*, 11 Wm. & Mary J. Women & L. 221 (2005); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008).

[21] *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975). *Schlesinger* involved a Fifth Amendment due process challenge to a statutory scheme that accorded women naval officers a 13-year tenure of commissioned service before mandatory discharge for want of promotion, while requiring the mandatory discharge of male officers who are twice passed over for promotion but who might have less than 13 years of commissioned service. The Court found the sex-respecting rule did not violate the Due Process Clause, as the different treatment of men and women officers resulted from the fact that other sex-respecting rules (regarding combat and sea duty) left female officers with fewer opportunities for promotion.

[22] *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978)(describing the difference between "real" and "fictional" difference between men and women); S*chlesinger*, 419 U.S. at 507. To discover whether a sex-respecting rule is premised on a stereotype, courts and commentators expressly interrogate the rule's "assumptions." In *Schlesinger* the Court described this process of assumption-interrogation:

> In both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed*, the assumption underlying the Idaho

Where a sex-respecting rule is deemed to be factually predicated on an impermissibly "broad" or "fictional"[24] generalization about men or women,

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> statute was that men would generally be better estate administrators than women. In *Frontiero*, the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

Id. at 507.

[23] Representative early cases that endorsed this proposition include: *Reed v. Reed*, 404 U.S. 71 (1971) (holding an Idaho statute that facially preferred men to women in the administration of estates violated the Equal Protection Clause in that it gave "a mandatory preference to members of [one] sex over member of the other" and thereby eliminated "hearings on the merits."); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (striking a provision of the U.S. Code that permitted a U.S. serviceman to claim his spouse "dependent" and obtained increased military benefits without a showing of actual dependence, but required a servicewoman to demonstrate actual dependence when claiming her spouse "dependent."); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down a Utah statute that required child support to be paid in support of male children up to the age of 21 while support was only extended to female children until the age of 18. In *Stanton*, the Court identified the sex-differentiated rule's factual predicates as: (1) that girls marry at a younger age than boys, and (2) boys require support longer so they may educationally prepare to support their own families. The Court then observed, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas…To distinguish between the two is on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed."); *Craig v. Boren*, 429 U.S. 190 (1976) (striking down Oklahoma's sex-differentiated drinking age statute despite evidence presented by the state that young men were more likely to be involved in drinking-related car accidents. In so doing, the Court advanced the belief that "[t]he very social stereotypes that find reflection in age-differential laws...are likely substantially to distort the accuracy of these comparative statistics. Hence, 'reckless' young men …are transformed into arrest statistics whereas their female counterparts are chivalrously escorted home." *Id*. at n.14). *Orr v. Orr*, 440 U.S. 268, 279 (1979) (striking down an Alabama statute that provided that alimony would be paid to women but not men; the Court found the statute unconstitutional in part because "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."). *See also Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Further, for an overview of the treatment of the concept of "stereotype" in both the context of the Equal Protection Clause and Title VII, *see* Case, *supra* note 20 at 1463. Case argues that under both the Equal Protection Clause and Title VII analyses, a generalization that forms the predicate of a sex-respecting rule is "over broad"- and therefore an impermissible stereotype – when the generalization is nonuniversal.

[24] *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978) (finding that a city department's requirement that female employees make larger contributions to its pension fund than male employees violated Title VII, even though the

the rule is said to be based on "stereotyped distinctions between the sexes"[25] and the rule is disallowed. The linchpin of this inquiry is the correct sorting of generalizations: every sex-respecting rule is predicated on a generalization (as indeed every rule is),[26] but not every gender generalization is a stereotype.[27] Therefore the task of conventional sex-stereotype analysis has traditionally been to identify when a gender generalization is a stereotype (a "fictional" or "overbroad" distinction between the sexes) and when it is not.[28]

However, while the project of identifying "sex-stereotypes" has long been a gender-equality touchstone and continues to be the analytic focal point of a number of emerging norms in Equal Protection and statutory antidiscrimination law,[29] there is a troubling lack of consensus within the

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requirement was predicated on actuarial predictions regarding the life expectancy of women as compared to men.).

[25] *Frontiero*, 411 U.S. at 685.

[26] SCHAUER, RULES, *supra* note 1 at 113.

[27] SCHAUER, PROFILES, *supra* note 1 at 131.

[28] *Schlesinger*, 419 U.S. 498, 507.

[29] For example, sex-stereotyping theories have been advanced in Equal Protection challenges to state and federal laws that restrict the definition of marriage to a man and woman. *See e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) Brief of Plaintiffs-Appellants at 56 (*Andersen v. King* County, 138 P.3d 963 (Wash. 2004); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 103434-04). For a discussion of the role that sex-stereotyping theories have played in challenging same-sex marriage restrictions, *see* Deborah A. Widiss, Elizabeth L. Rosenblatt, Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461 (2007).

Similarly, the question of whether transgender discrimination (*i.e*. discrimination that is based on an employee's status as a transgendered individual) is cognizable under Title VII will ultimately turn on a theory of sex-stereotyping. Courts are presently split on the question of whether transgendered plaintiffs may use a sex-stereotyping theory to advance Title VII claims. The Sixth Circuit has twice allowed the theory to go forward, first, and *Barnes* v. *City of Cincinnati*, 401 F.3d 729 (2005) (denying the appeal of a motion to overturn a jury verdict predicated on a sex-stereotyping theory of discrimination; plaintiff was a pre-operative male-to-female transsexual police office who claimed she was demoted for failing to comport with sex-stereotypical notions of masculinity). Similarly, a case pending in United States District Court for the District of Columbia promises to pass upon the applicability of a sex-stereotyping/transgender discrimination theory in the context of the federal government as employer. *Schroer v. Billington*, No. 05-1090. Plaintiff, former Army Colonel Diane Schroer, alleges that her offer of employment at the United States Library of Congress was revoked following her disclosure to a future supervisor that she was transgendered and planned to adopt a traditionally feminine name and dress.

juridical and academic communities regarding the criteria for identifying sex-stereotypes.[30] Three dominant approaches to defining sex-stereotypes have emerged. First, Mary Ann Case has identified a "perfect proxy" approach to identifying sex-stereotypes.[31] Case moors the legal definition of sex-stereotype to the categorical exclusion of women from opportunities or benefits.[32] In Case's view, a gender generalization is a stereotype if it is non-universal – *i.e.* fails to obtain in all instances – and the application of the rule would exclude women from a class of benefits or opportunities.[33] In contrast, Justice Scalia, among other, has articulated a "false generalization" approach to identifying sex-stereotypes which fixes the legal definition of "sex-stereotype" solely upon descriptive accuracy of the generalization itself.[34] In Scalia's view, if the gender generalization is statistically sound, the generalization is not a stereotype, even if the application of the generalization results in the categorical exclusion of women.[35]

Further, a third approach to defining sex-stereotypes has been borne of difficulties that arise when applying either of the first two approaches to assimilationist rules (*e.g.* men must be masculine and women must be feminine) rather than exclusionary rules (*e.g.* only men need apply).[36] Because assimilation rules permit an individual to mould her behavior to a gendered norm rather than categorically excluding women (or men) from jobs or benefits, the justice-sensibilities of courts and commentators shift in

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[30] Mary Ann Case has described "sex-stereotype" as "a term of art" within antidiscrimination analysis and theory. Case, *supra* note 20 at 1449. The term "stereotype," as it has been used in this context, describes something more than a non-universal generalization about men or women. After all, virtually no gender generalization obtains in every case, yet not every gender generalization is a stereotype. Instead, the term "stereotype" suggests a particular kind of generalization: a stereotype is an *unfair* generalization, or more specifically in the context of legal discourse, a generalization that when it serves as the factual predicate of a sex-respecting employer or legal rule, renders the rule discriminatory.

[31] Case, *supra* note 20 at 1449 - 1453.

[32] *Id.*

[33] *Id.*

[34] *United States v. Virginia*, 518 U.S. 515, 572-574 (1996) (Scalia, dissenting).

[35] *Id.*

[36] Rather than excluding all women (or all men) from a class of benefits or opportunities, assimilationist rules require regulated individuals to alter their behavior to comport with the gender generalizations that form the rule's predicate. For example, a rule forbidding men to wear dresses at work requires male employees to act in conformity with the rule's factual predicate (i.e. "men do not wear dresses").

these contexts, and the malleable definition of "sex-stereotype" bends to meet this sensibility.[37] Rather than focusing on the descriptive accuracy of the generalization itself (*e.g.* is the proposition "men are masculine" spurious? Is it universal?), courts and commentators have focused on the benefits and burdens imposed by the challenged rule.[38] Where the sex-respecting rule imposes too great a burden on the regulated individual, the rule depends upon a "stereotype."[39] On the other hand, where the burden imposed by the rule is adjudged reasonable in light of the rule's benefit, the fact that the rule is predicated on a non-universal – and thereby potentially "overly-broad"-- gender generalization becomes immaterial.[40]

The combination of these three context-specific and consequence-based approaches to defining sex-stereotypes has created uncertainty not only about which generalizations "count" as stereotypes, but more importantly, they have created uncertainty as to why gender generalizations are uniquely unjust or "discriminatory" as compared to other kinds of generalizations.[41]

To illustrate this point, consider, for, example, the factual predicate of the Virginia Military Institute's (VMI) male-only admission policy.[42] In defending its admission rule against an Equal Protection challenge, VMI

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[37]Rules that can be categorized as "assimilationist" may require adherence to more than broad notions of masculinity or femininity; they frequently require adherence to caricatures of masculinity or femininity. For example, the rule at issue in *Jespersen*, discussed in detail *infra* at Section I C (1) and Section III, required female employees to do more than refrain from masculine dress or presentation. Female employees were required to adopt a "hyperfeminized" presentation at work, teasing their hair, wearing specific kinds of make-up and so forth. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006).

[38] *See, e.g. Jespersen*, 444 F.3d 1104.

[39] *See, e.g., Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc).

[40] *See, e.g., Jespersen*, 444 F.3d 1104.

[41] Or, more specifically, why the use of these particular generalizations as rule-predicates is discriminatory. *See e.g.*, Schauer, Profiles supra note 1 at 17 (observing, "but if stereotyping is wrong…we have…ambiguity about whether stereotyping is wrong only when the stereotype lacks any statistical foundation, or whether it is wrong also when [statistically sound] stereotypes are used to make decisions about entire classes."); *see also*, Hellman, *supra* note 20 at 43 (describing the make-up requirement at issue in *Jespersen* as one of a "whole set of stereotypes about women " that are "wrong" in the discrimination sense insofar as they denigrate women) .

[42] *United States v. Virginia*, 518 U.S. 515 (1996).

pointed to evidence that women are less likely to succeed in the type of adversarial educational environment that VMI provided.[43] According to VMI's experts, a non-spurious and nonuniversal generalization[44] about women formed the factual predicate of VMI's exclusionary admission policy: some women may be able to succeed at VMI, but *most* women – if VMI's evidence was to be believed – would not.[45] In this light, VMI made a probabilistic assessment based on this descriptive generalization ("women are less likely than men to succeed at VMI") regarding the wisdom of admitting women cadets, in light of its purported goal of limiting admission to cadets who are most likely to succeed at VMI.[46]

Nonetheless, the Supreme Court concluded that, even assuming VMI's evidence were true, VMI's rule-predicate ("most women will not succeed at VMI") was insufficient to justify VMI's sex-classification.[47] In articulating the insufficiency of the gender generalization ("most women will not succeed at VMI"), Justice Ginsburg objected to the fact that the rule failed to provide an opportunity for extraordinary women to defy, with their individual and particular strengths, the strictures of the general.[48]

Ginsburg's objection is intuitively appealing, and may tempt us towards the conclusion that non-universality is the key to the analysis.[49] We might conclude, as Mary Ann Case does, that all non-universal generalizations that exclude women (or men) are "stereotypes" and therefore

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[43] *VMI*, 518 U.S. at 523.

[44] A nonuniversal generalization may be statistically relevant but it fails to obtain in every case. In contrast, an example of a universal generalization is Socrates' declaration: all men are mortal. The statement describes an attribute that is true as applied in all cases. A universal generalization may still be used in a fallacious manner (*i.e.* "we should hire a woman instead of a man because all men are mortal" – implying, falsely, that women are not mortal), but this is a different type of logical error than that which follows from the application of a nonuniversal generalization (of which stereotypes are a subset) to a particular person or all people in a group. For an helpful explanation of the difference between universal and nonuniversal generalizations, *see*, Schauer, PROFILES, *supra* note 8 at 27-48.

[45] *VMI*, 518 U.S. at 523.

[46] *Id.*

[47] *VMI*, 518 U.S. at 550.

[48] *VMI*, 518 U.S. at 550 (stating, "estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.").

[49] *Id.*

discriminatory.[50] But Ginsburg's objection is also not unique. If, for example, VMI's exclusionary policy were predicated on another kind of probabilistic generalization – one that did not distinguish along gender lines – the rule would have been allowed.[51] After all, VMI is permitted to exclude individuals who are too young, who lack the requisite academic qualifications, or whose physical infirmities would – in VMI's probabilistic assessment – prevent success at VMI.[52] Undoubtedly, each of the generalizations that form the factual predicate of these exclusionary rules is also over-inclusive.[53] Some members of each of the classes excluded (children, individuals with poor academic records, individuals who are infirm) are capable of succeeding at VMI, yet these individuals are not permitted an opportunity to defy the generalization that excludes them. VMI is permitted to exclude these individuals based on a generalized rather than individualized judgment about their capabilities, as long as those generalizations seem non-arbitrary (*i.e.*, the generalization describes a state of the world with an acceptable degree of accuracy and is causally linked to the justification for the rule) and not *gendered*.[54]

What makes the VMI majority's use of "sex-stereotype" even more perplexing is the fact that *all* rules are predicated on nonuniversal generalizations.[55] As Frederick Schauer has explained, the factual predicate of *every* rule (including all legal rules, employer rules and college admission rules) is a generalization that fails to obtain in every case.[56] Rules are, by nature, over and under-inclusive.[57] Rules govern the general case, and eschew individualized considerations.[58] Because it is impossible to make an admissions or employment rule without relying on generalities, we tolerate over and under-inclusive generalizations about young people, poor

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[50] *See* Case, *supra*, note 20 at 1457.

[51] Most commentators would agree that the animus-based exclusion of women is not a legitimate purpose for a sex-respecting rule.

[52] *See*, SCHAUER, PROFILES, *supra* note 1 at 149.

[53] SCHAUER, RULES *supra* note 1 at 31-34.

[54] *See* SCHAUER, PROFILES, *supra* note 1 at 149.

[55] SCHAUER, RULES, *supra* note 1 at 23.

[56] *Id*.

[57] SCHAUER, RULES, *supra* note 1 at 31-34; and PROFILES, *supra* note 1 at 45.

[58] SCHAUER, RULES, *supra* note 1 at 31-34.

test-takers, and a slew of other imperfect proxies.[59] Where the reliance on a non-universal generalization seems justified by the strength of the causal link between the predictive power of the generalization (*e.g.*, "students with low S.A.T. scores will not succeed") and the legitimate evil the rule seeks to avoid (*e.g.*, admitting applicants who will not succeed), we are inclined to tolerate the fact that some individuals who are capable of succeeding at VMI are excluded "unfairly" by its admissions rules.[60] Why then do we not have the same tolerance for a rule that excludes the subset of women who are capable of succeeding at VMI?[61]

Here, conventional antidiscrimination analysis falters. The VMI question illustrates that rules that are predicated on *gender* generalizations (*e.g.* "most women will not succeed at VMI") often run afoul with both our justice-conceptions and antidiscrimination law, even where they might be descriptively (*e.g.*, statistically) accurate, and therefore reasonably helpful predictors of the evil the rule seeks to avoid. And – more significantly -- the source of this objection must be *something more* than simply that fact that the generalization fails to obtain in every case (thereby denying the exceptional woman her due), because every rule is predicated on a generalization that fails to obtain in every case (thereby denying someone exceptional his or her due). So what then is special about *gender* generalizations and how do we know which gender generalizations are stereotypes?

This paper offers two answers to this question. First, it observes that attempts at sorting generalizations into permissible probabilistic assessments and impermissible "sex-stereotypes" are analytically unhelpful. The paper demonstrates that the idea of "sex-stereotype" is itself conceptually empty. Rather than using "stereotype" as a substantive standard, analysts have used "stereotype" as a heuristic for capturing judgments about the justness of applying gender generalizations in particular contexts. However, the heuristic has failed to provide criteria for distinguishing "stereotyping" generalizations from other types of generalizations, and therefore it is not helpful in performing its primary function: sorting discriminatory rules from nondiscriminatory rules.

The second, and primary, insight of this paper offers an explanation for the failure of the "stereotype" heuristic. The argument holds that while

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[59] *Id.*

[60] SCHAUER, PROFILES, *supra*, note 1 at 131 -154.

[61] *Id.*

antidiscrimination law and theory has been rhetorically attentive to the *descriptive* dimensions of gender generalizations, both doctrine and theory in this area has been substantively driven by a suspicion of or discomfort with the *prescriptive* dimensions of gender generalizations. This misalignment has led to confusion over both the application of and justification for the legal rule against using sex-stereotypes as employer or legal rule predicates.

This paper clarifies this considerable confusion by explicating two under-theorized phenomena: (1) the manner in which gender generalizations function prescriptively; and (2) the manner in which the use of gender generalizations as rule-predicates limits the revisabilty of those generalizations while reinforcing their prescriptive dimensions. The paper concludes that it is these phenomena that lie at the center of antidiscrimination law and theory's objection to discriminatory "assumptions" and "stereotyped distinctions between the sexes," and therefore these phenomena should be at the center of future analysis.

The argument will proceed in three parts. First, Part I of the paper will examine the current method of using the "stereotype" heuristic to assess gender generalizations as rule-predicates, and demonstrate how the heuristic fails in the manner described above. Next, Part II will identify and analyze the prescriptive dimensions of gender generalizations. Finally, Part III will consider the role that these prescriptive dimensions play in rendering gender generalization objectionable as employer or legal rule-predicates.

I. The Empty Idea of Stereotypes

It is not difficult to arrive at an intuitive understanding of the term "stereotype" – we know that it is a type of generalization that concerns qualities or attributes assigned to a category of people.[62] We know, too, that a stereotype is an "unfair" or "unjust" generalization: one that has either a spurious predicate (*i.e.* women are bad drivers), or - and this is the trickier case – it is a generalization that captures something that is *generally*, or sometimes, or even usually "true" about the category of people that it describes, but the application of the generalization in a particular context is still somehow objectionable or unfair.

For example, the generalization that "women with young children miss work to care for children more often than men with young children" may be statistically sound, but it does not obtain in all cases and we would likely describe it as a "stereotype" if it served as the factual predicate of a legal rule that permitted employers to decline to hire women (but not men) with young children. Our objection in that context would be that limiting the options of women with young children based on a non-universal and categorical generalization is unfair, despite the fact that the rule's predicate is statistically supported.[63] However, is it a "stereotype" to point to evidence that supports the generalization, and then to draw conclusions from it? If this generalization formed the factual predicate of a legal rule that allocates benefits to women with young children designed to decrease absenteeism, would the generalization, in that context, be a stereotype? Can a generalization with the same propositional content be a stereotype in one context (*i.e.* as the factual predicate of a legal rule that permits employers to decline to hire women with young children), while not a stereotype in another context?

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[62] For a general discussion of the concept of "stereotype" in the context of sex discrimination , *see*, SCHAUER, PROFILES, *supra* note1 at 131-154.

[63] In contrast, we would not think it unfair for an employer to decline to hire a particular applicant with a history of job absenteeism or to dismiss an employee who missed work frequently. It would seem that what we find objectionable is the application of a generalization to the broader category of people to whom it may or may not obtain. Schauer would thus describe the nature of this objection as a kind of "particularlism" – a reflection of the belief that "making decisions on the basis of the characteristics of particular …individuals, rather than on the basis of the characteristics of the groups or classes of which the particular[individuals] may be members, is…a moral imperative. Indeed it is often thought to define the concept of justice, and justice has long been thought to reside in the particulars." SCHAUER, PROFILES, supra note 1 at 19-20. *See also*, Case, *supra* note 20 (making the case that the Supreme Court embraces the view that fairness in the context of sex-respecting rules requires individualized decision-making).

The preceding example suggests that it is difficult to determine whether a gender generalization is a "stereotype" without reference to the fairness of a particular application of the generalization.[64] This is because the idea of a stereotype carries with it a connotation of unfairness or injustice, but it does not delimit or offer specific guidance about the character of unfairness that transforms a garden-variety nonuniversal generalization into a stereotype.[65] Thus, to determine whether a generalization is a stereotype, an analyst or adjudicator must first be committed to a principle of justice by which the "fairness" of the application of the generalization can be measured. Only after a justice principle has been embraced, can a generalization be evaluated as both (1) non-universal, and (2) "otherwise unfair."[66]

Seen in this light, the concept of "stereotype" begins to seem like an empty idea.[67] To determine whether it applies, we must first have an affirmative principle of justice; then, if a particular generalization fails to meet the criteria setout by the justice-principle we embrace, that generalization is a stereotype. If the generalization is a stereotype, it is disallowed. In this iteration the concept of "stereotype" is not doing any analytic work: a generalization is either just or unjust as applied, and if it is unjust, it is disallowed.

If it is indeed the case that "stereotype" is an empty standard, it should come as no surprise that courts and commentators have adopted diverse and

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[64] It is difficult to understand generalizations to be unfair on their own terms – they are primarily fair or unfair, just or unjust as applied in particular contexts. An exception to this statement are generalizations that have spurious factual predicates (*e.g.* women are bad drivers).

[65] SCHAUER, PROFILES, *supra* note 1 at 3.

[66] Arguments as to what renders a nonuniversal generalization unfair vary; sometime application of a nonuniversal generalization is deemed "otherwise unfair" because it is perceived to be spurious or statistically unsound, while other times it is perceived to be unfair because it offends a commitment to particularism. *See supra* text accompanying note 41.

[67] The phrase "empty idea" is an allusion to Peter Westen's provocative article, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). In this piece, Westen argues that "equality" is an empty idea in that before one can determine how to obey the Aristotelian directive to "treat likes alike," one must first refer to external values to decide which people are alike and which treatments constitute "like treatment." However, after one has settled on a value to determine which people and treatments are alike, that value becomes the reason or justification for the "equal" treatment. Thus, the concept of "equality" is not doing any work in the analysis: likes are to be treated alike because of the way in which they are alike, not because of a substantive concept of equality. *But see*, Steven Burton, *Comment On "Empty Ideas": Logical Positivist Analyses Of Equality And Rules*, 91 Yale L.J. 1136 (1982).

idiosyncratic methods for identifying "sex-stereotypes."[68] Of these varied approaches, three are particularly prominent. First, courts were originally (at least rhetorically) concerned with generalizations that had spurious factual predicates (*e.g.* women are bad drivers), and some commentators continue to embrace the idea that only "false" – as in statically unsound – generalizations are sex-stereotypes, but that statistically sound generalizations are permissible rule predicates.[69] Second, Mary Ann Case has observed that courts have embraced a "perfect proxy" definition of stereotype that holds all nonuniversal gender generalizations to be stereotypes, where the application of the generalization would categorically exclude women from a class of opportunities or benefits.[70] However, as mentioned above, each of these approaches has been the subject of critiques that are particularly salient in the context of sex-respecting assimilation rules (*e.g.*, rules that require women to behave femininely and men to behave masculinely).

In fact, because neither the "perfect proxy" nor "false generalization" approach provides a helpful framework for assessing gender generalizations in the context of assimilation rules, courts and commentators have adopted a third approach to assessing sex-respecting rule predicates in those contexts. Where a sex-respecting rule requires assimilation (rather than compelling exclusion), courts have largely retained the rhetoric of the

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[68] It should also come as no surprise that these diverse methodologies have produced inconsistent – and at times even bizarre – results. Consider, for example the observation of Richard Posner, concurring in a recent sex-stereotyping decision:

> The [7th Circuit] case law as it has evolved holds… that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of "sex stereotyping" or "gender stereotyping"…[T]his curious distinction… would be very difficult to explain to a lay person. [T]he absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. *To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction.* It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process….

Hamm v. Weyauwega Milk Products, 332 F.3d 1058, 1066 (J. Posner, concurring) (2003) (emphasis added).

[69] *See, e.g., VMI*, 518 U.S. at 540-44 (Scalia, dissenting).

[70] *See*, Case, *supra* note 20 at 1457 .

"stereotype" heuristic, while actually applying a balancing of equities approach to determining whether the rule is discriminatory.

Each of these methods of defining of "sex-stereotype" -- the "false generalization" approach, the "perfect proxy" approach, and the "balancing-of-equities" approach -- is considered below.

A. "False" Generalizations

Initially, in identifying discriminatory sex-respecting rule-predicates, courts and commentators were interested in identifying generalizations that were not predicated on a "true" state of the world, but that instead reflected the widespread observation of social rules that had the effect of segregating women into a discrete and subordinate behavioral realm. Implicit in these early decisions was the belief that social rules were constructing a "fictional" account of women's nature and abilities, and these "false generalizations" about women were thereby separating women from opportunities women might otherwise be equal to. Therefore, the first strike at gender generalizations was directed at these "false generalizations." A discussion of this method of defining "sex-stereotype" as well as the degree to which this method still animates sex-stereotyping doctrine and theory follows.

1. Early Rule-Predicate Analysis

Early in the development of modern sex discrimination doctrine[71]both courts and commentators began using the term "stereotype" to criticize the factual predicates of a subset of employer and legal rules that drew distinctions between men and women which were rooted in non-universal generalizations about men and women. For example, in 1978 the Supreme Court observed:

> There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman;

[71] The phrase "modern sex discrimination doctrine" is use to signify both Equal Protection and Title VII doctrine beginning with the period following the enactment of the Civil Rights Act. After the Civil Rights Act was enacted, courts systematically revised the ambit of the Equal Protection Clause in light of the definition of sex discrimination that was established by the Act. *See*, Case, *supra* note 20 at 1463 (describing the relationship between Title VII's anti-sex stereotyping mandate and the reinterpretation of the Equal Protection Clause).

> it is not true that the average woman driver is more accident prone than the average man…It is now well recognized that employment decisions cannot be predicated on *mere "stereotyped" impressions about the characteristics of males or females.* 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."[72]

Thus, in assessing the potentially discriminatory components of an employer's sex-respecting rule, courts first identified the rule's factual predicate and assessed whether the predicate fell into one of two categories: (1) spurious and thereby impermissible gender generalizations (*i.e.*, "the average woman driver is more accident prone than the average man");[73] and (2) gender generalizations that courts deemed to be non-fictional or "true" (*i.e.* "the average man is taller than the average woman").[74]

In this spirit, the Supreme Court struck down a series of legal and employer rules predicated, in the Court's view, on "gross, stereotyped distinctions between the sexes."[75] In these early sex-stereotyping cases generally involved the categorical exclusion of men or women from particular benefits or opportunities.[76] For example, in this context, an airline rule was invalidated that required purser to be male and stewardesses to be female, and afforded pursers greater benefits – including a cleaning allowance.[77] The airline justified the male-only cleaning allowance by appealing to a

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[72] *Manhart*, 435 U.S. at 708. (emphasis added).

[73] *Id.* at 708.

[74] *Id*. at 708.

[75] *Frontiero*, 411 U.S. at 685, *supra* note 23.

[76] *See, supra,* text accompanying note at 23 (summarizing, *Frontiero*, 411 U.S. 677; *Craig*, 429 U.S. 190; and *Orr*, 440 U.S. 268). *See also, Sprogis v. United Air Lines, Inc*., 444 F2d 1194 (1971) *cert. den.* 404 US 991(1971) (holding that an airline's policy of employing married men but not married women violated Title VII as interpreted by the Equal Employment Opportunity Commission's regulation stating that same; the court held the EEOC's regulation (formerly 29 CFR § 1604.3(a), presently 29 CFR § 1604.4, supra § 1[c]) was reasonable and consistent with Title VII).

[77] *Laffey v. Northwest Airlines, Inc*., 740 F.2d 1071 (D.C. Cir., 1984).

widely-held belief about men and women: men and women enjoy different relationships to domesticity.[78]

In evaluating the legal and employer rules in these early sex-stereotyping cases, courts focused on the "assumptions" of the rules in question – by which courts meant the rules' factual predicate -- *i.e.* women have a special affinity with or relationship to domesticity.[79] If the assumptions reflected "archaic" or "false" gender generalizations (which courts broadly described as "stereotypes"), the assumption was deemed insufficient to justify the sex-classification and the sex-respecting rule was invalidated.[80]

However, there were two difficulties with this early "false generalization" approach. First, it was an uncomfortable and largely unmanageable project for courts to sift spurious gender generalizations from "true" generalizations based solely on judicial intuitions.[81] In these early rule-predicate cases,

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[78] *Id.* This factual predicate – that women and men are differently situated with respect to issues surrounding domesticity – is typical of the kind of "stereotypical" predicates that courts chastised in these early cases.

[79] In a related line of cases, courts were asked to evaluate practices in which customer's purportedly stereotypical preferences were offered as the reason for (or justification of) a sex-differentiated practice. For example, in this context courts were asked to pass upon an airline's policy of hiring only female flight attendants and requiring them to dress in sexually provocative uniforms. *Wilson v. Southwest Airlines Co.,* 517 F. Supp. 292 (1981). In these cases, courts focused on the insufficiency of the reason for the distinction (customers' preference) as a justification for the exclusionary hiring practice.

[80] *See, supra,* text accompanying note at 23.

[81] Although courts have not universally bowed before the challenge; indeed, Judge Posner continues to articulate his intuitively-driven views regarding the spuriousness of gender generalizations:

> [I]f a fire department refused to hire mannish women to be firefighters, this would be evidence that it was discriminating against women, because mannish women are more likely than stereotypically feminine women to meet the demanding physical criteria for a firefighter.

Hamm v. Weyauwega Milk Products, 332 F.3d 1058, 1066 (J. Posner, concurring) (2003).

It is not clear from the context what Judge Posner holds to be the causal link between what he describes as "mannish" women and physical strength. One must assume that he means "mannish" to indicate gender-nonconforming women. It is possible the relationship he would draw is premised on a connection between size and strength, which he views as related, in some way, to gender-conformity. It may be that Judge Posner believes gender-nonconforming women to be physically larger than gender-conforming women. In any

courts stopped short of using the epistemological tools of trial (*e.g.* the presentation of evidence) to determine whether the gender generalization that forms the predicate of a contested rule is "true."[82] Instead, courts described gender generalizations as spurious "stereotypes" based on judicial intuitions about the content of the generalization itself.[83]

More significantly however, an examination of the methodology of these cases reveal that courts' conclusions about permissibility of a rule's factual predicate turned not on a scrutiny of the content of the generalization in terms of its truth or falseness, but on the fairness of applying the generalization in particular contexts. While retaining a formal reliance on "false generalization" rhetoric, in practice, courts were defining "stereotype" in light of the consequences of applying the generalization. If the rule was predicated on a nonuniversal gender generalization, and application of the rule resulted in the categorical exclusion of women from a particular opportunity or benefit, the rule's predicate was a "stereotype." In other words, courts were applying a justice-based standard rather than assessing the validity or the accuracy of the rule's predicate. Within this methodology, the empty vessel of "stereotype" was filled with a conception of justice that held it unfair to categorically exclude women from benefits and opportunities when the gender generalization applied only to some, but not *all* women.

This method resulted in an uneven application of the sex-stereotype standard. Courts attached the label of "stereotype" to generalizations which categorically excluded women, even if there was reason to believe the generalizations were statistically supported, while tacitly approving more questionably-based predicates in other contexts.[84] Thus, although courts

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event, it seems clear that Judge Posner perceives that generalizations which draw causal links between femininity and relative physical weakness to be sound. In the same concurrence, Judge Posner discusses potentially "mincing" male employees, bare-breasted lady ditch-diggers, and observes that "mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism" -- all of which suggests that an evaluation of the spuriousness gender generalizations should not be committed solely to judicial intuitions. *Id.* at 1066.

[82] Although Justice Scalia has proposed that the determination of the validity of a gender-based distinction should be consigned to a fact-finder reviewing evidence, rather than a legal standard or judicial intuition. *VMI*, 518 U.S. at 572-74. *See* Ronald J. Allen and Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1769 (2003).

[83] *Id.*

[84] In these early sex-stereotyping cases – particularly in the context of the Equal Protection Clause – courts were not moved to permit categorical exclusions even in instance in which

were formally defining "stereotypes" as generalizations that were in some manner "untrue" or spurious, as illustrated by "woman driver" versus "tall man" examples above, in practice courts were using the appellation "stereotype" to chastise generalizations that may or may not be statistically supported, but that were, in courts' estimation, unfair as applied.[85]

This tension between the rhetoric of "false generalizations" and the justice-based method that courts used to define "sex-stereotype" increased as the doctrine developed. After a first wave of cases which dealt with clearly spurious rule-predicates, courts were increasingly called upon to evaluate sex-classifications that were predicated on generalizations that were neither clearly spurious (women drivers) nor clearly "true" (tall men).[86] As the metrics by which the "accuracy" of gender generalizations could be assessed grew increasingly elusive, courts were forced to rely on idiosyncratic justice-based judgments about what constitutes a "false generalization."[87]

2. "False Generalizations" Re-imagined

Perhaps the apex of the method of defining "stereotype" in light of the justness of its application in the context of the categorical exclusions was reached in the 1996 case which challenged the Virginia Military Institute's (VMI) categorical exclusion of women as cadets, discussed in this introduction to this piece.[88] In this challenge, female applicants argued that VMI's exclusion of women was predicated on two over-inclusive generalizations: (1) that women were generally ill-suited to the adversarial educational style employed by the Institute; and (2) that most women would not choose to attend VMI given its adversarial pedagogical style.[89] VMI

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defendants defended the statistical accuracy of the factual predicate of the practice. For example, in *City of Los Angeles, Dept. of Water and Power v. Manhart*, the city defended its practice of requiring women to make more pension contributions than men by pointing to the statistical likelihood that women live longer than men. This disparate treatment, in the city's view, was not predicated on "myths" or spurious notions of what men and women are like, but on an actual, "true" difference between men and women. 435 U.S. 702, 708 (1978). *See,* Case, *supra,* note 20 (describing how Equal Protection has never been satisfied by sex-stratification that is justified with reference to statistical "truths.").

[85] *See supra* text accompanying note 23.

[86] *Manhart*, 435 U.S. at 708.

[87] *See supra* text accompanying note 23.

[88] *United States v. Virginia*, 518 U.S. 515 (1996). For a history of the case, *see*, Philippa Strum, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS (2002).

[89] *VMI*, 518 U.S. at 540.

defended its sex-segregatory policy by providing expert testimony that "females tend to thrive in a cooperative atmosphere" and that, although some women may prefer the adversarial educational style offered by VMI, *most* women were unlikely to prefer such a method.[90] Thus, in defending its practice against the plaintiffs' charge, VMI asserted that the admittedly nonuniversal sex-respecting generalizations that formed the factual predicate of its rule were in fact "true" – meaning they were grounded in a reasonably accurate picture of the world.[91] In other words, VMI disputed that its rule was predicated on a sex-stereotype, in that VMI understood stereotypes to be limited to those nonuniversal generalizations that are spurious.[92] In VMI's view, it was not discriminatory for VMI to exclude women based on a statistically accurate picture that women were unlikely to succeed at VMI.[93]

While the majority held that VMI's sex-respecting rule violated the Equal Protection Clause, VMI's analysis found a friend in Justice Scalia. Scalia agreed with VMI's argument that the definition of "sex-stereotype" excludes statistically sound generalizations.[94] In his dissent, Scalia suggested that he would draw a distinction between exclusionary rules that are predicated on "bad old days" spurious generalizations designed to "keep women in their place," and rules that are predicated on rationally-drawn generalizations that accurately reflect states of the world.[95] Moreover, in Scalia's rendering, the evaluation of whether a generalization is rational or spurious is an empirical rather than legal or conceptual question. To sort the spurious chaff from the rational wheat Scalia would rely upon the

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[90] *VMI*, 518 U.S. at 540-44. For an analysis of the "real" difference testimony in VMI, *see,* Diane Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. 189 (1996).

[91] *VMI*, 518 U.S. at 540-44.

[92] *Id.*

[93] *VMI*, 518 U.S. at 549. Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F.Supp., at 480-481.

[94] *VMI*, 518 U.S. 572-574 (Scalia, dissenting).

[95] *VMI*, 518 U.S. at 591 (Scalia, dissenting). In particular, Justice Scalia emphasized that the trial record supported the rationality of VMI's generalization concerning the fitness of women to meet VMI's instructional requirements. Justice Scalia observed both that, "[i]t is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women."

epistemological procedures of trial.[96] Where the adversarial process of trial reveals the generalization is statistically sound then the generalization is not a "stereotype" and the application of the generalization is not discriminatory.[97]

Thus, Scalia's VMI dissent articulated his method for defining "sex-stereotype": he would identify a sex-respecting rule's gender-generalization predicate and permit the rule to stand where a fact-finder determines the generalization to be sound.[98] In this way, Scalia's definition of "sex-stereotype" echoed courts' early "false generalization" rhetoric --although, decidedly not courts' "false generalization" methodology.[99] Where earlier courts disallowed statistically-sound nonuniversal generalizations if the application of those generalizations resulted in categorical exclusions, Scalia would allow the categorical exclusion if the generalization is not spurious.[100]

Scalia's departure from previous courts' method of defining "stereotype" is rooted not in a disagreement about what constitutes a spurious (as opposed to sound) generalization. It is based instead on a disagreement about what justice requires in the application of a nonuniversal generalizations that categorically exclude women from opportunities.[101] While earlier courts were committed to a justice-principle that provided individual women an opportunity to defy generalizations (regardless of whether they obtained in most cases), Scalia is committed to a justice principle than would allow law-makers and employers to draw broad sex-respecting distinctions where those distinctions were predicated on "true" generalizations about men and women, where truth is determined by the epistemological procedures of trial.[102]

However, the "false generalizations" approach that Scalia embraces has proven vulnerable to criticism. First, while Scalia's approach provides a method for distinguishing permissible rule-predicates from impermissible rule predicates, it fails to categorize as "impermissible" the class of

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[96] *VMI*, 518 U.S. 585-587 (Scalia, dissenting).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

generations that earlier courts disallowed not because they were spurious, but because they were "overly broad."[103] As Mary Ann Case observed in the context of critiquing Scalia's VMI dissent, "[e]ven a generalization demonstrably true of an overwhelming majority of one sex or the other [has not satisfied the Court in the past]: virtually every sex-respecting rule struck down by the Court in the last quarter century embodies a proxy that was overwhelmingly, though not perfectly, accurate."[104] Thus, Scalia's method of identifying "sex-stereotypes" fails to capture – and is indeed inconsistent with -- the justice-based judgments that early courts sought to apply by adopting the "stereotype" heuristic.[105]

In particular, Scalia's "false generalization" approach fails to incorporate the express judgment within courts' early rule predicate analysis, that if past "discrimination" has created a gendered regularity, it is unjust to allow an employer or legal rule to exploit or enforce that regularity. This judgment was established early in the Court's "sex-stereotypes" doctrine in cases in which women's relative lack of educational qualifications or relative poverty were used as the basis of sex-respecting rules. For example, in *Reed* v. *Reed*, the Court stuck down an Idaho statute that preferred men to women in the administration of estates, even though, as Schauer notes, the rule was likely premised on the statistically sound generalization that a woman in Idaho in 1971 were less likely than a man to have the requisite "understanding of accounting…familiarity with the world of investments, and general knowledge of business" to be competent estate administer.[106] Because past discrimination played in a role in creating the regularity that the generalization captures (*i.e.* women are less educated than men in business matters), the Court was presumably disinclined to allow Idaho to reinforce that regularity with its sex-respecting rule.[107]

But what does it mean to say that a gendered regularity is the product of past "discrimination"? Surely it would be reductive to state that the gendered differences in knowledge and experience that renders the Idaho estate-administrator rule non-arbitrary were caused solely by *de jure*

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[103] *Id.*

[104] Case, *supra* note 20 at 1450.

[105] *VMI*, 518 U.S. at 566-603 (Scalia, dissenting).

[106] 404 U.S. 71 (1971); SCHAUER, PROFILES, *supra* note 1 at 139.

[107] Similarly, courts have been disinclined to allow sex-respecting rules to stand where their factual predicate is based on a regularity created by past discrimination against women, even where the sex-respecting rule favors women. *See e.g.*, *Orr v. Orr*, 440 U.S. 268, 279 (1979) (striking down a statute that would allow only women to receive alimony).

discrimination.[108] Further, no causal link to past *de jure* discrimination is required for courts to find that these types of gender generalization are insufficient rule-predicates – even if they are statistically accurate. Therefore, embodied in courts' early rule-predicate analysis is the judgment that the unacceptability of a gender generalization as a sex-respecting rule predicate is tied to the prescriptive forces that create the regularity of behavior the generalization describes, even where those prescriptive forces almost certainly include adherence to non-legal rules such as rules about "gender roles" and the appropriateness of women in business. Thus, in *Reed*, the generalization that "women are not good at attending to business matters" is descriptively accurate, yet prescriptively suspect.[109] In fact, courts have consistently declined to reinforce the *prescriptive* dimensions of generalizations such as the one supporting Idaho's rule, even though the generalizations are *descriptively* valid.[110] Scalia's "false generalization" approach to assessing rule-predicates would exclude this judgment.

Thus, Scalia's "false generalization" approach is inconsistent with the justice-commitments of the earlier courts' "stereotype" heuristic, particularly in that it would exclude spurious rule predicates but allow rule predicates which reinforce gendered regularities that are themselves the product of suspect prescriptive forces.

B. A Perfect Proxy

Justice Ginsburg authored the majority opinion in *VMI*, and her opinion adopted a posture with the early sex-stereotyping cases that was the mirror image of Scalia's.[111] While Scalia substantively embraced the "false generalization" standard but rejected the attendant justice-based method for assigning "falseness," Ginsburg's opinion detached from the early cases' reliance on the rhetoric of "false generalizations" while openly embracing the justice-principle advanced in those cases.[112] In finding VMI's sex-respecting rule to be predicated on impermissible generalizations about women, Ginsburg stated that even assuming that most women would not

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[108] *Reed v. Reed*, 404 U.S. 71 (1971) ((holding an Idaho statute that facially preferred men to women in the administration of estates violated the Equal Protection Clause).

[109] *Id.*

[110] *Id.*

[111] *VM United States v. Virginia*, 518 U.S. 515, 566-603 (1996) (Scalia, dissenting).

[112] *VMI*, 518 U.S. 515 at 564.

succeed at VMI, that fact does not justify "denying opportunity to women whose talent and capacity place them outside the average description."[113]In other words, if VMI's rule was based on a generalization about women, the generalization must either apply universally to *all* women, or VMI had to provide an opportunity for extraordinary women to defy the generalization.[114]

Mary Ann Case has persuasively described Ginsburg's analytic move as consistent with the Court's previous evaluations of sex-respecting rules that categorically exclude women.[115] Case observed that *VMI* is in many ways an "easy" sex-stereotyping case, in that it fits squarely within the Court's implicit understanding that, "'stereotype' has become a term of art by which is simply meant any imperfect proxy, any overbroad generalization... That is to say, the assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men."[116]Case further observes that the gender generalizations that courts have consistently disallowed have represented not only imperfect proxies, but also "outdated normative stereotypes," a conclusion that returns us to the original problem: what makes a generalization a stereotype?[117] It surely cannot be the fact that the generalization is non-universal as virtually all generalizations (and therefore all rule-predicates) are non-universal.[118]

Case is correct that *VMI* merely made explicit what had long been implicit in the Court's analyses, but she is mistaken in what the case exposed "lurking… just below the surface of the [the Court's stereotyping] decisions."[119] Rather than revealing that Court implicitly favors an "overbroad" definition of "stereotype" rather than a "false" definition as Case suggests, *VMI* reveals that the Court's attention long ago shifted from the descriptive *accuracy* of factual predicates (if, indeed, descriptive

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[113] *VMI*, 518 U.S. at 550. For a critical assessment of the Court's rejection of VMI's defense of its rule based on "real" or "true" sex difference as demonstrated by statistical evidence, *see,* Kimberly Schuld, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461, 469 (1999).

[114] *See* SCHAUER, PROFILES, *supra* note 1 at 131-154.

[115] Case, *supra* note 20 at 1452.

[116] Case, *supra* note 20 at 1449.

[117] Case, *supra* note 20 at 1450.

[118] SCHAUER, RULES, *supra*, note 1 at 15.

[119] Case, *supra* note 20 at 1448 - 1457.

accuracy was ever an animating concern), and towards a less bounded assessment of whether the application of a sex-respecting rule is just.[120] The fact-predicate in *VMI*, while non-universal, is not disallowed *because* it is non-universal (or virtually all rule-predicates would be discriminatory), nor is it disallowed because the generalization ("most women would not succeed at VMI") is "outdated." It is disallowed because it is, in the Court's view, unfair to *apply* the generalization in this context.[121] *Why* it is unfair, however, is a question that is no more satisfactorily resolved by Ginsburg's "perfect proxy" rationale than it is adequately addressed by Scalia's "false generalization" approach.

Thus, while stereotyping analysis in the exclusion context was relatively simple to administer in situations in which the factual predicate of the challenged rule was clearly spurious (or at least in the court's view represented more "myth" than reality), the appropriate role for stereotyping analysis became less clear in cases such as *VMI*, in which it is not obvious that the sex-specific generalizations can be described as a "fictional" nor is it obvious that the generalization is uniquely "overbroad."[122] To wriggle free from these conceptual difficulties, courts and commentators retained the rhetoric of "stereotyping" while infusing the legal heuristic with sufficient conceptual elasticity to encompass an ever-broadening range of intuitions about the justness of gendered rules.

C. "Stereotypes" in the Assimilation Context

At the same time that courts and commentators were moving their analytic-center points away from the spuriousness or universality of rule predicates in the context of categorical exclusions, courts were increasingly called upon to evaluate a second category of sex-stereotyping claims. These claims were based not on categorical exclusion of men or women from a particular benefit or opportunity, but were instead directed at employer rules that required employees to exhibit gender-conforming sets of behaviors. In these cases, courts were asked to evaluate whether employers were permitted to penalize employees for failing to adhere to stereotypical notions of how men and women should behave.

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[120] *Id.*

[121] *Id.*

[122] *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

This category of claims first met with the "stereotype" standard in the Supreme Court in 1986.[123] In *Price Waterhouse* v. *Hopkins*, [124] the Court announced that a sex-stereotyping theory that challenges an employers' requirement that employees adhere to conventional sex-specific behavioral rules (*i.e.* that men behave in a manner that is consistent with masculinity and women behave in a manner that is consistent with femininity) can form the basis of a claim of sex discrimination cognizable under Title VII.[125] The court stated:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of

[123] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989).

[124] *Price Waterhouse*, 490 U.S. at 251.

[125] *Id*. at 251. The decision resolves a Title VII claim brought by Ann Hopkins in which she claimed, *inter alia*, that Price Waterhouse failed to promote her in part because she failed to adhere to stereotypical notions of femininity, a standard which was only applied to female employees. In support of her claim, Hopkins pointed to a series of comments by her Price Waterhouse superiors which suggested that the partnership utilized sex-differentiated behavioral standards for evaluating their employees. For example, Hopkins produced evidence that some of the partners evaluating her candidacy believed her to be too "macho" and aggressive even though these qualities were rewarded in male candidates. She also produced evidence that she was criticized for using foul language while the use of foul language was unremarkable in male employees, and noted that a partner praised her by stating that she had, "matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." Finally, in a piece of evidence the Supreme Court appeared to deem particularly significant, Hopkins showed that in the meeting in which the decision not to promote her was explained to her, the partner who relayed the decision advised that she would increase her chances of being promoted if she would, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. at 235. It is further worth noting that while the decision as a whole was a plurality, the following holdings commanded a six-justice majority: (1) the sex-stereotypical comments were evidence that Ann Hopkins was not promoted (in part) because she failed to conform to sex-stereotypes; and (2) if Price Waterhouse failed to promote Hopkins because she failed to conform to sex-stereotypical notions of femininity Price Waterhouse discriminated against Hopkins.

> disparate treatment of men and women resulting from sex stereotypes.'[126]

Thus, in language harvested from the early sex-stereotyping cases, the Court reiterates that disparate treatment that results from sex-stereotyping is discriminatory, and that such discrimination occurs when an employer negatively evaluates an employee for failing to match stereotypes associated with their group.[127] In the case of *Price Waterhouse*, the "stereotype" associated with Ann Hopkins's group (women) was femininity (or attributes associated with femininity).[128] This conclusion is necessarily based on rule-predicate analysis: Price Waterhouse drew a sex-classification (women were treated differently than men) and the classification was predicated on generalizations about men and women. Minimally, the gender generalization that underlies a rule that penalizes a female employee for failing to be feminine is "women are (or should be) feminine." This gender generalization, the Court seemed to say, is a "stereotype" and Price Waterhouse was not permitted to impose a sex-respecting rule on its employees that was predicated on a sex-stereotype.[129]

If Brennan's plurality had stopped here, then *Price Waterhouse* would have seemed to embrace a perfect-proxy standard of "stereotype."[130] After all, the generalization in question ("women are (or should be) feminine") is not obviously spurious.[131] Further, defining this generalization as a "stereotype" is distinguishable from the doctrine's early justice-principle, as the application of the generalization does not result in the categorical exclusion of women from an opportunity. While women are not permitted to defy the generalization (as Hopkins had to her peril), women were permitted to adhere to the generalization and remain employed.[132] However, Price

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[126] *Id*. at 251 (quoting, *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc*., 444 F.2d 1194, 1198 (CA7 1971).

[127] *Id.* at 254.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Indeed, it may be – in Scalia's framework – statistically sound, although it is unclear what is meant by "women are (or should be) feminine" and it is difficult to imagine that it is a generalization that could be empirically demonstrated.

[132] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

Waterhouse went on to explain – with Hellerian flourish - what was especially unfair about Ann Hopkins' employment situation: [133]

> An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[134]

From the perspective of defining "stereotype," this catch-22 language illuminates nothing about the generalization in question ("women are (or should be) feminine").[135] Instead, it describes the *consequence* of applying the generalization in the particular context that Hopkins faced. If she defied the generalization, she was penalized by not being promoted. On the other hand, if she adhered to the prescription of the generalization, she would be prevented from displaying characteristics that were necessary to her success at Price Waterhouse.[136] In a reading that identifies the catch-22 objection as a criterion upon which the decision turns, the sex-respecting rule is disallowed not because it was predicated on a generalization that is spurious or that failed to provide an avenue for defying the generalization, but because the application of the generalization made it impossible for women to succeed at Price Waterhouse.[137]

In fact, in a catch-22-as-criterion reading of *Price Waterhouse*, reliance on the permissibility of the rule's predicate as a "stereotype" seems completely superfluous. We might just as easily (and more clearly) state the analytic frame of the decision without making use of the idea of "stereotype": a sex-respecting rule is discriminatory if it makes it impossible (or significantly harder) for one sex to succeed in a given context. To carry through with this framing, we might say that in Ann Hopkin's case, she was treated differently than a male accountant would have been treated (*i.e.* she was

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[133] A catch-22 is a situation in which the criteria that must necessarily be meet to achieve success are mutually exclusive – thus success can never be achieved. It is not a situation in which it is difficult to succeed or in which success is not likely, it is a situation in which success is impossible for all who undertake it based solely on the criteria for success. Joseph Heller coined the term "catch-22" in his 1961 novel of the same name.

[134] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989).

[135] *Id.* at 260.

[136] *Id.*

[137] *Id.*

required to behave in a manner that is consistent with notions of femininity) and this disparate treatment was unjust in that she was not permitted to receive the same reward (promotion) that a male accountant would have received had he behaved in the same manner.

Thus, in a catch-22 reading, it is immaterial that Hopkins was asked to conform to conventional notions of femininity. Price Waterhouse might just as well have asked Hopkins (and all its female employees) to wear a clown costume in an atmosphere in which clown-costume-wearing is less rewarded than non-clown wear. In this iteration, the unfairness of Hopkin's situation issues from the coupling of a mandatory requirement – regardless of the origin or social significance of the content of that requirement – with a system of reward that is incommensurate with those who do not face the same requirement. Thus in this reading, it does not matter whether Price Waterhouse's sex-respecting rule had anything to do with "stereotyped distinctions between the sexes." [138]

1. *Price Waterhouse* I and II

In this light we begin to see two *Price Waterhouse* precedents. A first reading of *Price Waterhouse* takes the catch-22 language as a criterion for finding a rule requiring women to behave femininely to be predicated on a "stereotype" (*i.e.*, the rule must create a double-bind to be a "stereotype"). This reading establishes a new method of defining "stereotype" that is animated by a new justice-principle. In this reading, the justice-commitment of the *Price Waterhouse* Court holds that it is unfair to apply a nonuniversal gender generalization where the application of the generalization is disproportionately burdensome to one sex, regardless of the content of that generalization. The fact that the Court also identified the rule's predicate ("women are (or should be) feminine") as a "stereotype" does not seem to mean the same thing that the designation of "stereotype" has meant in other contexts, in that it does not seem to mean that the generalization itself is per se impermissible as a rule-predicate.

On the other hand, one could also just as reasonably adopt a second reading of *Price Waterhouse*. The second reading of *Price Waterhouse* finds the holding consistent with the perfect proxy approach to defining "stereotype."[139] In this reading, the catch-22 language in *Price Waterhouse* is mere rhetorical flourish, and the case stands for the proposition that generalizations about male masculinity and female femininity are

[138] *Id.*

[139] *Id.*

"stereotypes" in that they are "fictional," "overbroad" or "imperfect proxies," and therefore these generalizations can never form the predicates of sex-respecting employer or legal rules.[140]

However, this second reading also offers a novel justice-principle behind its definition of "stereotype." The "perfect proxy" justice-principle requires that an individual is provided with an opportunity to defy a nonuniversal generalization that would otherwise exclude her from a category of benefits or opportunities.[141] But the application of generalizations about femininity and masculinity do not result in the categorical exclusion of men or women. Instead, masculinity and femininity generalizations allow an opportunity to conform to the generalization – to assimilate. Thus, individuals are penalized not for "being" a man or woman, but instead for failing to behave as the generalization holds that men or women should behave. Therefore, in this second reading of *Price Waterhouse*, the justice-principle animating the definition of "stereotype" is not related to the relative burden that the generalization places on one sex, or to categorical exclusion of men or women, but is instead grounded in one of two objections. Either it is unjust to require men or women to express a gender identity that is inconsistent with the identity they would prefer to express, or it is unjust to require women to behavior in a manner that comports with traditional notions of femininity because those behaviors bear the vestiges of past (or present) subordination.[142]

Unsurprisingly, given the ambiguity with which the Court treated the significance of the "stereotype" in *Price Waterhouse*, courts and commentators have applied the case as though there were two *Price Waterhouse* precedents.[143] *Price Waterhouse* I *(PW*I) takes seriously the catch-22 criterion and holds that gender generalizations that allow an avenue of assimilation (including generalizations about masculinity and femininity) are permissible rule-predicates as long as the application of rule does not disproportionately burden one sex.[144] *PW*I is most often embraced

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *C.f.*, *Jespersen v. Harrah's Operating Co., Inc*., 444 F.3d 1104, 1110 (9th Cir. 2006) (holding, " [w]e have long recognized that companies may differentiate between men and women in appearance and grooming policies… The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.").

when generalizations about masculinity and femininity seem benignly motivated (*e.g.*, not motivated by an animus towards gender nonconforming individuals and/or homosexuals) and the rule-generator (usually an employer) gains a benefit from the imposition of the rule.[145]

For example, the Ninth Circuit recently employed a *PW*I interpretation of *Price Waterhouse* in *Jespersen v. Harrah's Operating Co.*[146] In *Jespersen*, the sex-respecting rule at issue was Harrah's "Personal Best" grooming policy that required female employees to wear make-up and forbade male employees from doing the same.[147] Plaintiff Darlene Jespersen challenged the requirement advancing, *inter alia*, the theory that requiring her to conform to traditional notions of femininity constituted impermissible sex-stereotyping under *Price Waterhouse*.[148] In an *en banc* decision the Ninth Circuit disagreed, finding determinative the facts that that Harrah's rule did not place Jespersen in a double-bind, in that the rule did not require Jespersen to appear feminine, when masculine appearance was rewarded at Harrah's.[149] Taking the catch-22 language to be a criterion for finding that a generalization about women and femininity (*i.e.*, "only women wear make-up" or "women but not men should wear make-up") to be a "stereotype," the *Jespersen* Court determined that Harrah's rule did not prevent women from succeeding at Harrah's, it simply required that women comply with a distinct set of grooming rules.[150] *Jespersen* provides a good example of the circumstances in which courts and commentators seem inclined to apply *PW*I, in that the reason for the sex-respecting rule seemed tied to Harrah's desire to attract customers rather than a desire to punish or

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[145] *Id.*

[146] *Jespersen* , 444 F.3d 1104.

[147] *Jespersen,* 444 F.3d at 1107.

[148] *Id.* at 1111.

[149] The court also engaged in a disparate treatment analysis and determined that the Personal Best Policy nor did it disproportionately burden female employees as compared to male employees. *Id.* at 1110.

[150] Although the court did state that if the grooming requirement were to indicate a "sexually stereotypical intent" on the part of Harrah's, then the requirement might constitute sex-stereotyping. *Id.* at 1112. In support of this assertion, the court referred favorably to *EEOC v. Sage Realty Corp.*, 507 F.Supp. 599 (S.D.N.Y.1981). In *Sage*, a female lobby attendant was required to wear a sexually provocative revealing uniform and the court concluded the requirement constituted sex-stereotyping. It is unclear, however, how the Ninth Circuit understands a requirement directed at sexualizing or sexually objectifying an employee to be "stereotyping" in a way that a requirement directed at feminizing an employee is not.

harass employees who are gender-nonconforming or who are perceived to be transsexual or homosexual.[151]

Price Waterhouse II (*PW*II), on the other hand, adopts the perfect proxy definition of "stereotype" in the context of generalizations about masculinity and femininity, and thereby embraces the second of the two justice-principles discussed above. Where *PW*II is embraced, the court or commentator's attention is focused on the non-universality of the sex-respecting rule's predicate (*e.g.*, not all women are feminine, nor all men masculine) and the sex-respecting rule is disallowed.[152] *PW*II is most often applied when three factors are present: (1) the court or commentator perceives there to be less of a viable road of assimilation available to the regulated individual (often because the plaintiff is perceived to actually "be" non-feminine/non-masculine rather than simply "behaving" non-femininely/non-masculinely); (2) the rule-generator (again, usually an employer) does not seem to gain a generalized benefit (*i.e.* attracting customers) from the rule; and (3) the sex-respecting rule seems motivated by animus directed at either gender non-conforming individuals or at individuals perceived to be transsexual or homosexual.

For example, in *Smith v. City of Salem*, the Sixth Circuit adopted a perfect-proxy *PW*II approach to the question of whether a male-to-female transsexual employee could be penalized for failing to behave and appear "like a man."[153] The court held that to require male employees to behave and appear "like a man"—that is, "masculinely"-- was to require the employee to comport with a "stereotype."[154] Similarly, the idea that a male employee must appear or behave in a manner that comports with notions of masculinity was also identified as impermissible "stereotyping" under a *PW*II approach by the Ninth Circuit in *Rene v. MGM Grand Hotel*. [155] In *Rene*, the plaintiff was a gay man who complained that his coworkers harassed and demeaned him by treating him "like a woman" because he did

[151] Harrah's rule had the effect of punishing Darlene Jespersen, but the record did not provide information regarding Jespersen's sexual orientation. *See* Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-Fication of Bartenders*, 14 Duke J. Gender L. & Pol'y 285 (2007) (describing her representation of Jespersen as Senior Counsel at Lambda Legal Defense); *see also*, Michael Selmi, *The Many Faces Of Darlene Jespersen*, 14 Duke J. Gender L. & Pol'y 467 (2007).

[152] *C.f.*, *Doe v. Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997).

[153] *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

[154] *Id.* at 572.

[155] *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc).

not, in his coworkers' view, adequately behave "like a man."[156] The court found that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping" in Rene's case, while four years later determining that Jespersen was not the victim of sex-stereotyping despite the fact that the gender generalization that formed the penalizing rule's predicate was the same in both instances: "men must behave and appear 'like men' or 'masculinely' and women must behave and appear 'like women' or 'femininely'."

However, the discovery of a "stereotype" in the *PW*II cases (or perhaps more accurately, the decision to apply *PW*II rather than *PW*I in the first place) appears to turn on an assessment not of the universality or spuriousness of the gender generalization that forms the rule's predicate, but instead on an assessment of the three factors mentioned above: (1) the consequence of applying the generalization -- *i.e.*, where the court/commentator perceives the plaintiff to somehow "be" non-feminine/non-masculine, the consequence of the rule begins to look more like categorical exclusion, as the plaintiff seems either less able to assimilate or asking plaintiff to assimilate seems somehow less just; (2) the degree to which the employer receives a general benefit from the rule -- *i.e.*, Harrah's rule attracts a customer demographic while MGM Grand's and the City of Salem's rules do not; and (3) the appropriateness of the purpose of the rule -- *i.e.*, Harrah's desire to attract customers is appropriate, while MGM Grand's and the City of Salem's desire to penalize gender-non-conformers/transsexuals/homosexuals is not appropriate. If these three criteria are satisfied, *PW*II is usually employed and the generalization " men are masculine" is a "stereotype" even though it is decidedly not a "stereotype" in other contexts.

2. Truths and Proxies, Assimilation and Exclusion

The addition of these two *Price Waterhouse* definitions of "stereotype" in the context of assimilation cases has led sex-stereotyping doctrine to splinter along several analytic axis. Where application of the sex-respecting rule in question categorically excludes men or women from a class of benefits or opportunities, courts and commentators choose between a "false generalizations" or "perfect proxy" definition of "stereotype." Similarly, where the sex-respecting rule results not in categorical exclusion but instead requires assimilation to a gendered norm, courts and commentators employ either a *PW*I or a *PW*II definition of "stereotype."

[156] *Id.* at 1068.

This bifurcated analysis has produced a doctrine with a set of internally inconsistent de facto rules for assessing gender generalizations that form the predicates of sex-respecting rules. Generally, a sex-respecting legal or employer rule is disallowed when it fails to permit an avenue of assimilation, even when the state or employer rationally assumes that assimilation is not probable or that it will be difficult/costly (as was the case in *VMI*), but excluding instances in which assimilation is genuinely impossible (as in the case of a bona fide occupational qualification).[157] So if the rule does not provide an avenue of assimilation, the generalization that forms the rule's predicate must represent a perfect proxy. The second prong of this bifurcated analysis provides that in instances in which assimilation is permitted, the gender generalization need not provide a perfect proxy, as long as assimilating to the sex-specific standard does not disproportionately burden one sex (as with Hopkins), unless the assimilationist demands are motivated primarily by a desire to penalize gender non-conforming individuals or individuals that are perceived to be homosexual.

So in defining "stereotype" courts and commentators split into a few justice-based camps, some holding the "sex-stereotype" rhetorical line at spurious generalizations, while others embracing Case's "perfect proxy," while still others adopting a bifurcated approach that holds nonuniversal generalizations to be just in assimilation contexts while unjust in exclusion contexts.[158] In this light, it becomes apparent that the heuristic of "stereotype" is analytically unhelpful. Is a generalization only a stereotype if it is never or only rarely true? Must a generalization be accurate as applied in every case to avoid being characterized as a stereotype? Is a generalization a stereotype if it imposes an extra burden on outliers (*e.g.* it has the effect of demanding uniformity in an aspect of behavior that should be committed to autonomous choice)? Our definition of "stereotype" in these contexts turns on the conception of justice we embrace, and in this way the term "stereotype" only parrots back the justice-principle we impose upon it. The content of our concept of "stereotype" is simply too thin to do more.

However, there is a key point to distill from these otherwise disparate "stereotype" analyses. The point of embarkation for each analysis is the (posited) fact of gendered regularities. The factual predicate of each

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[157] Permitting an avenue of gender assimilation means that the state or employer must allow candidates to try and meet the sex-specific standards. It does not mean that the state or employer must alter the standard to alleviate the need for assimilation.

[158] *See*, Case, *supra* note 20 at 1451. For an interesting discussion of BFOQ *see* Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 Cal. L. Rev. 1(2007).

contested rule holds that men or women (or men and women) generally behave in reasonably predictable ways: men usually do not wear dresses (*City of Salem*);[159] women usually do not flourish in an adversarial environment (*VMI)*;[160] women attend more often to domestic affairs (*Laffey*);[161] and so forth. The "stereotype" heuristic addressed these putative regularities as if the antidiscrimination concern were *whether* they existed, when in fact the concern driving the analyses was *why* they existed. Courts and commentators were disquieted not by the non-universality of these generalizations, but by the implicit concern that the regularities were guided by background social rules that were themselves potentially unjustified. Given this concern, antidiscrimination law and theory was committed to not allowing legal or employer rules to further entrench, instantiate or enforce the these background social rules.

So while the conceptual and doctrinal morass created by divergence methods for defining "stereotype" might tempt us to abandon the project of rule-predicate analysis altogether, this temptation should be resisted. There is a reason why antidiscrimination analysis was initially concerned with sex-respecting rule-predicates. In criticizing the "antiquated" and "false" generalizations about men and women that served as justification for sex-classifications, courts were striking at rule-predicates that embodied not just spurious predicates but also those that represented the set of background informal rules that produced the sex-segregatory society that antidiscrimination law and theory were committed to -- if not remedying -- at least not reinforcing.[162]

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[159] *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

[160] *United States v. Virginia*, 518 U.S. 515 (1996).

[161] *Laffey v. Northwest Airlines, Inc*., 740 F.2d 1071 (D.C. Cir., 1984).

[162] Consider, for example, the picture of pre-Civil Rights Act sex-segregation offered by Kimberly Yuracko:

> Indeed, private discrimination was in some cases required by state law. 'By the mid-1960s 26 states prohibited women from working in certain jobs and 19 states had hours regulations for women workers.' Women were statutorily excluded from jobs that required heavy lifting as well as from work as diverse as tending bar, shining shoes, and legislative service. Society viewed men as the primary labor market participants and wage earners. Society viewed women as peripheral market participants and supplemental wage earners seeking "pin money."

Towards this end, courts and commentators attempted to draw a line between gender generalizations that operated not only as *descriptive* generalizations (*i.e.* "women are shorter than men") but also as *prescriptive* generalizations (*i.e.* "women are primarily responsible for domestic affairs") and other rule sets (*i.e.* an employer's rule that disallows the hiring of married women but not married men).[163] Although this concern has been muddled within the "stereotype" heuristic, the impetus to disaggregate our legal and employment rules from underlying social gender prescriptions is rooted in doubts about the sufficiency of the reasons for and justifications of underlying gender prescriptions (*i.e.* why should women have a special relationship to domesticity?) and the sense that, in light of these doubts, legal and employer rules must not play a role in entrenching or enforcing those regularities of behavior.[164] In other words, under the banner of prohibiting the enforcement of "stereotypes," antidiscrimination law has consistently been committed to protecting the revisability of gender generalizations.

In sum, gender generalizations are subject to special antidiscrimination law scrutiny and, as we have seen, the explanation for that scrutiny cannot rest on the fact that gender generalizations are more "spurious," "false" or "overbroad" than other kinds of generalizations. Although we generally tolerate legal and employer rule-predicates that are reasonably accurate and thereby serve as reasonably good predictors of future behavior, gender generalizations are frequently disallowed as rule-predicates even in instances in which they appear to be statistically accurate. Accuracy does not necessarily render gender generalizations suitable rule-predicates because the descriptive accuracy of gender generalizations is often the result of prescriptive forces that are themselves suspect from the perspective of antidiscrimination law and theory. It is unease with the underlying prescriptive dimensions of gender generalizations, as well as the

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Kimberly Yuracko, *Trait Discrimination As Sex Discrimination: An Argument Against Neutrality*, 83 Tex. L. Rev. 167 (2004).

[163] *Laffey*, 740 F.2d 1071.

[164]These doubts in turn give rise doubts about the descriptive generalizations that follow from the behavioral regularity that is created by the prescriptive force of the regulatory rule (*e.g.*. statistically, women spend more time performing domestic tasks than men). When this potentially accurate descriptive generalization forms the factual predicate of an employer rule (*i.e.*, men but not women receive housekeeping assistance); the concern is not that it is descriptively inaccurate or spurious, but that the reason for, or justification of, the underlying prescriptive rule which creates the regularity of behavior is inadequate to support a sex-based classification in a legal or employer's rule, and therefore the proposition *ought not* be enforced or entrenched by legal or employer rules.

relationship between those prescriptive dimensions and legal or employer rules that lies at the heart of the "stereotype" heuristic.

Therefore, Parts II and III of this paper will consider this relationship between the prescriptive dimensions of gender generalizations and their role as rule-predicates. First, Part II will explore the prescriptive dimensions of gender generalizations. Part III will then discuss the ways in which the prescriptive dimensions of gender generalizations problematically interact with legal and employer rules, using the Ninth Circuit's decision in *Jespersen* as an example.

II. Gender Generalizations as Gender Rules

The generalization "men do not usually wear dresses" describes (with imperfect accuracy) a state of the world, but it also does a great deal more than that. Gender generalizations are "something more" than imperfect descriptive proxies (as all rule-predicates are) because they guide as well as describe our practices.[165] In addition to simply communicating propositions that identify a state of the world, gender generalizations precede, create, and constitute that which they describe. Thus, in neglecting to account for the prescriptive dimensions of gender generalizations, conventional sex-respecting rule-analysis fails to articulate what is unique about the objection it would (albeit inconsistently) enforce. The key to the uniqueness question – that is, what is "special" about gender generalizations as opposed to other varieties of nonuniversal generalizations -- lies in understanding the phenomenon of gender rules.

However, to understand the phenomenon of gender rules, it is necessary to first understand a little bit about the nature of generalizations and a little bit about the structure of rules. As the ideas advanced here builds upon Frederick Schauer's philosophical account of both generalizations and rules, a brief summary of those accounts follows.

[165] *C.f.*, SCHAUER, PROFILES, *supra*, note 1 at 153-154 (stating, "[t]he major lesson for us is that the condemnation of gender-based generalizations is not simply an instantiation of a condemnation of generalizations, but is an outgrowth of something distinctive about the treatment of gender…The fact that we routinely condemn even statistically rational sex discrimination…shows that the issue is not generalization but gender.").

A. The Power of Prescriptive Generalizations

To begin a discussion of prescriptive gender generalizations, it is important to first remember that not every gender generalization has attendant prescriptive dimensions. There is a narrow subset of gender generalizations that can be described as purely descriptive. To illustrate this point, it is helpful to return to the oft-quoted taxonomy of gender generalizations offered by the *Manhart* Court.[166] In *Manhart*, the Court described a dichotomy of "true" and "not true" or "fictional" difference between men and women.[167] The Court used the examples of "men are taller" versus "women are worse drivers" to illustrate its point that some gender generalizations are not "stereotypes," while others are "stereotypes."[168]

What courts like the *Manhart* Court have struggled to isolate with this "real" and "fictional" distinction is the broad class of gender generalizations that have attendant prescriptive dimensions, from the narrower category of purely descriptive gender generalizations. When courts identify a so-called "real difference" generalization, they are in fact isolating what they believe to be a purely *descriptive* generalization.[169] A purely descriptive generalization describes a regularity of events or behavior, but lacks prescriptive force, such as the generalization "it rains more in Mobile than in Birmingham."[170] It is accurate to say that it rains more in Mobile than in Birmingham, but the *fact* that it rains more in Mobile *now* does not influence whether it is likely to rain more in Mobile in the *future*. The rain, in essence, is indifferent to the proposition "it rains more in Mobile than in Birmingham" and is incapable of molding its behavior to accord with the generalization. Nor does the generalization "it rains more in Mobile than in Birmingham" articulate or effect what we mean by "more" or "rain" or

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[166] *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978). *Manhart* Court itself, although often quoted in the context of sex-stereotyping analysis, did not engage in a sex-stereotyping analysis *because* the Court was confronted with a rule-predicate gender generalization that it believed articulated a "real" difference between men and women: "women live longer than men." *Id.*

[167] *Id*. at 707.

[168] *Id.*

[169] Schauer uses the phrase " descriptive rule" to describe purely descriptive generalizations, which he takes to be generalization that are entrenched in the manner described *infra* at Section III B, but that lack prescriptive character. In contrast, Schauer describes prescriptive rules as "mandatory rules. " Nothing follows from the application of term "rule" here, so in the interest of simplicity I use the term "generalization." SCHAUER, RULES, *supra* note 1 at 1-2.

[170] *Id*.

"Mobile" in other contexts. A purely descriptive generalization about rain in Mobile lacks the capacity redefine the past, construct the present, or project into the future - in other words, it lacks prescriptive force.[171]

In contrast, prescriptive generalizations guide behavior in three ways. First, certain types of prescriptive generalizations – known as constitutive rules - tell us what types of behavior "count" in a given context.[172] For example, the generalization "pitches in the strike zone are strikes" tells us which pitches count as "strikes" and which do not. Similarly, the same generalization can also serve as a regulatory prescription, applying pressure directly to our actions. If I am a pitcher and I wish to do something that counts as a strike, I am going to try and pitch into the strike zone, *because* of the rule about pitches and strikes.

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[171] When the Court identifies what it understands to be a purely descriptive generalization as the gendered predicate of a sex-respecting rule, the Court does not engage in "stereotyping" analysis, as the stereotype heuristic captures judgments about the justness of applying gender generalizations with *prescriptive dimensions*. Instead, in the Equal Protection context, the Court will interrogate the causal relationship between the imperative of the rule and the purpose of the rule to ensure that the sex-respecting classification is being employed to achieve a justified end, rather than as a pretext for excluding women (or men). In other words, the Court will ask whether the purpose of the rule constitutes "an important government interest," and whether the means (imperative) is "substantially related" to the purpose of the rule. *Craig v. Boren*, 429 U.S. 190 (1976). Examples of these purely descriptive generalizations have included: "women live longer than men" (*Manhart*, 435 U.S. at 707); and "a biological mother is necessarily present at the birth of her child, while a biological father is not necessarily present at the birth of his child" (*Miller v. Albright*, 523 U.S. 420, 444 (1998)).

When confronting what it believes to be a purely descriptive generalization in the context of Title VII, the Court engages in a similar interrogation of the causal relationship between the rule's imperative and its purpose, using the bona fide occupational qualification standard (BFOQ standard). *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In applying the BFOQ standard, the court determines whether the purpose of the rule is justified in that it relates to the "central purpose" of the employer's business and the imperative is the lest restrict means of achieving that end. Purely descriptive generalizations that have served as factual predicates in this context include: "only women can become pregnant" (*Automobile Workers v. Johnson Controls, Inc*., 499 U.S. 187 (1991)) and "women are shorter and lighter than men" (*Dothard*, 433 U.S. 321).

It is important to note that a generalization that is purely descriptive is not necessarily a "perfect proxy" (*i.e.*, universal). A generalization may fail to obtain in every case, as with "women are shorter than men" (not every woman is shorter than every man), but still be probabilistically or statistically sound. However, if a rule's justified purpose can be achieved by means other than a sex-respecting imperative, the Court will require the rule's imperative to exclude sex-classification, and to instead employ an imperative that applies pressure to the desired quality directly.

[172] Constitutive rules are discussed in greater detail *infra* at Section II C.

Further, the generalization "pitches in the strike zone are strikes" can effect behavior in a third way. The rule about strikes exerts pressure on our understanding of "strikes" beyond setting a specific navigational goal. Because the rule says nothing about the color of the ball, the speed of the pitch, or the ethnicity of the pitcher, we do not think that color, speed and ethnicity are criterial with respect to strikes.[173] The generalization suppresses these properties as irrelevant to the category it defines -- that is, "strikes."[174] These now irrelevant properties fade from the forefront of our understanding of strikes, and the possibility of incorporating color, speed or ethnicity into the set of properties that we hold to be material to "strikes" becomes more remote.[175]

On the other hand, the strike-zone generalization emphases the physical placement of pitches, which renders this property prominent in our understanding of strikes. In the future we will pay particular attention to the placement of pitches, which may be fine, if our original generalization was correct in identifying what is relevant about strikes in light of our purpose in defining strikes in the first place. But what happens when our generalization gets this initial sorting wrong? Or, more accurately, what happens when our information or beliefs about which properties are relevant to the category change over time?

Frederick Schauer paints the role of generalizations in our discursive and decision-making lives in grand -- but ultimately compelling -- proportions.[176] "To generalize," states Schauer, "is to engage in a process that is part of life itself."[177]Without the ability to generalize we would lack

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[173] *See* SCHAUER, RULES *supra* note 1 at 21-22.

[174] *Id.* (noting, "In focusing on a limited number of properties, a generalization simultaneously *suppresses* others, including those marking real differences among the particulars treated as similar by the selected properties.") (emphasis in original).

[175] The effects of the suppression and emphasis of properties on our understanding of future possibilities is, at least in part, a psychological phenomenon. *See* SCHAUER, RULES *supra* note 1 at 43 (noting that "[e]ntrenchment makes the properties suppressed by a generalization less subject to recall on demand… and generalizations mould our imagination and apprehension in such a way that methods of thinking that would focus on different properties become comparatively less accessible."). The quintessential example of this "molding" arises in the context of language. Cognitive psychologists have observed how rules of language can influence the degree to which speakers of those languages observe or perceive certain properties. For a fascinating account of this phenomenon, *see*, Lera Boroditsky, *How Does our Language Shape the Way We Think?*, EDGE (June 12, 2009) http://www.edge.org/3rd_culture/boroditsky09/boroditsky09_index.html.

[176] SCHAUER, RULES, *supra* note 1 at 18-23.

[177] SCHAUER, RULES, *supra* note 1 at 18.

the capacity to organize information in a way that permits us to discern patterns and draw meaning from particular attributes or events.[178] Indeed without the ability to generalize we would be hobbled in our attempts to learn from the past, to plan for the future, and to make sense of the present.[179]

But, the benefits of generalizing come at a cost. Generalizing propositions (such as "men do not usually wear dresses") even if statistically sound, necessarily produce errors.[180] If I am a speaking to a colleague and I use the foregoing proposition I will be in error insofar as my colleague takes me to mean that no man usually wears a dress.[181] My colleague may point to particular examples of men who do usually wear dresses (Eddie Izzard circa 2002, perhaps). In this instance, the plasticity of conversation will allow me to supplement my proposition to better account for what Schauer describes as "recalcitrant experience" – that is evidence that the generalization is flawed in a way that matters given the purpose of using the generalization.[182] Recalcitrant experience may show us that a generalization is over-inclusive or under-inclusive in light of the reason that we are applying the generalization; or it may reveal that a generalization thought to be universal is not universal, by demonstrating that it fails to obtain in a particular case (as with Izzard); or it may show that the generalization suppresses qualities that are relevant to the conclusion drawn.[183] Here, the discovery of a man who does wear dresses is a kind of recalcitrant experience.[184] Yet when presented with this information, I can respond to it. Whether I wrongly believed that my statement was universal, or it was wrongly taken to be universal, the plasticity of conversation will permit me to alter my generalization to more accurately reflect what I now know to be true about the world.[185]

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[178] SCHAUER, RULES, *supra* note 1 at 18.

[179] SCHAUER, PROFILES, *supra* note 1 at 7-19.

[180] SCHAUER, RULES *supra* note 1 at 31-37.

[181] *Id.*

[182] SCHAUER, RULES, *supra* note 1 at 38-47 (identifying three varieties of recalcitrant experience, "the first in which a probabilistically warranted generalization is incorrect on this occasion, the second in which a supposedly universal generalization turns out not to be universal, and the third in which a suppressed property turns out now to be germane.").

[183] *Id.*

[184] SCHAUER, RULES, *supra* note 1 at 39.

[185] SCHAUER, RULES, *supra* note 1 at 38-42.

However, gender generalizations that form the predicates of sex-respecting rules are not subject to this flexible "conversational model" of generalization-formation.[186] Instead, they exist within what Schauer describes as an "entrenchment model" of generalizations.[187] The concepts contained within the generalizations that form the factual predicate of sex-respecting rule have become "entrenched" in that they are sufficiently accepted as guides for organizing information about the subject of the generalization (here, "men" and "women") that they need not be asserted and endorsed conversationally to be recognized and understood by the relevant community.[188] Instead, they are simply recognized and understood by the relevant community as a commonly accepted way of organizing information about men and/or women.[189] In other words, "men do not usually wear dresses" is a generally accepted guide for organizing information about men and dresses, regardless of whether any one individual believes the generalization to be true, justified, or applicable in any given situation.

Because they are not asserted conversationally, entrenched generalizations cannot "explain away" misunderstanding or misapplications with supplemental information, they way that I can explain to my colleague that I did not mean that *no one* man usually wears a dress, but instead I meant that *most* men do not wear dresses.[190] Similarly, entrenched generalizations cannot be as sensitive to recalcitrant experience as non-entrenched generalizations.[191] When a non-entrenched generalization meets with recalcitrant experience, the conceptual contours of the generalization bends to account for the new information and the new experience is accommodated.[192] Exceptions are made and the generalization is fine-tuned.[193] However, when an entrenched generalization meets with recalcitrant experience, the generalization resists immediate amendment.[194]

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[186] SCHAUER, RULES, *supra* note 1 at 39.

[187] SCHAUER, RULES, *supra* note 1 at 42 -52.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] SCHAUER, RULES, *supra* note 1 at 47.

[192] SCHAUER, RULES, *supra* note 1 at 42.

[193] SCHAUER, RULES, *supra* note 1 at 39.

Moreover, although all generalizations suffer from the kinds of flaws that are revealed by recalcitrant experience, these flaws are compounded when the generation is treated as entrenched by a broad community of people – as is the case with social rules. When a community of people behave as though the generalization were entrenched, the *fact* that the generalization is treated as entrenched becomes a *reason* to treat the generalization as entrenched.[195] When this happens, the over or under-inclusiveness or situational irrelevance of the generalization are not merely an impediment to me being understood by my colleague. The flaws of the entrenched generalization become ossified, and serve as an impediment to the community's goal of achieving correct outcomes in light of purpose of the generalization (or social rule).

In this way, because entrenched generalizations are less readily revisable than non-entrenched generalizations, and because the practice of treating an entrenched generalization as entrenched becomes self-sustaining, entrenched generalizations begin to operate with prescriptive force.[196] Indeed, when individuals behave as though a generalization is entrenched, then Schauer understands the generalization to function as a "rule" – that is to provide an independent reason for acting in conformity with the generalization.[197] The argument presented here holds that gender generalizations, in particular, possess these types of prescriptive forces. In other words, the argument here holds that prescriptive gender generalizations are best understood as a unique system of rules.

To explore the idea that gender generalizations function as a unique species of social rule, let us return to the example of the generalization "men do not usually wear dresses." If we understand this proposition to have prescriptive force, what manner of rule is it? It is not a formal rule – it is not, for example, a rule that has a formulation that is mediated by an authoritative source.[198] Nor is it a rule that is enforced by legal or other organized and explicit sanction. How then do we know that it is a rule?

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[194] As is discussed, *infra*, at Section III, this is not to say that entrenched generalizations are unaffected by recalcitrant experience, merely that the process by which entrenched generalizations adapt to changing information is less immediate.

[195] SCHAUER, RULES, *supra* note 1 at 47-48.

[196] SCHAUER, RULES, *supra* note 1 at 49-52.

[197] *Id.*

[198] *Id.*

Part of the answer lies in first understanding that there are two kinds of rules that give rise to rule-guided behavior: formulated rules (which can be either authoritative or unauthoritative) and unformulated rules (which are usually unauthoritative).[199] A formulated rule is one that is reducible to a generally accepted proposition or set of propositions,[200] such as the Rule Against Perpetuities,[201] or the Golden Rule,[202] or the rule in baseball that states that the batter must stand within the batter's box during his time at bat.[203] Formulated rules may be mediated by a source of authority that arbitrates disputes of application (such as a court in the case of the RAP, or the Major League Baseball Commission in the case of baseball) or not (like the Golden Rule, which is formulated in a number of ways in a number of different sources, but no one institution or person is authorized to determine when or how the rule has been violated).[204] Importantly, the existence of both formulated and unformulated rules are evidenced by a convergence of behavior: for a rule to exist people must behave in a manner that is consistent with the existence of that rule.[205] However, formulated rules

[199] *See*, SCHAUER, RULES, *supra* note 1 at 62 -72. Schauer takes as "unassailable" certain propositions that support the idea that rules need not be authoritatively formulated. He offers a number of examples in support of this conclusion, including the fact that we can use a number of different propositions to formulate the same rule, rules remain the same when translated into different languages and so forth. Schauer understands the distinction between formulated and unformulated rules to be significant in that he understands unformulated or unformulatable to provide a weaker entrenchments of the rules' generalization, a point with which this argument is in accord.

[200]*See*, Schauer, Rules, *supra*, at note 1 at 62.

[201] Although many first-year law students would disagree that the Rule Against Perpetuities is rendered in anything resembling intelligible language, a commonly accepted formulation of the rule is: "To be valid, an interest must vest or fail within 21 years of a life in being." *See* J. Gray, RULE AGAINST PERPETUITIES S 201 (4th Ed. 1942).

[202] Although many versions of the Golden Rule (also known as the ethic of reciprocity) are found in a variety of philosophies and religions it was perhaps first rendered by Sextus the Pythagroean in 406 B.C. as, "what you wish your neighbors to be to you, such be also to them." Other formulations include: "do unto others as you would have others do unto you."

[203] *See*, Rule 2.00 of the Official Rules of Major League Baseball, which states, "the BATTER'S BOX is the area within which the batter shall stand during his time at bat."

[204] Thus, because the Golden Rule lacks an authoritative source or authority charged with mediating disputes, we would have to develop exogenous criteria for mediating disputes in application.

[205] SCHAUER, RULES, *supra* note 1 at 62 -72.

have an obvious advantage in this capacity: their very formulation provides evidence – although not conclusive evidence – that a rule exists. [206]

Unformulated rules on the other hand, must be evidenced entirely by our practices. As Schauer observes, "insofar as some number of people have internalized the same rule, a rule with the same meaning, and have treated that meaning as entrenched, the rule can be said to exist for those people, even without a canonical formulation."[207] Minimally, then, an unformulated rule is evidence by a convergence of behavior that indicates a rule exists.[208] Therefore, to demonstrate that a gender rule exists, we must demonstrate that the relevant community of people *behave as though* a rule existed.

In exploring this idea is it helpful to return to the image of Jack Lemon on the train platform in *Some Like it Hot.* In that example there would seem to be two sets of behavior that serve as candidates for such a convergence: (1) the convergence of behavior that is reflected in the proposition that men do not usually wear dresses (meaning the social fact that men tend not to wear dresses) and (2) the convergence of behavior that is reflected in the audience's laughter (manifesting, as it does, some kind of shared understanding of a relationship between men and dresses).

Each of these convergences of behavior suggests that a distinct species of unformulated social rule is at work. The first convergence of behavior corresponds to a regularity in the world -- men indeed do not generally wear dresses – which suggests that a *regulatory* rule may be constructing this phenomenon.[209] The second convergence of behavior – our shared ability to apply the generalization ("men do not wear dresses") in a way that permits us to conclude that men who do wear dresses are engaging in behavior that we might describe as gender transgression or nonconformity – suggests that a *constitutive* rule is at work.[210] An examination of how gender generalizations function as both constitutive and regulatory social rules follows below.

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[206] Thus, if Rule 2.00 of the Official Rules of Major League Baseball remained on the books but players ceased observing it and no sanction attached to this lack of attentiveness to the batter's box rule, it would no longer be accurate to describe it as a rule.

[207] SCHAUER, RULES, *supra* note 1 at 71.

[208] It bears emphasizing that a convergence of behavior is a "minimal" requirement for the existence of a rule. It is a necessary but not sufficient rule existence condition.

[209] SCHAUER, RULES, *supra* note 1 at 6.

[210] SCHAUER, RULES, *supra* note 1 at 6-7.

B. Guiding Behavior: Gender Rules as Regulatory Rules

When people follow rules, behavior becomes regularized.[211] Individuals acting in conformity with a rule behave in predictable ways that we can accurately describe in generalities.[212] For example, observation of a rule that class begins at eight o'clock produces a behavioral uniformity: a classroom of people are waiting in their seats at eight o'clock. It may be the case that some members of the class are not early-risers and would prefer to arrive later in the day, but the prescriptive pressure of the rule generally overrides these individual preferences.[213] As a result of the rule we have a regularity of behavior that we can describe as a generalization: students are in their seats by eight o'clock. The generalization may not be universally true (inevitably there are stragglers), but it is also not spurious. If it were the case that students were not generally in their seats at eight o'clock, we would probably conclude there was no such rule (or that the rule was not generally observed or obeyed).[214]

Similarly, gendered regularities of behavior can be understood as the product of rule-guided behavior. As discussed above, gender generalizations that have historically been heuristically described as "stereotypes" (*e.g.,* women have a special relationship to domesticity; men are more suited to be estate administrators; men do not wear dresses etc.) are propositions that describe regularities of behavior with various degrees of accuracy ranging from spuriousness to near-universality. These behavioral regularities can be said to be the product of rule-following to the extent that they are not produced coincidentally by the individual application of reasons to the situation at hand (*i.e.* each man who does not wear a dress does so for reasons unrelated to the fact that other men do not wear dresses).[215] For behavior to be described as rule-guided, individuals

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[211] SCHAUER, RULES, *supra* note 1 at 112 -115.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] A second and third explanation are also possible; first, those that understand conventions to be distinct from other types of social rules may attribute gendered regularities to the prescriptive force of convention. A discussion of the manner in which adherence to gender rules is distinguished from conventional behavior follows *infra* at Section II D.

who behave in conformity with the rule must do so because of the rule, not simply because the strictures of the rule coincides with the individuals' own reasons for acting. [216]

In other words, as Schauer succinctly restates Joseph Raz: "rules are reasons for action."[217]Or, more specifically, rules provide an independent reason for acting.[218] Rules apply a normative pressure to behavior and that pressure obtains even in instances in which applying the justification (or purpose) for the rule directly to the situation at hand would not yield the same result.[219] Thus, the key to engaging in rule-guided behavior (as opposed to, say, acting out of habit, or acting for our own independent reasons) is that the normative pressure of following the rule provides a reason for a engaging in behavior that we otherwise would not.[220]

In contrast, outside the context of rule-following, when our reasons for acting in a particular way do not obtain in a given instance, we generally alter our behavior to account for the particularities of the situation.[221] For

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A third explanation may also be offered: the regularity is *purely* the product of non-volitional forces (*e.g.,* intrinsic dimensions of the non-human world and/or physiological phenomena beyond an individual non-dress-wearer's control). However, if the regularity of behavior were purely the product of non-volitional forces (like breathing) we would expect an explanation of how some men who generally adhere to the regularity (do not wear dresses) are able to choose to wear a dress in specific contexts (*i.e.* to perform in a film) as well as an explanation of the manner in which women are distinguished from men in this respect.

[216] SCHAUER, RULES, *supra* note 1 at 113 (noting for a rule to exist for a particular individual it must provide that individual a reason for acting that does not amount to a "coincidence of behavior…following a rule requires being *guided* by that rule." Therefore, an individual can only be said to be following a rule when that individual "performs an act *because* the rule indicates that it is to be performed."). It is important to be clear, however, that the rule need not provide our *sole* reason for acting in conformity with the rule's imperative. We can describe our behavior as rule-guided as long as the fact of the rule is among the reasons we behave in conformity with its imperative. *Id.*

[217] Schauer, RULES, *supra,* note 1at 4; JOSEPH RAZ, PRACTICAL REASON AND NORMS (Hutchinson & Sons Ltd. 1975); *See also,* H.L.A. Hart, THE CONCEPT OF LAW (1961) and DEFINITION AND THEORY IN JURISPRUDENCE (1953). The central concern of THE CONCEPT OF LAW is the phenomenon of legal rule-following, which Hart takes to be a subset of "social" rule-following. Social rules, in Hart's account, are the species of background social practice that gives rise to the possibility of feeling obligated to obey a legal rule.

[218] SCHAUER, RULES, *supra* note 1 at 112-118.

[219] *Id.*

[220] SCHAUER, RULES, *supra* note 1 at 66.

[221] SCHAUER, RULES, *supra* note 1 at 51.

example, assume I drive a specific way to work each day because it is faster than the alternative route. However, on a particular day I observe that my usual route is clogged with traffic due to road construction. In such an instance, I would ordinarily change my behavior (*i.e*. not drive my usual route) because the reason that I engage in the behavior (*i.e.* it is faster than the alternative route) no longer obtains. In such an instance, although I drive my usual route with regularity, when I do so I am not engaging in rule-following, because the putative "rule" *(i.e*. drive the same way to work each day) does not apply normative pressure to my behavior independent of the reasons for the rule (*i.e*. getting to work faster). When circumstances are altered such that the reason for the regularity in behavior no longer applies to the new circumstances, I apply the reason for my action directly to the situation and abandon my regularity (i.e. I take the alternate route to work). Therefore, I am not engaged in rule-following behavior.[222]

Compare this with my observation of the speed limit on my way to work each morning. Assume I obey the imperative of the rule "drivers' speed must not exceed 35 miles per hour within City limits" when I drive my usual route to work.[223] On the hypothetical day that I alter my route, I will still obey this imperative, even if I believe that I could safely exceed 35 miles per hour while driving the alternate route because the alternate route is less hilly. Although the circumstances have changed (I am driving a road more physically suited to increased speed) I will persist in obeying the generalization about 35 miles per hour because among the reasons that I observe the rule is the *fact* that it is a rule.[224] The rule provides an independent reason for limiting my speed, and this independent reason is accompanied by its own normative force (which may include fear of sanction, concern that other drivers will disapprove of my action and so forth).[225] Because of the normative force attendant to the speed rule, I drive 35 mph even when my other reason for doing so (safety) no longer obtains. Therefore, I am engaging in rule-following behavior.

Similarly, the fact that men do not usually wear dresses can be described as a rule if the convergence of behavior (the fact that other men do not wear dresses) provides an independent reason to act in conformity with the

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[222] SCHAUER, RULES, *supra* note 1 at 64, 113.

[223] *See* DAVID LEWIS, CONVENTION 22 (1969) (discussing rule-following in the context of speed limits).

[224] *Id.*

[225] SCHAUER, RULES, *supra* note 1 at 113.

practice of not wearing dresses, even if circumstances might otherwise recommend dress-wearing.[226] If the normative force that issues from the existence of the regularity (*e.g.* expectation of conformity; fear of sanction for nonconformity; the desire to avoid being perceived as playing a "gender game" other than the game associated with maleness or masculinity; and so forth) is sufficient to cause an individual to act in conformity with the regularity when he otherwise might not, then the rule can be said to guide his behavior in a way that driving the same route to work does not guide my behavior.[227]

To explore the possibility that gender rules supply an independent reason for acting in conformity with the imperative of the rule, it may be instructive to consider the relationship between a gender rule's imperative and the purpose of the rule. Take for example, the rule about men and dresses. Would applying individual reasons (considerations of warmth, perhaps) to the situation (choosing what to wear) produce the same result? Note that the result we are interest in is not a given man's decision to not wear a dress, but instead the convergence of behavior that results in the fact that most men do not wear dresses (but many women do). Would men still refrain from wearing dresses if there was no longer an expectation that men refrain from wearing dresses? In the hypothetical above, my reason for driving the same way to work each day is that I believe it is the fastest route and my purpose in conforming to the regularity is to get to work faster. What then is the purpose of these gendered regularities of behavior and what are our reasons for complying with those regularities?

In this light, we begin to see an interesting feature of gender rules: we seem to follow gender rules without being able to identify a purpose for the rule or a reason for following the rule *absent* the reasons that attend the fact that other people follow the rule. In other words, we follow gender rules "blindly."[228]

Moreover, this "blind" following attends gender rules beyond those that govern gendered dress and deportment. When we interrogate the gender generalizations that form the factual predicates of a variety of contested rules, we encounter the same problem: "women are more likely to be

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[226] Lewis, *supra* note 223.

[227] *Id.*

[228] For a discussion of the practice of rule-following in the absence of an identifiable purpose ("justification," in Schauer's and Wittgenstein's locutions, *but see infra*, text accompanying note 240) , *see* Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS, *supra* note 1 at §201.

financially dependant on a spouse;"[229] "women have a special relationship to domesticity;"[230] "women are more likely to miss work to care for children;"[231] "women are paid less for the same work;"[232] "women are less likely to become an equity partner than similarly situated men;"[233] and so forth. Each of these non-universal but statistically sound generalizations articulates a regularity of behavior (with various degrees of accuracy). What is the purpose of each regularity, and what are our reasons for acting in conformity with it?

Absent the reasons that fall out of the *fact* that others conform to these regularities (which include not only attendant expectations and fear of social sanction, but also reasons related to facts that result from the regularity such as a lack alternative means for achieving particular goal) our reasons for behaving in conformity with these generalizations are unclear. It is difficult too, to discern the purpose of these rules. That is to say, it is not difficult to understand why *someone* might be primarily responsible for something like childcare, and why it even might be socially helpful to have that expectation regularized, but it is difficult to identify the purpose of drawing the distinction along *sex* lines. Or, more accurately, it is difficult to identify a purpose for the distinction that we deem *justified* in light of the *effect* of gender rules.

Here, then, is where antidiscrimination discomfort meets with gendered regularities. Although our legal and employer rules are often predicted on background social rules regarding matters of etiquette or social expectation, and these background rules often enforce hierarchical relationships (*e.g.*, between a young person versus a older person; a person in position of superior responsibility versus a subordinate) our sense that these hierarchical background social rules are justified (in the sense that they fail to arouse our antidiscrimination sensibilities) *depends upon* our sense that the hierarchical relationships they delineate are justified.

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[229] *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

[230] *Laffey v. Northwest Airlines, Inc*., 740 F.2d 1071 (D.C. Cir., 1984).

[231] *Back v. Hastings on Hudson Union Free Sch. Dist*., 365 F.3d 107, 121 (2d Cir. 2004) (female school psychologist with a young child could show that she was denied tenure because of the sex-based assumption that women are more likely to care for children).

[232] *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (holding that employers cannot justify paying women lower wages because that is what they traditionally received under the "going market rate.").

[233] *See* Paula Nailon, *Perceptions of Partnership*, ABA YLD, Miami Spring Conference, (May 2005), http://www.abanet.org/yld/elibrary/miami05pdf/PerceptionofPartnership.pdf

In the case of gendered regularities of behavior, our sense that gendered hierarchical relationships are *justified* has been ebbed away (largely, if not exclusively, by recalcitrant experience), but we remain entrenched in patterns of regulated behavior that are now unmoored from their once-attendant purposes – purposes which related to enforcing what we then believed to be justifiably distinct realms of behavior for men and for women.[234] As a consequence of this unmooring, gender rules are situated in a precarious justificatory posture -- at least by antidiscrimination law's lights. A consideration of the justificatory posture of gender rules as well as the reasons why gender rule-guided behavior should not be thought of as "merely conventional" follows.

1. Gender Rules and Justification

To say that a rule is "justified" is a normative claim, and accounts of what constitutes rule-justification in any given context dependants first on a preexisting principle of justice.[235] Yet, when we say that a rule is justified we generally mean one of two things: (1) the imperative of the rule is justified in light of its purpose (and by this we mean that the imperative is *causally linked* in satisfactory way to the purpose); or (2) the rule's *purpose* is justified in light of another normative principle.[236] However, to assess whether a rule is justified either in light of its purpose or whether its purpose is justified, we must first be able to identify the purpose of the rule.

If we have difficulty identifying the purpose of gender rules, it is because we have disaggregated our practices in this context from their erstwhile justifications. For example, we once though distinct behavioral realms for men and women (*e.g.*, male-only enfranchisement) were justified in light of inherent or essential differences between men and women (*i.e.*, women are

[234] Some readers may contest the proposition that prescriptive gender generalizations, on the whole, delineate hierarchical relationships rather than merely distinguished (*i.e.* "male" versus "female" or "feminine" versus "masculine") relationships. While I take the proposition to be correct, a full defense of this claim is unnecessary as nothing here depends upon it. At a minimum, sex-respecting generalizations delineate distinct categories of behavior for different groups of people and our sense that these distinct categories of behavior are justified has, as discussed above, ebbed away.

[235] *See* Hart, *supra* note 1.

[236] In fact, there is a third sense in which we might speak of a rule's justification. We might mean that a rule is justified in that the rule represents a justified exercise of authority (meaning in the context of law, for example, that the rule is the legitimate product of a legitimate sovereign). *See*, Hart, *supra*, note 1. However, this sense of a rule's justification is not relevant here.

emotionally or intellectually weak) but we have largely distanced ourselves from those "archaic" factual predicates.[237] Similarly, we have also become disenchanted with the purpose of gender-rules, insofar as the purpose is to delineate status and/or reinforce power differentials between men and women.[238] For example, we once thought that male-only enfranchisement served the purpose of keeping women in a subordinate position in public life, which in turn served the purpose of retaining the structure of family and home life, which in turn served the purpose of supporting the Republic.[239] However, we no longer understand the goal of keeping women politically subordinate to be justified even in light of other, valid purposes such as supporting the Republic.[240]

In fact, it is exactly this dissonance between the disavowed purposes/factual predicates of our gender rules and our persistence in treating the imperatives of those rules as entrenched – that is, following the rules *because* they are rules even though we no longer believe their justifications -- that caused courts and commentators to identify even accurate generalizations as "stereotypes."[241] When encountering even descriptively accurate prescriptive gender generalizations as the factual predicates of legal or employer rules, that courts and commentators criticize those generalizations as "false" not because they fail to describe a "true" regularity of behavior, but because we now believe the prescriptive generalization that creates that regularity to be flawed (over-inclusive, emphasizing an irrelevant property, etc.) and/or we no longer endorse the purpose of the gender rule.[242] In other words, it is our "blind" gender rule following – that is the space between gender rule's no-longer discernible justification and our persistence in following it – that gave rise to the "stereotype" heuristic in the first place.

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[237] E.*B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994) (criticizing a factual predicate as embodying, "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women");

[238] For a discussion of the subordinating effect of gendered classifications, *see* Catherine MacKinnon, WOMEN'S LIVES, MEN'S LAWS (Belknap Press, 2005).

[239] HELEN KENDRICK JOHNSON, WOMAN AND THE REPUBLIC Ch. XI (1913).

[240] This example illustrates the phenomenon of "layering" justifications. The purpose of a rule may be justified in light of another purpose, which may itself depend upon another purpose. For a discussion of this phenomenon, *see* SCHAUER, RULES, *supra*, note 1 at 73.

[241] *See* discussion *supra* at Section I.

[242] *See* SCHAUER, RULES *supra* note 1 at 31.

Moreover, it is important to be clear here that in disallowing prescriptive gender generalizations as the factual predicates of legal or employer rules, courts are not evaluating the wisdom or normative sufficiency of our entrenched gender generalizations (or background social rules). Instead, courts are evaluating the *relationship* between those generalizations and sex-respecting legal and employer rules. Where the justification (as non-arbitrary in light of its purpose) of a sex-respecting legal or employer rule depends up a regularity of gendered behavior, and the regularity is not purely descriptive, then antidiscrimination law's substantive commitments require that the legal or employment rule not be permitted to *further entrench* the prescriptive dimensions of the gender rule.[243] Antidiscrimination law's commitment then is best described as a commitment not to *revise* background gender rules, but to protect the revisability of those social rules by limiting the sanctions that attend them to *social* sanctions rather than legal or employment sanction.[244]

Finally, this dissonance between the justification of gender rules and our practice of adhering to them places gender rules in a precarious justificatory posture because of the consequences that attend adhering to them. There are many varieties of social rule that we adhere to "blindly" and that form the factual predicates of legal and employer rules without incident – notably, for example, rules of etiquette.[245] However, gender rules are distinct in that they enforce differing limitations on distinct groups within the same community of adherents, and these differing limitations delineate status and/or reinforce power differentials. In other words, it is a mistake to think about gender rules as "merely conventional." An account of how gender rules differ from conventional rules follows.

[243] *But see*, *Jespersen v. Harrah's Operating Co., Inc*., 444 F.3d 1104 (9th Cir. 2006).

[244] Of course, strictly speaking, employment and legal sanctions are types of "social" sanction, but I use the term here to distinguish the sanctions that attend gender non-conformity in other arenas from those that attend the failure to obey a legal rule or an employment rule. *See* discussion *infra,* Section III A.

[245] Rules of etiquette are generally understood to be "conventional."*See* Lewis, *supra* note 223; *see also,* Andrei Marmor, SOCIAL CONVENTION: FROM LANGUAGE TO LAW (2009).

2. Gender Rules and Conventional Rules

Informal social rules – sometimes called "conventions" - influence virtually all of our practices and their content vary from community to community.[246] Etiquette rules, the use of money, rules regarding personal space, rules of appropriate dress, the use of slang, or the significance of gestures all may be said to be "conventional" and the content of these rules differ depending on the community of adherents.[247] For example, Midwestern middle-class teenagers recognize different social rules regarding appropriate use of slang than, say, elderly professors of law in the Deep South. Moreover, conventions apply pressure to behavior, provide an independent reason for acting in conformity with the regularity they create, and we seem to follow them "blindly" – meaning without knowing *why* the content of a particular conventional rule is preferable to an equally available alternative rule (*e.g.*, why is "soda" the acceptable term for what goes by "pop" in other quarters?).[248] In these ways, gender rules and conventional rules are similar.

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[246] Lewis, *supra* note 223; Marmor, *supra* note 245. There is a large body of literature on the notion and workings of social conventions that transverse various philosophic inquiries (i.e. philosophy of language, ontology, epistemology, etc.) as well as other disciplines (i.e. economic theory, sociology and so forth). *C.f.* David Hume, A TREATISE ON HUMAN NATURE (1740) (hereinafter NATURE) and ENQUIRY CONCERNING HUMAN UNDERSTANDING (hereinafter UNDERSTANDING); Lewis, *supra,* note 230; Marmor, *supra*, note 230;Thomas Schelling, THE STRATEGY OF CONFLICT (1960); Hilary Putnam, *Convention: a theme in philosophy*, New Literary History, 13, 1-14 (1981); Robert Brandom, MAKING IT EXPLICIT (1994); Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, Philosophy and Public Affairs 29: 170–200 (2000). Certainly this discussion is not directed at summarizing nor even sliding a toe into the thrashing waters that surround the many varied debates regarding the phenomena of convention. Instead, my concern here is simply to observe that there seems to be agreement that conventions share two dimensions. First, an existence condition for a convention to arise is the need for (or at least advantages of) conformity or uniformity or some kind of regularity of behavior ; second, that at least part of the normative force that creates the regularity of a convention issues from the benefit that is accrued by the establishment of a regularity. The gender rules that I am describing share neither of these dimensions.

[247] HUME, NATURE *supra* note 246 at 490 (observing, "languages [are] gradually establish'd by human conventions without any explicit promise. In like manner do gold and silver become the common measures of exchange, and are esteem'd sufficient payment for what is of a hundred times their value.").

[248] *See e.g.*, Leslie Green, *Pornographizing, Subordinating, Silencing*, Censorship and Silencing: Practices of Cultural Regulation (ed. Robert Post) (1998) (describing, in the context of pornography, how sexual conventions only bind those within the relevant community).

However, it is a mistake to think of gender rules as merely a specific type of conventional rule. [249] David Lewis offers a particularly prominent account of the features of social convention, which he takes to include regularities of behavior that are not dictated by human need (*i.e*. breathing) or human nature (whatever that may turn out to be) but are nonetheless undertaken because individual agents understand conformity to be in their self-interest.[250] In Lewis' account conventions emerge in situations in which it is everyone's best interest to have a regularity of behavior, but more than one course of behavior (if regularized) would serve equally well as another.[251] To illustrate such a situation, Lewis presents the by now familiar example of driving on a particular side of the road.[252] While it is not very important whether motorists drive on the left or right side of the road, it is very important (and in every motorist's interest) that the driving

[249] It is especially important to make this distinction because gendered dress and gendered deportment are frequently included among common examples of social conventions, and while the convergences of gendered behavior considered in this piece are certainly not limited to issues of dress and deportment, the same error obtains in considering a wider array of gendered behavior to be "merely" conventional. It should also be noted that that the account of convention offered here is derived from David Lewis' classic account detailed in: CONVENTION: A PHILOSOPHICAL STUDY (1969). However, in his recent book, SOCIAL CONVENTION: FROM LANGUAGE TO LAW (Princeton University Press, 2009), Andrei Marmor reexamines Lewis' classic account of convention and persuasively argues that the phenomenon of convention encompass much more than the subset of regularities produced by the need for coordinated behavior. Nonetheless, the discussion presented in this section remains centered on Lewis' account because in distinguishing Lewis' narrower account of convention from the kind of rule-guided behavior that forms regularities of gendered behavior, my goal is only to disaggregate these regularities from the evidently pervasive notion that gendered regularities of behavior are akin to the kind of content-neutral and benignly-segregating norms that separate drivers onto the right and left sides of a road (meaning that the content of the rule does not matter much but having *some* rule is important). *See,* John Searle, SPEECH ACTS 33 (Cambridge University Press, 1969).

[250] More specifically, agents understand conformity to be in their interest if they have reason to expect others will also conform. Lewis, *supra* note 223.

[251] Notably, Lewis's account relies on the rationality and self-interest of the conformists and thereby resolves some concerns about how, in situations in which more than one solution may be equally "good"/sensible/agreeable, regularities of behavior can be explained absent either explicit or tacit agreements. *See*, LEWIS, *supra* note 246; *accord*, HUME, *supra* note 246 at 257 (describing conventions as sustained by a "sense of common interest; which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others into a general plan or system of actions, which tends to public utility.").Other accounts rely less on self-interest. *See* MARMOR, *supra* note 223.

[252]Lewis, *supra* note 223.

behavior of motorists be regularized.[253] Thus, a convention of driving on the right side of road commands conformity by appeal to universal self-interest.[254] In other words, the benefit of having *some* rule is sufficient to bring regularity about,[255] and *that* benefit - the predictability that follows from regularized behavior -- accrues to each conformist as long as others conform as well.[256]The meta-purpose of conventional rules, then, is to allow us to predict behavior in those aspects of our lives in which a shared set of rules (whatever their content) is either necessary or universally beneficial (*e.g.*, language, etiquette, etc.).[257]

However, it is exactly this last point that differentiates convergences of gender behavior from social conventions. Gender rules lack conventional rules' "meta-purpose." It is not clear that a benefit follows from having *some* rule (whatever its content) that divides adherents into "male" and "female" behavioral lanes. Unlike rules of language (which are necessary for us to communicate) or etiquette (which tell us how not to offend), it is not clear that a rule that tells us how to behave based on *status* confers a general benefit to all adherents. In other words *some* etiquette rules are necessary to help us to rub along together, but this meta-purpose is not served by bifurcating those etiquette rules into male and female behavioral sets.[258]

Thus, in contrast to conventions which set rules for engaging in behaviors in which coordination is either beneficial or required, gender rules are better understood as social rules which allocate power horizontally within a

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[253] In this understanding of conventions, conventions are stable and self-sustaining because the general expectation that others will conform to the convention is sufficient to motivate people to conform. *See*, Robert Sugden, *The Role of Inductive Reasoning in the Evolution of Conventions*, LAW AND PHILOSOPHY, Vol. 17, No. 4, 381(Jul., 1998).

[254] Even before it becomes so entrenched as to become a norm and/or codified into a legal rule. *See* Lewis, *supra* note 223. *See also*, HART, *supra* note 1.

[255] Lewis, *supra* note 223.

[256] This is obviously a reductive account, but sufficient for the purpose of distinguishing the convergences of behavior at issue here.

[257] As a consequence we are generally satisfied with justifying our adherence to these norms by reference to the fact that these are merely our practices.

[258] The ability to predict and avoid offending behavior could just as easily be served if the same behavioral requirements attached to all adherents regardless of sex. An explanation of why the *same* behavior may or may not be offending depending on the sex of actor requires reasons that exceed the necessity for uniform behavior.

community.[259] In this sense, conventions determine what is appropriate behavior within a relevant community (*i.e.*, law professors), while gender rules split a single community – whatever its organizing criteria (*i.e.*, age, geographic location, socioeconomic class) -- in half (*i.e.*, male law professors and female law professors) and assign different roles and entitlements within the *same community of adherents*. The distinction of sex-based behavioral realms serves to delineate the categories of "men" and "women" as well as the relative status of gendered qualities, vocations, behaviors and even language.[260] In contrast, the distinction between right and left side driving does not designate a superordinate and subordinate category of drivers; the driving convention treats all conformists as a whole (drivers) and imposes a singular requirement on all conformists (right-side driving).[261]

Gender rules then enforce status-based distinctions rather than a distinction that supplies a meta-purpose benefit for all adherents.[262] Creating two "lanes" of gendered behavior does not avoid the same kind of catastrophe that two driving lanes avoids. Whatever one's view of the potential "essential" differences between men and women, insofar as men or women are capable of operating in the "other lane," it is not clear why there should be a set of rules discouraging this operation.[263] It is not even clear why (or that) we need the lanes.[264]

Moreover, within most accounts of conventional rules, the content of the rules are generally insignificant -- *i.e.* it does not matter much whether we drive on the left or right side, or whether we use one grammar rule rather than another, or whether we deem it polite to shake hands with or embrace a stranger -- as long as the relevant community all treat the rule as a rule.[265] In this sense, our conventional practices can rationally be justified simply with reference to the meta-purpose of the rule: we obey the rules of

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[259] SCHAUER, RULES, *supra* note 1 at 158 (describing how rules "operate as tools for the allocation of power" horizon ally within a community).

[260] MacKinnon, *supra*, note 243.

[261] LEWIS, *supra*, note 223.

[262] *See* HUME *supra* note 246 (arguing that conventions arise in response to rational self-interest which is supported by the ability to predict the actions of others).

[263] LEWIS, *supra* note 223.

[264] *Id.*

[265] *Id.*

language because if we did not we could not communicate.[266] Or, we obey the rules of etiquette because if we failed to regularize this behavior identifying occasions of offense would be left to individual psychologies, which would result in increased incidents of conflict.[267] In both of these examples, the consequence of having uniform behavioral expectations is more significant than the consequence of picking a particular rule over any number of equally available alternatives.[268] In this sense, our conventional practices are justified as simply "what we do" and this is true in part because we require (or benefit from) uniformity in these areas, and in part because the consequence of picking one rule of etiquette or grammar over another is not very significant.

However, the content of gender rules matter very much because they limit the behavioral possibilities of some, but not all, adherents in a given community. It is an important matter, for example, whether or not women can be admitted to the bar, and the consequence of selecting one rule over another (*i.e.* either that women are permitted to sit the bar or that they are not) is more significant than the consequence of having *some* rule about women and the bar.[269] Therefore, in justifying the selection of one of these women/bar rules over another, we require more than simply reference to the uniformity of our practices. Instead, we need to understand the power relationship that is delineated by the distinction to be justified in light of a meta-purpose or to be justified by essential facts about "men" and "women," both of which we perhaps once embraced, but as discussed above, have long since abandoned.

Thus, it is these two facts: (1) the absence of meta-purpose for gender rules, and (2) the significance of the content of gender rules (*e.g.*, are women permitted to sit the bar, or not?), that both distinguishes gender rules from conventional rules and that places gender rules in a different justificatory posture than conventional rules. For these reasons, antidiscrimination sensibilities are not aroused when legal or employer rules use conventional rules as factual predicates, but those sensibilities are aroused when a gender rule forms the factual predicate.

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[266] *See* LEWIS, *supra* note 223 (providing that conventions create truth-conditions for sentences); *but see* NOAM CHOMSKY, RULES AND REPRESENTATIONS (1980) (arguing that while language conventions exist, they do not determine meaning).

[267] LEWIS, *supra*, note 223.

[268] *Id.*

[269] *Id.*

C. Gender Games: Gender Rules as Constitutive Rules

To introduce the idea that gender rules are constitute rules, it is helpful to return again to the description of the train platform scene in *Some Like it Hot*. Recall that the joke of the scene relies on a non-obvious and non-explicit understanding about men and dresses. Remember too that the audience is able to apply this understanding without (1) reference to an explicit formulation of the underlying proposition (*i.e.* "men do not wear dresses"); (2) necessarily believing the proposition to be true; or (3) necessarily endorsing the proposition (believing it *should* be true). Yet somehow, with being *told* that men do not wear dresses and without necessarily *believing* that men should not wear dresses, the audience is able to *apply the rule* that men do not wear dresses in the context of the scene and thereby generate new meaning. The scene is funny to the audience if and only if the audience is able to correctly apply the rule about men and dresses.

It bears emphasizing here that the phrase "correctly apply" does not in any way suggest that the underlying men/dress connections (or any proposition that might be formulated to convey them) that the audience applies to render the scene intelligible are *morally* or somehow empirically (e.g. statistically) correct.[270] Instead, the phrase refers to the audience's ability to know which connection (or, more accurately, which set of connections) among all the possible connections between men and dresses generates meaning in the context of the scene.[271] "Correct" in this context does not modify or evaluate the meaning that has been conveyed by virtue of the mastery in underlying rules. Thus, to say that the behavior of the audience demonstrates the existence of a social rule (or, more precisely, to say that the audience applied a rule correctly) is to say nothing about the reason for the rule or the rule's justification. It is certainly not to say that the rule is *right*, in the sense of being morally justified, or that it accurately captures or reflects something *true* about the state of the world.[272] It is only to say that behavior of the audience and filmmaker has revealed that the generalization "men do not wear dresses" has been applied in a particular case.[273]

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[270] *Id.*

[271] *Id.*

[273] Hume, *supra* note 231; Lewis, *supra* note 231.; Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, Philosophy and Public Affairs 29: 170–200 (2000); Robert Brandom, MAKING IT EXPLICIT (1994).

In this way, the laughter of the audience demonstrates something more than simply knowledge of the underlying proposition accompanied by an attitude about the proposition (*i.e*. "I believe that men do not usually wear dresses" or "I believe that men should not wear dresses"). This "something more" is the ability to apply the rules of gender in manner that makes sense of the scene. The audience and the filmmaker cannot engage in the exchange that they do absent a set of background understandings about gender that not only precede the film, but that actually build the conceptual platform upon which the train-platform joke rests. In this way, the rules of gender *constitute* our gender conversations.[274]

Schauer describes constitutive rules as rules that "create the very possibility of engaging in conduct of a certain kind. They define and thereby constitute activities that could not otherwise even exist."[275] The paradigmatic example of constitutive rules are the rules of a games.[276] To illustrate this point, imagine that you ask me to play a game of tennis. I agree, and yet when we meet on the court, instead of serving the ball and counting points in accord with the rules of tennis, I use my racket to hammer at the net for ten minutes until it is detached from its moorings, at which point I declare myself the winner of our game of "tennis." At this point, you may object to my claim by stating that while I may have been engaged in some manner of activity during the preceding ten minutes, I was not playing tennis. You would be justified in making this claim in that only by abiding by the rules of tennis am I *able* to engage in the activity of playing tennis. In this sense, the rules of the game do more than guide my behavior within the construct of the game, the rules *define* my conduct as falling within the construct of the game. The rules of the game of tennis transform the behavior of hitting a ball with a racket into the activity of tennis – the rules of tennis give the action of ball-hitting a meaning that it could not possess without the game-constitutive rules.

Similarly, the gender generalizations at issue here structure our pervasive gender understandings and tell us what "counts" as appropriate gender moves.[277] Knowledge of the generalization that "men do not wear dresses," for example, creates the possibility of describing a dress-wearing man as gender transgressive, or as "breaking" a gender rule. So we are able to identify the existence (if not formulation) of a man/dress rule because we

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[274] *See*, Searle, *supra* note 11; Andrei Marmor, SOCIAL CONVENTION: FROM LANGUAGE TO LAW (Princeton University Press, 2009).

[275] SCHAUER, RULES, *supra* , note 1 at 6; s*ee also,* John Rawls, *Two Concepts of Rules*, The Philosophical Review, Vol. 64, No. 1, 3-32. (Jan., 1955).

[277] For an account of how pornography sets sexual conventions and determines what counts as appropriate sexual "moves," *see*, Rae Langton, SEXUAL SOLIPSISM 25-63 (2008).

have identified that the audience must necessarily *know how to apply the rule* in order to grasp the joke.[278] The existence of a rule and the audience's knowledge of the rule are demonstrated by the behavior of the filmmaker and the audience and the understanding that could not pass between them but for their mutual recognition of and ability to apply the rule.[279]

In this way, gender rules possess constitutive force even in instances in which the rule itself is not obeyed in the regulatory sense. Jack Lemon, for example, disobeys the rule that men do not wear dresses, but the constitutive dimension of the rule nonetheless continues to determine the manner in which the image of a man in a dress is received by the audience. Thus, as in the example of tennis offered above, gender rules make our gender-conscious behaviors possible: they transform our actions (*e.g.* wearing clothing) into actions that have meaning in the context of gender (*e.g.* wearing *women*'s clothing).

Another way of stating the constitutive force of gender rules is to say that gender rules allow us to know which behaviors fit within which "gender game." If a man wears a dress (in the absent excepting circumstances) we know he is not playing the game of "gender-conforming male" because dresses are associated with femininity which is not usually associated with maleness and so forth. In contrast, if a woman wears a dress (in the absence of other gender-demarking behavior) we may perceive that she is playing the game of "gender-conforming woman." The behavior (dress-wearing) remains the same but our understanding of the significance changes in these two contexts because we have mastered a set of background understandings that create the requisite connection between men and dresses and women and dresses.

Seen in this light, mastery of the constitutive function of gender rules – although ubiquitous - actually represents a very complex ability. To apply gender rules appropriately, one must do more than learn a hierarchical system of possible connections (*i.e.*, if man → no dress). This is a necessary, but not sufficient condition for being able to discern the "correct" gender-generalization-based connections in a given context. When we demonstrate with our behavior that we have grasped the rule (*i.e.*, by laughing at Jack Lemon) we are demonstrating an ability that is independent of both of the explicit content of the propositions that undergird our understanding and our own normative attitudes about the content of those propositions. This knowledge of sex-respecting rules permeates our everyday understandings, whether those understandings are explicitly

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[279] SCHAUER, RULES, *supra*, note 1 at 64.

structured into propositional phrases *(i.e*. "men do not wear dresses") or, as is much more often the case, those understandings are made manifest in our behaviors (*i.e*. laughing at Jack Lemon). We are able to move fluidly from film-image to reaction without consideration of the underlying proposition ("men do not wear dresses"), much less an evaluation of the justification for the underlying proposition, because whatever our personal views of gender roles and gender conformity, we are sufficiently conversant in the rules of gender to be able to identify a transgression. Regardless of whether we personally believe that men should wear dresses, we know the correct connection to draw (among any number of connections that might make sense of the scene) such that we understand the joke. In other words, we know how to "get" the joke, regardless of whether we find it funny, because we know something more important than the isolated content of an individual descriptive gender generalization: we know how to apply "gender rules."[280]

III. Gender Rules and Discriminatory "Assumptions"

Having explored the prescriptive features of gender generalizations, we turn now to the question that of how – and more importantly, why – prescriptive gender generalizations are understood to be "discriminatory" when they serve as the factual predicate of a sex-respecting rule. Assuming that the subset of gender generalizations that have been heuristically described as "stereotypes" possess the prescriptive dimensions described above, a central question remains: how do the prescriptive dimensions of these gender generalizations interact with legal and employer rules in a manner that attracts or warrants antidiscrimination-law scrutiny?

The answer to this question is two-fold and has already been presented in main within the preceding analysis: (1) the justifications for adhering to gender rules are suspect in a manner that distinguishes from other types of ubiquitous social rules, yet adhering to gender rules has the effect of delineating status and/or perpetuate power or resource differentials; and (2) when a legal or employer rule adopts a gender rule as its factual predicate, the gender rule becomes less revisable because the legal or employer rule provides and independent reason to act in conformity with the background

[280] It follows, too, that gender rules have constitutive force – that is they tell us which behaviors "count" within various gendered categories - beyond the arena of defining dress and deportment. Consider, for example, the prescriptive generalization "women have a special relationship to domesticity" beside the phrase "bachelor pad." We are able to apply the background rule about what "counts" as gender-conforming in the context of domesticity, regardless of whether we have an opinion about whether women are or should be tidy more tidy than men. Constitutive gender rules transform the behavior (keeping a messy apartment) into gendered behavior (keeping a bachelor's pad).

rule and also serves to create a stronger entrenchment of the gender rule.[281] The former point having been explicated in the preceding section, this section will explicate the latter point.

A. The Commitment to Revisabilty

As discussed above, one of the problems with entrenched generalizations -- such as the gender generalizations at issue here -- is that they are less sensitive to recalcitrant experience and therefore they persist in imposing their revealed flaws (*e.g.*, the emphasis of an irrelevant property or the suppression of a relevant one) on future decision-making.[282] Even in the face of newer and better information, we treat gender generalizations as entrenched and consequently our gender rules resist revision.

But this is not to say that gender rules are unrevisable. On the contrary, clearly there are different gender rules in force presently than were in force in the 19th Century or even the 1950s. Ultimately the prescriptive potency of gender rules is not indifferent to recalcitrant experience. When gender rules are broken, the transgressive behavior calls into question not only the factual predicate of the rule, but the reasons for and purpose of the rule. Eventually, our rational spade may find a way beneath the "blind" practice if persistent recalcitrant experience causes us to begin to dig for a purpose for the rule or a reason for adhering to it.

In this way, individual action that questions the universality (some men do wear dresses) or relevance (it virtually never matters whether an individual wears a dress) of sex-specific generalizations creates a space between our knowledge of how to apply the rules and our endorsement of and compliance with those rules. Through this glacially-paced process of transgression and questioning, we appear to be able to rid ourselves of social rules – even power-allocating rules such as gender rules - that are no longer useful or desirable. The fulcrum of this decaying-rule brush-clearing seems to be the lack of compelling reasons or legitimate purposes that attend the gender rule in question. We are able to stop obeying "blindly" when a sufficient degree of nonconformity allows us to "see" the rule that forms the previously unconsidered predicate of our gendered understandings and thereby situate those rules within the same framework that we use to evaluate other types of non-conventional rules. Why don't

[281] SCHAUER, RULES, *supra*, note 1 at 77-88.

[282] SCHAUER, RULES, *supra*, note 1 at 47.

men wear dresses? Why should women be primarily responsible for domestic affairs?

Legal rules feature in this process of gender-rule revision in three significant ways. First, legal rules obviously have the power to limit the range of sanctions that attend the failure to comply with gender rules. When Ann Hopkins broke the rule that "women are feminine (or women are not non-feminine)," the Supreme Court determined that while she may face assorted sanctions for engaging in that behavior, losing her Price Waterhouse promotion could not be among them.[283] Indeed, while once gender-rule breakers were vulnerable to a penalties such as the loss of property, child custody, employment, and even the loss of personal freedom, increasingly, court and congress have acted to remove both legal and employment sanctions from the array of penalties that attend gender-rule violations.[284] Once legal and employment penalties are disallowed, social opprobrium becomes a lonely constable and possibility of revisiting the rule becomes less remote.

A second way in which legal rules affect the revisability of gender rules is through their influence on the constitutive rules of gender. Legal rules have the power to literally define what counts as a "man" or a "woman" – for example in the context of marriage and pre-operative transsexuals – but more subtly, legal rules exert pressure on constitutive rules that appear inconsistent with legal rules.[285] We may feel differently about identifying an activity as gender-nonconforming after a legal rule announces that the activity must include both sexes. For example, we might once have understood college basketball to be a "man's game" such that coeds who played basketball were engaging in a type of gender-nonconforming behavior.[286] However, after Title IX fostered the proliferation and success

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[283] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

[284] *Id.*

[285] *See e.g.*, *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. App., 2d Dist., 2004) (holding that a post-operative female-to-male transsexual person did not count as "male" and therefore could not marry a woman in Florida, because the term "male" within Florida's marriage statute refers to an immutable trait determined at birth and therefore no surgery could transform a person not born with this trait into a person who counts as "male" for the purpose of the marriage statute); *accord*, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

[286] For a discussion of the gender constitutive rules in the context of sports, *see* EILEEN MCDONAGH AND LAURA PAPPANO PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS (Oxford University Press, 2007); *see also*, Robert Lipsytea, *Who's Got Game*, THE NATION (Mar. 24, 2008)(quoting McDonagh and Pappano as describing sports as a " 'social force that does not merely reflect gender differences, but in some cases,

of women's collegiate basketball programs, our judgments about whether female-basketball-playing "counts" as gender-nonconforming behavior are undermined.[287]

Of course, legal authority does not always exercise its dual power to remove sanctions and de-constitute gendered understandings. The Ninth Circuit declined to stand between Darlene Jespersen and the sanction she received at the hands of Harrah's Casino, but it is precisely this calculus -- whether to protect the revisability of gender rules -- that lies at the heart of antidiscrimination law and theory's struggle to apply its "stereotype" heuristic. And it is important to be clear that the calculus is not whether to protect revisability on the one hand, or remain neutral on the other. In allowing Harrah's to enforce its Personal Best policy, the Ninth Circuit lent the considerable constitutive weight of legal authority to the gender rules that formed the Personal Best predicate.[288] A legal rule that says it is permissible to require hyper-femininity of bartenders like Darlene Jespersen but not of accountants like Ann Hopkins, reinforces background gender rules about what counts as appropriate gendered expressions for women in each of those professions, a point which we shall return to in the final section of this analysis.

Finally, a third way in which legal rules can affect the revisability of gender rules, is by allowing a sex-respecting rule (which might be an employer rule like "women must wear make-up" or a legal rule like "women cannot be estate administrators") to *further entrench* the gender generalization that forms its factual predicate.[289] A consideration of this phenomenon follows.

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creates, amplifies, and even imposes them.' It enforces 'the notion that men's activities and men's power are the real thing and women's are not. Women's sports, like women's power, are second-class.'").

[287] 20 U.S.C. § 1681.

[288] *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

[289] SCHAUER, RULES, *supra* note 1 at 74 (explaining that formal rules can either entrench their factual predicates as entrenched or defeasible).

B. Gender Rules as Predicates

When a legal or employer rule adopts a gender generalization as its factual predicate, the legal or employer rule applies its own independent prescriptive pressure to the generalization. Consider, again, *Price Waterhouse*.[290] In being a transgressor of the background gender rule "women are feminine (or women are not non-feminine)" in other aspects of her life, Hopkins encountered whatever social sanctions attend failing to adhere to that particular prescription. However, in failing to adhere to that prescription at Price Waterhouse, Hopkins faced a new and distinct sanction: she was not promoted.[291] The desire to avoid the sanction that independently attends Price Waterhouse's rule "women must be feminine at Price Waterhouse," supplies an independent reason for complying with the background gender rule.[292]

In other words, because of Price Waterhouse's rule, Hopkins would have a reason to behave femininely, even if there was no background social expectation that women behave femininely, nor any regularity of behavior concerning the feminine behavior of women. If Hopkins wants to be promoted at Price Waterhouse, she has a reason to act in conformity with Price Waterhouse's informal rule, regardless of the reason for or purpose of the rule. In this way, the Price Waterhouse rule has the effect of enforcing the imperative of the background gender rule ("women must/should behave femininely") without having to (or even being able to) provide a reason for or justification of the background prescription. This is true even though the reasons for and justification (as non-arbitrary in light of its purpose) of Price Waterhouse's rule *depends* upon the background gender rule. Absent the regularity of behavior reflected in the background gender rule ("women are feminine (or women are not non-feminine"), Price Waterhouse would have no reason for imposing that requirement on its female employees, nor could the requirement be justified in light of some defendable purpose – it would, in effect, be arbitrary.

Another way of understanding the relationship of Price Waterhouse's rule to the background gender rule that forms its factual predicate is that the Price Waterhouse rule *further entrenches* the background gender rule and it does so in a way that is qualitatively different than the process by which the background gender generalization is itself both entrenched and – more significantly – revised. The manner in which a legal or employer rules

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[290] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

[291] *Id.*

[292] *Id.*

functions to further entrench the background gender prescriptions that form its factual predicates, as well as the manner in which this entrenchment renders prescriptive gender generalizations less revisable is considered below.

1. Enforcement, Exploitation and Instantiation

To explore how sex-respecting legal and employer rules further entrench gender rules, it is necessary to take a step back and identify some of the structural features of rules. Schauer explains that rules are comprised of four basic parts: (1) the imperative that pressures behavior (often formulated, but sometimes, as in the instance of gender rules, unformulated); (2) a factual predicate; (3) a reason (this is a causal claim – it refers to the reason the rule is adopted or observed); and (4) a purpose (the aim of the rule or the evil it seeks to avoid).[293]To explore the mechanics of these component parts, let us consider again the employer rule that was at issue in *Jespersen.* [294]

In *Jespersen*, the putatively sex-stereotyping practice at issue concerned Harrah's "Personal Best" grooming policy that required female employees to wear make-up and forbade male employees from doing the same.[295] In

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[293] Schauer describes the rule's aim (or the evil it seeks to avoid) as its "justification" but because this use of justification can be easily confused with claims that a rule is normatively/morally justified, I refer to the rule's aim as its purpose, which is sufficient for this discussion. SCHAUER, RULES, *supra*, at 23; *see also* text accompanying note 17 (distinguishing connotations of "justified" in the context of rules).

[294] *Jespersen v. Harrah's Operating Co., Inc*., 444 F.3d 1104 (9th Cir. 2006) (en banc).

[295] The "Personal Best" policy imposed the following mandatory requirements for women employees:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Make up (face powder, blush and mascara) must be worn and applied neatly in a complimentary colors. Lip color must be worn at all times.

Further, to aid its female employees in, assumedly, achieving their "personal best" Harrah's hired at considerable expense a make-up consultant, who met with each female employee and demonstrated for each employee how she should apply the requisite make-up. At the end of the session a picture was taken of the professionally made-up employee and placed in the employee's file so that a manger could use the photograph as a baseline for determining, each day, whether the employee was in compliance with the "Personal Best" requirement.

fact, not only did the casino require its female employees to wear make-up, it required them to meet an elaborate set of grooming requirements that included teasing their hair, applying face power, blush and mascara, and so forth, such that compliance with the policy resulted in the construction of a hyper-feminized self-presentation.[296]

Plaintiff Darlene Jespersen challenged the requirement, advancing the theory that requiring her to conform to traditional notions of femininity constituted impermissible sex-stereotyping in violation of Title VII as it was interpreted in *Price Waterhouse*.[297] However, Jespersen had in mind *PW*II, while the Ninth Circuit was of a mind, on this occasion, to embrace *PW*I. In an *en banc* decision the Ninth Circuit disagreed with Jespersen's framing of the issue, finding instead that the relevant inquiry was whether the policy disproportionately burden female employees with respect to male employees.[298] Concluding that that rule placed equal burdens on both male and female employees, the court held that the policy did not constitute discriminatory sex-stereotyping.[299]

So the Ninth Circuit used the elastic "stereotype" heuristic to arrive at its conclusion. Yet a rule-centered analysis reveals features of the relationship between Harrah's rule and background gender rules that are obscured by the "stereotype" heuristic. Let us begin with the Harrah's rule's imperative. For the purposes of this analysis, we can simplify the Personal Best Policy and summarize its imperative in the following three propositions: (1) *only* female employees wear make-up; (2) female employees *must* wear make-up; and (3) female employees must wear a *lot* of make-up.[300] However, to

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Harrah's "Personal Best" policy asks the following of its male employees:

- Hair must not extend below top of shirt collar; Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.

Jespersen, 444 F.3d at 1107 .

[296] *Jespersen*, 444 F.3d at 1107.

[297] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989).

[298] *Jespersen*, 444 F.3d 1104.

[299] *Id*. at 1112.

[300] Rather than describing the Personal Best policy as a single rule with three imperatives, it would be more accurate to describe the policy as three separate rules. However, given that

understand the significance of these imperatives, we must situate them within the context of the other components of Harrah's rule.

The next task then is to identify the reason for Harrah's Person Best rule. The reason for the rule is, literally, the reason why Harrah's adopted the rule.[301] This is a causal claim.[302] In explaining the reason that Harrah's adopted its policy, the casino stated that its aim was to create uniformity among its employees that would yield a greater degree of brand recognition among customers.[303] However, it may be fruitful to interrogate whether this reason provides an adequate causal link to each of the rule's three imperatives. For example, "creating uniformity" provides a reason for having a rule at all, meaning in this instance, having a uniform set of grooming requirements. In claiming that uniformity is the reason for its rule, Harrah's is describing its rule as a driving-on-the-right-side rule: it does not matter whether employees appear hyper-feminine or hyper-masculine as long as whatever "lane" of grooming behavior is selected that lane is observed by all employees. But "creating uniformity" does not provide a reason for having *this* rule – that is, a sex-differentiated rule, and it is the sex-differentiated aspect of the rule that causes it to be of antidiscrimination law concern. In fact, if uniformity were the sole or even primary reason for adopting a grooming requirement, requiring that *all* employees or *no* employees wear make-up would provide a more sensible fit with this goal.

Readers may object here, noting that asking *all* employees to wear make-up would be foolish. But what renders this proposal foolish? What piece of information do we need to understand what is wrong with an all-employee make-up rule? Here we begin to see the usefulness of the thinking-in-slow-motion approach offered by a rule-centered analysis. When we interrogate the rule's assumptions at this level we realize that a background rule (that, being gender-rule conversant, we would otherwise reflexively apply) is required to make sense of the sex-differentiation in this context. When we interrogate the connection between the imperative of Harrah's rule and

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various background gender rules feature in the analysis of Harrah's Personal Best policy, it is simpler to describe the policy itself as a single rule. *See*, SCHAUER, RULES, *supra* note 1 at 62-64 (describing the difference between rules and their formulations, and stating that two different formulations of a similar prescriptive proposition can be said to represent two distinct rules if the different formulations apply different pressure to behavior such that the application of the formulations can produce a different result in at least one case).

[301] SCHAUER, RULES *supra* note 1 at 23.

[302] *Id.*

[303] *Jespersen,* 444 F.3d 1107.

reason offered by Harrah's for having the rule, we learn what we already know: that usually only women wear make-up.[304] The gender generalization "usually only women wear make-up" is a factual predicate of this sex-respecting rule.

To return to our "lanes" of gendered behavior metaphor, Harrah's is requiring some conformists to drive on the left and other conformists to drive on the right. It is the reason for *this* distinction that is of interest to antidiscrimination analysis, not the fact that Harrah's regulates driving at all. The reason for this "lanes" distinction cannot be "to create uniformity." Harrah's was perhaps interested in creating uniformity among its women employees and another kind of uniformity among its men employees. However the uniformity-reason offers us nothing in terms of understanding the distinction we are really interested in. We are not interested in learning why Harrah's chose to regularize the face-uniform of its employees.[305] Instead, we are interested in answering the question: why only women?

The uniformity-reason also does not help us with the second aspect of the Personal Best imperative: women *must* wear make-up.[306] Uniformity would be just as easily (or more easily) achieved by having a rule that no women can wear make-up at Harrah's (or, as already suggested, that no one can wear make-up at Harrah's). The uniformity reason leaves us then with a second unsatisfied question: why make-up?

Finally, with respect to our reason-skepticism, Harrah's uniformity-reason does not help us with the third Personal Best imperative: women must wear a *lot* of make-up. Even if our first two questions were adequately addressed, this third imperative, predictably, leaves us in the position of wondering: why *so much* make-up (or why hyper-femininity)?

Because Harrah's espoused reason for the rule leaves these three questions unsatisfied, we might look next to the purpose of Harrah's rule. The purpose of the rule is not to oppress or women or harass gender-

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[304] Judge Kozinski likewise questioned the factual predicate of this imperative. In dissenting in the en banc decision, Kozinski wrote, "[w]omen's faces, just like those of men, can be perfectly presentable without makeup: it is a cultural artifact that women raised in the United States learn to put on--and presumably enjoy wearing--cosmetics. But cultural norms change . . . . I see no justification for forcing [female employees] to conform to Harrah's quaint notion of what a "real woman" looks like." *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

[305] *Jespersen*, 444 F.3d at 1114 (Pregersen, J., dissenting)(describing Harrah's rule as requiring Jespersen to wear "a facial uniform (full makeup).").

[306] *Jespersen*, 444 F.3d at 1107.

nonconformers – instead, the purpose of the rule is to attract customers.[307] In other words, Harrah's adopted the Personal Best rule because it believed that application of the rule would please customers. Are the rule's three imperatives reasonably causally linked to the aim of the rule such that we would describe the rule justified in light of its purpose?

In fact, the causal relationship between each of the rule's imperatives and the rule's purpose depends upon a gender generalization that serves as the Personal Best rule's factual predicate. We have already indentified the factual predicate upon which the first imperative ("only women can wear make-up at Harrah's") depends: "usually only women wear make-up." But the second imperative (women *must* wear make-up) also reveals a factual predicate: make-up (or, potentially, the absence of make-up, as the rule could be understood to avoid the evil of women like Jespersen appearing make-up-less at work) *signifies* something about the wearer.[308] A thorough analysis of exactly *what* make-up or the absence of make-up might or must signify could occupy a journal volume, but it is sufficient for our purpose here to observe that Harrah's concluded that requiring its female employees to wear make-up would signal something about those employees that would be pleasing to customers. Harrah's, then, was exploiting a *constitutive* gender rule: the presence of make-up on women "counts" as something or communicates something in the same way that that the presence of a dress on Jack Lemmon does. Harrah's employed our shared gender grammar to create an understanding between the casino and its patrons in the same manner that the *Some Like it Hot* filmmaker creates an understanding with the audience.

The third imperative of the Personal Best policy (women must wear a *lot* of make-up) also reveals a gender generalization as its factual predicate: women in the service industry are (or should be) hyper-feminine, while white-collar, professional women are not (or should not be). Harrah's rule does not require its female employees to wear a conservative or neutral face-uniform. Harrah's rule requires women to tease their hair, apply face powder, mascara, and rouge. And then of course there is the matter of lip color: lip color must be worn *at all times*.[309] To aid us in identifying the contours of the factual predicate of this imperative, let us imagine the rule

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[307] Harrah's crafted the rule to increase brand-recognition so that it could attract more customers. *See* See Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism,* 14 Duke J. Gender L. & Pol'y 13, 66 (2007).

[308] *See e.g*., Hellman, *supra*, note 20 at 43.

[309] *Jespersen* 444 3d. at 1107.

was imposed not by a casino but by the United States Supreme Court. A rule that demands that Ruth Bader Ginsburg and Sonia Sotomayor not appear on the bench without teased hair and lipstick (while only requiring the other seven justices to keep their hair above their shirt collars) would be absurd. But why is it absurd? Why is requiring that Sotomayor tease her hair rather than Jespersen nonsensical? The reason the rule would be unjustifiable in the context of the Supreme Court is again reducible to our gender-rule conversancy: we know (although we may never formulate this knowledge into propositions as explicit as the one that follows) that the appropriateness of women's gender expression varies markedly depending on class context.[310] In other words, we know the rule about Supreme Court justices and teased hair the same way we know the rule about men and dresses, and the justification of Harrah's imperative depends upon that background rule.

Moreover, as with the factual predicate of the second imperative, Harrah's rule both exploits the constitutive force of the background rules regarding teased hair and a certain style of make-up, and also instantiates the background gender generalization that forms its predicate. Harrah's workers' hyper-feminized gendered presentations "count" as something specific within our gendered understandings, and they also provide a concrete example of the generalization ("women in the service industry are (or should be) hyper-feminine").[311] When we walk into Harrah's casinos we meet with evidence that supports the background generalization, and reinforces its descriptive accuracy.

Finally, Harrah's rule instantiates background gender rules, and in so doing it treats the background gender rules it instantiates as either justified (*e.g.*, in light of some inherent difference between men and women) or as "merely" conventional and thereby not requiring justification beyond the fact that they are merely our practices.[312] For example, Harrah's rule does not supply

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[310] But, interestingly, the appropriateness of men's gendered expressions seems much less tied to class contexts. Scalia's gendered presentation, for example, would meet Harrah's Personal Best requirements. For a compelling consideration of hierarchical structures in the context of gendered expressions, *see* Mary Ann Case, *Disaggregating Gender From Sex And Sexual Orientation: The Effeminate Man In The Law And Feminist Jurisprudence*, 105 Yale L.J. 1 (1995).

[311] For a discussion of the relationship between hyper-femininity and class structures in the context of Harrah's rule, *see*, Ann McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 Duke J. Gender L. & Pol'y 257 (2007); Jennifer Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-Fication of Bartenders*, 14 Duke J. Gender L. & Pol'y 285 (2007).

[312] The Harrah's rule-component exercise teaches us an interesting lesson: once we understand that the reason for and justification of a gender rule (*i.e.* men do not usually

a reason (independent of the background gender rule) for the distinction that only women can wear make-up. Instead, Harrah's rule instantiates the rule as "simply our practice." Indeed, the purpose of Harrah's rule is to enforce this background rule *because* it is our practice. However, as discussed *supra* at Section II A 2, decisions about *which* gender rule among equally available options (*i.e.* should we allow women to sit the bar or should we not?) cannot be justified in light of the meta-purpose of conventional rules: the need to regularize behavior in a particular practice. It is not clear that we need "lanes" of gendered behavior, and certainly not clear in light of the fact that unlike conventional rules which select between equally appealing options,[313] regularity in the gender context comes at significant cost. The content of an individual gender rule (*i.e.*, only women wear make-up) matters in a way that selecting a grammar rule for *everyone* to use does not. Yet Harrah's rule instantiates gender rule imperatives as if they required no justification and thereby reinforces the practice of following gender rules "blindly."

So Harrah's rule further entrenches the gender generalizations that form the factual predicates of its rule in three ways. First, Harrah's rule directly enforces the gender generalization "only women wear make-up" by adopting it as an imperative and attaching a new set of sanctions to its prescription. Further, Harrah's rule exploits the constitutive force of the gender rules that form the factual predicates of its three imperatives. Finally, Harrah's rule instantiates background sex-based distinction and in doing so Harrah's rule treats those distinctions as though they did not require justification– when in fact they do. The effect of this enforcement, instantiation and exploitation on the revisability of background gender rules is considered below.

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wear dresses) is distinct from the reason for and justification of the employer rule that adopts the gender generalization as its factual predicate (*i.e.*, men cannot wear dresses here, at this job), it becomes clear that the employer's rule *cannot* provide a reason for or justification of the underlying gender rule, even if the employer's rule is itself justified in light of *its* purpose (attracting customers). On the other hand, however, the underlying sex-classification can and *does* play an essential role in justifying the employer's rule.

[313] Or at least options in which the consequence of selecting one rather than another is not very significant. *See*, LEWIS, *supra* note 223.

2. Revisability and Formal Rules

This relationship between Harrah's formal rule and its factual predicates obstructs the revisability of those predicates in several ways. First, when Harrah's rule entrenches a gender rule, the rule is reinforced in ways that noncompliance with the gender rule fails to undermine. Recall that Harrah's rule bears its own prescriptive force. As discussed above, the rule imposes a sanction structure that is independent of the sanctions that attend noncompliance with the background gender rule. Because of this, conformity with Harrah's rule reinforces the background generalization by suggesting a willingness to conform to the background rule that may, in individual cases, be untrue. For example, a male bartender at Harrah's might decided to conform to Harrah's no-make-up rule to save his job, while in the absence of Harrah's rule he would have worn make-up to work. His conformity at work, however, appears from the outside to be indistinguishable from conformity with the background gender rule ("only women wear make-up"). In this example, Harrah's rule then has the effect of suppressing what would otherwise be an instance of recalcitrant experience: the male bartender is conscripted into reinforcing the generalization that men do not usually wear make-up.

Similarly, as discussed above, a formal and authoritative rule like Harrah's can exploit the background gender rule's constitutive function to create a desired gendered meaning. Harrah's rule is rendered arbitrary and senseless absent an understanding of background gender generalizations about women and make-up and hyper-femininity and class-structures, just as the train platform scene is senseless in the absence of the ability to apply rules about men and dresses. The "gender grammar" of background gender rules creates the effect that Harrah's seeks: it constitutes the relationship between Harrah's female employees and hyper-femininity (*i.e.* a hyper-feminine-presenting bartender is making an appropriate gender "move"), behavior that would be differently understood in another context – notably, at an accounting firm (say, Price Waterhouse). But in applying the generalizations constitutively, Harrah's is both endorsing, from an authoritative position, judgments about what "counts" as appropriate behavior in the casino context, while pressuring behavior to conform to its endorsement. In so doing, Harrah's has the effect of dominating (or participating in a larger commercially-driven convergence that dominates) our gender-constituted conversations about women, femininity, and casinos-type environments.

Finally, Harrah's rule is both formulated and revised by a process that is distinct from and qualitatively different than the process that forms and revises the background generalizations it instantiates. For example, the women-only make-up imperative appears from the outside indistinguishable from the background rule that it instantiates, but the purpose of Harrah's rule has nothing to do with the purpose of the background rule (whatever that might have been). Harrah's rule is not the product of truth-seeking, hierarchy-building or cooperative social organization; it is an exercise in profit-increasing. Yet although it is formulated in a manner that is unrelated to the forces that formed the background generalization, and although Harrah's rule further entrenches the background generalizations in the manner described above, Harrah's rule is not subject to the same glacially-paced revision process to which the background rules are subject. Harrah's may retain its instantiation of the women-only make-up rule as long as it serves Harrah's purpose: attracting customers. The process by which other evidence supporting a gender rule is undermined (*i.e.* the presentation of recalcitrant experience) need not effect Harrah's rule. In this way, Harrah's rule, with its own purpose and reasons, obstructs the dead-wood-clearing process by which we seem to rid ourselves of "bad-old-days"[314] notions about men and women.

C. New Gender Games: *Jespersen* and the Future of Revisabilty

Having explored the relationship between formal rules like Harrah's Personal Best and the background gender generalizations it entrenches, it is important to return to the role that antidiscrimination law potentially plays in policing that relationship. Rather than applying pressure directly to the background prescriptions themselves (*e.g.*, "women have a special relationship to domesticity"), antidiscrimination law stands between gender rules and the legal or employer rules that would (1) further entrench those rules; and (2) render them less revisable (*i.e.*, an employer is not permitted to condition a benefit on the assumption that women have a special relationship to domesticity). The judgment then that antidiscrimination law must make is when the entrenchment and obstruction of the revisability of a particular gender rule is tolerated by the law, and when it is not.

However, in making these judgments, the antidiscrimination law is also assuming the role of referee in a subset of our gender-constituted conversations. As alluded to above, in determining that demands for femininity are inappropriate in the professional context of Price Waterhouse, but appropriate in the context of Harrah's Casino, antidiscrimination law is doing more than permitting background assumptions about gender expressions in those contexts to stand. Legal

[314] U.S. v. Virginia, 518 U.S. 515, 586 (1996) (Scalia, J., dissenting).

authority is, instead, selecting among various gender generalizations to determine which should "count" as appropriate moves in certain contexts. The judgment that Jespersen was not harmed in the way that Hopkins was harmed relies on a series of gendered understandings about what is *appropriately* linked to success in a male-dominated, serious, professional, and intellectual context, like Price Waterhouse, and what is *appropriately* linked to success in a decidedly less heady job like bartending at a casino. These judgments themselves turn on gendered understandings about what gender-markers like make-up and teased hair say about qualities like intellectualism and seriousness.[315] And so forth.

In this sense, antidiscrimination law is constantly engaged in both refereeing and constituting new and existing gender "games." Legal authority is called to referee when plaintiffs like Jespersen require the court to determine what "counts" appropriately causally linked to success in particular instances. The law is likewise engaged in the activity of constituting new gender games when it announces a new rule: femininity is not appropriately causally linked to the success of accountants, but it can be demanded of bartenders. Once the rule is announced, behavior bends to accommodate it, and our understanding of what is an appropriate "move" for a casino-owner, bartender, Price Waterhouse partner and gender-nonconforming accountant are all brought into new relief. Our settled understandings of these relationships are consequently either pressured or confirmed.[316]

Moreover, it may be the case that our antidiscrimination law intuitions are undisturbed by a rule that holds "women in the service industry are (or should be) hyper-feminine, while white-collar professional women are not (or should not be)." But to reach this conclusion, deeper questions about the implication of such a rule must, at a minimum, be acknowledged. For example, given that gender rules regarding male gender expression tend to be relatively stable across class and status contexts, do sex-respecting rules that indentify what "counts" as an appropriate "type" of women according to class and status contexts, define women or confine women's opportunities or in a way akin to rules concerning other type of behavior restrictions (*e.g.* women and domesticity)? Does the fact that women can be

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[315] *See* Meredith Render, *Misogyny, Androgyny, And Sexual Harassment: Sex Discrimination In Agender-Deconstructed World*, 29 Harv. J. L. & Gender 99 (2006) (describing the hierarchical ordering of gender roles).

[316] In this sense, the Harrah's rule is relevant in understanding the gender moves that are appropriate for bartenders, only until antidiscrimination law evaluates Harrah's rule. However, once antidiscrimination law permits or disallows Harrah's rule, the legal rule becomes the referee of this particular gender game.

required to assimilate to male norms in some context, while not permitted to escape femininely-associated norms in other contexts suggest or even instantiate implicit notions about where women belong, which "type" of women are useful for which type of work, and which class or status contexts appropriately require women (and men) to apologize for failing to embody a male ideal?[317]

So, gender rules do change, and decidedly *have* changed. Most sex-respecting rules that prescribe the exclusion of women from a category of opportunities have fallen away. No longer can Price Waterhouse justify declining to hire a female accountant based on the assumption that "women are bad at accounting." But in the aftermath of this dead-wood rule clearing, new gender games are emerging, and antidiscrimination law and theory must remain cognizant of the role it necessarily plays in both constituting and mediating these new conversations. At a minimum, in evaluating the "discriminatory assumptions" of sex-respecting rules, courts and commentators should be knowledgeable about the relationship between rule sets, and the manner in which the recognition of some predicates as "discriminatory" (*i.e.* "women have a unique relationship to domesticity") and not others ("women in the service industry are (or should be) hyper-feminine, while white-collar professional women are not (or should not be)" effects the degree to which new, and potentially disquieting, gender rules emerge.

Conclusion: Eliminating the "Stereotype" Heuristic

To conclude, the concept of "sex-stereotype" is analytically empty. While the heuristic was helpful in articulating then-nascent objections to the use of legal and employment rules to impede the revision of potentially unjustified gender rules, thanks to the work of legal philosophers such as Frederick Schauer, courts and commentators are now equipped with sufficient knowledge about the prescriptive dimensions of gender generalizations to abandon the heuristic and apply their analyses directly to the issues at hand.

In engaging in this process, courts and commentators should be particularly aware of the new "gender games" that are emerging through the constitutive force of gender generalizations, and the slow process of entrenchment-revision that is at least partially mediated and molded by antidiscrimination law dictates. In particular, new associations that cross-reference conceptions of femininity and masculinity with limiting conceptions of competence and

[317] For a discussion of how gendered norms that vary across class contexts reflect intuitions about the appropriateness of women in those contexts, *see* Render, *supra* note 312.

class-based status are at risk of becoming further entrenched (and thereby rendered less revisable) by legal and employer rules. These new "gender games" should not escape the attention of courts and commentators as they strive to evaluate the sufficiency of the factual predicates of sex-respecting rules.

Due, in part, to antidiscrimination law's commitment to protecting the revisability of a subset of gender rules, our gender rules have clearly been changing. Factual predicates such as "women have a special relationship to domesticity" have given way to predicates such as "women in the service industry are (or should be) hyper-feminine, while white-collar professional women are not (or should not be)." However, we should be careful not to replicate past analytic missteps by failing to recognize these new gender rules or by purporting to assess new gender rules solely in terms of their descriptive accuracy. In terms of these new gender generalizations, the antidiscrimination question remains what it has always been: whether legal and employer rules should be permitted to entrench these generalizations, or whether the prescriptive force of legal and employer rules must remain neutral while the gender-game players negotiate the rules of the game.