

Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law

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As the legal mechanisms supporting the antidiscrimination principle¹ have developed, a system of heightened judicial protection for disempowered minorities or "suspect classes" has emerged as a powerful tool.² Legally recognized suspect classes include classes defined by the characteristics of race,³ ethnicity,⁴ and, to somewhat lesser extents, gender,⁵ alienage,⁶ and illegitimacy.⁷ American law has made great strides in recognizing and protecting suspect classes defined by a single characteristic (such as race), and also in protecting "double-suspect classes," that is, classes defined by a combination of suspect characteristics (such as race and gender).⁸ A significant problem still remains, however, regarding the appropriate legal response to cases that involve a combination of suspect and non-suspect characteristics. For example, a claim of discrimination against overweight women would involve a combination of gender, a suspect characteristic, and weight, a non-suspect characteristic. The thesis of this Current Topic is that an ostensibly non-suspect characteristic may be transformed, through a process of stereotyping, into a vehicle for discrimination against a suspect class. For instance, stereotypic images of women may dictate a narrower range of acceptable body weights for women than for men, and women whose weight exceeds the acceptable range may suffer a form of

1. For a discussion of the meaning and structure of the antidiscrimination principle, see Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 108-17 (1976). See also Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1 (1976).

2. For a discussion of theories regarding the central function of suspect classification doctrine, see Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 344-55 (1987).

3. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

4. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954).

5. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

6. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971).

7. See, e.g., *Pickett v. Brown*, 462 U.S. 1 (1983); *Lalli v. Lalli*, 439 U.S. 259 (1978).

8. See Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, *forthcoming in* 24 *Harv. C.R.-C.L. L. Rev.* (1989).

stigmatization distinct from that suffered by overweight men.⁹ In such a case, the non-suspect characteristic, weight, is transformed into a discriminatory criterion.

Current antidiscrimination law lacks a comprehensive theory under which to recognize discrimination stemming from such stereotypic transformation of a non-suspect criterion. This Current Topic offers a theory for consistent legal cognition of that form of discrimination. This theory is based upon a recognition that the stereotypic meaning of characteristics may be transformed by their combination with other characteristics and that, through that transformative dynamic, even a non-suspect characteristic may function as a discriminatory criterion.

Section I discusses transformative stereotyping of double-suspect classes (such as black women). Section II examines transformative stereotyping involving a combination of suspect and non-suspect characteristics (such as overweight women). Section III explores the special problems raised when the transformed non-suspect characteristic is a personality trait (such as "pushy" women). Finally, Section IV demonstrates that the two traditional modes of establishing liability for discrimination, disparate impact analysis and discriminatory treatment analysis, are readily applicable to discrimination stemming from transformative stereotyping.

I. Transformative Stereotyping of Double-Suspect Classes

Legal recognition of double-suspect classes, that is, classes defined by a combination of suspect characteristics, is now relatively unproblematic.¹⁰ Federal courts have recognized that a double-suspect class is, *a fortiori*, a suspect class.¹¹

For example, in *Jefferies v. Harris County Community Action Association*,¹² the class "black women" was recognized as a distinct suspect

9. See *infra* text accompanying notes 24-31.

10. In the past, some courts declined to recognize double-suspect classes as distinct suspect classes and allowed a defendant successfully to defend against claims of discrimination involving a double-suspect class (e.g., black women) by showing that he or she did not discriminate against each of the constituent classes (blacks and women). See, e.g., *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480, 484 (8th Cir. 1977). That approach has not prevailed.

11. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1986); *Graham v. Bendix Corp.*, 585 F. Supp. 1036 (D. Ind. 1984).

12. 615 F.2d 1025 (5th Cir. 1980).

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class. Jefferies brought a Title VII¹³ discrimination action against the Harris County Community Action Association (HCCAA) alleging that HCCAA, in denying Jefferies's application for promotion to a "field representative" position, had discriminated against her "because she is a woman . . . and because she is Black."¹⁴ The Fifth Circuit Court of Appeals observed that "discrimination against black females can exist even in the absence of discrimination against black men or white women."¹⁵ The Fifth Circuit was correct in pointing out that discrimination against a double-suspect class (such as black women) can exist even in the absence of discrimination based on the constitutive characteristics of that class (such as blackness or femaleness). Such particularized discrimination is possible because discrimination is mediated by stereotyping. Stereotypes function as the interpretative step between an individual's perception of a given characteristic, e.g., race, and the individual's discriminatory behavior on the basis of that characteristic. Because the stereotype of a double-suspect class may be distinct from the stereotype of either of its constitutive classes, the double-suspect class may be subject to discrimination distinct from that suffered by its constitutive classes.

To put this point differently, stereotypes are characterizations of a group.¹⁶ Those characterizations define the "appropriate," often discriminatory, response to members of the stereotyped group. If you ask a person who is prejudiced against blacks why she dislikes or fears blacks, the answer is unlikely to be: "They're black." Rather, the more likely response is a description of the stereotypic characteristics—particularly the personality characteristics—of blacks. These stereotypic characterizations purport to justify the subsequent discriminatory treatment of blacks.¹⁷ For example, a characterization such as "blacks are violent" might be the basis of an individual's fear of blacks and preference not to live in a neighborhood with blacks. In this way, stereotypic characterizations provide

13. Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982).

14. *Jefferies*, 615 F.2d at 1029.

15. *Jefferies*, 615 F.2d at 1032. On appeal after remand, the Fifth Circuit affirmed the District Court's holding that, even when the class "Black women" was considered a distinct suspect class, the particulars of Jefferies' case did not make out a sustainable Title VII claim. See *Jefferies v. Harris County Community Action Ass'n*, 693 F.2d 589 (1982).

16. See Miller, *Historical and Contemporary Perspectives on Stereotyping*, in *In the Eye of the Beholder* 29 (A. Miller ed. 1982) (discussing various definitions of stereotyping).

17. See LeVine & Campbell, *Ethnocentrism* 158 (1972); Morris & Williamson, *Stereotypes and Social Class: A Focus on Poverty*, in *In the Eye of the Beholder* 448 (A. Miller ed. 1982).

the cognitive connection linking the group characteristic (race) to discriminatory treatment of that group.¹⁸

In a double-suspect class stereotype, the stereotypic meaning of each of the characteristics defining the class is transformed by its combination with the other constitutive characteristics. That transformation produces a new and distinct stereotype specific to the double-suspect class in question. For example, the stereotypic meaning of "Jew" (usually a male image)¹⁹ is transformed when Jewishness is combined with femaleness.²⁰ The stereotype of "a Jew" (e.g., Shylock²¹ or Portnoy²²) is different from that of a Jewish woman (e.g., Shylock's daughter or Portnoy's mother).

Similarly, the stereotypes attached to the double-suspect class "black women" are specific to that double-suspect class; they are not just the sum of the stereotypes attached to the constituent characteristics black and female.²³ It is *because* the stereotypes of double-suspect classes are distinct from those of their constitutive classes that, in *Jefferies*, HCCAA could be willing to hire both women and blacks, but not black women, as field representatives. The stereotypic meaning of each constitutive characteristic is transformed when the characteristics are combined in a double-suspect class.

18. The Supreme Court has recognized the need to address the phenomenon of stereotyping in order to deal effectively with the problem of discrimination. Writing for the Court in *Mississippi Univ. for Women v. Hogan*, Justice O'Connor noted, "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." 458 U.S. 718, 725 (1982). In a recent gender discrimination case, the Court commented on its holding by observing that, were it to hold otherwise, "the problem of subconscious stereotypes and prejudices would remain." *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2786 (1988). The Court thus expressed its concern with the role of stereotyping—even unconscious stereotyping—in discrimination.

For a discussion of the largely unconscious nature of stereotyping and the implications of unconscious prejudice for antidiscrimination law, see Lawrence, *supra* note 2.

19. See G. Rothbell, *The Case of the Jewish Mother: A Study in Stereotyping*, ch. 9 (unpublished Ph.D. dissertation, S.U.N.Y. at Stony Brook) (1988).

20. *Id.*

21. See W. Shakespeare, *The Merchant of Venice* (Oxford University Press, 1957).

22. See P. Roth, *Portnoy's Complaint* (1967).

23. For example, in contrast to the stereotype of black men as lazy and shiftless and the stereotype of JAPs, see *infra* note 47 and accompanying text, as spoiled and idle, black women have often been stereotyped as hard-working and long-suffering mothers holding one or more jobs to support their children. That stereotype may have been largely replaced in recent years with the image of the black welfare mother. Neither stereotype evokes an image of an elegant or even attractive woman. Hiring black women is, therefore, not likely to be perceived as enhancing the public image of a local community organization.

II. *Transformative Stereotyping: Combinations of Suspect and Non-Suspect Characteristics*

The same transformation of stereotypic meaning that occurs in stereotypes of double-suspect classes also takes place when a suspect characteristic is combined with a non-suspect characteristic. Just as the meaning of each constituent element in a double-suspect class is transformed by its combination with the other elements, a non-suspect characteristic's meaning is transformed by its combination with a suspect characteristic.

An example of this type of stereotypic transformation was presented in *Gerdom v. Continental Airlines*.²⁴ Gerdom was fired from her job as a flight attendant when she became overweight according to height/weight standards set by the airline.²⁵ Obviously, it was not Gerdom's suspect characteristic (her femaleness) that caused her dismissal, since she was able to retain her job until she became "overweight." Therefore, one might think that her dismissal was based upon weight, a non-suspect characteristic.²⁶ Judge Sneed, writing for the court in *Gerdom I*, applied that line of reasoning when he observed, "Continental's weight requirements have not excluded women as a class from jobs as flight attendants. Some women have

24. The procedural history of this case is important to note. The United States District Court for the Central District of California entered summary judgment for the defendants in 1978, and the plaintiffs appealed. I will refer to this appeal (*Gerdom v. Continental Airlines*, 648 F.2d 1223 (9th Cir. 1981)) as *Gerdom I*. In *Gerdom I*, the court reversed in part, affirmed in part, ordered certification of the plaintiff's class, and remanded to the district court. The case, however, did not return to the district court at that point. Rather, the plaintiffs petitioned for and were granted en banc consideration. I will refer to this en banc appeal (*Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983)) as *Gerdom II*.

25. In 1971, the Fifth Circuit Court of Appeals held that exclusion of men from employment as flight attendants violated Title VII. *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Prior to that 1971 holding, Continental had employed only women as flight attendants.

During the period when Continental flight attendants were exclusively female, Continental required that its "flight hostesses" maintain their weight below maximum weights specified on their height/weight chart. In 1973, in the wake of the *Diaz* decision, as Continental began to employ men as flight attendants, Continental abandoned its height/weight chart and, thereafter, required only that flight attendants maintain their weight in a "reasonable relationship to their height, bone structure, and age." *Gerdom I*, 648 F.2d at 1225.

In *Gerdom I*, the plaintiffs challenged both the pre-1973 weight requirements based on the height/weight chart, and the post-1973 "reasonable weight" requirements. In *Gerdom II*, the court considered only the pre-1973 requirements.

26. For a discussion of the general problem of weight discrimination, see Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. Rev. 947 (1982).

been excluded, but that exclusion has been on the basis of weight only."²⁷

The flaw in Judge Sneed's reasoning is the failure to recognize that the stereotypic meaning of the non-suspect characteristic "overweight" is transformed by its combination with the suspect characteristic, female. Rather than recognizing the transformation of the non-suspect characteristic, the *Gerdorm I* court allowed the introduction of the non-suspect characteristic, weight, to mask the influence of the suspect characteristic, gender. Judge Sneed allowed the introduction of the non-suspect characteristic to obscure the fact that the suspect characteristic still exerted influence. He did not acknowledge that "overweight" may have a different meaning when the weight is on a woman than when it is on a man.²⁸ The range of "acceptable" weights may be narrower for women; weight and body shape may be more central to evaluation of the physical attractiveness of women; and physical attractiveness may be more central to evaluation of the overall worth of women or, certainly, their worth as flight attendants.²⁹ The court in *Gerdorm I* failed to recognize that when the stereotypic meaning of "overweight" is transformed by its combination with "woman," the application of the transformed meaning of "overweight" as an employment criterion is a form of gender discrimination.

Upon en banc consideration in *Gerdorm II*, the Ninth Circuit rejected the reasoning of *Gerdorm I*. The *Gerdorm II* court implicitly recognized the transformation of the non-suspect characteristic, weight. The court observed that Continental's weight policy "was enforced only against women because it was not merely slenderness, but slenderness of female employees which Continental considered critical."³⁰ The *Gerdorm II* court thus found Continental liable for

27. 648 F.2d at 1226.

28. The fact that added flexibility in weight standards was introduced upon the desegregation of the occupation supports the notion that "overweight" for women carries different connotations from "overweight" for men.

29. This transformative dynamic was implicitly acknowledged in Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 Harv. L. Rev. 2035 (1987). "Some individual victims of appearance discrimination who are also members of other, protected groups may find protection under race, sex, or age discrimination statutes." *Id.* at 2042. An example of such a case was heard before the Equal Employment Opportunity Commission (EEOC). An interviewer had commented in his written report that the applicant, who was black, had "unattractive, large lips." E.E.O.C. Decision No. 70-90, Case No. 6-2-1079, 1973 E.E.O.C. Decisions (CCH) No. 41, T6065 (Aug. 19, 1969). The EEOC found that the comment constituted a reasonable basis for belief that racial discrimination had occurred.

30. 692 F.2d at 608.

gender discrimination. Yet the court did so without articulating the theory of transformative stereotyping on which its holding was implicitly based.³¹ Because recognition of the transformative dynamic has never been made explicit and incorporated into the body of antidiscrimination doctrine, courts have often failed to provide protection against this form of discrimination.³² Federal courts have decided several cases other than *Gerdorn* involving combinations of suspect and non-suspect characteristics. Even when courts find discrimination in such cases, the courts' opinions often reflect a failure to recognize the transformation of the non-suspect characteristic. For example, in *Phillips v. Martin Marietta Corp.*,³³ an employer refused to hire mothers of pre-school children but hired fathers of pre-school children. Based on a theory prohibiting disparate treatment of men and women, the Court held it impermissible for the employer to have "one hiring policy for women and another for men—each having pre-school-age children."³⁴ But even while so holding, the *Marietta* court nevertheless suggested that "the existence . . . of family obligations, if demonstrably more relevant to job performance for women than for men, could arguably be a basis for distinction under [Title VII]." The Court then remanded the case for fuller development of the evidence on that question. In that way, the Court actually "[fell] into the trap of assuming that the Act permits ancient canards about the proper role of women [i.e., that women's "family obligations" are relevantly different from men's] to be a basis for discrimination."³⁵ Applying the *Marietta* principle, the Seventh Circuit Court of Appeals in another "sex-plus" case,³⁶ *Sprogis v. United Air Lines*,³⁷ held it impermissible for an employer to limit hiring of married women while hiring men without regard to their marital status.

31. 692 F.2d at 610. It should be borne in mind, however, that the court in *Gerdorn II* was considering only the pre-1973 requirements, i.e., those that were in force while the flight attendant position was restricted to females. See *supra* note 25. It was on that basis that the *Gerdorn II* court found that "[a] facial examination of the weight program here reveals that it is designed to apply only to females." 692 F.2d at 608. And it was on the basis of that finding that the *Gerdorn II* court found a *prima facie* case of discrimination. 692 F.2d at 608. It is not clear how the *Gerdorn II* court would have approached a challenge to the post-1973 weight requirements.

32. See, e.g., *Fertig v. Hillel*, No. 79 Civ. 607E (W.D.N.Y. 1987), *infra* notes 51-57 and accompanying text.

33. 400 U.S. 542 (1971).

34. 400 U.S. at 544.

35. 400 U.S. at 545 (Marshall, J., concurring).

36. "Sex-plus" is used here to refer to cases where application of the non-suspect criterion is explicitly conditioned on gender (e.g., marital status is relevant only if the job applicant is female).

37. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

While these holdings properly prohibit application of a double standard to men and women, the opinions fail to articulate the way in which the meaning of the non-suspect characteristic (parenthood or marital status) is transformed by its combination with the suspect characteristic of femaleness. The opinions do not address the reality that motherhood has different stereotypic meaning than fatherhood and that marriage has different stereotypic connotations for women than for men. The opinions fail to address the fact that this stereotypic alchemy—this transformation of the non-suspect characteristic into a discriminatory criterion—underlies the employers' discriminatory practices. This failure has inevitably resulted in inconsistent antidiscrimination protection in cases involving non-suspect criteria that have been transformed by their combination with a suspect characteristic.

In fact, drawing on the reasoning in *Jefferies* and in the sex-plus cases such as *Phillips* and *Sprogis*, the United States District Court for the District of Columbia specifically repudiated the provision of legal protection in cases involving a combination of suspect and non-suspect characteristics. That court, in *Judge v. Marsh*, stated:

Extrapolating from . . . "sex-plus" cases, the Fifth Circuit has determined [in *Jefferies*] that black women are a distinct subgroup, protected by Title VII. This outcome is logical. . . . Race discrimination directed solely at women is not less invidious because of its specificity. . . . The difficulty with this position is that it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII's prohibition. . . . For this reason, the *Jefferies* analysis is appropriately limited to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic.³⁸

Thus, the court in *Marsh* asserted that protection should be provided only for double-suspect classes or for classes defined by a combination of a suspect characteristic and a fundamental right (e.g., gender plus parenthood or marital status). That proposed limitation of the *Jefferies* analysis fails to recognize that a non-suspect, nonfundamental-right "second" characteristic—such as weight—may be transformed by its combination with a suspect characteristic. Adoption of the limitation suggested in *Marsh* would actually prohibit legal recognition of discrimination stemming from

38. 649 F. Supp. 770, 780 (D.D.C. 1986) (citations omitted). In *Marsh*, a black female employee of the United States Army brought a Title VII action claiming that she had been denied promotion based on race and gender discrimination. The court held for the Army, finding that the promotion decision was based not on discriminatory criteria, but rather on the Army's assessment that the plaintiff had an "abrasive personality."

transformation of a non-suspect characteristic. That prohibition would establish a policy of permitting the presence of a non-suspect criterion to mask the influence of a suspect criterion in cases involving transformative stereotyping. Such a policy would pose a formidable obstacle to the effective functioning of antidiscrimination law.

An explicit adoption of a doctrine of transformative stereotyping would preclude doctrinal development in the direction suggested in *Marsh*. The theory of transformative stereotyping establishes that the introduction of a non-suspect criterion does not negate the influence of the suspect criterion. Rather, the transformation may often run in the other direction; the suspect characteristic may transform and render discriminatory the non-suspect characteristic. Explicit articulation of the transformative stereotyping doctrine would permit focused investigation and rigorously reasoned holdings in cases alleging transformative stereotyping and would, thereby, facilitate consistent antidiscrimination protection.

III. Personality Traits as Non-Suspect Characteristics

The transformation of objectively measurable characteristics—such as weight—is only one part of transformative stereotyping. An additional complication arises from the fact that stereotypes are composed largely of personality trait characterizations. Personality traits are not generally measured through “objective” tests but rather through more subjective means such as personal interactions, job interviews, and supervisors’ ratings.

The stereotypic meaning of a personality trait, just like the meaning of an objective trait, may be transformed by its combination with a suspect characteristic. The personality trait is the non-suspect characteristic (like “overweight” in *Gerdomb*) whose meaning is transformed by its combination with the suspect characteristic. The traits are different, but the alchemy is the same.

The process of stereotypically transforming personality traits operates in two ways. First, the stereotyper may evaluate the personality traits of a member of a suspect class in a biased way consistent with the stereotype attributed to the suspect group.³⁹ For instance, a trait that might be positively evaluated as frugality in a Gentile might be negatively evaluated as “cheapness” in a Jew.⁴⁰ Through

39. See R. Merton, *Social Theory and Social Structure* 475-90 (1949).

40. *Id.* at 482-83.

this process of biased evaluation, the stereotypic meaning of personality traits may be transformed by their combination with a suspect characteristic.

Alternatively, stereotypic personality transformation may occur through a process of biased interpretation in which the stereotyper assumes the existence of personality traits that are not actually present. Such inaccurate perceptions occur when the interpretation of an individual's behavior is prejudiced by the stereotypic expectations of the stereotyper.⁴¹ Thus, for example, angry shouts by a black person might be interpreted as revealing a violent personality—consistent with a stereotype of blacks—when in reality the individual in question is not violent at all. In this way, the meaning of the individual's behavior would be transformed by the individual's membership in the suspect class, blacks.

In either scenario, "biased evaluation" or "biased interpretation," the non-suspect criterion, personality, is transformed into a discriminatory criterion by its combination with a suspect characteristic. The resulting negative personality characterization and subsequent rejection of the individual is the result of stereotyping and is, therefore, a form of discrimination against a suspect class.

Although federal courts have shown some willingness to recognize discrimination based on stereotypic personality characterizations, there has yet to be a clear articulation of the transformative stereotyping dynamics that form the basis of such discrimination. The case of *Hopkins v. Price Waterhouse*,⁴² heard by the United States Supreme Court during the 1988 Fall Term, provides a good example. Hopkins claimed that she had been denied promotion at Price Waterhouse because her employers found her personality objectionable, although they would have found the same traits unobjectionable in a male. In support of that claim, Hopkins presented three principal types of evidence: (1) the comments partners made about Hopkins herself, including comments that she was "macho"

41. See Greenberg & Rosenfield, Whites' Ethnocentrism and Their Attributions for the Behavior of Blacks: A Motivational Bias, 47 J. Personality 643 (1979); Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, 5 Personality & Soc. Psychology Bull. 461 (1979). See also Lawrence, *supra* note 2, at 343. Lawrence observes that this process of biased interpretation may also function to disadvantage suspect classes indirectly through the operation of positive bias toward the favored group. Lawrence gives this example: "[A]n individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as 'more articulate,' 'more collegial,' 'more thoughtful,' or 'more charismatic.' He is unaware of the learned stereotype that influenced his decision."

42. 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988).

and “a masculine, hard-nosed manager”; (2) the testimony of an expert in the field of stereotyping, who identified some of these comments as the product of sexual stereotyping; and (3) comments made about other women candidates in previous years.⁴³

The United States Court of Appeals for the District of Columbia affirmed the District Court’s ruling that held Price Waterhouse liable for sex discrimination in violation of Title VII. Based on the evidence presented, the Court of Appeals concluded that “there is ample support in the record for the District Court’s finding that the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes toward female candidates.”⁴⁴ Implicit in the holdings of the District Court and the Court of Appeals is a recognition that the non-suspect criterion, personality, functioned as a vehicle for discrimination against women. However, neither court made explicit the principle, crucial for consistent anti-discrimination protection, that application of a non-suspect criterion should not be allowed to mask the influence of the suspect criterion. Neither court clearly articulated the type of discrimination to which Hopkins was subjected: a non-suspect criterion (personality) was applied to a member of a suspect class (females) in such a way that the non-suspect criterion was transformed into a discriminatory criterion. The problem was not that the partners “stereotyped” Hopkins in a vacuum and then, separately and independently of that stereotyping, disliked her personality. The partners’ views of Hopkins’s personality were an integral part of the stereotyping process.

Hopkins may have been the victim of biased evaluation wherein her aggressive personality traits were disparaged as “macho” and “hard-nosed,” whereas a man with those personality traits might have been evaluated as assertive or as “a go-getter.”⁴⁵ Alternatively, this may have been a case of biased interpretation, whereby aggressive personality traits were erroneously attributed to Hopkins in accordance with her evaluators’ stereotypic images of businesswomen. In either case, the non-suspect criterion of personality was

43. 825 F.2d at 465.

44. 825 F.2d at 468 (referring to the district court opinion at 618 F. Supp. 1109 (D.D.C. 1985)).

45. In a study in which male and female subjects rated the degree to which various personality attributes applied to men and women, subjects rated men as more ambitious, aggressive, and independent than women. Miller, *Gender Stereotypes and Perceptions of Occupational Success*, in *Women and Work: Selected Papers* (M. Knezek, M. Barrett & S. Collins eds. 1985).

transformed into a discriminatory criterion by its combination with the suspect characteristic of femaleness.

Neither of the lower courts enunciated the transformative stereotyping principle: that use of a non-suspect criterion does not negate the influence of the suspect characteristic but, quite the reverse, the transformative influence of the suspect characteristic inculcates the use of the non-suspect criterion. Whether the Supreme Court will make any movement toward recognizing transformative stereotyping in their *Price Waterhouse* opinion is unknown at the time of this writing.

A doctrine of stereotypic personality transformation would be applicable not only in the context of single-suspect class stereotypes, such as the gender stereotype in *Price Waterhouse*, but also in the context of double-suspect class stereotypes, such as stereotypes that characterize Jewish mothers as "smothering,"⁴⁶ or "Jewish American Princesses" ("JAPs") as "spoiled."⁴⁷ In fact, the theory of stereotypic personality transformation is particularly relevant to stereotypes of double-suspect classes because stereotyping is more potent as the stereotyped class becomes more narrowly defined.⁴⁸ That is, a clearer stereotypic image can be invoked of a more specific group, such as "black women" as compared to "blacks." Very highly specified classes, such as "JAPs" and Jewish mothers, which include specifications as to ethnicity, gender, and age, invoke very highly elaborated personality stereotypes.⁴⁹ Thus, the more highly specified the class, the more elaborated its personality stereotype and the greater its vulnerability to discrimination based on stereotypic personality transformation.⁵⁰

46. See, e.g., D. Greenberg, *How to Be a Jewish Mother* (1964); P. Roth, *supra* note 22.

47. See, e.g., D. Lukatsky & S. Toback, *The Jewish American Princess Handbook* (1982); A. Sequoia, *The Official J.A.P. Handbook* (1982).

48. See G. Rothbell, *supra* note 19, ch. 1, at 8 *passim*.

49. *Id.*

50. Courts should be particularly vigilant in providing protection for composite suspect classes. To be consistent with equal protection doctrine and particularly the doctrine arising from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1937), the more discrete and insular the minority, the greater the judicial protection required. Composite suspect classes are even more discrete and insular than single-suspect classes.

As a subgroup of each of its constitutive unitary classes (e.g., black women are a subgroup of both blacks and women), a composite class is necessarily numerically weaker than each of its constitutive unitary classes. Moreover, composite classes often lack the support or protection of their constitutive classes. For example, the Antidefamation League of B'nai Brith has not addressed the Jewish Mother stereotype as defamation of Jews (see G. Rothbell, *supra* note 19, ch. 7, at 40)—whereas *Lilith Magazine*, a "Jewish feminist" magazine, has directly addressed the Jewish Mother stereotype as pejorative.

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Consider, for example, the case of *Fertig v. Hillel*.⁵¹ Fertig, a 52 year old Jewish woman, brought an age discrimination claim under the Age Discrimination in Employment Act⁵² after being fired from her job as secretary at the Hillel House at the State University of New York at Buffalo. Fertig testified that Rabbi Wolfe had said that he was firing her because he did not like her "old Jewish mother image" around the Hillel house.⁵³ Rabbi Wolfe explained at trial that by "Jewish mother image" he meant the image of someone who is "overbearing, talks a lot, smothers people, [and is] overassisting."⁵⁴

The district judge in *Fertig* held that "[Rabbi] Wolfe's use of the term 'old Jewish mother image' is . . . insufficient to prove that age

17 Lilit Mag. 9 (1987). Relatively advantaged members of the constituent classes may actually dissociate themselves from the most disadvantaged class members in order to reduce their own stigmatization by distinguishing themselves from the "undesirable" members of their group (e.g., second-generation American Jews participating in the denigration of newly arrived "Greenhorns"). See G. Rothbell, *supra* note 19, ch. 1, at 10 *passim*. As Justice Marshall observed in his concurrence in *Castaneda v. Partida*:

Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

430 U.S. 482, 503 (1977).

By virtue of their stigmatization by both "society at large" and their own constitutive classes, composite suspect classes are the ultimate "discrete and insular minority." Therefore, such classes should receive the utmost judicial protection. See *Carolene Products*, 304 U.S. at 152 n.4.

51. No. 79 Civ. 607E (W.D.N.Y. 1987).

52. 29 U.S.C. § 621 *et seq.* (1982).

53. No. 79 Civ. 607E at 7. In addition to his own dislike of Fertig's "Jewish mother image," Rabbi Wolfe also suggested that the image might "turn off" students who would otherwise participate in Hillel activities. No. 79 Civ. 607E at 8. Rabbi Wolfe's "customers' tastes" claim is basically that, although an employer may not act based on his own prejudices, business necessity requires that an employer accommodate the prejudices of his customers. Under such an argument, if the customers of a particular restaurant prefer that their food be served by whites, then the employer can discriminate against blacks when hiring waiters; that is, in this restaurant, blackness interferes with job performance. But such employer acquiescence to the "bigot's veto" (Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 260 (1971) (citing H. Kalven, Jr., *The Negro and the First Amendment* 140-60 (1965))) has been held impermissible. See, e.g., *Diaz v. Pan American World Airways*, 442 F.2d 385 (alleged customer preference for female flight attendants held to be an impermissible basis for rejecting male applicants for employment as flight attendants); *Gedrom II*, 692 F.2d 602 (gender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job).

Acquiescence to the bigot's veto has also been held impermissible in the *constitutional* context. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

54. *Fertig*, No. 79 Civ. 607E at 12.

had been a determining factor in the plaintiff's employment termination."⁵⁵ The judge was right: Fertig's firing could not accurately be called, simply, "age discrimination." Rather, what was being applied to Fertig was the stereotype of the triple-suspect class (ethnicity, gender, and age) of "Jewish mothers." In using the term "Jewish mother *image*" Rabbi Wolfe acknowledged that the phrase "Jewish mother" was intended to invoke a particular stereotypic "image." When Rabbi Wolfe was questioned as to what he meant by "Jewish mother image," he described the content of that stereotype by listing personality traits.⁵⁶ It appears that Fertig was fired on the basis of stereotypic personality transformation.⁵⁷ Her firing might be analogized to firing an older black male employee of the NAACP for having an "Uncle Tom image." Both firings would be based upon personality stereotypes of groups defined by gender, age, and ethnicity/race. Such stereotype-based firing violates the principles of antidiscrimination law. Yet Fertig was unable to find redress for her grievances in the courts. No available theory of antidiscrimination law was found applicable to the form of discrimination she had suffered. The theory of stereotypic personality transformation proposed in this Current Topic provides a legal vehicle for redressing that form of discrimination.

The theory of stereotypic personality transformation proposes that when such transformation leads to rejection of an individual, that rejection is a form of discrimination. This theory of personality transformation is part of the larger theory of transformative stereotypes set forth in this Current Topic. This broader theory recognizes, generally, that the stereotypic meaning of characteristics may be transformed by their combination with other characteristics.

55. No. 79 Civ. 607E at 16-17. The court also considered issues regarding Fertig's qualifications, but those issues are not relevant to the court's failure to recognize the transformative stereotyping dynamic that was operative.

56. No. 79 Civ. 607E at 7. It should be noted that Fertig may not in fact have had the personality traits attributed to her. Rabbi Wolfe may have erroneously assumed the existence of those traits through the process of biased interpretation. Even assuming *arguendo* the objective existence of the personality traits in question, it remains possible that the Rabbi's evaluation of those traits may have been biased by their combination with the suspect class "Jewish mothers." As discussed above, personality traits are evaluated in the context of those traits being held by particular individuals who evoke particular stereotypic images. See *supra* text accompanying notes 39-40. Personality traits are therefore subject to biased evaluation. In the Fertig case, Rabbi Wolfe *might* have evaluated Fertig's personality as very helpful, articulate, assertive, and warm. Instead, he evaluated her personality as "overassisting, . . . overbearing and smothering." No. 79 Civ. 607E at 12.

57. An evidentiary hearing would be required to determine whether the firing was in fact stereotype-based. Methods of establishing liability for stereotype-based discrimination are discussed below. See *infra* text accompanying notes 58-81.

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This transformative dynamic may cause double-suspect classes to be subject to stereotypes distinct from those of their constitutive classes. Moreover, not only are suspect characteristics subject to transformation, but non-suspect characteristics may be transformed into discriminatory criteria by their combination with suspect characteristics. Finally, the theory of transformative stereotyping recognizes that both objective non-suspect characteristics (e.g., weight), and subjective characteristics (e.g., personality) may be transformed into discriminatory criteria.

IV. *Establishing Liability*

To function effectively as an apparatus for legal cognition of stereotype-based discrimination, the theory of transformative stereotyping requires workable methods of establishing liability under the theory. What constitutes proof that a non-suspect characteristic has been “transformed”? How can one prove, for example, that stereotypic personality transformation has formed the basis for an employment decision? Conversely, how can an employer rejecting a member of a suspect class on the basis of personality ever prove that transformative stereotyping did not form the basis for the rejection? This latter difficulty was pointed to by Judge Williams in his dissent in *Price Waterhouse*. Judge Williams asserted:

To [the expert witness in this case] it seems plain that no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes.⁵⁸

Legal cognition of transformative stereotyping, however, need not lead to the undesirable state of affairs described by Judge Williams. An adapted version of the traditional methods of establishing liability for discrimination would be effective in cases involving transformation of a non-suspect characteristic.

Traditionally, there have been two basic methods of establishing liability for discrimination against a suspect class: proof of disparate impact and proof of discriminatory treatment. Proof of either disparate impact or discriminatory treatment is sufficient to sustain a discrimination claim under Title VII,⁵⁹ whereas a showing of discriminatory *treatment* is required to sustain constitutional (equal

58. 825 F.2d at 477 (Williams, J., dissenting).

59. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

protection or due process) claims.⁶⁰ Both of these traditional methods of establishing liability would be applicable to discrimination cases involving transformation of a non-suspect characteristic.

A. Disparate Impact Analysis

In *Griggs v. Duke Power Co.*,⁶¹ a disparate impact case brought under Title VII, the Court specified that use of an employment criterion that has a disparate impact on a suspect class will be considered discriminatory when the criterion is not relevant to job performance. In *Griggs*, the employer had used high school graduation and standardized intelligence test results as hiring criteria. The Court held that use of such criteria was impermissible under Title VII because it had a disparate impact on black job-seekers and had no "manifest relationship" to an individual's capacity to perform the jobs in question.⁶² Successful job performance does not include satisfying the employer's personal tastes or preferences. Rather, a characteristic is construed as not interfering with successful job performance unless by hiring applicants with that characteristic "the essence of the business operation would be undermined. . . ."⁶³ Thus, under disparate impact analysis, even non-suspect criteria are impermissible if they function disproportionately to disadvantage a suspect class and cannot be justified by business necessity.

The applicability of disparate impact analysis was extended in *Watson v. Fort Worth Bank & Trust*.⁶⁴ In *Watson*, the Court held that not only objective employment criteria, such as standardized tests or height and weight requirements, but also subjective criteria, such as supervisors' evaluations of an employee's tact or loyalty, could be subject to disparate impact analysis. In so holding, the Court noted that failure to include subjective criteria within the scope of disparate impact analysis would "largely . . . nullif[y]" the antidiscrimination principles upheld in *Griggs*.⁶⁵ Exemption of subjective criteria from disparate impact analysis would permit an employer to escape

60. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

61. 401 U.S. 424 (1971).

62. 401 U.S. at 432. The job-relatedness of many employment criteria can be tested through "formal validation studies which seek to determine whether discrete selection criteria predict actual on-the-job performance." *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2787 (1988) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 429-36 (1975)).

63. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Diaz v. Pan American World Airways*, 422 F.2d at 388).

64. 108 S. Ct. 2777 (1988).

65. 108 S. Ct. at 2786.

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liability for discriminatory impact simply by adding any subjective element to its employment criteria. The Court observed:

So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.⁶⁶

Thus, under *Griggs* and *Watson*, disparate impact analysis is applicable to both objective and subjective criteria. A non-suspect criterion—objective or subjective—is impermissible if it functions to disadvantage a suspect class and is not demonstrably job-related.

Disparate impact analysis provides a readily applicable method for establishing liability in cases involving a combination of suspect and non-suspect characteristics.⁶⁷ Under disparate impact analysis, the complainant must demonstrate that application of a particular non-suspect criterion has a disparate impact on the suspect class involved. Proof that the non-suspect criterion was transformed would be unnecessary. The showing of disparate impact—the disparate result—supplants the need to demonstrate the transformative dynamic which caused that result. This exemption from the need to prove discriminatory intent may be crucial in cases where the discrimination involved stemmed from subtle forms of prejudice, such as “biased interpretation” and “biased evaluation.”⁶⁸

The Supreme Court pointed to the importance of disparate impact analysis in dealing with subtler forms of discrimination when it extended disparate impact analysis to cover subjective criteria in *Watson*. There the Court stated: “[E]ven if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudice would remain.”⁶⁹

In applying disparate impact analysis to a personality criterion such as that applied in the *Price Waterhouse* case,⁷⁰ the complainant would establish the existence of disparate impact by a statistical

66. 108 S. Ct. at 2786.

67. For a discussion of the related topic of applying disparate impact analysis to cases where gender stereotyping creates bias in employer perceptions of job descriptions and qualifications rather than of job applicants, see Note, Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII, 97 Yale L.J. 1397 (1988).

68. See *supra* text accompanying notes 39-41.

69. 108 S. Ct. at 2786.

70. In reality, Hopkins did not bring her case against Price Waterhouse as a disparate impact case, but rather as a discriminatory treatment case. This was probably in

showing that female employees were disproportionately excluded from partnership on the basis of that personality criterion. A prima facie case having thus been established, the burden would shift to the employer to demonstrate that use of that personality criterion was a business necessity. Unless the employer were able to demonstrate that the personality criterion was legitimately job-related, that criterion would be found to be impermissible as applied.

Thus, disparate impact analysis is well-suited for establishing liability in many cases involving combinations of suspect and non-suspect characteristics.⁷¹ Disparate impact analysis might even be thought of as a streamlined vehicle in such cases, since it does not require proof that the non-suspect characteristic was transformed. In fact, if disparate impact analysis were applicable in all cases, there would be little need for a theory of transformative stereotypes. But this is not the case; disparate impact analysis is inapplicable to many potential discrimination claims. For instance, proof of disparate impact is not legally sufficient to sustain a *constitutional* claim of discrimination.⁷² Also, even in the statutory context, many cases involve numbers too small for application of disparate impact analysis. In the context of employment discrimination, for example, the company involved may have too few employees to allow for the type of statistical analysis generally required to show disparate impact. Even in large companies, the number of employees at the relevant level—at the managerial level, for instance—may be too small to be

part because of the problem of small numbers, discussed below. See *infra*, text accompanying note 73.

71. The court in *Gerdorn II* found Continental liable under a theory of discriminatory treatment. Application of disparate impact analysis to *Gerdorn II* would have raised the complex issue of how disparate impact analysis would apply in cases where challenged employment criteria are imposed upon a job classification which is itself segregated by sex, race, or any other suspect classification. The court in *Gerdorn II* specified that it did "not reach the applicability of disparate impact analysis to [such situations]." 692 F.2d at 605.

72. The Supreme Court stated in *Washington v. Davis* that a showing of discriminatory *purpose* shall be required to prove discrimination in constitutional claims under the equal protection and due process clauses. 426 U.S. at 238-42. The *Washington v. Davis* standard was reiterated in *Personnel Adm'r of Mass. v. Feeney*: "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." 442 U.S. 256, 272 (1978).

Professor Lawrence, observing that racist intent may often be unconscious, has proposed a method for legally cognizing unconscious racism while still fulfilling the intentionality requirement of *Washington v. Davis*. See Lawrence, *supra* note 2; discussion *infra* note 78.

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susceptible to statistical analysis.⁷³ In those cases where disparate impact analysis is inapplicable or inappropriate, application of the second traditional method of proof, proof of discriminatory treatment, is necessary.⁷⁴

B. Discriminatory Treatment Analysis

In *McDonnell Douglas Corp. v. Green*,⁷⁵ the Court delineated the following standards and procedures to be employed in proving discriminatory treatment. The complainant may establish a prima facie case of discrimination by showing (1) that he or she belongs to a suspect class; (2) that he or she was qualified for the position in question but was nonetheless rejected; and (3) that, after his or her

73. In the case of double-suspect classes, the problem of small numbers will be exacerbated since, for example, the number of black women in a firm will be even smaller than the number of blacks or the number of women in the firm.

Also weighing against the use of disparate impact analysis in some cases is the possibility that the non-job-relatedness of subjective criteria may be difficult to prove. Within the *Watson* opinion itself there is evidence of ambiguity and perhaps conflict regarding the standards of proof to be applied to claims of discriminatory impact involving subjective criteria. The plurality opinion in *Watson* stated, "In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of 'a manifest relationship to the employment in question.'" 108 S. Ct. at 2791. Justice Blackmun, in a concurrence joined by Justices Brennan and Marshall, evinced a different tone. He asserted, "[I]t is clearly not enough for an employer merely to produce evidence that the method of selection is job-related. It is the employer's obligation to persuade the reviewing court of this fact." 108 S. Ct. at 2795. The standards of proof that are ultimately adopted may prove crucial in determining the utility of disparate impact analysis for future antidiscrimination litigation involving subjective criteria.

For a discussion of methods for validating the job-relatedness of subjective employment criteria, see *Watson*, 108 S. Ct. at 2795 (Blackmun, J., concurring). See also *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973) (holding that subjective observations by employer of minority employees had to be supported by empirical evidence of validity); Friedman & Williams, Current Use of Tests for Employment, in 2 *Ability Testing: Uses, Consequences and Controversies* 99-100 (A. Wigdor & W. Garner eds. 1982) (acknowledging that the definition of selection procedures has extended to the full range of assessment devices, including interviews, and that all the devices are to be scrutinized according to the same guidelines used to evaluate standardized tests). See generally Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 987-988 (1982) (discussing the application of disparate impact analysis to subjective criteria).

74. In *International Bd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court compared disparate impact and discriminatory treatment analysis. The Court explained that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory." 431 U.S. at 335-36 n.15. In contrast, the Court described discriminatory treatment as arising when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335-36 n.15.

75. 411 U.S. 792 (1973).

rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Once the complainant has thus established a prima facie case of discriminatory treatment, the burden shifts to the employer to "articulate some legitimate nondiscriminatory reason" for the employment decision. If the employer successfully articulates such a reason, the burden then shifts back to the complainant to show that the stated reason was in fact pretextual.⁷⁶ If the employer is able to demonstrate a non-pretextual "nondiscriminatory reason" for the challenged decision, then the decision is considered legitimate notwithstanding the disadvantageous effect on the complainant.

The discriminatory treatment method of establishing liability is readily applicable to cases involving a combination of suspect and non-suspect characteristics. For example, in a case like *Gerdorn*,⁷⁷ the complainant would first establish a prima facie case by showing (1) that she belongs to a suspect class (female); (2) that she was qualified for the flight attendant job by all criteria other than the allegedly discriminatory criterion (weight); (3) that, despite her qualifications, she was dismissed; and (4) that, after her dismissal, the position remained open and was available to applicants with complainant's qualifications.

Once *Gerdorn* had established a prima facie case, the burden would shift to the airline to articulate some legitimate non-discriminatory reason for the dismissal. The airline would, presumably, put forward the non-suspect criterion of weight. At this point, following the *McDonnell Douglas* procedures, the burden would shift back to the complainant to demonstrate that the stated reason was pretextual. In a discriminatory non-suspect criterion case, however, the complainant would not then show that the reason was pretextual. Rather, the complainant would show that the stated criterion was itself discriminatory as applied. The complainant would demonstrate that the meaning of the non-suspect characteristic of weight

76. 411 U.S. at 802, 804.

77. The court in *Gerdorn II* ultimately considered a challenge to only the pre-1973 weight requirements that were in force while the flight attendant position was exclusively female. See *supra* note 25. The method of applying discriminatory treatment analysis presented here would be applicable not only in challenging the pre-1973 policies, but also in challenging the weight policies that were in force after 1973, when there were both male and female flight attendants.

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was transformed by its combination with gender and that the transformed, gender-specific meaning of “weight” was applied as an employment criterion.⁷⁸

Once the complainant had demonstrated that the non-suspect criterion had been transformed by its combination with the suspect characteristic, the employer would have an opportunity to show that it was not the stereotypic meaning of the criterion that was operative in the employment decision but rather a job-related application of the criterion. In *Gerdorn*, for example, the employer might have argued that the weight criterion was related to the airline’s interest in having physically fit flight attendants to assist in emergency situations and rescue operations. Where a court was presented with such competing explanations for the application of a criterion, the court would decide whether the criterion was used “at least in part because of, not merely in spite of”⁷⁹ its stereotypic implications. If the court determined that the stereotypic implications of the criterion had formed at least part of the basis for using the criterion, then the court would render a finding of discriminatory treatment.

Not only is discriminatory treatment analysis readily applicable to cases involving stereotypic transformation of an objective non-suspect criterion, it is also applicable to cases involving a subjective non-suspect criterion, such as personality. In demonstrating the

78. Support for this showing could include the three types of evidence used by Hopkins in *Price Waterhouse*: relevant comments by the employer about the complainant, relevant comments by the employer about previous employees, and expert testimony interpreting the stereotypic significance of those comments. 825 F.2d at 465. Another approach to proving the existence of particular stereotypic meanings is Lawrence’s “cultural meaning” test. Lawrence proposes “a test that would look to the ‘cultural meaning’ of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly. This test would evaluate . . . conduct to see if it conveys a symbolic message to which the culture attaches racial significance. . . . If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the . . . action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action’s meaning had influenced the decisionmakers.” Lawrence, *supra* note 2, at 355-56.

As discussed above, *see supra* note 53, customer preferences—such as a customer preference for thin female flight attendants—are not sufficient to legitimate a criterion challenged as discriminatory.

79. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. at 279 (stating that “discriminatory purpose” “implies that the decisionmaker . . . selected . . . a course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” The court did not find discriminatory purpose in the *Feeney* case because, it asserted, “nothing in the record demonstrates that this preference for veterans was . . . enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place. . . .”) 442 U.S. at 279.

transformation of a subjective non-suspect characteristic, the complainant would, as with objective criteria, be required to demonstrate that the criterion in question had been transformed by its combination with a suspect characteristic and was therefore discriminatory as applied.

For example, in the *Fertig* case, Fertig would have to demonstrate that the personality traits that Rabbi Wolfe attributed to her were part of the stereotype of the triple-suspect class of Jewish mothers. Fertig could use various types of evidence to delineate the personality characterizations in that stereotype, including the three types used in *Price Waterhouse*:⁸⁰ relevant comments by the employer; social scientific data, perhaps presented by an expert witness; and comments made about other "Jewish mothers" by the employer. In *Fertig*, comments made by the respondent would have been particularly powerful evidence since Rabbi Wolfe himself told the court that it was the personality characteristics constituting Fertig's "Jewish mother image" that he disliked.⁸¹

Fertig could take two approaches to proving that stereotypic implications of the personality criteria were operative in the Rabbi's decision to fire her. She could argue that she does not have the personality traits alleged and that Rabbi Wolfe misinterpreted her behavior to conform to stereotypical expectations regarding her personality. That is, she could claim biased interpretation. Alternatively, Fertig could argue that the Rabbi was engaged in biased evaluation whereby he took a negative view of her personality traits when he would have evaluated the same traits positively in a non-member of the Jewish mother class. In either case, Fertig would argue that when the Rabbi applied the personality-trait criteria to her he did so in a biased way based upon his stereotypical image of the suspect class "Jewish mothers." Therefore, Fertig would conclude, the non-suspect criterion of personality had been transformed into a discriminatory criterion, and by applying that discriminatory criterion, Rabbi Wolfe had engaged in discriminatory treatment.

Thus, discrimination that occurs through the dynamic of transformative stereotyping should be readily cognizable through proof of discriminatory treatment. Stereotypic transformation of both objective and subjective non-suspect criteria can be legally recognized

80. 825 F.2d at 465.

81. No. 79 Civ. 607E at 12.

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using this adaptation of the traditional discriminatory treatment method of establishing liability.

V. Conclusion

The traditional methods for establishing liability for discrimination, disparate impact analysis and discriminatory treatment analysis, provide a satisfactory apparatus for establishing liability in cases involving combinations of suspect and non-suspect characteristics. The efficacy of that apparatus depends upon the development of a doctrine recognizing the possible transformation of non-suspect characteristics. The theory of transformative stereotyping articulates the basic concept that the stereotypic meaning of characteristics—suspect or non-suspect—may be transformed by their combination with other characteristics.

Where a suspect characteristic and a non-suspect characteristic are combined and the non-suspect characteristic is transformed, the non-suspect characteristic becomes a discriminatory criterion. Application of that criterion is a form of discrimination against the suspect class. The absence of a legal theory of transformative stereotyping has resulted in inconsistent antidiscrimination protection in cases involving a combination of suspect and non-suspect characteristics. Development of a doctrine of transformative stereotyping would provide an important tool for ensuring that the constitutional and statutory guarantees of protection against discrimination will be readily and consistently fulfilled.

