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Gender Rules

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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 that the stereotype heuristic should be abandoned 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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INTRODUCTION

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 articulate,

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[1] This statement should be qualified: in dominant 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 (1991) [hereinafter RULES].

[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 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). H.L.A. HART, THE CONCEPT OF LAW 56-57, 256-57 (Oxford Univ. Press 1994) (1961). It is important to distinguish at the outset the kinds of "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 do 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, what Frederick Schauer has described as a "descriptive rule." SCHAUER, RULES, *supra* note 1, at 1-2. In other words, we might mean simply to communicate an observed regularity that lacks normative force. Schauer distinguishes "descriptive rules," which he understands to merely describe regularities (e.g., "it rains more in Mobile than in Birmingham"), from what he terms "mandatory rules," which he describes as rule 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" primarily at issue in this piece are comprised of generalities that exert normative force (i.e., apply pressure directly to behavior). The phrase "men do not wear dresses" is distinguishable from a purely descriptive generalization. Insofar as the *fact* that men do not wear dresses becomes a reason not to wear a dress and that reason replaces independent reasons one might have to wear a dress (comfort, preference to exhibit femininity, and so forth), 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 4 (Oxford Univ. Press 1999) (1975); SCHAUER, RULES, *supra* note 1, at 5.

Finally, while the arguments presented here do not turn on this point and Hart's use of the term "conventional" notwithstanding, I would be clear that I do not take the "gender rules" discussed here to be a subset of a specific type of social rule known as a "convention." *See* DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969) (presenting the dominant account of conventional behavior); *see also* ANDREI MARMOR, SOCIAL CONVENTIONS (2009) (challenging Lewis's account). However, an explanation of how gender rules differ from both Lewis' and Marmor's accounts of conventional

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 on the content of the rule, without knowing why the rule exists, and without necessarily 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.[4]

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

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behavior (and why these differences are significant) regrettably exceeds the scope of this project. Instead, it is sufficient here to note that conventions arise in response to the need for uniformity in an area of behavior, and part of the normative force that creates the regularity of a convention issues from the benefit that is accrued by the fact of the regularity itself. The gender rules that I am describing share neither of these features. For a survey of the literature concerning social conventions, see DAVID HUME, A TREATISE ON HUMAN NATURE (1740); THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960); Hilary Putnam, *Convention: A Theme in Philosophy,* 13 NEW LITERARY HIST. 1 (1981); Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 29 PHIL & PUBL. AFF. 170 (2000).

[3] The gender rules discussed here are principally *unformulated* rules: there are no authoritative sources (e.g., statutes, signposts, or scripture) that definitively or canonically articulate the rules. 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). For example, 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 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 wearing 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 the rule in various contexts (e.g., by not wearing a dress). *See* SCHAUER, RULES, *supra* note 1, at 62-64, 71; *see also* discussion of formulated and unformulated rules *infra* at Section II.A.

[4] 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 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 SCHAUER, RULES, *supra* note 1, and to a lesser degree in FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES (2003) [hereinafter PROFILES]. However, the phenomenology of rule-following has long been the subject of study and debate among philosophers and social scientists. For a sample of some of the more influential literature relating to rule-following, see GORDEN P. BAKER & P. M. S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY (1985); DAVID BLOOR, WITTGENSTEIN, RULES AND INSTITUTIONS (1997); GARY EBBS, RULE-FOLLOWING AND REALISM (1997); HART, *supra* note 2, at 9-11, 19-25, 125-154; G.W.F. HEGEL, THE PHENOMENOLOGY OF SPIRIT (1807); SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953); Lorenzo Bernasconi-Kohn, *How Not to Think About Rules and Rule Following: A Response to Stueber*, 36 PHIL. SOC. SCI. 86 (2006); Max Black, *The Analysis of Rules*, *in* MODELS AND METAPHORS (1984); David Landy, *Hegel's Account of Rule-Following*, 51 INQUIRY 170 (2008); Norman Malcolm, *Wittgenstein on Language and Rules*, 64 PHILOSOPHY 5 (1986); and Karsten R. Stueber, *How to Think About Rules and Rule Following*, 35 PHIL. SOC. SCI. 307 (2005).

arbitrary?[5] If we do not find it arbitrary, it is because we are able to effortlessly identify the rule's implicit *factual predicate*.[6] A rule's implicit factual predicate is the piece of information that causally links the expressed scope of the rule (here, for example, the rule applies to *all women*) with the rule's purpose (for example, meeting customers' expectations concerning employee apparel). To understand the causal link between allowing only women to wear dresses and the purpose of the rule (to satisfy expectations), we must be able to identify the rule's implicit predicate: only women wear dresses. In this way, the implicit factual predicate of the employer's rule is the piece of information that is necessary to render the distinction drawn (men versus women) sensible.[7] Indeed, the employer 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 rule.[8] 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*.[9]

This relationship between gender generalizations ("men do not wear dresses")[10] and sex-respecting rules ("men cannot wear dresses here, at this 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."[11] Courts and commentators have long recognized that the Equal

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[5] 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*, 64 PHIL. REV. 3 (1955).

[6] 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").

[7] *Id.*

[8] "Justified" here does not connote *moral* justification. *See* Rawls, *supra* note 5. When we speak of a rule being justified, we usually mean either that the imperative of the rule is justified in light of its purpose or 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 rule's purpose is ghettoizing poor people), but we may still describe the rule as unjustified. In this, we mean that the purpose of the rule (or the reason for 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 26-27. When a rule is described as "unjustified" in this discussion, the reader should assume the first connotation: that is, the imperative of the rule is not justified in light of its purpose.

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

[10] The phrase "gender generalization," as it is used throughout the piece, includes all generalizations that are based in or cognizant of sex, gender, or gendered 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 the foregoing permutations.

[11] The treatment of sex stereotypes in legal analysis is the subject of a diverse literature. For a representative sample, see, for example SCHAUER, PROFILES, *supra* note 4; Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face Of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007); Katharine Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221 (2005); Mary Anne Case, *"The Very Stereotype The Law*

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 premised on "overbroad generalizations"[12] or "fictional" assumptions[13] about men and women.[14] Where a sex-respecting rule is deemed

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Condemns": Constitutional Sex Discrimination Law as a Quest For Perfect Proxies, 85 CORNELL L. REV. 1447 (2000); 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); Robert Post, *Prejudicial Appearances: The Logic Of American Antidiscrimination Law,* 88 CAL. L. REV. 1 (2000); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence,* 30 HARV. J. L. & GENDER 461 (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).

[12] Schlesinger v. Ballard, 419 U.S. 498, 507 (1975) (sex-respecting rule that favored female navel officers did not violate the Due Process Clause because female officers had fewer opportunities for promotion).

[13] City of Los Angeles v. Manhart, 435 U.S. 702, 708 (1978) (describing the difference between "real" and "fictional" differences between men and women); *Schlesinger,* 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, id.,* the Court described this process:

> 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 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.

[14] Representative early cases that endorsed this proposition include: *Orr v. Orr,* 440 U.S. 268, 279 (1979) (striking down an Alabama statute requiring that alimony be paid to women but not men. The Court found the statute to be 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."); *Craig v. Boren,* 429 U.S. 190, 203 n. 14 (1976) (striking down Oklahoma's sex-differentiated drinking age statute despite evidence that young men were more likely to be involved in drinking-related car accidents. The Court stated "[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."); *Stanton v. Stanton,* 421 U.S. 7, 10 (1975) (striking down a Utah statute that required child support for 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) 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 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."); *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973) (striking down a provision of the U.S. Code that permitted a U.S. serviceman to claim his spouse as a "dependent" and obtain increased military benefits without a showing of actual dependence but required a servicewoman to demonstrate actual dependence when claiming her spouse as a "dependent"); and *Reed v. Reed,* 404 U.S. 71, 76 (1971) (holding that 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 members of the other" and thereby eliminated "hearings on the merits"). *See also* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

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 11, at 1463. Case argues that under both 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.

to be factually predicated on an impermissibly "broad" or "fictional"[15] generalization about men or women, the rule is said to be based on "stereotyped distinctions between the sexes,"[16] 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),[17] but not every gender generalization is a stereotype.[18] 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.[19]

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,[20] there is a troubling lack of consensus within the juridical and academic communities regarding the criteria for identifying sex stereotypes.[21] Three dominant approaches to defining sex stereotypes have emerged. First, Mary Anne Case has identified a "perfect proxy" approach to identifying sex stereotypes.[22] Case moors the legal definition of sex stereotype to the categorical exclusion of women from opportunities or benefits.[23] In Case's view, a gender generalization is a stereotype if it is nonuniversal (i.e., fails to obtain in all instances) and the application of the rule would exclude women from a class of benefits or opportunities.[24] In contrast, Justice Scalia, among others, has articulated a "false generalization" approach to identifying sex stereotypes, which fixes the legal definition of "sex stereotype" solely upon

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[15] *Manhart*, 435 U.S. at 708 (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 requirement was predicated on actuarial predictions regarding the life expectancy of women as compared to men).

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

[17] SCHAUER, RULES, *supra* note 1, at 17-18.

[18] SCHAUER, PROFILES, *supra* note 4, at 17.

[19] *Schlesinger*, 419 U.S. at 507.

[20] 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); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006). For a discussion of the role that sex-stereotyping theories have played in challenging same-sex marriage restrictions, see Deborah A. Widiss et al., *supra* note 11.

Similarly, the question of whether transgender discrimination is actionable 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. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

[21] Mary Anne Case has described sex stereotype as a term of art within antidiscrimination analysis and theory. Case, *supra* note 11, at 1449. The term "stereotype," as it has been used in this context, describes something more than a nonuniversal 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 which, when it serves as the factual predicate of a sex-respecting employer or legal rule, renders the rule discriminatory.

[22] Case, *supra* note 11, at 1449-53.

[23] *Id.*

[24] *Id.*

descriptive accuracy of the generalization itself.[25] In Scalia's view, if the gender generalization is statistically sound, the generalization is not a stereotype, even if applying the generalization results in the categorical exclusion of women.[26]

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).[27] Unlike exclusionary rules, which exclude all women or 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 rules' predicates. 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).

Because assimilationist rules permit an individual to mold his or her behavior to gendered norms rather than categorically exclude women (or men) from jobs or benefits, the justice sensibilities of courts and commentators shift in these contexts, and the malleable definition of "sex stereotype" bends to meet this sensibility.[28] 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.[29] Where the sex-respecting rule imposes too great a burden on the regulated individual, the rule is found to be predicated on a "stereotype."[30] On the other hand, where the burden imposed by the rule is

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[25] United States v. Virginia (*VMI*), 518 U.S. 515, 572-74 (1996) (Scalia, J., dissenting).

[26] *Id.*

[27] For example, the informal workplace rule that was at issue in *Price Waterhouse v. Hopkins* was assimilationist rather than exclusionary. 490 U.S. 228, 251 (1989) (plurality opinion). In reviewing Ann Hopkins' application for partnership, a partner at Price Waterhouse communicated that the partnership preferred that female employees behave "femininely." Hopkins was negatively evaluated for failing to adhere to that informal rule. The rule at Price Waterhouse did not exclude women as a class from a category of employment (i.e., it was not that rule that only men could become partners). Instead, women at Price Waterhouse were asked to adhere to a specific gendered norm, while men at Price Waterhouse were asked to adhere to a different norm. *See infra* Section I.C. and note 116 (discussing *Price Waterhouse*).

[28] Assimilationist rules may require adherence to more than broad notions of masculinity or femininity; they frequently require adherence to caricatures of masculinity or femininity. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc) (involving rule that employees adopt a hyper-feminized presentation at work by teasing their hair and wearing specific kinds of makeup). *See infra* Section I.C.1. and Part III.

[29] *See, e.g., Jespersen*, 444 F.3d at 1109-10.

[30] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that a male-to-female transsexual firefighter who alleged that she was discriminated against in her employment for exhibiting "feminine" behaviors and appearance stated an actionable claim of sex discrimination under Title VII; the court specifically noted that the plaintiff had been diagnosed with Gender Identity Disorder); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc) (plurality opinion) (plaintiff's claim of sex discrimination under Title VII could go forward where plaintiff produced evidence that he was singled out for sexual harassment by members of his own sex; the court held that the fact that plaintiff was gay was irrelevant to the sex discrimination analysis).

adjudged reasonable in light of the rule's benefit, the fact that the rule is predicated on a nonuniversal—and, therefore, potentially "over broad"—gender generalization becomes immaterial.[31]

The combination of these three context-specific and consequence-based approaches to defining sex stereotypes has created uncertainty not only about which generalizations constitute stereotypes, but also, more importantly, about why gender generalizations are uniquely unjust or "discriminatory" as compared to other kinds of generalizations.[32]

To illustrate this point, consider the factual predicate of the Virginia Military Institute (VMI) policy of admitting only men.[33] In defending its admission rule against an equal protection challenge, VMI pointed to evidence that women were less likely to succeed in the type of adversarial educational environment that VMI provided.[34] According to VMI's experts, a non-spurious and nonuniversal generalization[35] 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.[36] In this light, in excluding women candidates, VMI merely drew a probabilistic distinction that was causally related to its purported goal of limiting admission to cadets who are most likely to succeed at VMI.[37]

Nonetheless, the Supreme Court concluded that, even assuming VMI's evidence were true, VMI's rule-predicate that "most women will not succeed at VMI" was insufficient to justify VMI's sex classification.[38] In articulating the insufficiency of the gender generalization that "most women will not succeed at VMI," Justice Ginsburg objected to the fact that the rule failed to provide an

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

[32] More specifically, there is uncertainty about why the use of these particular generalizations as rule-predicates is discriminatory. *See, e.g.*, SCHAUER, PROFILES, *supra* note 4, at 17 ("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* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 43 (2008) (describing the makeup 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).

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

[34] *Id.* at 540-41.

[35] A nonuniversal generalization may be statistically relevant but fail to obtain in every case. In contrast, an example of a universal generalization is Socrates' declaration that 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 (for example, "we should hire a woman instead of a man because all men are mortal," which falsely implies 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 a helpful explanation of the difference between universal and nonuniversal generalizations, see SCHAUER, PROFILES, *supra* note 4, at 27-48.

[36] *VMI*, 518 U.S. at 540-41.

[37] *Id.*

[38] *Id.* at 550.

opportunity for extraordinary women to defy, with their individual and particular strengths, the strictures of the general.[39]

Ginsburg's objection is intuitively appealing and may tempt us towards the conclusion that nonuniversality is the key to stereotyping analysis.[40] We might conclude, as Mary Anne Case does, that all nonuniversal generalizations that exclude women (or men) are "stereotypes" and therefore discriminatory.[41] 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.[42] 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.[43] Undoubtedly, each of the generalizations that form the factual predicates of these exclusionary rules is also over-inclusive.[44] 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 generalizations that exclude 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*.[45]

What makes the VMI majority's use of "sex stereotype" even more perplexing is the fact that *all* rules are predicated on nonuniversal generalizations.[46] 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.[47] Rules are, by nature, over- and under-inclusive.[48] Rules govern the general case and eschew individualized considerations.[49] 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 test-takers, and a slew of other imperfect proxies.[50] Where the reliance on a nonuniversal

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[39] *Id.* ("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.").
[40] *Id.*
[41] *See* Case, *supra* note 11, at 1457.
[42] Most commentators would agree that the animus-based exclusion of women is not a legitimate purpose for a sex-respecting rule.
[43] *See* SCHAUER, PROFILES, *supra* note 4, at 149.
[44] *See* SCHAUER, RULES, *supra* note 1, at 31-34.
[45] *See* SCHAUER, PROFILES, *supra* note 4, at 149.
[46] SCHAUER, RULES, *supra* note 1, at 17-18.
[47] *Id.*
[48] *Id.* at 31-34; SCHAUER, PROFILES, *supra* note 4, at 45-46.
[49] SCHAUER, RULES, *supra* note 1, at 31-34.
[50] *Id.*

generalization seems justified by the strength of the causal link between the predictive power of the generalization (e.g., "students with low SAT 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.[51] 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?[52]

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 of both our justice-conceptions and antidiscrimination law, even where they might be descriptively (i.e., 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 the 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. So what then is special about *gender* generalizations, and how do we know which gender generalizations are stereotypes?

This Article 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 Article demonstrates that the idea of "sex stereotype" is itself conceptually empty. Rather than using "stereotype" as a substantive standard, analysts have used the term "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 Article offers an explanation for the failure of the stereotype heuristic. The argument holds that while antidiscrimination law and theory have been rhetorically attentive to the *descriptive* dimensions of gender generalizations, both doctrine and theory in this area have 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 predicates for employer or legal rules.

This Article 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 revisability of those generalizations while reinforcing

[51] SCHAUER, PROFILES, *supra* note 4, at 131-54.
[52] *Id.*

their prescriptive dimensions. The Article concludes that these phenomena are what 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 proceeds in three parts. Part I examines the current method of using the stereotype heuristic to assess gender generalizations as rule-predicates and demonstrates how the heuristic fails. Next, Part II identifies and analyzes the prescriptive dimensions of gender generalizations. Finally, Part III considers the role that these prescriptive dimensions play in rendering gender generalizations objectionable as predicates for employer or legal rules.

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.[53] We know too that a stereotype is an "unfair" or "unjust" generalization: one that has either a spurious predicate (e.g., "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 a rule limiting the options of women with young children based on a nonuniversal and categorical generalization is unfair, even if the rule's predicate is statistically supported.[54] However, are we invoking a stereotype when we point to evidence that supports the generalization and then draw conclusions from it? If this

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[53] For a general discussion of the concept of "stereotype" in the context of sex discrimination, see SCHAUER, PROFILES, *supra* note 4, at 131-54.

[54] 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 for 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:

> mak[ing] 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 particulars.

SCHAUER, PROFILES, *supra* note 4, at 19-20. *See also* Case, *supra* note 11 (making the case that the Supreme Court embraces the view that fairness in the context of sex-respecting rules requires individualized decision-making).

generalization formed the factual predicate of a legal rule granting benefits to women with young children in order to decrease absenteeism, would the generalization, in that context, be considered a stereotype? Can a generalization with the same propositional content be a stereotype in one context but not in another?

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.[55] 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 type of unfairness that transforms a garden-variety nonuniversal generalization into a stereotype.[56] 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) nonuniversal and (2) otherwise unfair.[57]

Seen in this light, the concept of "stereotype" begins to seem like an empty idea.[58] To determine whether it applies, we must first have an affirmative principle of justice; then, if a particular generalization fails to meet the criteria set out 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 idiosyncratic methods for identifying "sex stereotypes." [59] Of these varied

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[55] 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. Excepted from this statement are generalizations that have spurious factual predicates (e.g., "women are bad drivers").

[56] SCHAUER, PROFILES, *supra* note 4, at 2-3.

[57] Ideas vary about what renders the application of a generalization "otherwise unfair." Sometimes 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* SCHAUER, PROFILES, *supra* note 4, at 19-21.

[58] 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[s]." *Id.* at 571-72. 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 J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982).

[59] 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

approaches, three are particularly prominent. First, courts originally were (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 statistically unsound generalizations are sex stereotypes.[60] Second, as Mary Anne Case has observed, some 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.[61] However, as mentioned above, each of these approaches has been the subject of critiques that are particularly salient in the context of sex-respecting assimilationist rules (e.g., rules that require women to behave femininely and men to behave masculinely).

In fact, because neither the "false generalization" nor the "perfect proxy" approach provides a helpful framework in the context of assimilationist 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 compels exclusion), courts have largely retained the rhetoric of the stereotype heuristic, while actually applying a balancing of equities approach to determine whether the rule is discriminatory.

Each of these methods of defining "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 that these false generalizations about women were disqualifying women from opportunities they might otherwise be equal to. Therefore, the first strike at gender generalizations was directed at

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> 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 Prod., 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring) (emphasis added).

[60] *See, e.g.*, United States v. Virginia (*VMI*), 518 U.S. 515, 540-44 (1995) (Scalia, J., dissenting).

[61] *See* Case, *supra* note 11, at 1457.

these "false generalizations." The following Sections discuss this method of defining sex stereotype as well as the degree to which this method still animates sex-stereotyping doctrine and theory.

1. Early Rule-Predicate Analysis

Early in the development of modern sex discrimination doctrine,[62] 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 that were rooted in nonuniversal generalizations about each sex. 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; 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.[63]

Thus, in assessing the potentially discriminatory components of a sex-respecting employer rule, courts first identified the rule's factual predicate and then 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");[64] and (2) gender generalizations that courts deemed non-fictional or "true" (i.e., "the average man is taller than the average woman").[65]

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."[66] These early sex-stereotyping cases generally involved the categorical exclusion of men or women from particular benefits or opportunities.[67] For example, an airline rule was invalidated that required stewardesses to be female and pursers, who received greater benefits, including

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[62] The phrase "modern sex discrimination doctrine" is used to signify both Equal Protection and Title VII doctrines 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 11, at 1463 (describing the relationship between Title VII's anti-sex stereotyping mandate and the reinterpretation of the Equal Protection Clause).

[63] City of Los Angeles v. Manhart, 435 U.S. 702, 707-08 (1978) (emphasis added).

[64] *Id.* at 707.

[65] *Id.*

[66] Frontiero v. Richardson, 411 U.S. 677, 685 (1973); *see also* Case, *supra* note 11.

[67] *See also* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (1971), *cert. denied*, 404 U.S. 991(1971) (holding that an airline's policy of employing married men but not married women violated Title VII and that 29 CFR § 1604.3(a), presently 29 CFR § 1604.4, was reasonable and consistent with Title VII).

a cleaning allowance, to be male.[68] The airline attempted to justify the male-only cleaning allowance by appealing to a widely-held belief about men and women: men and women enjoy different relationships to domesticity.[69]

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 predicates (e.g., women have a special affinity with or relationship to domesticity).[70] 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.[71]

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.[72] In these early rule-predicate cases, courts stopped short of using the epistemological tools of trial (i.e., the presentation of evidence) to determine whether the gender generalization that formed the predicate of a contested rule was "true."[73] Instead, courts described gender

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

[69] *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.

[70] In a related line of cases, courts were asked to evaluate practices in which customers' 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 (N.D. Tex. 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.

[71] *See supra* note 67.

[72] Courts, though, have not universally bowed before the challenge; indeed, Judge Posner continues to articulate his intuition-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 Prod., 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring). 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 might assume that he means "mannish" to indicate gender-nonconforming women. It may be that Judge Posner believes gender-nonconforming women to be physically larger than gender-conforming women. In any 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 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.

[73] Justice Scalia, however, 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. United States v. Virginia (*VMI*), 518 U.S. 515, 572-74 (1996) (Scalia, J., dissenting). *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769 (2003).

generalizations as spurious "stereotypes" based on judicial intuitions about the content of the generalization itself.

More significantly, however, an examination of these cases reveals that courts' conclusions about the permissibility of a rule's factual predicate turned not on 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, courts in practice 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 deemed a "stereotype." In other words, courts were applying a justice-based standard rather than assessing the validity or 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,[74] while tacitly approving more questionable predicates in other contexts. Thus, although courts were formally defining "stereotypes" as generalizations that were in some manner "untrue" or spurious, in practice courts were using the appellation "stereotype" to chastise generalizations that may or may not be statistically supported but were, in the courts' estimation, unfair as applied.[75]

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 (e.g., women drivers) nor clearly "true" (e.g., tall men).[76] As more gender stereotyping cases were brought and decided, the metrics by which the "accuracy" of gender generalizations could be assessed grew increasingly

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[74] In these early sex-stereotyping cases—particularly in the context of Equal Protection cases—courts were not moved to permit categorical exclusions even in instances in which defendants defended the statistical accuracy of a practice's factual predicate. For example, in *Manhart*, the city unsuccessfully defended its practice of requiring women to make more pension contributions than men by pointing to the fact 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. City of Los Angeles v. Manhart, 435 U.S. 702, 707-08 (1978). *See Case*, *supra* note 11 (describing how Equal Protection has never been satisfied by sex stratification that is justified solely with reference to statistical truths).

[75] *See supra* note 21 and accompanying text.

[76] *See, e.g.*, *Manhart*, 435 U.S. at 707.

elusive, and courts were forced to rely on idiosyncratic justice-based judgments about what constitutes a "false generalization."[77]

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 categorical exclusions was reached in *United States v. Virginia*,[78] which, as described above, challenged a policy excluding women from admission to VMI. 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 VMI; and (2) that most women would not choose to attend VMI given its adversarial pedagogical style.[79] VMI defended its exclusionary 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.[80] 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.[81] 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.[82] 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.[83]

While the majority held that VMI's sex-respecting rule violated the Equal Protection Clause, VMI's analysis found a friend in Justice Scalia. Justice Scalia agreed with VMI's argument that the definition of "sex stereotype" excludes statistically sound generalizations.[84] 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

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[77] *See supra* note 21 and accompanying text.
[78] United States v. Virginia (*VMI*), 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).
[79] 518 U.S. at 540.
[80] *Id.* 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).
[81] 518 U.S. at 540-44.
[82] *Id.*
[83] *Id.* at 549. The Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. *See* United States v. Virginia, 852 F. Supp. 471, 480-81 (W.D. Va. 1994)
[84] 518 U.S. at 572-74 (Scalia, J., dissenting).

accurately reflect states of the world.[85] Moreover, in Scalia's rendering, the evaluation of whether a generalization is rational or spurious is an empirical rather than a legal or conceptual question. To sort the spurious chaff from the rational wheat, Scalia would rely upon the epistemological procedures of trial.[86] Where the adversarial process reveals that the generalization is statistically sound, Scalia would hold that the generalization is not a stereotype and the application of the generalization is not discriminatory.[87]

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.[88] In this way, Scalia's definition of "sex stereotype" echoed courts' early "false generalization" rhetoric—although decidedly not courts' "false generalization" methodology.[89] Whereas earlier courts disallowed even statistically sound generalizations if the application of those generalizations resulted in categorical exclusions, Scalia would allow the categorical exclusion if the generalization is not spurious.[90]

Scalia's departure from previous courts' method of defining "stereotype" is not rooted 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 generalization that categorically excludes women from opportunities. While earlier courts were committed to a justice principle that provided individual women the opportunity to defy generalizations (regardless of whether they obtained in most cases), Scalia is committed to a justice principle that would allow lawmakers and employers to draw broad sex-respecting distinctions where those distinctions are predicated on "true" generalizations about men and women, where truth is determined by the epistemological procedures of trial.[91]

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 generations that earlier courts disallowed not because they were spurious but because they were "overly broad." As Mary Anne Case observed in her critique of Scalia's *VMI* dissent, "[e]ven a generalization demonstrably true of an overwhelming

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[85] *Id.* at 591. 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, "[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."

[86] *Id.* at 585-87.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

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 embodied a proxy that was overwhelmingly, though not perfectly, accurate."[92] Thus, Scalia's method of identifying sex stereotypes fails to capture—and indeed is inconsistent with—the justice-based judgments that early courts sought to apply by adopting the stereotype heuristic.[93]

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 was used as the basis of sex-respecting rules. For example, in *Reed v. Reed,* the Court struck 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 was 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 a competent estate administrator.[94] Because past discrimination played 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.[95]

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 render the Idaho estate-administrator rule non-arbitrary were caused solely by *de jure* discrimination.[96] Further, no causal link to past *de jure* discrimination is required for courts to find that these types of gender generalizations 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.[97] In fact, courts have consistently declined to reinforce the

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[92] Case, *supra* note 11, at 1450.
[93] 518 U.S. at 566-603 (Scalia, J., dissenting).
[94] SCHAUER, PROFILES, *supra* note 4, at 139.
[95] Similarly, courts have been disinclined to allow a sex-respecting rule to stand where its 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).
[96] Reed v. Reed, 404 U.S. 71 (1971) (holding that an Idaho statute that facially preferred men to women in the administration of estates violated the Equal Protection Clause).
[97] *Id.*

prescriptive dimensions of generalizations such as the one supporting Idaho's rule, even though the generalizations are *descriptively* valid.[98] 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.[99] While Scalia rhetorically embraced the false generalization standard but rejected the attendant justice-based method for assigning "falseness," Ginsburg's opinion embraced the justice principle from early cases but abandoned the rhetoric of "false generalization."[100] In finding that VMI's sex-respecting rule was based on impermissible generalizations about women, Ginsburg stated that even assuming that most women would not succeed at VMI, that fact does not justify "denying opportunity to women whose talent and capacity place them outside the average description."[101] 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.[102]

Mary Anne Case has persuasively described Ginsburg's analytic move as consistent with the Court's previous evaluations of sex-respecting rules that categorically exclude women.[103] 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 or 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)."[104] Case has further observed that courts have consistently disallowed gender generalizations that represent not

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[98] *See* Case, *supra* note 11, at 1449-53.
[99] United States v. Virginia (*VMI*), 518 U.S. 515 (1996).
[100] *Id.*
[101] *Id.* 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*, U. CHI. LEGAL F. 461, 469 (1999).
[102] *See* SCHAUER, PROFILES, *supra* note 4, at 131-54.
[103] Case, *supra* note 11, at 1452.
[104] *Id.* at 1449.

only imperfect proxies, but also "outdated normative stereotypes," a conclusion that returns us to the original problem: what makes a generalization a stereotype?[105] It surely cannot be the fact that the generalization is nonuniversal, since virtually all generalizations (and therefore all rule-predicates) are nonuniversal.[106]

Case is correct that *VMI* merely made explicit what had long been implicit in the Court's analyses, but she is mistaken about what the case exposed "lurking . . . just below the surface of the [Court's stereotyping] decisions."[107] Rather than revealing that the Court implicitly favors an "overbroad" definition of stereotype rather than a "false generalization" definition, as Case suggests, *VMI* reveals that the Court's attention long ago shifted from the descriptive *accuracy* of stereotypes (if, indeed, descriptive accuracy was ever an animating concern) and towards a less bounded assessment of whether the application of a sex-respecting rule is just. The rule-predicate in *VMI*, while nonuniversal, is not disallowed *because* it is nonuniversal (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, in the Court's view, it is unfair to *apply* the generalization in this context. 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 "fictional," nor is it obvious that the generalizations are uniquely "over broad." 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 focus 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

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[105] *Id.* at 1450.
[106] SCHAUER, PROFILES, *supra* note 4, at 1-25.
[107] Case, *supra* note 11, at 1448-50.

based not on the 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.

This category of claims first met with the "stereotype" standard in the Supreme Court in 1989.[108] In *Price Waterhouse v. Hopkins*,[109] the Court announced that a sex-stereotyping theory that challenges an employer's requirement that employees adhere to conventional sex-specific behavioral rules (i.e., that men behave in a manner that is consistent with masculinity and that women behave in a manner that is consistent with femininity) can form the basis of a sex discrimination claim cognizable under Title VII.[110] 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 disparate treatment of men and women resulting from sex stereotypes."[111]

Thus, in language harvested from the early sex-stereotyping cases, the Court reiterated that disparate treatment that results from sex stereotyping is discriminatory and that such discrimination occurs when employers negatively evaluate employees for failing to match stereotypes associated with their

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

[109] *Id.*

[110] *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 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 its 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." *Id.* at 235. 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 makeup, have her hair styled, and wear jewelry." *Id.* 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.

[111] *Id.* at 251 (quoting City of Los Angeles v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

groups.[112] In the case of *Price Waterhouse*, the "stereotype" associated with Ann Hopkins's group (women) was femininity (or attributes associated with femininity). 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.[113]

If Brennan's plurality opinion had stopped here, then *Price Waterhouse* would have seemed to embrace a perfect proxy definition of "stereotype."[114] After all, the generalization that women are (or should be) feminine is not obviously spurious.[115] Further, in defining this generalization as a "stereotype," the Court extended the doctrine's early justice principle because the stereotype at issue in *Price Waterhouse* did not result in the categorical exclusion of women from an opportunity. While women were not permitted to defy the generalization (as Hopkins had to her peril), women were permitted to adhere to the generalization and remain employed.

However, *Price Waterhouse* went on to explain—with Hellerian flourish[116]—what was especially unfair about Ann Hopkins's employment situation:

> 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.[117]

From the perspective of defining "stereotype," this catch-22 language illuminates nothing about the generalization in question ("women are (or should be) feminine"). Instead, it describes the *consequence* of applying the generalization in the particular context that Hopkins faced. If she defied the generalization, she would be 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 be successful

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[112] *Id.* at 254.
[113] *Id.* at 250-51.
[114] *Id.*
[115] 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.
[116] A catch-22 is a situation in which the criteria that must necessarily be met 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. Joseph Heller coined the term in his novel of the same name. JOSEPH HELLER, CATCH-22 (1961).
[117] *Price Waterhouse*, 490 U.S. at 251.

at Price Waterhouse.[118] 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.[119]

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 Hopkins's case, she was treated differently than a male accountant would have been treated (i.e., she was 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 traditional 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-wear is less rewarded than non-clown-wear. In this iteration, the unfairness of Hopkins'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 the system enjoyed by 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."[120]

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

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[118] *Id.*
[119] *Id.*
[120] Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

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."[121] 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 "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.[122]

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.[123] 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 not penalized for *being* a man or woman but are instead penalized 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 the 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 behave in a manner that comports with traditional notions of femininity because those behaviors bear the vestiges of past (or present) subordination.

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. *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 the rule does not disproportionately

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[121] *See* Case, *supra* note 11, at 1449-53.
[122] *Id.*
[123] *Id.*

burden one sex.[124] *PWI* is most often embraced when generalizations about masculinity and femininity seem benignly motivated (i.e., not motivated by an animus towards gender nonconforming individuals and/or homosexuals) and when the rule-generator (usually an employer) gains a benefit from the imposition of the rule.[125]

For example, the Ninth Circuit recently employed a *PWI* interpretation of *Price Waterhouse* in *Jespersen v. Harrah's Operating Co.*[126] In *Jespersen*, the sex-respecting rule at issue was Harrah's "Personal Best" grooming policy that required female employees to wear makeup and forbade male employees from doing the same.[127] Plaintiff Darlene Jespersen challenged the requirement, arguing that requiring her to conform to traditional notions of femininity constituted impermissible sex stereotyping under *Price Waterhouse*.[128] In an *en banc* decision, the Ninth Circuit disagreed. It determined that Harrah's rule did not place Jespersen in a double-bind because it did not require Jespersen to appear feminine while rewarding masculine appearance.[129] Taking the catch-22 language to be a criterion for finding a generalization about women and femininity (i.e., "only women wear makeup" or "women but not men should wear makeup") 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.[130] *Jespersen* provides a good example of the circumstances in which courts and commentators seem inclined to apply *PWI*: the sex-respecting rule seemed connected to Harrah's desire to attract customers rather than a desire to punish or harass employees who are gender-nonconforming.[131]

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[124] *C.f.* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) ("[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.").

[125] *Id.*

[126] *Id.*

[127] *Id.* at 1107.

[128] *Id.* at 1108.

[129] *Id.* at 1113 ("Jespersen's claim here materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.") The court also engaged in a disparate treatment analysis and determined that the Personal Best policy did not disproportionately burden female employees as compared to male employees. *Id.* at 1111-13.

[130] The court did state that if the grooming requirement indicated 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; the court concluded that the requirement constituted sex stereotyping. The Ninth Circuit, however, failed to explain why a requirement directed at sexualizing or sexually objectifying an employee constitutes "stereotyping" while a requirement directed at feminizing an employee does not.

[131] 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 the author's representation of Jespersen as Senior Counsel at Lambda Legal

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 nonuniversality 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.[132] *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 or non-masculine rather than simply "behaving" non-femininely or non-masculinely); (2) the rule-generator (again, usually an employer) does not seem to gain a generalized benefit (such as 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*,[133] 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." The court held that to require a male employee to behave and appear like a man—that is, masculinely—was to require the employee to comport with a stereotype.[134] Similarly, the idea that a male employee's appearance or behavior must accord 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*.[135] 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 not, in his coworkers' view, adequately behave like a man. The court found that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitute[d] ample evidence of gender stereotyping" [136] in *Rene*, but four years later the same court nonetheless concluded that Darlene Jespersen was not the victim of sex stereotyping, despite the fact that the gender generalization forming 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

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Defense); *see also* Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467 (2007).

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

[133] 378 F.3d 566 (6th Cir. 2004).

[134] *Id.* at 572.

[135] 305 F.3d 1061 (9th Cir. 2002) (en banc).

[136] *Id.* at 1068 (Pregerson, J., concurring).

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—where the court or commentator perceives the plaintiff to somehow "be" non-feminine or 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 (e.g., 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 (e.g., 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 that "men are masculine" is recognized as a "stereotype" even though it is not recognized as 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 axes. Where application of a sex-respecting rule in question categorically excludes men or women from a class of benefits or opportunities, courts and commentators apply either a "false generalizations" or "perfect proxy" definition of "stereotype." Similarly, where the sex-respecting rule does not result 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."[137]

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 improbable or that it will be difficult or 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).[138] 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

[137] The state or employer permits an avenue for gender assimilation when it allows candidates to try to meet sex-specific standards. The state or employer does not have to alter the standard to alleviate the need for assimilation.

[138] *See* Case, *supra* note 11, 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).

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 who are perceived to be homosexual.

So in defining "stereotype," courts and commentators split into a few justice-based camps: some hold the "sex stereotype" rhetorical line at spurious generalizations, while others embrace Case's "perfect proxy," and still others adopt a bifurcated approach that holds nonuniversal generalizations to be just in assimilation contexts but unjust in exclusionary contexts. 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 by 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. 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 of behavior. The factual predicate of each contested rule holds that men and women generally behave in predictable ways: men usually do not wear dresses (*City of Salem*);[139] women usually do not flourish in an adversarial environment (*VMI*);[140] women attend more often to domestic affairs than men do (*Laffey*);[141] and so forth. The stereotype heuristic has addressed these putative regularities as if courts and commentators were concerned about *whether* they exist, when in fact the concern driving the analyses was *why* they exist. Courts and commentators were disquieted not by the nonuniversality 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 were committed to not allowing legal or employer rules to further entrench, instantiate, or enforce these background social rules.

While the conceptual and doctrinal morass created by divergent 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-

[139] 378 F.3d 566 (6th Cir. 2004).
[140] 518 U.S. 515 (1996).
[141] 740 F.2d 1071 (D.C. Cir. 1984).

respecting rule-predicates. In criticizing the "antiquated" and "false" generalizations about men and women that served to justify 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.[142]

Towards this end, courts and commentators attempted to draw a line between gender generalizations that operated not only as *descriptive* generalizations (e.g., "women are shorter than men"), but also as *prescriptive* generalizations (e.g., "women are primarily responsible for domestic affairs") and other rule sets (e.g., an employer rule that disallows the hiring of married women but not married men).[143] 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 (e.g., 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.[144] 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 "over broad" 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

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[142] 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."

Kimberly Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004) (internal citations omitted).

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

[144] These doubts in turn give rise to 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 (e.g., men but not women receive housekeeping assistance), the concern is not that it is descriptively inaccurate or spurious but that the reason or justification for the underlying prescriptive rule which creates the regularity is inadequate to support a sex-based classification in a legal or employer rule, and therefore the proposition *ought not* be enforced or entrenched by legal or employer rules.

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 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 Article will consider this relationship between the prescriptive dimensions of gender generalizations and their role as rule-predicates. 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. 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.[145] 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 distinct phenomenon of gender rules, it is helpful to take a step back and first understand a little bit about the nature of generalizations and the structure of rules. As the ideas advanced here build upon Frederick Schauer's philosophical account of both generalizations and rules, a brief summary of those accounts follows.

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[145] *C.f.* SCHAUER, PROFILES, *supra* note 4, at 153-54 ("[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 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.[146] In *Manhart*, the Court described a dichotomy of "true" and "not true" or "fictional" differences between men and women.[147] 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.[148]

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.[149] 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."[150] 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 affect what we mean by "more" or "rain" or "Mobile" in other contexts. A purely descriptive generalization about rain in Mobile lacks the capacity to redefine the past, construct the present, or project into the future—in other words, it lacks prescriptive force.[151]

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[146] City of Los Angeles v. Manhart, 435 U.S. 702, 707 (1978). Although *Manhart* is often quoted in the context of sex-stereotyping analysis, the *Manhart* Court itself did not engage in 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.*

[147] *Id.*

[148] *Id.*

[149] Schauer uses the phrase "descriptive rule" to describe purely descriptive generalizations, which he takes to be generalizations 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 1-4.

[150] *Id.*

[151] When the Court identifies what it understands to be a purely descriptive generalization as the gendered predicate of a sex-respecting rule, it 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 and the purpose of the rule to ensure that the sex-respecting

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.[152] For example, the generalization "pitches in the strike zone are strikes" tells us which pitches count as "strikes" and which do not. Second, 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 to pitch into the strike zone *because* of the rule about pitches and strikes.

Further, the generalization can affect behavior in a third way, in that 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, or ethnicity are criterial with respect to strikes.[153] The generalization suppresses these properties as irrelevant to the category it defines (strikes).[154] 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.[155]

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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 (the imperative) is "substantially related" to the purpose of the rule. Craig v. Boren, 429 U.S. 190, 197 (1976). Examples of these purely descriptive generalizations have included: "women live longer than men," City of Los Angeles v. Manhart, 435 U.S. 702, 704 (1978), 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 (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 "essence" of the employer's business and that the imperative is the least restrictive 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 (1977)).

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," 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 directly to the desired quality.

[152] Constitutive rules are discussed in greater detail *infra* in Section III.C.

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

[154] *Id.* ("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.")

[155] The effect 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 ("Entrenchment makes the properties suppressed by a generalization less subject to recall on demand, and entrenched 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

On the other hand, the strike zone generalization emphasizes the physical placement of pitches, which renders this quality 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?

Schauer paints the role of generalizations in our decision-making lives in grand—but ultimately compelling—proportions.[156] "To generalize," states Schauer, "is to engage in a process that is part of life itself."[157] Without the ability to generalize we would lack the capacity to organize information in a way that permits us to discern patterns and draw meaning from particular attributes or events.[158] Generalizations help us organize complex and changing information into a format that is useful for making predictions about future events. 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.[159]

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.[160] If I am 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.[161] My colleague may point to particular examples of men who do usually wear dresses. In this instance, the plasticity of conversation will allow me to refine my proposition to better account for what Schauer describes as "recalcitrant experience": evidence that the generalization is flawed in a way that matters given the purpose of using the generalization.[162] 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; or it

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or perceive certain properties. For a fascinating account of this phenomenon, see Lera Boroditsky, *How Does our Language Shape the Way We Think?*, *in* WHAT'S NEXT: DISPATCHES ON THE FUTURE OF SCIENCE 116 (Max Brockman ed., 2009).

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

[157] *Id.* at 18.

[158] *Id.*

[159] SCHAUER, PROFILES, *supra* note 4, at 7-19.

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

[161] *Id.*

[162] *Id.* at 39 (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").

may show that the generalization suppresses qualities that are relevant to the conclusion drawn.[163] Here, the discovery of a man who does wear dresses is a kind of recalcitrant experience.[164] 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.[165]

The gender generalizations that form the predicates of sex-respecting rules, however, are not subject to this flexible "conversational model" of generalization-formation.[166] Instead, they exist within what Schauer describes as an "entrenchment model" of generalizations.[167] The concepts contained within the generalizations that form the factual predicates of sex-respecting rules have become "entrenched" in that they are sufficiently accepted by the relevant community[168] as guides for organizing information about the subject of the generalizations (here, men and women) such that they need not be asserted and endorsed conversationally to be identified or understood.[169] Instead, they are simply recognized by the relevant community as a method of organizing information about men and women.[170] 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" misunderstandings or misapplications with supplemental information, the 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 usually wear dresses.[171] Similarly, entrenched generalizations cannot be as sensitive to recalcitrant experience as non-entrenched generalizations.[172] When a non-entrenched generalization meets with recalcitrant experience, the conceptual contours of the generalization bend to account for the new information, and the new experience is accommodated.[173] Exceptions are made, and the generalization is fine-tuned.[174] However, when

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[163] *Id.*
[164] *Id.*
[165] *Id.* at 38-42.
[166] *Id.* at 39.
[167] *Id.* at 42-52.
[168] Here, the "relevant community" is the community affected by the sex-respecting rules that courts evaluate.
[169] SCHAUER, RULES, *supra* note 1, at 42-52.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 47.
[173] *Id.* at 42.
[174] *Id.* at 39.

an entrenched generalization meets with recalcitrant experience, the generalization resists amendment.[175]

Moreover, while all generalizations suffer from the kinds of flaws that are revealed by recalcitrant experience, these flaws are ossified when the generalization is treated as entrenched by a broad community of people, as is the case with social rules. When a community behaves as though the generalization were entrenched, the *fact* that the generalization is treated as entrenched becomes a *reason* to treat the generalization as entrenched.[176] In this way, because the practice of treating an entrenched generalization as entrenched becomes self-sustaining, the generalizations begin to operate with prescriptive force.[177]

In fact, when a particular community treats a generalization as sufficiently entrenched, the generalization begins to function as a type of social "rule"—that is, it begins to provide an independent reason for acting in conformity with the generalization.[178] At this stage, the degree to which the generalization serves a useful purpose (and serves that purpose well) becomes less significant than the fact that the relevant community accepts the generalization as entrenched. The relevant community treats the generalization as entrenched even in instances in which using the generalization to achieve a particular purpose seems to produce an incorrect result.

Thus, when an entrenched generalization operates as a social rule, the flaws of the entrenched generalization (e.g., its over-inclusiveness, under-inclusiveness, or emphasis of irrelevant qualities) become ossified. When new information calls into question the causal link between the scope of the generalization and the purpose of generalizing in the first place, the fact that the generalization is entrenched serves as an impediment to revising it. Similarly, when new information calls into question our purpose in generalizing in the first place (e.g., enforcing status or hierarchy), we continue to behave as though the generalization were justified (i.e., we behave as though the generalization is justified in light of the conclusion drawn or as though our purpose in generalizing itself is justified) even though we now have reason to believe that it is not.

The argument presented here holds that gender generalizations in particular exert this type of revision-resistant prescriptive force. Although our information and beliefs about men and women have changed dramatically over the last several decades, the gender generalizations that form the factual predicates of our sex-respecting rules resist revision, even where (as is often the case) the

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

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

[177] *Id.* at 49-52.

[178] *Id.*

purpose of generalizing along gender lines (e.g., to reinforce status or hierarchy) is no longer justified in light of our present beliefs. In other words, the argument here holds that gender generalizations are best understood as a distinct type of social rule: one that typically advances a socially disavowed purpose and is resistant to revision.[179]

Further, it is these three factors—(1) that gender generalizations are prescriptive; (2) that the purpose of generalizing along gender lines is often inconsistent with our publicly-held present beliefs (which thereby produces unjust outcomes); and (3) that gender generalizations resist revision—that both explain and justify courts' commitment to disallowing gender generalizations as the factual predicate of sex-respecting rules. Each of these factors is considered in more detail below.

B. Gender Generalizations as Social Rules

To explore the idea that gender generalizations function as a distinct 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. 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?

Part of the answer lies in 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).[180] A formulated rule can be reduced to a generally accepted proposition or set of propositions,[181] such as the Rule Against Perpetuities,[182] or the Golden Rule,[183] or the rule in baseball that the batter must stand within the batter's box during his time at bat.[184] Some formulated rules are mediated

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[179] In identifying gender rules as a distinct species of rule, I do not mean to suggest that gender rules are not social rules. Instead, I take gender rules to be a distinct *type* of social rule.

[180] *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 several 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 rules to provide a weaker entrenchment of the rule's generalizations, a point with which this argument is in accord.

[181] *Id.* at 62.

[182] 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 201 (4th ed. 1942).

[183] Although many versions of the Golden Rule (also known as the ethic of reciprocity) are found in different philosophies and religions, many believe Sextus the Pythagroean first articulated the Golden Rule 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."

[184] *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."

by an authority that arbitrates disputes about when and how to apply the rules (such as a court in the case of the Rule Against Perpetuities or the Major League Baseball Commission in the case of baseball). Other formulated rules are not mediated by such authorities. For example, no one institution or person is authorized to determine when or how the Golden Rule has been violated.[185] Importantly, the existence of both formulated and unformulated rules is 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.[186] However, formulated rules have an obvious advantage in this capacity: their very formulation provides evidence, although not conclusive evidence, that a rule exists.[187]

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."[188] Minimally, then, an unformulated rule is evidenced by a convergence of behavior that indicates that a rule exists.[189] Therefore, to demonstrate that a gender rule exists, we must demonstrate that the relevant community *behaves as though* a rule exists.

In exploring this idea, let us consider an application of the generalization we have been discussing: men do not usually wear dresses. Consider the iconic train platform scene in the 1959 film *Some Like It Hot.* In the scene, Jack Lemmon wears a dress and heels and wobbles down a train platform to comedic effect.[190] The joke in the film relies upon a non-obvious understanding of the following proposition: men do not wear dresses.[191]

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 required to get the joke.[192] The audience demonstrates its knowledge by grasping the joke, but the audience has not necessarily

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[185] 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.

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

[187] Thus, for example, if Rule 2.00 of the Official Rules of Major League Baseball remained on the books but players ceased to observe it and could do so without sanction, it would no longer be accurate to describe it as a rule.

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

[189] 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 existence condition.

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

[191] The proposition might just as easily be: men do not usually wear dresses. These formulations are used interchangeably through this piece. *See* SCHAUER, RULES, *supra* note 1, at 71; *supra* note 3 and accompanying text.

[192] For a philosophical discussion of the criteria that must be met for one to grasp a joke, see TED COHEN, JOKES (1999).

demonstrated knowledge of a particular proposition.[193] After all, the audience does not have to *believe* the proposition to be true to get the joke nor does the proposition need to *be* true (indeed, it is not true in the film).[194] Thus, to grasp the joke it is not sufficient to know a fact about the world (i.e., that men do not usually wear dresses) because a fact about the world, even if true (and/or understood probabilistically), does not explain what is funny about this instance in which a man does wear a dress.[195]

Similarly, the audience's understanding of the joke is not dependant upon a particular normative belief about the relationship between men and dresses. To understand the joke, the audience need not believe that Jack Lemmon *should* refrain from wearing a dress. Instead, the audience demonstrates the ability to apply the generalization in a way that makes sense of the scene.[196] The ability the audience demonstrates is much more sophisticated than a mere understanding of the proposition that underlies it.[197] In laughing at Lack Lemmon, the audience demonstrates that it knows the rules of a particular gender game and that it has mastered the technique of applying them.[198]

So, recalling that unformulated rules are evidenced by our practices and, specifically, by the convergences or regularities in our behavior that are formed by the observation of a shared social rule, consider the train platform scene in the following light. In communicating his joke through the visual depiction of Lemmon in a dress, the filmmaker relies on two convergences of behavior: (1) the convergence of behavior that is reflected in the proposition that men do not

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[193] 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 MIND (1949).

[194] 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 4, at 1-25.

[195] *See* COHEN, *supra* note 192. 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 unusual 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 Lemmon on the train platform.

[196] 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* G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 41 (2d ed. 2005) (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").

[197] As discussed in more detail *supra* in Part 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 R. SEARLE, SPEECH ACTS 33 (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"). 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 are versed in the rules of the game, the filmmaker is able to make a "move" that has gendered significance (in this case, humor) the same way that the rules of chess permit a chess-player to make a move that signifies checkmate.

[198] For an interesting, if controversial, discussion of what it means to master the application of constitutive rules, see LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR (1974).

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.[199] 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.[200] An examination of how gender generalizations function as both regulatory and constitutive social rules follows below.

1. Gender Rules as Regulatory Rules

When people follow rules, behavior becomes regularized.[201] Individuals acting in conformity with a rule behave in predictable ways that we can accurately describe in generalities.[202] For example, observation of a rule that class begins at eight o'clock produces a behavioral uniformity: a classroom full of people 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.[203] 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).[204]

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 with domesticity," "men are more suited to be estate administrators," and "men do not wear dresses") are propositions that describe regularities of behavior with varying degrees of accuracy, ranging from spuriousness to near universality. These behavioral regularities can be

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[199] SCHAUER, RULES, *supra* note 1, at 6.
[200] *Id.* at 6-7.
[201] *Id.* at 112-15.
[202] *Id.*
[203] *Id.*
[204] *Id.*

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).[205] For behavior to be described as rule-guided, individuals who behave in conformity with the rule must do so because of the rule, not simply because the strictures of the rule coincide with the individuals' own reasons for acting.[206]

In other words, as Schauer succinctly restates Joseph Raz, rules are reasons for action.[207] Or, more specifically, rules provide an independent reason for action.[208] Rules apply 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.[209] Thus, the key to engaging in rule-guided behavior (as opposed to acting out of habit or for our own independent reasons) is that the normative pressure of following the rule provides a reason for engaging in behavior that we otherwise would not.[210]

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.[211] For example, assume that 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 and not drive my usual route because the reason that I engage in the behavior (because 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" ("drive the same way to work each day") does not apply normative pressure to my behavior independent of the reason for the rule (getting to work faster).[212] When circumstances are altered such that the reason for the regularity in behavior no longer applies to the new circumstances, I

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[205] Alternative explanations are also possible. A second explanation would be that the regularity is purely the product of non-volitional forces (e.g., intrinsic dimensions of the non-human world or physiological phenomena beyond an individual non-dress-wearer's control).

[206] SCHAUER, RULES, *supra* note 1, at 113 (noting that 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 existence of the rule is among the reasons we behave in conformity with it. *Id.*

[207] SCHAUER, RULES, *supra* note 1, at 4; JOSEPH RAZ, *supra* note 1, at 51. *See also* HART, *supra* note 2; H.L.A. HART, DEFINITION AND THEORY IN JURISPRUDENCE (1953).

[208] SCHAUER, RULES, *supra* note 1, at 112-18.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 51.

[212] *Id.* at 64, 113.

apply the reason for my action directly to the situation and abandon my regularity (by taking the alternative route to work). Therefore, I am not engaged in rule-following behavior.

Compare this with my observation of the speed limit on my way to work each morning. Assume I obey the imperative of the rule that "drivers' speed must not exceed thirty-five miles per hour" when I drive my usual route to work.[213] On the hypothetical day that I alter my route, I will still obey this imperative, even if I believe that I could safely exceed thirty-five miles per hour because the alternative route is less hilly. Although the circumstances have changed (I am driving on a road better physically suited to increased speed), I will persist in obeying the imperative of the generalization that drivers' speed must not exceed thirty-five miles per hour because among the reasons that I observe the rule is the *fact* that it is a rule.[214] The rule provides an independent reason for limiting my speed, and this independent reason has its own normative force (which may include fear of sanction, concern that other drivers will disapprove of my action, and so forth).[215] Because of the normative force attendant to the speed rule, I drive thirty-five miles per hour even when my other reason for doing so (safety) no longer obtains. Therefore, I am engaging in rule-following behavior.[216]

Similarly, the fact that men usually do not 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 practice of not wearing dresses, even if circumstances might otherwise recommend dress-wearing.[217] If the normative force that issues from the existence of the regularity (e.g., expectation of conformity, fear of sanction for nonconformity, or the desire to avoid being perceived as playing a "gender game" other than the one associated with maleness or masculinity) is sufficient to cause an individual to act in conformity with the regularity when he might otherwise 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.[218]

To explore the possibility that gender rules supply an independent reason for acting in conformity with the imperative of the rules, 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 interested in is not a particular man's decision to not wear a dress but instead the convergence of

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[213] *See* LEWIS, *supra* note 1, at 22 (discussing rule-following in the context of speed limits).
[214] *Id.*
[215] SCHAUER, RULES, *supra* note 1, at 112-18.
[216] *Id.* at 64-68, 112-18.
[217] LEWIS, *supra* note 1.
[218] *Id.*

behavior that results in the fact that most men do not wear dresses. Would men still refrain from wearing dresses if there were no longer an expectation that they 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."[219]

Moreover, this blind following attends gender rules beyond those that govern gendered dress and deportment. When we examine 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 financially dependent on a spouse;[220] women have a special relationship to domesticity;[221] women are more likely to miss work to care for children;[222] women are paid less for the same work;[223] women are less likely to become partners than similarly situated men;[224] and so forth. Each of these nonuniversal but statistically sound generalizations articulates a regularity of behavior (with varying 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 the fear of social sanction, but also reasons related to facts that result from the regularity such as a lack of alternative means for achieving a 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 even why it might be socially helpful to have that expectation regularized, but it is difficult to identify the purpose of drawing the distinction

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[219] For a discussion of the practice of rule-following in the absence of an identifiable purpose ("justification" in Schauer's and Wittgenstein's locutions), see WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 4, at § 201.

[220] Frontiero v. Richardson, 411 U.S. 677, 681 (1973).

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

[222] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (holding that a 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).

[223] 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).

[224] *See* Paula Nailon, *Perceptions of Partnership*, Program Handout at ABA YLD, Miami Spring Conference (May 2005), *available at* http://www.abanet.org/yld/elibrary/miami05pdf/Perceptionof Partnership.pdf.

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 an older person or between a person in a 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 on our sense that the hierarchical relationships they delineate are justified.

In the case of gendered regularities of behavior, our sense that gendered hierarchical relationships are justified has ebbed (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.[225] As a consequence of this unmooring, gender rules are situated in a precarious justificatory posture, at least by antidiscrimination law's lights.

2. Gender Rules as Constitutive Rules

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."[226] The paradigmatic example of constitutive rules is the rules of a game. To illustrate this point, imagine that you ask me to play a game of tennis. I agree, but 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, then 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 because 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

[225] Some readers may contest the proposition that prescriptive gender generalizations, on the whole, delineate hierarchical relationships rather than merely distinguish relationships (i.e., "male" versus "female" or "feminine" versus "masculine"). 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.

[226] SCHAUER, RULES, *supra* note 1, at 6. *See also* Rawls, *supra* note 5, at 25-28.

tennis transform the behavior of hitting a ball with a racket into the activity of tennis. In other words, 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 an appropriate gender move.[227] Knowledge of the generalization "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 in the *Some Like It Hot* example, we can identify the existence (if not the formulation) of a "men do not wear dresses" rule because we have identified that the audience must necessarily *know how to apply the rule* in order to get the joke. The existence of a rule and the audience's knowledge of the rule both 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.

In this way, gender rules possess constitutive force even in instances in which the rule itself is not obeyed in the regulatory sense. Jack Lemmon, 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 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 describing 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 (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 connections 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 system of possible connections (e.g., "if man, then no dress"). This is a necessary but not sufficient

[227] For a potentially analogous account of how pornography sets sexual conventions and determines what counts as appropriate sexual "moves," see RAE LANGTON, SEXUAL SOLIPSISM 25-63 (2009).

condition for discerning the "correct" gender-generalization-based connections in a given context.

When we demonstrate with our behavior that we have grasped the rule (e.g., by laughing at Jack Lemmon), we demonstrate an ability that is independent of both 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 structured into propositional phrases (e.g., "men do not wear dresses") or, as is much more often the case, those understandings are made manifest in our behaviors. We are able to move fluidly from film-image to reaction without considering the underlying proposition ("men do not wear dresses"), much less evaluating 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.

III. GENDER RULES AND REVISABILITY

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 predicates of sex-respecting rules. Assuming that the subset of gender generalizations that have been described heuristically 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: (1) we follow gender rules because they are rules, although in most instances we have publicly disavowed their original purposes, which leads to undesirable outcomes; 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 an independent reason to act in conformity with the background rule.[228] The former point having been explicated above, this Part will discuss the latter.

A. The Commitment to Revisability

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 persist in imposing their revealed flaws (e.g., the emphasis of an irrelevant property or the suppression of a relevant

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

one) on future decision-making.[229] Even in the face of newer and better information, we treat gender generalizations as entrenched, and consequently our gender rules resist revision.

This is not to say that gender rules are unrevisable. On the contrary, clearly there are different gender rules in force today than were in force in the nineteenth 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 also 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 or relevance 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 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 rules. Why don't 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.[230] Indeed, while gender-rule breakers were once vulnerable to penalties such as the loss of property, child custody, employment, and even the loss of personal freedom, increasingly courts and Congress have acted to remove both legal and employer sanctions from the array of penalties that attend gender-rule violations.[231] Once legal and employment penalties are disallowed, social opprobrium becomes a lonely constable and the possibility of revisiting the rule becomes less remote.

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[229] *Id.* at 47.
[230] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[231] *Id.*

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.[232] 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 women who played basketball were engaging in a type of gender-nonconforming behavior.[233] However, after Title IX fostered the proliferation and success of women's collegiate basketball programs, our judgments about whether women's basketball playing "counts" as gender-nonconforming behavior are undermined.[234]

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 the 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 rule's predicate.[235] 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 to which we shall return 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 makeup" or a legal rule like "women cannot be

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[232] *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 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; 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).

[233] For a discussion of gender constitutive rules in the context of sports, see EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS (2007); *see also* Robert Lipsyte, *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, 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.'").

[234] Education Amendments of 1972, 20 U.S.C. § 1681-88 (2006).

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

estate administrators") to *further entrench* the gender generalization that forms its factual predicate.[236] A consideration of this phenomenon follows.

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.*[237] In transgressing 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.[238] The desire to avoid the sanction that independently attends Price Waterhouse's rule that "women must be feminine at Price Waterhouse" supplies an independent reason for complying with the background gender rule.[239]

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 its 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 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 of Price Waterhouse's rule *depend* on 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 sex-respecting requirement be justified in light of some defensible 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 from the process by which the background gender generalization is itself both entrenched and—more significantly—revised. The manner in which a legal or employer rule functions

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[236] SCHAUER, RULES, *supra* note 1, at 74 (explaining that formal rules can either treat their factual predicates as entrenched or defeasible).
[237] 490 U.S. 228 (1989).
[238] *Id.*
[239] *Id.*

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, are 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 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).[240] To explore the mechanics of these component parts, let us consider again the employer rule that was at issue in *Jespersen*.[241]

As discussed above, the putatively sex-stereotyping practice at issue in *Jespersen* concerned Harrah's "Personal Best" grooming policy that required female employees to wear makeup and forbade male employees from doing the same. In fact, not only did the casino require its female employees to wear makeup, 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,[242] such that compliance with the policy resulted in the construction of a hyper-feminized self-presentation.[243]

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[240] 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 or morally justified, I refer to the rule's aim as its purpose. SCHAUER, RULES, *supra* note 1, at 26; *see also supra* note 8 (distinguishing connotations of "justified" in the context of rules).

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

[242] The "Personal Best" policy imposed the following mandatory requirements on female 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.
- Makeup (face powder, blush, and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.

Id. at 1114.

Further, to aid its female employees in, assumedly, achieving their "personal best," Harrah's hired at considerable expense a makeup consultant who met with each female employee and demonstrated for each employee how she should apply the requisite makeup. 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. Avery & Crain, *supra* note 11, at 46, 76.

Harrah's "Personal Best" policy asked 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.

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

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 interpreted in *Price Waterhouse*.[244] 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 burdened female employees compared with male employees.[245] Concluding that the rule placed equal burdens on both male and female employees, the court held that the policy did not constitute discriminatory sex stereotyping.[246]

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 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 makeup; (2) female employees *must* wear makeup; and (3) female employees must wear *a lot* of makeup.[247] However, to 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 Personal Best rule. The reason for the rule is, literally, the reason why Harrah's adopted the rule.[248] This is a causal claim.[249] 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.[250] However, it is useful to examine 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, meaning in this instance a uniform set of grooming requirements. In claiming that uniformity is the reason for its rule, Harrah's is likening its rule to a driving-on-the-right-side rule: while it does not matter whether all motorists drive on the right side of the

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

[245] *Jespersen*, 444 F.3d at 1104.

[246] *Id.* at 1112.

[247] 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 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).

[248] *Id.* at 23.

[249] *Id.*

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

road or the left, it matters very much that all motorists drive on the same side of the road. Here, Harrah's claim is that 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 makeup would provide a more sensible fit with this goal.

Readers may object here, noting that asking *all* employees to wear makeup 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 makeup rule? Here we begin to see the usefulness of the thinking-in-slow-motion approach offered by a rule-centered analysis. When we examine the rule's assumptions at this level, we realize that a background rule (which, being gender-rule conversant, we would otherwise reflexively apply) is required to make sense of the sex-differentiation in this context. When we examine the connection between the imperative of Harrah's rule and the reason offered by Harrah's for having the rule, we learn what we already know: that usually only women wear makeup.[251] The gender generalization "usually only women wear makeup" 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 may have been interested in creating uniformity among its female employees and another kind of uniformity among its male 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.[252] 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 makeup.[253] Uniformity would be

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[251] Judge Kozinski also questioned the factual predicate of this imperative. In his dissent, 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 1118 (Kozinski, J., dissenting).

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

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

more easily achieved by a rule that women cannot wear makeup at Harrah's (or, as already suggested, that no one can wear makeup at Harrah's). The uniformity reason leaves us with a second unsatisfied question: why makeup?

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 makeup. Even if our first two questions were adequately addressed, this imperative leaves us wondering: why *so much* makeup?

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 women or harass people who do not conform to gender rules—instead, the purpose of the rule is to attract customers.[254] 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 as 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 makeup at Harrah's") depends: usually only women wear makeup. But the second imperative ("women *must* wear makeup") also reveals a factual predicate: makeup (or potentially the absence of makeup, as the rule could be understood to avoid the evil of women like Jespersen appearing without makeup at work) *signifies* something about the wearer.[255] A thorough analysis of exactly *what* makeup or the absence of makeup 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 makeup would signal something about those employees that would please customers. Harrah's, then, was exploiting a *constitutive* gender rule: the presence of makeup on women "counts" as something or communicates something in the same way 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 created an understanding with the film's audience.

The third imperative of the Personal Best policy (women must wear a *lot* of makeup) 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

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[254] Harrah's crafted the rule to increase brand-recognition so that it could attract more customers. *See* Avery & Crain, *supra* note 11, at 66.

[255] *See, e.g.*, HELLMAN, *supra* note 32, at 43.

rule requires women to tease, curl, or style their hair, apply face powder, mascara, and rouge, and wear lip color at all times.[256] To aid us in identifying the contours of the factual predicate of this imperative, let us imagine the rule was imposed not by a casino but by the Supreme Court. A rule that demands that Justices 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 rather than Jesperson rather tease her hair 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.[257] 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 makeup 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 that "women in the service industry are (or should be) hyper-feminine."[258] When we walk into Harrah's casinos we encounter 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 (in light of some inherent difference between men and women) or as merely conventional and therefore not requiring justification beyond the fact that they are merely our practices.[259] For example, Harrah's rule does not supply a reason (independent

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

[257] Interestingly, the appropriateness of men's gendered expressions seems much less tied to class context. 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 Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

[258] 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); and Pizer, *supra* note 131.

[259] The Harrah's rule-component exercise teaches us an interesting lesson: once we understand that the reason for and justification of a gender rule (e.g., men do not usually wear dresses) is distinct from the reason for and justification of the employer rule that adopts the gender generalization as its factual predicate (e.g., 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). The underlying sex classification, however, can and *does* play an essential role in justifying the employer's rule.

of the background gender rule) for the distinction that only women can wear makeup. 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 a social practice. Harrah's rule instantiates gender rule imperatives as if they require 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 makeup" 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 distinctions and in doing so treats those distinctions as though they do 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.

2. Revisability and Formal Rules

The 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 false. For example, a male bartender at Harrah's might decide to conform to Harrah's no-makeup rule to save his job, while in the absence of Harrah's rule he would have worn makeup to work. His conformity at work, however, appears from the outside to be indistinguishable from conformity with the background gender rule ("only women wear makeup"). In this example, Harrah's rule 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 makeup.

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 appears arbitrary and senseless absent an understanding of background gender generalizations about women, makeup, 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 such as 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 and pressuring behavior to conform to its endorsement. In so doing, Harrah's rule has the effect of dominating (or participating in a larger commercially-driven convergence that dominates) our gender-constituted conversations about women, femininity, and casino-type environments.

Finally, Harrah's rule is both formulated and revised by a process that is distinct from the process that forms and revises the background generalizations it instantiates. For example, the women-only makeup 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 makeup rule as long as it serves Harrah's purpose of attracting customers. The process by which other evidence supporting a gender rule is undermined (i.e., the presentation of recalcitrant experience) need not affect 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"[260] notions about men and women.

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

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 (e.g., by prohibiting employers from conditioning

[260] United States v. Virginia (*VMI*), 518 U.S. 515, 586 (1996) (Scalia, J., dissenting).

benefits on the assumption that women have a special relationship to domesticity). The judgment then that antidiscrimination law must then make is when the obstruction of the revisability of a particular gender rule is tolerated by the law and when it is not.

However, in making these judgments, 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 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 an accounting firm 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 makeup and teased hair say about qualities like intellectualism and seriousness.[261]

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 gendered qualities "count" as being 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 is brought into new relief. Our settled understandings of these relationships consequently are either pressured or confirmed.[262]

Moreover, it may be the case that our antidiscrimination 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

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[261] *See* Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J. L. & GENDER 99 (2006) (describing the hierarchical ordering of gender roles).

[262] In this sense, 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.

gender rules regarding male gender expression tend to be relatively stable across class and status contexts, do sex-respecting rules that identify what "counts" as an appropriate "type" of woman according to class and status contexts define women or confine women's opportunities in a way akin to rules concerning other types of behavior restrictions (e.g., women and domesticity)? Does the fact that women can be required to assimilate to male norms in some contexts but are not permitted to escape femininely-associated norms in others suggest or even instantiate implicit notions about where women belong, which "type" of woman is 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?[263]

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-clearing process, new gender games are emerging, and antidiscrimination law and theory must remain cognizant of the role they necessarily play 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" (e.g., "women have a unique relationship to domesticity") and not others (e.g., "women in the service industry are (or should be) hyper-feminine, while white-collar professional women are not (or should not be)") affects the degree to which new and potentially disquieting gender rules emerge.

CONCLUSION: ELIMINATING THE "STEREOTYPE" HEURISTIC

The concept of "sex stereotype" is analytically empty. While the heuristic was once helpful in articulating then-nascent objections to the use of legal and employer rules to impede the revision of potentially unjustified gender rules, courts and commentators are now equipped with sufficient knowledge about the prescriptive dimensions of gender generalizations to abandon the heuristic and apply 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

[263] 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 261.

and masculinity with limiting conceptions of competence and 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.