AUTHENTICITY AT WORK: HARMONIZING TITLE VII WITH FREE SPEECH JURISPRUDENCE TO PROTECT EMPLOYEE AUTHENTICITY IN THE WORKPLACE

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ABSTRACT

Today's workers want to work in diverse environments and to express themselves authentically—or, as organizational scholars describe the phenomenon, "to bring their whole selves to work." The proliferation of diversity and inclusion initiatives demonstrates that companies are taking note. While the business world attempts to move forward, the legal landscape remains stagnant: Title VII of the 1964 Civil Rights Act bestows upon employees the right to be free from employer discrimination based on race, sex, color, national origin, and religion but creates no right to affirmatively express those class memberships—or any other identity—in the way an employee may want.

Outside of the private employment context, however, the law does not so cavalierly treat the individual in her quest to be herself. Most prominently, the Free Speech Clause of the First Amendment to the United States Constitution deems freedom of expression essential to human flourishing and to the American ethos. Although the First Amendment does not protect individuals from regulations imposed on them by non-governmental actors, the values of self-determination and authenticity that animate free speech theory and jurisprudence do not and should not disappear when someone enters the workplace.

Using the First Amendment as a lens through which to understand the law's commitment to authenticity, this article contends that federal employment law should expand beyond the group-based protections established in Title VII to protect and promote an employee's authentic self in the workplace. Although this article suggests certain doctrinal changes, its primary purpose is not to offer solutions; it is to acknowledge where we are failing and, more importantly, where we should look for inspiration.

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I.
INTRODUCTION

New York Times columnist Vanessa Friedman, noting the irony of the Fashion Institute of Technology's May 2016 exhibition on uniforms, wrote: "We live in a moment in which the notion of a uniform is increasingly out of fashion, at least when it comes to the implicit codes of professional and public life. Indeed, the museum may be the only place they now make sense."[1] As Friedman's commentary suggests, the post-war conformist ideal of "The Organization Man"[2] and his grey suit is on its way out, if not entirely gone. Many of today's workers, particularly ascending millennial employees, want to work in diverse environments and

1. Vanessa Friedman, *The End of the Office Dress Code*, N.Y. TIMES (May 25, 2016), https://www.nytimes.com/2016/05/26/fashion/office-fashion-uniforms.html [https://nyti.ms/25gjYr1].

2. *See generally* WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN (1956) (coining the term "organization man"—a reference to post-war America's conformist ideals in the workplace and the worker's preoccupation with sameness and "normalcy," rather than individuality).

have more freedom in the workplace;[3] they want to express themselves authentically or, as organizational scholars describe the phenomenon, "to bring their whole selves to work."[4]

For some, this means explicitly identifying with groups to which they belong (*e.g.*, I am a Jewish woman). For others, it means openly embracing political causes (*e.g.*, I place a "Make America Great Again" hat on my office bookshelf). And for still others, it means the freedom *not* to identify with a particular group or political cause (*e.g.*, I do not want to join my employer's women's group, and I do not want to attend a political rally with my colleagues). Contrary to traditional and legal notions of diversity—which are predicated upon group membership such as race, gender, and national origin—today's professionals increasingly do not want to be defined by only one dimension of their identity.[5] They want, instead, to express their ever-evolving identities on their own terms. They want the space to self-determine.

Organizational scholars have begun to study the advantages of encouraging authenticity in the workplace to both individual employees and the institutions they work for.[6] The results so far have been impressive. Employees who feel like they can "be themselves" are more engaged in their work, experience greater job satisfaction, suffer less burnout, and report improved mental health.[7] Studies show that this is especially true for women and racial minorities, who often perceive a devaluation of the diversity they bring to traditional work settings.[8] Organizations also benefit when employees feel true to themselves: individuals are more likely to speak up on important organizational issues, employees express greater commitment to their employers, and diversity initiatives are more likely to succeed.[9]

The proliferation of organizationally-sponsored diversity and inclusion initiatives demonstrates that many companies are taking note.[10] More and more com-

3. *See* WILLIAM H. FREY, DIVERSITY EXPLOSION 5 (2015) (describing "the diversity explosion" as "generational in character").

4. *E.g.*, David N. Berg, *Bringing One's Self to Work*, 38 J. APPLIED BEHAV. SCI. 397, 413 (2002) (using himself as a case study, the author examines the costs and benefits of bringing more of himself to work and the dilemmas he faced in doing so); Bernardo M. Ferdman & Laura Morgan Roberts, *Creating Inclusion for Oneself: Knowing, Accepting, and Expressing One's Whole Self at Work*, *in* DIVERSITY AT WORK: THE PRACTICE OF INCLUSION 93, 95 (Bernardo M. Ferdman ed., 2014) (exploring the practice of "bringing one's whole self to work" as a fundamental component of inclusion overall).

5. *See infra* Section II.C.

6. *See infra* Section II.A.2.

7. *See infra* Section II.A.2.

8. *See infra* Section II.A.2.

9. *See infra* Section II.A.2.

10. *See, e.g.*, Danielle Allen, *Toward a Connected Society*, *in* OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 71, 77 (Earl Lewis & Nancy Cantor, eds., 2016) ("Over the course of the past two decades, across the corporate sector, the educational sector, and the organizational sector of civil society, one after another institution, organization, or association has produced a 'diversity statement.'"); *see also* Allan H. Church, Christopher

panies are marketing themselves as spaces where employees can be true to themselves—such as by donning traditional cultural garb, engaging in political speech, or expressing their gender identity in ways that do not reflect mainstream culture—without sacrificing professional success.[11]

While the business world attempts to meet the desires of the next generation of employees, the legal landscape remains stagnant. Title VII of the 1964 Civil Rights Act, which prohibits employers from discriminating against employees on the basis of race, sex, color, national origin, and religion, is the primary legal basis for protecting diversity in the workplace.[12] In large part, Title VII bestows upon employees the right to be free *from* discrimination on the basis of membership in those protected classes but creates no right *to affirmatively* express those class memberships or any other identity in the way an employee might want. The positive impact of existing federal anti-discrimination laws on the advancement of women and minorities in the workplace is unmistakable.[13] But, as numerous scholars have argued, these laws have proven inadequate in addressing the varied and nuanced forms of what has been described as "second generation" discrimination that exist today.[14]

Title VII protects an employee's ability to present her authentic self at work

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T. Rotolo, Amanda C. Shull & Michael D. Tuller, *Inclusive Organization Development: An Integration of Two Disciplines*, *in* DIVERSITY AT WORK, *supra* note 4, at 260, 262 (noting that corporations "clearly have taken on" the diversity and inclusion change agenda "over the past decade, given shifting demographic trends and changes in generational differences, technology, and the global workforce"). This is not to say that companies are achieving their goals. Nancy Leong has argued that the focus on diversity may actually be commodifying "nonwhiteness," relegating minorities to "trophies" or "passive emblems" while allowing predominantly white organizations to claim social capital. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013); *see also* PETER FLEMING, AUTHENTICITY AND THE CULTURAL POLITICS OF WORK: NEW FORMS OF INFORMAL CONTROL ix (2009) (arguing that "difference, diversity, and the *sui generis* of individual actualization become expressive instruments that reinforce the conservative politics of accumulation. Difference is especially transmuted into a forced visibility that effaces its radical potential in significant ways . . . .").

11. *Cf.* Sherry E. Sullivan & Lisa A. Mainiero, *Kaleidoscope Careers: Benchmarking Ideas for Fostering Family-Friendly Workplaces*, 36 ORG. DYNAMICS 45, 47–48 (2007) (discussing new employer attitudes and workplace policies aimed at providing employees with a better balance between work and family as a way to promote authenticity).

12. 42 U.S.C. § 2000e-2(a) (2012); *see* Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 387 (2007) ("Employees typically file discrimination claims using Title VII.").

13. *See infra* Section III.A.

14. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (defining "second generation" discrimination as "[c]ognitive bias, structures of decisionmaking, and patterns of interaction" that "have replaced deliberate [discrimination] as the frontier of much continued inequality"); *see also generally* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward A Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

only if that presentation neatly coincides with a protected group characteristic. The law offers no protection for all other fundamental aspects of an employee's identity, such as her clothing choices or political beliefs, and courts deciding Title VII cases often characterize these forms of expression as trivial.[15] Although it is true that Title VII provides more comprehensive protections in the context of religion by requiring employers to reasonably accommodate employees' religious beliefs and practices—and thus, arguably provides more room to engage in conduct expressing one's authentic self—the accommodation model, as it is known, is, nevertheless, rooted in making room for difference, not fostering it.[16] Under existing federal antidiscrimination schemes, an employee's inability to express her individuality is of little concern to courts unless the employee can prove that she was discriminated against because she belongs to a statutorily protected class. Even then, the onus on the employee is great and the employer's actions receive little scrutiny.[17]

Outside of the private employment context, however, the law does not so cavalierly treat the individual in her quest to be herself. Most prominently, the Free Speech Clause of the First Amendment to the United States Constitution, which protects individual expression from most governmental regulation, deems freedom of expression essential to human flourishing and to the American ethos.[18] It goes so far as to protect the particular ways we express ourselves to others, often down to the precise words we utter or motions we make.[19] Far from characterizing identity concerns as trivial, free speech jurisprudence demands that the government tolerate—if not celebrate—individuality, and forbids the government from compelling us to espouse specific points of view or carry its message.[20] Moreover, unlike in the employment context, the government must justify its decision to silence an individual—not the other way around.[21] In doing all of this, the Free

15. *See infra* Section III.C.

16. In the context of religion, Title VII requires employers to reasonably accommodate employees' religious beliefs—and their corresponding observance and practice—unless doing so would impose "undue hardship" on the operation of the employer's business. *See* 42 U.S.C. § 2000e(j) (2012 & Supp. IV 2013–2017). The Americans with Disabilities Act (ADA) similarly requires greater employer accommodation in the disability context. *See* 42 U.S.C. §§ 12101–12203 (2012 & Supp. IV 2013–2017). As Kenji Yoshino has explained, however, courts have recently limited, rather than expanded, protections under the accommodation model. *See* YOSHINO, *supra* note 14, at 174–78.

17. *See infra* Section III.A.

18. U.S. CONST. amend. I; *see* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1790 (2004); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (characterizing "assuring individual self-fulfillment" as one of the four main values of free speech); DANIEL BOORSTIN, THE GENIUS OF AMERICAN POLITICS 8–9, 138–39 (1953) (writing that First amendment freedom is part of the "givenness" of the American polity).

19. *See infra* Section IV.B.

20. *See* Schauer, *supra* note 18, at 1797 ("[O]ne can say with some confidence that courts rarely find stretched First Amendment claims to be frivolous."); *see also infra* Section IV.B.4.

21. *See infra* Section IV.

Speech Clause and its accompanying body of case law treat the freedom to be ourselves as a fundamental right.

There are, of course, limits to what the Free Speech Clause protects, and the doctrine is complicated. Some speech is protected while other speech is not, and certain conduct is expressive enough to warrant protection while other conduct is not.[22] And perhaps most importantly for the purposes of this article, the First Amendment does not protect individuals from regulations imposed on them by non-governmental actors such as private employers.

That said, the *values* of self-determination and authenticity that animate free speech theory and jurisprudence do not and should not disappear when someone enters the workplace. Given how much time people spend at work and the importance of work to people's lives, those values are just as significant and worthy of protection in private settings as they are in public. For that reason, the First Amendment's free speech jurisprudence offers a powerful counterpoint to the limitations of federal employment discrimination law and specifically to Title VII.

Building on the work of numerous scholars who have demonstrated Title VII's insufficiency in protecting authenticity in the workplace, this article contends that federal employment law should—taking inspiration from free speech theory and jurisprudence—expand beyond the group-based protections established in Title VII in order to also protect and promote an employee's authentic self in the workplace. Part II of this article describes the social science research that explains the value of authenticity in the workplace, the importance of work to our identities, and recent shifts in what employees, especially Millennials, want from work. Part III then describes how Title VII fails to protect an employee's authentic self in the workplace by (1) refusing to extend protection to members of protected groups based on how they uniquely express their identities and (2) ignoring critical expressions of identity untethered to a protected class. In Part IV, the article describes various elements of free speech theory and jurisprudence that should inform how we think about and interpret Title VII. Finally, Part V offers legal suggestions for fostering authenticity in the workplace. Specifically, it argues for the adoption of a statutory scheme that requires courts to apply intermediate scrutiny to any workplace regulation that limits individual expressions of identity. By shifting the burden to the employer to justify its intrusions upon an employee's authentic self, the law would appropriately prioritize employee autonomy.

A few comments on the scope of this article and its arguments are in order. First, although there are other areas of constitutional law, such as substantive due process, that shed light on the law's protection of authenticity, this paper focuses

22. *See* Schauer, *supra* note 18 at 1765 ("Although the First Amendment refers to freedom of 'speech,' much speech remains totally untouched by it."). For example, the government cannot abridge your right to advocate civil disobedience, but it can prevent an employee of a company from providing false or misleading information to company shareholders despite the fact that both actions involve communication of a message. *Id.* at 1773, 1779.

exclusively on the Free Speech Clause of the First Amendment.[23] Because this paper is concerned with the right, necessity, and value in protecting the external expressions of self that people make—their public persona as opposed to their private person—the Free Speech Clause of the First Amendment provides the most apt support.[24] Second, this article does not argue for the elimination of categorical protections for particular groups in American society whose members have faced institutional oppression.[25] Those protections have been instrumental in opening up historically homogenous workplaces to women and minorities. Instead, this article argues for an expansion of Title VII to supplement existing protections from workplace discrimination.[26] Third, it does not advocate for a doctrinal extension of the First Amendment, which requires state action, to the private sphere.[27] Rather, it uses the First Amendment as a lens through which to understand the law's commitment to authenticity. Although this article suggests certain

23. Substantive due process rights guaranteed under the Fourteenth Amendment are deeply connected to notions of personal autonomy and self-determination. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (describing "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" as being "[a]t the heart of [the] liberty" protected under the Fourteenth Amendment). This article does not address that link because other scholars have drawn that comparison. *See, e.g.*, Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 316–17, 322–23 (2014); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1715–19 (1992). It also does not address substantive due process rights because the Supreme Court often characterizes these rights as being related to privacy and intimacy, rather than to outward expressions of self, the focus here. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) ("The fundamental liberties protected by [the Due Process Clause] . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."); Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (invoking the right to privacy in striking down a criminal sodomy law, as it invaded privacy by inviting "unwarranted government intrusions" that "touch[] upon the most private human conduct, sexual behavior . . . in the most private of places, the home").

24. In addition, this paper focuses only on the Free Speech Clause of the First Amendment, not on its religious counterparts. While the Free Exercise Clause offers insight on the link between one's status and one's conduct and protection of conduct as it relates to the exercise of religious beliefs, the Free Speech Clause offers more latitude for exploration because it is not limited to one dimension of self-expression. As such, all subsequent references to the First Amendment should be understood to mean the Free Speech Clause.

25. *See* Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 28–29 (2011) (arguing that "discrimination operates in such a way that a categorical approach . . . is not now and will never be enough to combat all of the forms of discrimination and protect the victims thereof.").

26. The paper focuses on Title VII, rather than on all federal anti-discrimination legislation. It uses Title VII as the exemplar of the class-based system in place today because it covers a spectrum of protected statuses—not because it is more important than the Age Discrimination in Employment Act (ADEA) or the ADA. While, again, it is true that the accommodation model under the ADA provides employees with more opportunity to exhibit their whole selves at work than Title VII does, *see supra* text accompanying note 16, the ADA similarly works backward from the assumption of assimilation—the goal is to accommodate difference, not to view difference as the starting place. This article challenges that broader assumption.

27. Others have persuasively argued for such an extension. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505–506 (1985).

doctrinal changes, its primary purpose is not to offer solutions; it is to acknowledge where we are failing and, more importantly, where we should look for inspiration.

II.
SOCIAL SCIENCE: THE PROVEN IMPACT OF AUTHENTICITY

A. Authenticity

Philosophers, sociologists, and psychologists have long grappled with what it means to be one's authentic self and why pursuing such a state is beneficial for individuals and society.[28] In the past twenty years, a growing number of organizational scholars have joined their endeavor, seeking to understand the nature and role of authenticity in the workplace.[29] This section will describe different conceptions of authenticity. It will then summarize research that demonstrates how fostering authenticity in the context of the workplace benefits employees and employers alike.

1. Background and Definition

Most theories related to authenticity begin with the "understanding, embracing, and enactment of self-defining characteristics."[30] It is, therefore, important to explain what scholars in the field mean by "self." The self is made up of multiple identities, which social scientists Bernardo Ferdman and Laura Morgan Roberts define as "the labels and categories that situate us in a social world through the construction of defining characteristics and relationships with other entities—as well as the associated thoughts, feelings, and intentions."[31]

These identities derive meaning from numerous sources, including:

- The groups to which we claim membership (*e.g.*, "woman," "Jew");

28. *See* Laura Morgan Roberts, Sandra E. Cha, Patricia F. Hewlin & Isis H. Settles, *Bringing the Inside Out: Enhancing Authenticity and Positive Identity in Organizations*, *in* EXPLORING POSITIVE IDENTITIES AND ORGANIZATIONS: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 149, 150–51, 153–54 (Laura Morgan Roberts & Jane E. Dutton, eds., 2009) (explaining that "authenticity has been a topic of discussion among philosophers, literary scholars, sociologists, and psychologists for centuries…[y]et, scholars hold differing assumptions about the nature of authenticity" and noting that research indicates "authenticity has been associated with fewer physical and depressive symptoms, lower anxiety, lower stress, and greater subjective vitality").

29. *Id*. at 150. *See also* Michael Knoll & Rolf van Dick, *Authenticity, Employee Silence, Prohibitive Voice, and the Moderating Effect of Organizational Identification*, 8 J. POSITIVE PSYCHOL. 346, 347 (2013) ("Despite its long tradition in philosophy, authenticity has been addressed only recently as a concept in empirical psychology.").

30. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 150; *see also* Michael H. Kernis & Brian M. Goldman, *A Multicomponent Conceptualization of Authenticity: Theory and Research*, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 283, 294 (2006) ("We have seen that most perspectives on authenticity stress the extent to which one's thoughts, feelings, and behaviors reflect one's true- or core-self.").

31. Ferdman & Roberts, *supra* note 4, at 98.

- The social roles we inhabit (*e.g.*, "mother," "neighbor");
- The reactions others have to us (*e.g.*, "My friends describe me as genuine");
- Social structures (*e.g.*, "rich vs. "poor"); and
- Individuating traits and characteristics (*e.g.*, "short," "introverted").[32]

Our identities also include *how we think and feel about* the groups to which we belong.[33] As Ferdman and Roberts write, "each of us integrates our multiple identities in an individualized way and gives meaning to the intersections and relationships among the identities in the context of our particular life path and social history."[34] Accordingly, there is both a singular and a group dimension to the self.

Authenticity, then, relates to the ways in which an individual expresses her complicated, ever-evolving self. Scholars differ on how to characterize this process. Some view authenticity as a set of character traits or a moral value that an individual possesses.[35] Others understand it as an optimal psychological state to which people should aspire.[36] In addition, some scholars construe authenticity as relational, such that it can be achieved only when two parties experience each other as engaging in a transparent exchange of strengths and limitations.[37] By contrast, others contend that another's external reaction is irrelevant—that the nature of authenticity lies only in the extent to which a person is "true to himself or herself."[38]

Although scholars conceptualize authenticity differently, a few key themes emerge. First, authenticity involves a connection between what one experiences

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32. *Id.*

33. *Id.* at 98–99; *see also* Laurie P. Milton, *Creating and Sustaining Cooperation in Interdependent Groups: Positive Relational Identities, Identity Confirmation, and Cooperative Capacity*, *in* EXPLORING POSITIVE IDENTITIES AND ORGANIZATIONS, *supra* note 28, at 295 ("Broadly conceived, a person's *self* includes all of the person's thoughts and feelings about himself or herself as an object, that is, as a physical, social and spiritual or moral being.").

34. Ferdman and Roberts, *supra* note 4, at 99.

35. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 150–51; *see also* BILL GEORGE, AUTHENTIC LEADERSHIP: REDISCOVERING THE SECRETS TO CREATING LASTING VALUE 11 (2003) ("After years of studying leaders and their traits, I believe that leadership begins and ends with authenticity."); Alex M. Wood, P. Alex Linley, John Maltby, Michael Baliousis & Stephen Joseph, *The Authentic Personality: A Theoretical and Empirical Conceptualization and the Development of the Authenticity Scale*, 55 J. COUNSELING PSYCHOL. 385, 385 (2008) ("To know yourself and to act accordingly has been seen as a moral imperative throughout history.").

36. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151; *see also* ROB GOFFEE & GARETH JONES, WHY SHOULD ANYONE BE LED BY YOU?: WHAT IT TAKES TO BE AN AUTHENTIC LEADER 16 (2006) (describing elements of authentic leadership, including comfort with self).

37. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151; *see also* Michael H. Kernis, *Toward a Conceptualization of Optimal Self-Esteem*, 14 PSYCHOL. INQUIRY 1, 13, 15 (2003) (arguing that a "relational orientation" is one of four essential components of authenticity—the others being awareness, unbiased processing, and action).

38. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151; *see, e.g.*, Rebecca J. Erickson, *The Importance of Authenticity for Self and Society*, 18 SYMBOLIC INTERACTION 121, 124 (1995) ("[A]uthenticity is a self-referential concept; unlike sincerity, it does not explicitly include any reference to 'others.'").

internally and what one expresses externally.[39] Therefore, authenticity is experienced subjectively: how an actor feels about whether she has sufficiently communicated and acted on her genuine internal experience determines whether she has acted authentically.[40] Second, authenticity is not a "static trait": people slide along a spectrum of inauthenticity to authenticity depending on the circumstances.[41] Even if some people are predisposed to being more authentic, one's environment and social role matter.[42] Third, and relatedly, "people are active agents who, under certain conditions, will attempt to 'become more authentic.'"[43] That is, people want to be authentic.[44]

2. Authenticity in the Workplace

In the context of the workplace, authenticity often runs up against organizational demands to assimilate—to downplay or hide one's true self for the sake of the job. Early management theory encouraged this quite literally, suggesting that employees bring only their physical bodies to work but leave their minds, and presumably their hearts, at home.[45] Although the tension between organizational

39. *See* Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151 ("[W]e define authenticity as the subjective experience of alignment between one's internal experiences and external expressions."); *see also* Daniel M. Cable and Virginia S. Kay, *Striving for Self-Verification During Organizational Entry*, 55 ACAD. MGMT. J. 360, 362 (2012) ("[T]he concept of authenticity emphasizes discovering (becoming aware of) and living out (communicating or acting on) whatever one learns about his or her self."); Susan Harter, *Authenticity*, *in* HANDBOOK OF POSITIVE PSYCHOLOGY 382, 382 (R.C. Snyder & J. Shane Lopez, eds., 2002) (defining authenticity as "owning one's personal experiences, be they thoughts, emotions, needs, wants preferences, or beliefs" and "expressing oneself in ways that are consistent with inner thoughts and feelings").

40. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151. This "assumes that individuals are capable of reflecting on and assessing the congruence between their experiences and their expressions." *Id*.

41. *See Id*.; *see also* Kernis, *supra* note 37, at 17 (explaining that the self is neither "monolithic and unchanging" nor "ever-changing, malleable, and without a core").

42. *See* Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151–152.

43. *Id*. at 152; *see also* Alexandra Sedlovskaya, Valerie Purdie-Vaughns, Richard P. Elbach, Marianne Lafrance, Rainer Romero-Canyas & Nicholas P. Camp, *Internalizing the Closet: Concealment Heightens the Cognitive Distinction Between Public and Private Selves*, J. PERSONALITY & SOC. PSYCHOL. 695, 696 (2013) ("As people become comfortable in a given . . . context, the drive for an authentic self leads cognitive representations of the self-in-public and the self-in-private to converge."); CARL ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY 351 (1961) (describing the human tendency to actualize one's self as "the directional trend which is evident in all organic and human life—the urge to expand, extend, develop, mature—the tendency to express and activate all the capacities of the organism, or the self").

44. Indeed, for many, authenticity is critical to psychological well-being. This is especially true for people with concealable stigmas such as minority sexual orientation and undocumented immigration status. *See, e.g.*, Sedlovskaya, Purdie-Vaughns, Elbach, Lafrance, Romero-Canyas & Camp, *supra* note 43, at 697 (finding that people that conceal stigmatized identities experience on average more psychological distress); Laura Smart & Daniel Wegner, *The Hidden Costs of Hidden Stigma*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA 220, 221 (Todd F. Heatherton et al., eds., 2000) ("Concealing a stigma leads to an inner turmoil that is remarkable for its intensity and its capacity for absorbing an individual's mental life.").

45. *See* Berg, *supra* note 4, at 398. As Berg explains, this was true of both blue- and white-

cohesion and individuality has not disappeared, social scientists have recently found that when employees perceive themselves as being authentic at work, both they and their organizations benefit.[46]

Organizations are created to achieve certain goals and generally require that employees work together to innovate and problem-solve to achieve those goals.[47] Scores of social scientists have confirmed that, at the most basic level, organizational survival depends on good ideas and good relationships—among coworkers, with management, and between groups within the organization.[48] In an effort to foster such cohesion, organizations attempt to minimize differences between employees.[49] Employees, trying to fit in, correspondingly struggle with how much to share about themselves at work.[50]

Prior to the 1960s, the question for many people was less about self-expression and more about getting through the door: women and minorities were either segregated into specific roles or not allowed into institutions entirely.[51] Through a combination of market, social, and legal pressures, organizations were forced, grudgingly, to open up.[52] Simultaneously, the world in which organizations were operating grew rapidly in terms of scope and complexity.[53] Seeking a competitive advantage in such a world, organizations—and those who work within them—have become increasingly complex and diverse.[54]

For organizations, the increase in diversity brings both rewards and challenges. As many have noted, diversity in background and viewpoints has the potential to lead to better organizational performance and greater innovation, which is necessary to meet diversifying consumer needs.[55] However, diversity along

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collar work. *Id.*

46. *See* discussion *infra*; *see also, e.g.*, Ralph van den Bosch & Toon W. Taris, *The Authentic Worker's Well-Being and Performance: The Relationship Between Authenticity at Work, Well-Being, and Work Outcomes*, 148 J. PSYCHOL: INTERDISCIPLINARY & APPLIED 659, 676 (2014) (finding that "authenticity at work is related to well-being and work outcomes, even after controlling for work characteristics and demographic variables").

47. *See* Berg*, supra* note 4, at 399-400.

48. *See id.*

49. *Cf.* Charles A. O'Reilly III, Jennifer Chatman, & David F. Caldwell, *People and Organizational Culture: A Profile Comparison Approach to Assessing Person-Organization Fit*, 34 ACAD. OF MGMT. J. 487, 492 (1991) ("[O]rganizations attempt to select recruits who are likely to share their values. New entrants are then further socialized and assimilated, and those who don't fit leave. Thus, basic individual values or preferences for certain modes of conduct are expressed in organizational choices and then reinforced within organizational contexts.").

50. *See* Berg, *supra* note 4, at 400–02; Ferdman & Roberts, *supra* note 4, at 111, 114.

51. *See* Berg, *supra* note 4, at 399.

52. *See id.* at 398–99.

53. *See id.* at 400.

54. *See id.*

55. *See, e.g.*, Jason Lambert*, Cultural Diversity as a Mechanism for Innovation: Workplace Diversity and the Absorptive Capacity Framework*, 20 J. ORG. CULTURE, COMMS. & CONFLICT 68, 72 (2016) (explaining that while "the mere presence of diversity is not sufficient to introduce creativity or innovation . . . some studies demonstrate that over time, diverse work groups are more cre-

those same dimensions also increases the likelihood of disagreement and conflict among employees.[56] As previously noted, organizations struggle with how to handle differences productively, and most respond by coalescing around an organizational culture. Because of the history of segregation and patriarchy in this country, that culture typically expresses white, heterosexual, middle class, male norms of behavior and values.[57] As a result, individuals, particularly those not in the dominant group, must decide whether and how to conform to these workplace norms.

Described alternatively as "covering" demands[58] and "cultural profiling,"[59] assimilation demands in the workplace are made when an institution, through its members, explicitly or implicitly requires that an individual adapt to the organization's culture by performing her identity in a specific, organizationally-sanctioned way. The demand can be obvious: a partner at a law firm tells a female associate to wear a skirt rather than pants because "it's an old-fashioned kind of place." It can also be subtle: the boss announces that she wants to go to drinks with her team after work, and an employee who would typically decline goes to fit in. In both examples, the employer asks or otherwise indicates that she expects the employee

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ative than homogeneous groups, generate more solutions and perspectives when addressing problems . . . , and introduce innovation in team settings . . . .") (internal citations omitted); Frances Bowen & Kate Blackmon, *Spirals of Silence: The Dynamic Effects of Diversity on Organizational Voice*, 40 J. MGMT. STUD. 1393, 1398 (2003); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 232–33 (2001) (describing theories and empirical research that support the notion that demographic diversity "increases the available pool of resources—networks, perspectives, styles, knowledge, and insights—that people can bring to bear on complex problems"). Although, as Ely and Thomas explain, the research on the benefits of diversity are mixed, *id.* at 229, 233, their research showed that cultural diversity enhances organizational outcomes under certain conditions, such as when "a work group views cultural differences among its members as an important resource," *id.* at 266–67. Social scientists Michele Jayne and Robert Dipboye similarly found that the benefits of diversity are contingent upon situational factors, such as organizational culture. *See* Michele E. A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Impose Business Performance: Research Findings and Recommendations for Organizations*, 43 HUM. RESOURCES MGMT. 409, 413 (2004).

56. *See* Berg, *supra* note 4, at 400; *see also* Bowen & Blackmon, *supra* note 55, at 1398 (noting that "differences in demographic attributes – diversity – can create the potential for group faultlines").

57. *See* Joan Acker, *Inequality Regimes: Gender, Class, and Race in Organizations*, 20 GENDER & SOCIETY 441, 443–448 (2006). "All organizations have inequality regimes, defined as loosely interrelated practices, processes, actions, and meanings that result in and maintain class, gender and racial inequalities within particular organizations." *Id*. at 443. "In general, work is organized on the image of a white man who is totally dedicated to the work and who has no responsibilities for children or family demands, other than earning a living." *Id.* at 448; *see also* Frank Linnenhan & Alison M. Konrad, *Diluting Diversity: Implications for Intergroup Inequality in Organizations*, 8 J. MGMT. INQUIRY 399, 400 (1999) ("Members of powerful groups in organizations accrue privileges or unearned advantages obtained by virtue of their identity group membership(s) . . . . History and culture determine the specific details associated with any particular privilege. . . . The privileges institutionalized in organizational structures and processes work to re-create and reinforce inequalities between identity groups."); *see generally* Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589 (1995).

58. Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 772, 776 (2002).

59. Roberts & Roberts, *supra* note 12, at 371.

to do something that "is not her" to satisfy some sort of organizational need or desire.[60] The employee must then choose whether to give in to the demand—to cover—or remain "true to herself" and face possible backlash.[61]

Social scientists have found that covering—and the struggle presented by the "choice" of whether to cover—comes at a cost to both individuals and organizations. In a seminal study, Arlie Russell Hochschild coined the term "emotional labor" to describe the pressure placed on flight attendants to feign happiness in the face of customers—and bosses—who demand that they do so and the flight attendants' corresponding effort to meet those demands.[62] In other words, Hochschild found that forcing employees to act inauthentically had negative effects on their well-being. Subsequent research on emotional labor suggests that conflicts between expressed and felt emotions are likely to lead to emotional exhaustion and work burnout.[63] Other studies have found that when workers feel pressure to conform their views to those they believe the dominant group holds, they are more likely to keep their ideas and opinions to themselves.[64] Research suggests that such self-censorship limits organizational creativity, innovation, and group learning.[65]

People who feel that they must behave inauthentically to conform to social expectations often experience what scholars call "identity conflict."[66] The strain posed by such a conflict is particularly acute for those with stigmatized identities,

60. *See* Knoll & van Dick, *supra* note 29, at 346 (documenting studies that show that employees are often required to act in specific ways at work).

61. *See id.* at 346–47; YOSHINO, *supra* note 14 at 93–96 (detailing how Robin Shahar lost her job at Georgia's Department of Law after she stopped covering and married another woman).

62. ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 4 (3d ed. 2012).

63. *See* Hakan Ozcelik, *An Empirical Analysis of Surface Acting in Intra-Organizational Relationships*, 34 J. ORGANIZATIONAL BEHAV. 291, 291 (2013) (finding such "surface acting" to be positively related to emotional exhaustion and negatively related to performance); Celeste M. Brotheridge & Raymond T. Lee, *Development and Validation of the Emotional Labour Scale*, 76 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 365, 375 (2003) ("Surface acting was significantly associated with higher levels of emotional exhaustion, depersonalization, the requirement to hide and control one's emotions, self-monitoring of expressive behavior, and negative affectivity.").

64. *See* Roberts, Cha, Hewlin & Settles, *supra* note 28, at 153 (listing studies).

65. *See id.*; *See also* Frances J. Milliken, Elizabeth W. Morrison & Patricia F. Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, 40 J. MGMT. STUD. 1453, 1473 (2003); Elizabeth Wolfe Morrison & Frances J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 719 (2000) (arguing that "the negative effects of silence on organizational decision making and change processes will be intensified as the level of diversity within the organization increases").

66. *See*, e.g., Isis. H. Settles, *When Multiple Identities Interfere: The Role of Identity Centrality*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 487, 487–88, 496 (2004) (finding that for women-scientists for whom one or both the woman and scientist identities were central, increased levels of identity interference resulted in lower self-esteem, performance, and life satisfaction); Isis H. Settles, Robert M. Sellers & Alphonse Damas Jr., *One Role or Two? The Function of Psychological Separation in Role Conflict*, 87 J. APPLIED PSYCHOL. 574, 574 (2002); *see also* Roberts, Cha, Hewlin & Settles, *supra* note 28, at 153.

such as women and minorities, for whom the emotional labor required at work often implicates a core aspect of the self.[67]

A few examples are illustrative. In their study on Hispanic managers in a predominantly white organization, Bernardo Ferdman and Angelica Cortes found that, when asked to describe how ethnicity was relevant to their work, the interviewees usually talked about negative experiences.[68] Many of these Hispanic managers viewed their workplace as inhospitable to their culturally influenced workstyle—a style that favored face-to-face dialogue and confronting work-related disagreements openly and directly rather than engaging indirectly, such as writing a memo, or delaying in addressing a workplace conflict.[69] Many reported receiving "subtle hints" or even being told directly that their workstyle was not appropriate and needed to change, leading at least one manager "to be less emotional, friendly and outgoing."[70] These managers were torn between wanting "positive recognition" of their Hispanic heritage and not wanting to be stereotyped; "[t]hey wanted to maintain their individuality but without losing their identity."[71] Unable to achieve this balance, many deemphasized their ethnicity at work and felt stifled as a result.[72]

In another example, David Berg, using himself as a case study, described his struggle to make his Jewish and professional identities peacefully coexist. An avid student of the Talmud and a management consultant, Berg found himself continually separating his two worlds, even when he saw fruitful connections between them.[73] When presented with the opportunity to provide a Talmudic analogy in a management consulting session, Berg, who had encountered this situation before, stopped himself: "Again, I made the choice to suppress a thought rooted in my Jewish experience in favor of an action born of my professional role. And again I was disturbed, unsettled by the experience and my handling of it."[74] He realized that, without his knowledge, he had "slowly accommodated in these settings, putting aside what [he] thought and felt."[75] His unconscious desire to protect his "appropriateness" resulted in an "increasing lack of vitality in [his] work."[76]

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67. *See* Ella Louise Bell, *The Bicultural Experience of Career-Oriented Black Women*, 11 J. ORG. BEHAV. 459, 474–75 (1990).

68. Bernardo M. Ferdman & Angelica C. Cortes, *Cultural and Identity Among Hispanic Managers in an Anglo Business*, *in* HISPANICS IN THE WORKPLACE 246, 270 (S. Knouse et al., eds., 1992).

69. *See id.* at 255–57, 261 (noting how Hispanic managers had preferences for stronger interpersonal relationships, participatory leadership, and open confrontation of work-related disagreements).

70. *Id.* at 266–67.

71. *Id.* at 271.

72. *Id.*

73. *See* Berg, *supra* note 4, at 402–04.

74. *Id.* at 405.

75. *Id.*

76. *Id.*

In her work on career-oriented African American women, Ella Bell found a very stark illustration of identity conflict: her interview subjects perceived themselves as living in two wholly distinct cultural contexts—Black at home and white at work.[77] Describing her subjects' "bicultural life experience[s]" as "a constant push and pull," Bell found that her subjects were continuously trying to prove their competence in their predominantly white workplaces while also trying to maintain ties to their Black communities.[78] The work her interviewees did internally to reduce the identity conflict, and externally to respond to a series of stereotypical projections in both communities, required cognitive resources that might otherwise have been directed elsewhere.

Scholars have theorized that fostering authenticity in the workplace holds great potential for both individual and organizational well-being and growth. Roberts, Cha, Hewlin and Settles have hypothesized that authenticity promotes the construction of more positive identities "by increasing private regard (*i.e.*, how positively people feel about themselves)."[79] They have argued that "becoming more authentic often requires an individual to defy or complicate other people's stereotypic, simplistic, and/or restrictive expectations of his or her role or group membership."[80] For women and minorities in particular, "becoming more authentic means finding ways to integrate one's gendered and cultural experiences into the values and practices of their work environment, perhaps even drawing on such aspects of one's background as a source of strength that enhances . . . one's work and relationships."[81] In the context of organizations, social scientists Frances Bowen and Kate Blackmon contend that individuals who believe themselves able to freely disclose their various identities at work—including less visible identities such as sexual orientation—are more likely to express their views on important organizational issues and to "engage in organizational voice."[82]

Recent empirical research supports these hypotheses. On an individual level, researchers have found that increased employee authenticity correlates to increased employee well-being.[83] For example, one study examined "authenticity

77. Bell, *supra* note 67, at 472–73.

78. *Id.* at 475.

79. Roberts, Cha, Hewlin & Settles, *supra* note 28, at 154–155.

80. *Id.* at 161.

81. *Id.* at 160; *see also* Ferdman & Roberts, *supra* note 4, at 102 ("[W]e believe that ultimately, when we can be authentic and draw on our full range of identities in an integrated and holistic way, we will be better off—and so will our work groups and organizations.").

82. *See* Bowen & Blackmon, *supra* note 55, at 1408–09.

83. *See, e.g.*, Vanessa Buote, *Most Employees Feel Authentic at Work, but It Can Take a While*, HARV. BUS. REV. (May 11, 2016), https://hbr.org/2016/05/most-employees-feel-authentic-at-work-but-it-can-take-a-while [https://perma.cc/DS8Y-PFT9] ("[F]indings indicated that authentic employees fared better than inauthentic employees, reporting significantly higher job satisfaction and engagement, greater happiness at work, stronger sense of community, more inspiration and lower job stress. . . . [R]esults show a clear link between authenticity and well-being.")

climate" in Australian health institutions in relation to emotional exhaustion.[84] The researchers defined an "authentic" climate as a shared perception by a group that the group values and accepts the self-expression of its members, especially negative emotions.[85] The study showed that a climate of authenticity mitigated the negative relationship between engaging in emotion work and emotional exhaustion.[86] That is, if employees worked in a group with a high climate of authenticity, they showed reduced strain compared to employees who worked in a group with lower levels of climate authenticity.[87] Particularly pertinent here, research has also found this to be true for people with marginalized identities. For example, numerous studies have linked degree of disclosure of one's sexual orientation at work to increased job satisfaction, career commitment, affective commitment, promotion rates, and belief in the support of top management.[88]

Empirical research also shows that organizations benefit when employees can be themselves. Researchers conducting a study on employee onboarding found that both employees' and organizational outcomes were more positive when organizations focused on encouraging newcomers' authentic self-expression, rather than organizational fit.[89] Employees who felt welcome to express their authentic selves at work exhibited higher levels of organizational commitment, individual performance, productivity, and quality of work.[90] Similarly, in a study of Army action teams, those teams with higher levels of authenticity, together with authentic leadership that fostered such an environment, displayed superior teamwork and productivity.[91]

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84. Alicia Grandey & Su Chuen Foo, *Free to Be You and Me: A Climate of Authenticity Alleviates Burnout from Emotional Labor*, 17 J. OCCUPATIONAL HEALTH 1, 1 (2012).

85. *Id.* at 4.

86. *Id.* at 8 (study results supported "that a low climate of authenticity exacerbates the resource depletion from self-regulating with patients, but [a] high climate of authenticity replenishes the self").

87. *Id.* at 9. Using data from 646 workers, another study similarly found that authenticity at work was related to employee well-being—specifically, greater work engagement, in-role performance, and job satisfaction. *See* Ralph van den Bosch & Toon W. Taris, *Authenticity at Work: Development and Validation of an Individual Authenticity Measure at Work*, 15 J. HAPPINESS STUD. 1, 14 (2013).

88. *See, e.g.*, Kristin H. Griffith and Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians: "Coming Out" at Work*, 87 J. APPLIED PSYCHOL. 1191, 1195–96 (2002) (finding that disclosing sexual identity at work was related to higher job satisfaction); Nancy E. Day & Patricia Schoenrade, *Staying in the Closet Versus Coming Out: Relationships Between Communication About Sexual Orientation and Work Attitudes*, 50 PERSONNEL PSYCHOL. 147, 159–60 (1997) (finding that work attitude levels of gay and lesbian workers are predicted in part by how much they communicate about their sexual orientation); *see also* Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT., 1466, 1476 (2013) (listing various studies that support "the notion that openness about one's concealable stigma is associated with increased job satisfaction").

89. *See* Daniel Cable, Francesca Gino & Brad Staats, *Breaking Them in or Eliciting Their Best? Reframing Socialization around Newcomers' Authentic Self-Expression*, 58 ADMIN. SCI. Q. 1, 23 (2013).

90. *See id.*

91. *See* Sean T. Hannah, Fred O. Walumbwa & Louis W. Fry, *Leadership in Action Teams:*

In one particularly illuminating study involving qualitative research of three culturally diverse organizations, Robin Ely and David Thomas investigated the role that cultural diversity played in group functioning, specifically whether and under what conditions women and people of color expressed their views openly.[92] They found that how an organization viewed diversity—that is, "group members' normative beliefs and expectations about cultural diversity and its role in their work group"—had a large impact on "how they expressed and managed tensions related to diversity" and "whether those traditionally underrepresented in the organization felt respected and valued by their colleagues."[93] Where an organization viewed cultural differences among its members as a valuable resource to use in its core work, rather than a means to gain entry into a particular demographic market, group members were encouraged "to discuss openly their different points of view because differences—including those explicitly linked to cultural experiences—were valued as opportunities for learning."[94] The implication of Ely and Thomas's work is that diversity initiatives only achieve their potential when employees genuinely feel able to be themselves.

Yet, the push for greater authenticity in the workplace should not be confused with a call to end all inhibition. Scholars have clarified that "[a]uthenticity is *not* reflected in a *compulsion* to be one's true-self, but rather in the free and natural expression of core feelings, motives, and inclinations."[95] Indeed, full disclosure of all of one's internal experiences to one's colleagues is not always beneficial for the organization or the individual.[96] As in the legal context, social scientists subscribe to the idea that "[y]our right to swing your arms ends just where the other man's nose begins."[97] The right to freely express one's authentic self in the workplace does not mean that one is at liberty to cause harm to others.

B. Importance of Work to Our Lives

Work—and the environment in which we do it—makes up much of our lives. Whether a clerical worker, a teacher, or the CEO of a Fortune 500 company, an employed adult spends most of her waking time at work. On a basic level, work enables our economic survival and our ability to provide for our families. Yet, as historians and social scientists have demonstrated, work is far more than a

Team Leader and Members' Authenticity, Authenticity Strength, and Team Outcomes, 64 PERSONNEL PSYCHOL. 771, 792 (2011).

92. Ely & Thomas, *supra* note 55, at 265.

93. *Id.* at 234, 260.

94. *Id.* at 265–66.

95. Kernis & Goldman, *supra* note 30, at 299 (emphasis in original); *see also* Berg, *supra* note 4, at 402 ("But 'wholeness' too can be stressful.").

96. *See, e.g.*, Ferdman & Roberts, *supra* note 4, at 112 ("'Bringing one's whole self' does not constitute the freedom to behave impulsively at work in ways that will be detrimental to other people in that environment—and likely harmful to oneself as well.").

97. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (internal citation omitted).

paycheck; people derive self-worth from working—they associate work with dignity, respect, independence, and civic participation.[98] As legal scholar Kenneth Karst writes, work "is a means of proving yourself worthy in your own eyes and in the eyes of others."[99] At work, one can acquire or lose social status, be encouraged or deterred, accepted or rejected.

Just as importantly for the development of self, the workplace is where adults form relationships and engage with people different from themselves. It is the place Cynthia Estlund describes as "the single most important site of cooperative interaction and sociability among adult citizens outside the family."[100] Employees interact with their co-workers all day—both during work hours and after. Colleagues become friends, and conversations range from shared frustration over a work-related issue to political and personal chatter. Studies have found that employees talk to their co-workers about things that matter to them more than anyone else outside their families, and more people say that they get "a real sense of belonging" among their co-workers than among any other group outside of family.[101]

The current workplace is also a place of comparative diversity and integration. Since the enactment of Title VII, there has been a significant increase in representation of non-whites and women in higher paying jobs.[102] In contrast to other arenas of social interaction, such as informal social networks, religious congregations, and voluntary groups, the workplace—at least theoretically—contains people from different cultural, religious, racial, and ethnic backgrounds. As Estlund explains, the involuntariness of workplace associations—such as the economic need to work, managerial authority within the workplace, and external regulations of law—plays a "curiously constructive role" in enabling close and regular interaction between people across racial and social lines.[103] This is not to say that the current workplace is without friction or that the work of integration is complete—hardly. Rather, it is because the workplace is often the *only* place many people interact across social divisions, particularly in the context of race, that fostering

98. *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997).

99. Karst, *supra* note 98, at 532. Karst describes how, as far back as the colonial era, colonists invested work "with an almost religious character," noting that "it was not work in general that they dignified, but the autonomy that was both expressed and reinforced by the free choice to work." *Id.* at 531.

100. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 7 (2003).

101. *Id*.

102. *See* Cynthia L. Estlund, *The Changing Workplace as A Locus of Integration in A Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 337 n. 18 (2000); *see also* John J. Donohue III & Peter Siegelman*, The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1010–11 (1991) (explaining that, in the United States, "from 1970 through 1980 the number of nonwhite managerial and professional workers rose 144 percent, and the number of female managerial and professional workers rose by 71 percent").

103. ESTLUND, WORKING TOGETHER, *supra* note 100, at 4–5.

authentic self-representation is important not only for the individuals involved but also for society as a whole.[104]

C. What We Seek From Work Today

People's relationship to work has evolved over time. At the corporation's height, the prevailing sentiment was that "the job makes the person."[105] Employees adapted in order to function as well as possible within their institutions, where, unlike today, many remained until retirement.[106] Although scholars disagree on just how much, there is little doubt that things have changed.[107] Declining job stability, changing demographics, and the spread of communication technologies are just a few of the factors that have transformed the American workplace.[108] Boundaries between work and non-work are eroding.[109] In the age of nonlinear and self-guided careers, many adults are seeking to enhance their experiences of authenticity at work.[110]

In their five-year study on the complex issues facing the modern worker, Sherry Sullivan and Lisa Mainiero concluded that today's workers, particularly GenXers[111] and Millennials,[112] are forging what they describe as "Kaleidoscope

104. *See* Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 96 (2000) ("It is a locus of associational life and of human connections without which a diverse democratic society cannot flourish.").

105. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 3 (1977).

106. *See* Lakshmi Ramarajan & Erin Reid, *Shattering the Myth of Separate Worlds: Negotiating Nonwork Identities at Work*, 38 ACAD. MGMT. REV. 621, 623 (2013) (observing a shift "from employment by a single organization to serial employment across many organizations") (internal citation omitted); Yehuda Baruch, *Transforming Careers: From Linear to Multidirectional Career Paths*, 9 CAREER DEVELOPMENT INT'L 58, 59 (2004).

107. *See generally* Sherry E. Sullivan & Yehuda Baruch, *Advances in Career Theory and Research: A Critical Review and Agenda for Future Exploration*, 35 J. MGMT. 1542 (2009) (describing differing scholarly perspectives on how much and the ways in which careers have changed since the 1950s).

108. *See* Ramarajan & Reid, *supra* note 106, at 622–23; Sullivan & Baruch, *supra* note 107, at 1542-43; Green, *supra* note 14, at 101 ("Although…organizational theorists disagree on the degree…there is general agreement that the employment relationship in both white- and blue-collar sectors of the American workplace is on the whole becoming more contingent, flexible, and individualized than in years past.").

109. *See* Sherry E. Sullivan & Lisa A. Mainiero, *The Changing Nature of Gender Roles, Alpha/Beta Careers and Work-Life Issues: Theory-Driven Implications for Human Resource Management*, 12 CAREER DEV. INT'L 238, 238–39 (2007) (describing the adoption of flexible work arrangements by a growing number of organizations); Ramarajan & Reid, *supra* note 106, at 622–24 (positing that the shift toward serial employment and declining job security, increasing demographic diversity, and the proliferation of communication technology are blurring and reshaping the boundaries between work and non-work identities); Baruch, *supra* note 106, at 58 (noting the emergence of boundaryless careers).

110. *See* Sullivan & Mainiero, *supra* note 109, at 239–40.

111. This refers to the generation born between 1965 and 1981. *See* Jean M. Twenge, *A Review of the Empirical Evidence on Generational Differences in Work*, 25 J. BUS. PSYCHOL. 201, 201 (2010).

112. Millennials were born between 1982 and 2004. *See id.*

Careers," or "careers that were not defined by a corporation but by the individual worker, based on his/her own values and life choices."[113] Working with a staggering amount of data, they found that rather than mindlessly climbing the corporate ladder, today's workers make career decisions based on their need for authenticity, work-life balance, and challenge.[114] Over the course of her life, a worker's relative prioritization of each principle will shift in response to her personal and career choices.[115] Nevertheless, unlike past understandings of career trajectories that focused only on the dichotomy of career and family, Sullivan and Mainiero found that today's workers increasingly focus on, as they described the priority in a later study, "being true to oneself and behaving in ways that matched their internal values."[116]

In choosing where to work, people are actively seeking organizations where they can be their authentic selves. Rob Goffee and Gareth Jones spent three years investigating what people thought "the organization of [their] dreams" looked like.[117] Speaking to hundreds of executives all over the world, they found that people wanted to work somewhere that nurtures individuality—not simply an organization that accommodates differences along traditional diversity categories like gender, race, age, and ethnicity, but one that embraces "differences in perspectives, habits of mind, and core assumptions."[118] They found that the ideal organization "is aware of dominant currents in its culture" but "makes explicit efforts to transcend them."[119]

A recent Deloitte University report suggests that these executives' views reflect changing generational attitudes toward diversity and inclusion in the workplace. The report found that Millennials take a different approach to diversity and inclusion than their predecessors: whereas GenXers and Baby Boomers most commonly defined diversity in the context of demographic representation and fairness, Millennials spoke more of unique perspectives, experiences, identities, and ideas.[120] For them, an inclusive workplace brings together people of different

113. Sullivan & Mainiero, *supra* note 11, at 46–47; *see also* Green, *supra* note 14, at 107 ("The new employment relationship marks an important ideological shift toward freedom and individualism over control.").

114. *See* Sullivan & Mainiero, *supra* note 11, at 47–48.

115. *See id.* at 48 ("Consider the working of a kaleidoscope; as one part moves, so do the other parts change.").

116. Sullivan & Mainiero, *supra* note 109, at 247.

117. Rob Goffee & Gareth Jones, *Creating the Best Workplace on Earth*, HARV. BUS. REV., May 2013, https://hbr.org/2013/05/creating-the-best-workplace-on-earth [https://perma.cc/2RHE-PLTB].

118. *Id.*

119. *Id.*

120. CHRISTIE SMITH & STEPHANIE TURNER, DELOITTE UNIV. LEADERSHIP CTR. FOR INCLUSION, THE RADICAL TRANSFORMATION OF DIVERSITY AND INCLUSION: THE MILLENNIAL INFLUENCE 8 (2015). Other studies show a gap in approaches between GenXers and Baby Boomers, further suggesting an evolving attitude over generations. *See* Sherry E. Sullivan, Monica L. Forret, Shawn M. Carraher & Lisa A. Mainiero, *Using the Kaleidoscope Career Model to Examine Generational Differences in Work Attitudes*, 14 CAREER DEV. INT'L. 284, 295 (2009) (finding that in a

backgrounds but views them as individuals, rather than as representatives of gender, racial, or ethnic groups.[121] Describing millennial workers as "intolerant of workplaces that don't allow them to be themselves," the report's authors concluded that "Millennials are refusing to check their identities at the doors of organizations today, and they strongly believe these characteristics bring value to the business outcomes and impact."[122]

Although still early in its development, the social science research on authenticity strongly supports the conclusion that both employers and employees benefit when people can be themselves at work. Employers who foster authenticity in their organizations attract people who are more committed to both their employers and their own personal performance. Greater workplace authenticity also has resulted in higher quality teamwork and more productivity. When employees can be their authentic selves at work, job satisfaction goes up, personal wellbeing increases, and fewer cognitive resources are spent attempting to resolve identity conflicts. This is particularly important for women and minorities, who often face the greatest identity conflicts, given their historically non-dominant status. Finally—and most importantly—authenticity is what the incoming workforce cares about.

III.
TITLE VII: AN INADEQUATE PROTECTION FOR AUTHENTICITY

As mounting social science demonstrates, authenticity and individuality are values that benefit people and the organizations they work for. American employment law, however, does not reflect the importance of those values. Title VII provides protection for an individual based on her status as a member of a protected class. It does not protect how she expresses her identity, even if that expression is intimately connected to her protected status. Even in the context of religion, where Title VII ostensibly provides greater protection for employees to act upon their identities, the courts' treatment is not as different as one might expect.[123] Employers are thus free to enforce social norms on, and compel certain expression from, employees during their time in the workplace, regulating much of what makes each individual employee who she is without running afoul of Title VII.

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survey of 982 professionals across the country, members of Generation X had "a significantly higher desire for authenticity than Boomers.").

121. SMITH & TURNER, *supra* note 120, at 7.

122. *Id*. at 6, 15.

123. *See* Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 452, 456 (2010) ("While [the provision related to religion in Title VII] collapsed the conduct/status distinction, religion is nonetheless often treated in a similar manner to the other protected traits, with courts requiring little more than 'neutral' treatment of religious employees. Courts have done so, in large part, by assuming that religion is nothing more than a matter of personal preference or a lifestyle choice."). In addition, Title VII does not require religious accommodations that impose more than de minimis costs on an employer. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

By contrast, the First Amendment forbids the government—as opposed to private actors—from doing precisely those things, in part, because they hinder our ability to express ourselves. While a clear difference separates government and private regulation—a tyrannical state surely trumps the proverbial horrible boss—the First Amendment remains instructive: it captures the value of individuality and intuits the importance of authenticity to the American way of life. By ignoring those same values in the workplace, the law "tolerate[s] denial of those values which, in the polity, it cherishe[s]."[124]

This is not to argue that the law should ignore employers' legitimate interest in running their businesses effectively "any more than the recognition of individual constitutional rights requires the law to blind itself to the interests of the community."[125] In certain circumstances, employers may have important interests in tightly regulating their employees' appearances or behaviors.[126] Rather, the concern is twofold. First, as Karl Klare wrote, "employers routinely abuse their power and impose restrictions that cannot be justified on productivity, safety, or any other legitimate grounds."[127] Second, courts act in "reflexive deference" to an employer's purported justification for constraining self-expression instead of scrutinizing it.[128] The combination of these two factors leaves an employee's expression of identity in the workplace almost entirely unprotected. For that reason and, in light of the myriad benefits generated by greater authenticity in the workplace, I argue that the constitutional model embodied in free speech jurisprudence gets it right. Like the government in the free speech context, employers should bear the burden of justifying significant intrusions upon employee authenticity.

This section will explain what Title VII does and where it falters. It will then describe various elements of First Amendment theory and jurisprudence that demonstrate how our society and, most importantly for the purposes of this article, our legal system value authenticity outside of the workplace.

A. Background of Title VII

A monumental step towards eradicating discrimination in the workplace, Title VII of the 1964 Civil Rights Act is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.[129] It applies to all private employers, state and local governments,

124. Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 5 (1991).

125. *Id.* at 6.

126. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2554 (1994) ("Dress conventions like judicial robes, theme-park costumes, and police uniforms can make employees more aware and, therefore, more faithful to those roles.").

127. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1430 (1992).

128. *Id.* at 1406.

129. 42 U.S.C. § 2000e-2 (2012).

and educational institutions that employ fifteen or more individuals.[130] The law addresses two types of discrimination: disparate treatment, which occurs when an employer intentionally discriminates against someone because of a protected characteristic, and disparate impact, which occurs when policies or practices that appear to be neutral result in a disproportionate impact on a protected group.[131] In both cases, the employee faces the ultimate burden of proof.[132]

First, an employee alleging a violation of Title VII must make out a prima facie case of employment discrimination by proving that: (1) she is a member of a protected class, (2) she was qualified for the position, (3) she faced an adverse employment action, and (4) an individual who is not a member of the protected class replaced her or the employer continued to seek applicants from people with the same qualifications.[133] If the employee successfully makes out a prima facie case, the employer has the opportunity to present a "legitimate, non-discriminatory reason" for the adverse employment action.[134] Courts often refer to this as a "business necessity"[135] and are very deferential to employers when determining whether it exists.[136] If the employer's reason is accepted by the court, the burden then shifts back to the employee to show either that the reason was pretextual—

130. 42 U.S.C. § 2000e(b) (2012 & Supp. IV 2013–2017).

131. 42 U.S.C. § 2000e-2 (2012); *see* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."). Disparate treatment claims include what have become known as hostile work environment claims. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated.") (internal citations omitted). Such discrimination is considered disparate treatment, rather than disparate impact, because the discriminatory motivation is inherent in the claim. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

132. *See* 42 U.S.C. U.S.C. § 2000e-2(k)(1)(A) (disparate impact); Watson v. Fort Worth Bank & Tr., 487 U.S. 977 (1988) ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (disparate treatment); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *see also* Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009) (describing standards). The following analysis focuses on disparate treatment claims.

133. *See McDonnell Douglas*, 411 U.S. at 802 (laying out the burden a Title VII complainant carries to make out a prima facie case of discrimination).

134. *Id.* An employer will have a complete defense to an allegation of employment discrimination if she can show that religion, sex, or national origin is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e)(1). However, far from obstructing authenticity, in those limited cases an employee *is* acting authentically in that she has chosen a job where a specific aspect or presentation of herself is *essential* to the job.

135. *Griggs*, 401 U.S. at 431.

136. *See, e.g.*, Klare, *supra* note 127, at 1406 (describing judicial deference to employer justifications in the context of constitutional appearance doctrine).

that discrimination was the *real* reason for the adverse action—or that that the employer had a mixed motive and discrimination played a part in the decision.[137]

Title VII has accomplished a lot of good for members of historically subordinated groups. As Robert Belton has explained, it was a "powerful engine for social change" in its first decades of enforcement, equalizing employment opportunities for African-Americans, Latinx, Asian-Americans, and women.[138] Since its passage, incidents of blatantly discriminatory actions have decreased significantly,[139] and courts have recognized more sophisticated theories of discrimination.[140]

Title VII also tries to straddle the line between protecting group membership and individuality. While the statute is typically associated with group protections, its purpose is to free the individual from unlawful discrimination. Justice John Paul Stevens emphasized this point in his majority opinion in *City of Los Angeles, Department of Water and Power v. Manhart*, where the Court held that female employees could not be required to contribute more to an employer's pension fund than male employees because women live longer than men on average.[141] Writing for the Court, Justice Stevens said, "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class."[142] He continued, "[e]ven if [Title VII's] language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[143]

Despite its successes and promises, Title VII has proven inadequate in addressing subtle instances of discrimination and in prompting "thoughtful scrutiny of individuals."[144] As numerous scholars have noted, the statute provides protection for specific group statuses only—it neither goes beyond those groups nor protects the many ways one might express one's identification with a protected

137. *See McDonnell Douglas*, 411 U.S. at 804; Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989).

138. Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005).

139. *See* Green, *supra* note 14, at 95–96; Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 670 (2005).

140. A hostile work environment claim, for example, does not involve something as explicit as firing someone on the basis of their sex, but courts recognize it as discrimination. *See, e.g.*, *Meritor Sav. Bank*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). In regard to gender, the Supreme Court has come to recognize sexual harassment and sex-stereotyping as forms of sex discrimination. *See Price Waterhouse*, 490 U.S. at 251; *Harris*, 510 U.S. at 22–23.

141. 435 U.S. 702, 711 (1978).

142. *Id.* at 708.

143. *Id.* at 709.

144. *Id.*

group.[145] The goal, as suggested by the name of the statute's enforcing agency, the Equal Employment Opportunity Commission ("EEOC"), is to provide equal opportunity. However, the statute's assurances of equal opportunity only protect immutable characteristics, such as skin color; if the characteristic in question is not immutable, courts assume that the employee can adapt to the regulation and, therefore, is not denied equal opportunity.[146] As a result, the statute (1) limits how members of a protected class can express their minority identities at work by allowing employers to force them to assimilate to dominant cultural norms; and (2) fails to protect other aspects of identity that one considers fundamental to her sense of self but which are not clearly connected to a protected group status.

B. How Title VII Limits Expression of Protected Identities

While the law prohibits discrimination based on certain protected group identities, courts have refused to extend protection to employees based on how they choose to individually express those identities. By going no further than protecting immutable characteristics—the manifestations of identity that one cannot change—the law constrains individuality in two particular ways. First, it forces employees to "cover" what makes them different, and, in the process, extinguishes authentic expressions of identity.[147] Second, and relatedly, it permits employers to force their employees to express their identity in line with dominant cultural norms. In both cases, it transfers control over one's identity and expression of that identity from the individual to the employer. This not only limits an individual's freedom to express her individuality qua individuality but also limits how she can express her affiliation with a protected group.

Instances of covering in the workplace are ubiquitous.[148] Employees cover with respect to whom they associate and affiliate with, what messages they advocate, and how they fashion their appearance.[149] For example, a gay individual who refrains from bringing her same-sex partner to a work event so as not to be seen as "too gay" engages in association-based covering.[150] While that person's colleagues may know that she is gay, she adjusts her conduct to "make her difference easy for those around her."[151] As the social science research discussed earlier

145. *See supra* note 14 and accompanying text (collecting works critiquing the limited scope of Title VII).

146. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134, 1140–41 (2004).

147. YOSHINO, *supra* note 14, at ix. It is important to note that "Authentic" here implies a shifting, subjective state, not a static or essentialized one. *See* Roberts, Cha, Hewlin & Settles, *supra* note 28, at 151–52.

148. *See generally* YOSHINO, *supra* note 14.

149. *Id.* at 79.

150. *See* Yoshino, *supra* note 58, at 847 ("Gays can cover by being or by appearing to be single. By not presenting a partner, such individuals prevent others from visualizing same-sex sexual activity.").

151. *Id.* at 837.

makes clear, changing oneself to "fit in" at an organization comes at a tremendous personal cost to the individual.[152] Since this "identity work" most often falls to organization outsiders—those who fall outside of the typical culture, such as women and minorities—legal scholars have argued that those costs are not merely demoralizing but also discriminatory.[153]

Courts have not seen it that way, often siding with employers when employees refuse to cover.[154] In the landmark opinion *Rogers v. American Airlines, Inc.*, Renee Rogers, an African American woman who wore corn rows, challenged the company's policy prohibiting employees in certain positions from wearing an all-braided hairstyle as discriminatory on the basis of race and gender.[155] She argued that corn rows had special significance for Black women, "reflective of cultural, historical essence of the Black women in American society."[156] In rejecting Rogers' claims, the district court noted that the policy was neutral on its face—that is, it applied to all genders and races—and, to the extent that the policy disproportionately affected African American women, wearing corn rows was a choice, not an immutable fact.[157] The court distinguished Rogers' braids from an Afro, which the court conceded might implicate Title VII because an Afro is "natural," as compared to the braids, which it described as "artifice."[158] Moreover, the court stated, the matter was "of relatively low importance in terms of constitutional interests," and the policy allowed Rogers to keep her braids, so long as she placed them in a wrap while on the job.[159] Although the court found that Rogers had not alleged sufficient facts to shift the burden to American Airlines to provide a non-discriminatory purpose for the policy, it suggested that, even if she had, American Airlines' desire to "project a conservative and business-like image" would have sufficed.[160]

The *Rogers* court dismissed the importance of Roger's hairstyle to her expression of self as a Black woman. By distinguishing between "natural" and "artific[ial]" expressions of Black female identity, the court implied that there was only one natural way to be a Black woman, namely by wearing an Afro.[161] In so holding, the court, as Laura Morgan Roberts and Darryl D. Roberts write, "constrains the choices that minority employees can make in presenting their identity in ways that are *authentic* to them, while reifying the dominant culture."[162] With respect to Roberts and Roberts' latter point, the court did not even question the

152. *See supra* Section II.B.
153. *See* Carbado & Gulati, *supra* note 14, at 1262.
154. *See, e.g.,* Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).
155. *Id.* at 231.
156. *Id.* at 232.
157. *Id.*
158. *Id.*
159. *Id.* at 231.
160. *Id.* at 233.
161. *Id.* at 232.
162. Roberts & Roberts, *supra* note 12, at 388 (emphasis added).

racialized implications of American Airlines' stated reason for the policy, suggesting that it was too obvious for comment that an employee's wearing corn rows would undermine the airline's "conservative and business-like image."[163] Contrary to Justice Stevens' vision of Title VII in *Manhart*, the *Rogers* court's interpretation of the statute both failed Rogers as an individual and stereotyped the group to which she belonged.[164]

Courts have also upheld employer policies that compel employees to affirmatively present in ways that typify dominant cultural norms. In *Jespersen v. Harrah's Operating Co*., Darlene Jespersen was terminated for refusing to wear makeup while working as a bartender in a casino shortly after the company implemented a new grooming policy.[165] While all employees had to don a specific uniform, female bartenders had to have their hair "teased, curled, or styled" and wear nail polish, face powder, blush, mascara and lipstick "at all times."[166] By contrast, male bartenders had to keep their hair short and could not wear makeup or nail polish. In her twenty years of working at the casino, Jespersen had never worn makeup and "felt very degraded and very demeaned" when forced to do so.[167] In addition, Jespersen testified that the makeup requirement "prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person."[168] She objected to the policy on the grounds that it subjected women to terms and conditions to which men were not similarly subjected and that, pursuant to *Price Waterhouse*'s sex-stereotyping theory, it required women to conform to sex-based stereotypes.[169]

Sitting *en banc*, the Ninth Circuit rejected both arguments. With respect to the first, the court held that the policy did not violate Title VII because Jespersen

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163. This argument is not dissimilar from those put forth during the Civil Rights Era by Southern employers who argued that hiring Blacks would put them out of business because white customers would go elsewhere—the customer preference defense. *See, e.g.*, Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1065 (2009). Whereas Congress and courts rejected such customer preference defenses when articulated explicitly on the basis of race, *see id.*, the *Rogers* court was either incapable of reading between the lines or unfazed by what it found.

164. Unfortunately, the reasoning of the *Rogers* court is not a relic of the past. In 2016, the Eleventh Circuit held that an employer's decision to rescind its offer of employment to a woman who refused to cut off her dreadlocks did not constitute discrimination based on race. E.E.O.C. v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016), cert denied, 138 S. Ct. 2015 (2018). Although the court noted that times are changing and that "[i]t may be that today 'race' is recognized as a 'social construct,'" the court said it was wedded to precedent based on distinctions between immutable and mutable characteristics. *Id*. at 1027–29 (citation omitted). *See also* Pitts v. Wild Adventures, Inc., No. CIV.A.7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) ("Dreadlocks and cornrows are not immutable characteristics, and an employer policy prohibiting these hairstyles does not implicate a fundamental right."); Ría Tabacco Mar, *Why Are Black People Still Punished for Their Hair*, N.Y. TIMES (Aug. 29, 2018), https://www.nytimes.com/2018/08/29/opinion/black-hair-girls-shaming.html [https://nyti.ms/2NB3OoQ].

165. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106–08 (9th Cir. 2006).

166. *Id.* at 1107.

167. *Id.* at 1108.

168. *Id.*

169. *Id.*

did not provide evidence that the requirements unduly burdened women when compared to the requirements imposed on men; without empirical data to suggest otherwise, the requirements were different but not unequal.[170] The court explained that grooming standards that "appropriately differentiate" between the genders present no statutory problem.[171]

Regarding Jespersen's sex-stereotyping argument, the Ninth Circuit found "no evidence . . . to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."[172] It distinguished the casino's policy from dress and appearance requirements intended to be sexually provocative, stereotyping women as sex objects.[173] In contrast, the majority wrote, there was nothing about the casino's grooming standards that "would objectively inhibit a woman's ability to do the job."[174] The court found there was no evidence supporting the sex-stereotyping claim except "Jespersen's own subjective reaction to the makeup requirement."[175]

As in *Rogers*, the court allowed the employer to require that Jespersen express her identity as a woman in a particular—and particularly narrow—way. Jespersen's reaction, the sincerity of which the court did not doubt, was largely irrelevant.[176] Indeed, in describing her claim as "the subjective reaction of a single employee," the court suggested the individual nature of Jespersen's claim was evidence of both its legal irrelevance and its strangeness; so-called normal women, the court seemed to be saying, were not upset by the policy.[177] Despite the case being what one dissenter called "a classic case of *Price Waterhouse* discrimination," the majority refused to acknowledge the gender stereotyping at work.[178] By

170. *Id.* at 1110.

171. *Id.*

172. *Id.* at 1112.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.* ("We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII.").

177. *Id*. at 1113.

178. *Id.* at 1116–17 (Pregerson, J., dissenting). Although the Supreme Court has not clarified the precise contours of *Price Waterhouse*'s sex-stereotyping theory, lower courts have been more amenable to the theory. For example, the Seventh Circuit recently held that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation put forth a viable sex discrimination claim under Title VII. *See* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017). The Seventh Circuit did so on the grounds that gender non-conformity represents "the ultimate case of failure to conform to the female stereotype" in a society, such as the United States, where heterosexuality is the norm. *Id.* at 346. Despite this clear step forwards in Title VII jurisprudence, the Seventh Circuit hewed very closely to the statutory language, arguing that "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Id.* at 350. Therefore, it seems unwise to assume courts will broaden their readings of Title VII far enough to sufficiently protect expressions of self that cannot be so clearly connected to the statute.

differentiating Jespersen's case from cases about sexually provocative uniform requirements, where Title VII violations have been found, the court legitimized the subtler means that employers use to enforce stereotypes and conformity.[179]

Legal constraints on authentic expressions of self go beyond physical appearance and gender identity. In *Garcia v. Gloor*, the Fifth Circuit rejected the argument made by Hector Garcia, a Mexican-American, that his employer's rule prohibiting sales employees from speaking Spanish on the job constituted discrimination on the basis of national origin.[180] Despite the fact that an expert witness testified that the Spanish language was "the most important aspect of ethnic identification for Mexican-Americans," and Garcia stressed its importance to his identity, the circuit found no violation.[181] It reasoned that national origin, a protected class, was "not to be confused with ethnic or sociocultural traits."[182] Or, in other words, you cannot change where you were born, but you can change what language you speak. Although the Fifth Circuit was slightly more sensitive to Garcia's arguments about the importance of speaking Spanish to his identity than either the Ninth Circuit was towards Jespersen or the Southern District of New York was towards Rogers, it nonetheless elevated the employer's right to enforce dominant norms and punish employees who refused to comply.[183]

The high point of protection for authentic expressions of self under Title VII is in the religious context. As the Supreme Court made clear in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, Title VII demands that employers accommodate an employee's religious practices unless doing so would constitute an undue hardship for the employer.[184] In this case, Abercrombie & Fitch did not hire an otherwise qualified candidate because the candidate's headscarf would have violated Abercrombie's "Look Policy," which prohibited employees from wearing "caps" of any kind.[185] In response to Abercrombie's argument that its policy was neutral with respect to religion, the Court clarified that Title VII requires more than "mere neutrality" in the religious context—it gives religious practices "favored treatment," thereby imposing an affirmative obligation on employers.[186] The Court

179. *See* Rhode, *supra* note 163, at 1055–56 ("Some requirements of alluring apparel are of particular concern because they expose women to humiliation, harassment, or, in the case of high heels, physical injury. But even less burdensome standards can reinforce demeaning stereotypes. Examples include the Midwest television station that wanted its anchor to feminize her clothing by wearing bows and ruffles; the Bikini Espresso, a drive-through espresso bar with waitresses in sheer babydoll negligees and matching panties; the Heart Attack Grill, featuring women in 'naughty nurses' costumes; the casino that wanted 'Barbie doll' dealers, and the 'Valet of the Dolls' valet parking service with a 'wild' and 'sexy' all-female staff.").

180. 618 F.2d 264, 270 (5th Cir. 1980).

181. *Id.* at 267.

182. *Id.* at 269.

183. *See id.* at 270 ("We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification.").

184. 135 S. Ct. 2028, 2031(2015).

185. *Id.*

186. *Id.* at 2034.

was quick to quarantine this exception, however, noting that the neutrality argument "may make sense in other [Title VII] contexts."[187]

As commentators have argued, the case law outside the context of religion is problematic for many reasons. First, the fact that one can change one's dress, appearance, and behavior does not mean that these are less essential to an individual's sense of dignity and self than race and sex. In fact, one could argue that the choice to manifest one's identity in a nonconforming way merits greater protection, not less. Moreover, as the aforementioned cases demonstrate, dress, appearance, and behavior are often intimately connected to the statuses Title VII is meant to protect. Second, it is inconsistent for courts to find dress, appearance, and behavior inconsequential to employees but pivotal to employers.[188] Third, courts' use of commonly accepted social norms to uphold appearance and behavior codes undermines Title VII's goals by reinforcing prejudices and stereotypes.[189] Or, as Klare has wryly put it in the gender context, "as the law stands, an employer may hold women to different standards from men, as long as it . . . 'merely' enforces prevailing prejudice."[190]

C. What Title VII Fails to Address

Title VII fails to adequately protect authenticity in the workplace. In addition to its aforementioned limitations on which expressions of protected identities qualify for legal protection, Title VII wholly omits groups of people who undoubtedly face discrimination in the workplace. The law also ignores authentic expressions of identity that are unrelated to protected group membership—or to any group membership—yet fundamental to an individual's self-image.[191]

Title VII neglects entire groups of people who face rampant discrimination in the workplace, because they do not directly fall under one of the enumerated categories in the statute. For example, Title VII does not reach transgender persons because courts typically construe the word "sex" narrowly to refer only to male

187. *Id.*

188. As Klare explains, "judges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices." Klare, *supra* note 127, at 1401 (citing Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L. J. 73, 74 (1982)).

189. The judgments in this area, as Katherine Bartlett has explained, "reflect more about the high degree of societal consensus regarding dress and appearance expectations than about the value that individuals or businesses attach to dress and appearance." Bartlett, *supra* note 126, at 2558.

190. Klare, *supra* note 127, at 1418 (internal citations omitted).

191. America's lack of protection in these situations stands in contrast to other countries, such as Germany, whose constitutions have been read to include a "right of personality." *See* Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept*, 98 CAL. L. REV. 1925, 1927, 1950–53 (2010) ("German personality interests have a constitutional dimension that applies both to the government's behavior and to that of private parties.").

and female cis-gendered people, excluding them from protection under that category.[192] As a result, transgender individuals encounter blatant discrimination in the workplace and are openly fired because of who they are.[193] Nor does the statute protect people from other types of bias, such as bias concerning perceived attractiveness or weight.[194]

Despite its purported focus on the individual, Title VII also does not provide protection for people whose expressions of self, though central to their identities, cannot be linked to a protected status. This is true even though the way in which individuals present themselves to the outside world—in their clothing, hair, jewelry, and tattoo choices, for example—often implicates their core values and, as Gowri Ramachandran has pointed out, "affect[s] each one of us every single day."[195] For example, divorced from religious or cultural arguments, Title VII does not protect someone who has a piercing, despite the potential significance of that piercing to the individual.[196] Nor does it offer any refuge for people who wish to voice or otherwise represent their political beliefs or regional affiliations. It also, of course, does not cover the various elements of diversity that Millennials found so important in the aforementioned Deloitte study, such as the ability to raise unique perspectives.[197]

In response to some of these deficiencies, Ramachandran has proposed a legal right to "[f]reedom of dress," which she defines as "the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry and other adornments that make up the public image of our sometimes private persons."[198] Ramachandran connects the freedom of dress to "control over our own bodies"—control which "is essential to human dignity."[199] Piercings, haircuts, and tattoos involve the right to modify and manipulate one's body as a means of exercising one's right to bodily autonomy—this connection is why individuals react so negatively to requirements to change these aspects of self.[200] "The relevant question,"

192. *See* Niedrich, *supra* note 25, at 29; *but see* Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 742–48 (E.D. Va. 2018) (holding transgender student had stated a Title IX claim for sex discrimination).

193. *See* Niedrich, *supra* note 25, at 29–30.

194. Rhode, *supra* note 163, at 1038–39 (citing statistics that show that "[a]bout 60% of overweight women and 40% of overweight men report experiences of employment discrimination," and "[r]esearchers consistently find a significant income penalty for being overweight").

195. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 13–14 (2006).

196. Even in the context of religion, these claims typically fail. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 129, 134–37 (1st Cir. 2004) (holding that while an employee's facial piercing *might* constitute a religious practice according to the Church of Body Modification, accommodating it would impose an undue hardship on the employer).

197. *See* SMITH & TURNER, *supra* note 120, at 7.

198. Ramachandran, *supra* note 195, at 13.

199. *Id.* at 36.

200. *Id.* ("This connection between freedom of dress and a notion that control over our own bodies is essential to human dignity is part of why it strikes many of us as intrusive and unwarranted when someone tells us what to wear, how to cut our hair, or whether we can have a tattoo.").

she writes, "seems not to be whether businesses may create an image of their choosing and communicate ideas of their choosing, but rather whether businesses can co-opt the bodies of their employees to communicate those ideas."[201] At present, the answer is yes, they can.

Building from Ramachandran's arguments, behaviors in the workplace that are central to one's sense of self—Berg's desire to voice a story rooted in his Judaism, for example—also deserve protection.[202] This is not because the behavior may be associated with a protected class but, rather, because it is an authentic expression of his identity. For Berg to represent himself authentically, he needed to tell a story rooted in the Talmud—that other Jewish people might not feel the same way does not diminish its importance to Berg's sense of self and thus should not diminish Berg's ability to do so.

Protecting behaviors as well as appearances would, at first impression, present a risk of being overbroad. Would such a scheme protect the employee who feels her most authentic when she is cursing profusely or the white supremacist who brings his whole self to work by wearing a shirt with a racist message? This article does not argue that the law should ignore an employer's right to the efficient functioning of its workplace, which presumably would be undermined by persistent cursing. It also does not argue that Title VII's other protections, such as its prohibition on hostile work environments, should disappear.[203] Rather, it advocates for a legal scheme that balances an employer's interest in efficiency and an employee's interest in authentic self-expression, recognizing that Title VII's protected-group scheme does not cover all forms of self-expression that merit protection. Moreover, in striking this balance, it errs on the side of protecting employee authenticity by placing the burden on employers to justify their actions to courts in the face of increased scrutiny.

IV.
FREE SPEECH: A DOCTRINE OF RESPECT FOR INDIVIDUALITY

The First Amendment's protection of freedom of expression embodies the same values that social scientists have concluded benefit individual employees and the organizations they work for—authenticity and individuality. However, Title VII does not protect these same values. Revered in jurisprudence as well as popular culture,[204] the First Amendment protects freedom of expression in its many forms. Although there are limits to the breadth of its guardianship, chief

201. *Id.* at 53.

202. *See supra* Section II.A.2.

203. *See, e.g.*, Johnson v. Austal, U.S.A., L.L.C., 805 F. Supp. 2d 1299, 1315–16 (S.D. Ala. 2011) (holding that a reasonable jury could find harassing conduct sufficiently severe to make out a hostile work environment claim where, among other things, the plaintiff's colleagues wore shirts that displayed the Confederate flag).

204. *See* Schauer, *supra* note 18, at 1793 ("[J]udges are also likely to be, or at least to *seem* to be, disproportionately sympathetic to First Amendment arguments.") (emphasis in original).

among them the fact that it shields expression only from government regulation, the First Amendment stands for the proposition that a well-functioning society must champion the autonomy of its citizens. It is, as Justice Cardozo said, "the matrix, the indispensable condition, of nearly every other form of freedom."[205]

To that end, the United States Constitution protects free speech, in part, because of the role individual expression plays in identity formation—in a citizen's ability to both realize and determine who she is. This foundational purpose is evident in scholarly justifications for the First Amendment, in the fact that government bears the burden of justifying limitations on expression, in the Supreme Court's protection of pure speech and extension to symbolic means of expression, and in the Court's rejection of speech compelled by the government. By examining the modes of expression the First Amendment protects and why it does so, I observe that the law already champions individuality and authenticity and, consequently, ask why Title VII should not do the same.

Before doing so, it bears repeating that Title VII regulates private employers while the First Amendment regulates government conduct. One could argue that this distinction alone answers the question I pose above. However, given the importance of work to our lives and the eroding boundaries between one's work and non-work lives,[206] I argue that the justifications discussed below do not lose their salience in the employment context. As the workplace increasingly occupies the role of the public square, it is time to question why employment law does not better reflect the virtues we protect there.

A. Theoretical Justifications for Valuing Free Speech

Scholars have long debated the theoretical foundations for protecting free speech. Most agree that First Amendment doctrine does not derive from one coherent theory but is, instead, supported by a number of different interests.[207] Nevertheless, commentators have generally advanced three theories to explain the value of free speech in our society: the pursuit of truth,[208] the promotion of democratic self-government,[209] and the preservation of individual autonomy and self-

205. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

206. *See supra* Section II.C.

207. *See, e.g.*, Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559–60 (2011) ("No theory has dominated the Court's complex accommodations."); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970) ("The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.").

208. Now associated with John Stuart Mill and Justice Oliver Wendell Holmes, the argument trades on the idea of survival of the fittest: let ideas into the marketplace so the best may surface. *See* JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Under this view, falsities should be protected as a means of challenging truth to emerge or because they contain an element of truth, however small.

209. To effectively govern themselves, the theory goes, citizens must be able to propose ideas,

realization.[210] I will focus on the third, which has arguably emerged as the leading and, as C. Edwin Baker described it, "most coherent theory."[211]

The third theory of free speech is rooted in autonomy, or one's "authority (or right) to make decisions about herself."[212] C. Edwin Baker argues that we protect self-expression from government control because it is essential to individual personhood and flourishing. From Baker's perspective, "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual."[213] It enables us to realize who we are, assert who we are, and distinguish ourselves from others. This approach emphasizes the speaker, rather than the content, and it is why we protect not only political debate but also art and storytelling.[214] As renowned First Amendment scholar Thomas Emerson put it, speech "is an integral part of the development of ideas, of mental exploration and of the affirmation of self"; therefore, "suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature."[215]

Although supporters of this theory do not necessarily use the specific word "authenticity" to define the value protected by free speech, many describe the virtues of free speech in the context of both internal development and outward expression. That is, they argue for protecting speech because it allows one to authentically present herself. Seana Valentine Shiffrin, for example, has argued for what she calls a "thinker-based" approach to the First Amendment.[216] In her view, what makes one a "distinctive individual *qua person* is *largely* a matter of the contents of one's mind."[217] Speech and expression must be protected because they "are the only precise avenues by which one can be known *as the individual one is* by others."[218] They are necessary "to make one's mental contents known to others in an unscripted and authentic way."[219] Martin Redish similarly describes the "one true value" served by the First Amendment as "individual self-realization," arguing

discuss their ramifications, and become informed. Because the people have decided to govern themselves, Meiklejohn argues that "it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (The Lawbook Exchange, Ltd. 2000) (1948).

210. *See generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978).

211. *Id.* at 964; *see also* Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1473 (2016) (describing "'individual-centered theories' of the First Amendment" as having achieved "special prominence and centrality in the later twentieth century") (internal citation omitted).

212. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011).

213. Baker, *supra* note 210, at 966.

214. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 611, 627 (1982).

215. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 879 (1963).

216. *See* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

217. *Id.* at 291 (emphasis in original).

218. *Id.* (emphasis in original).

219. *Id.* at 294.

that the First Amendment ultimately furthers both the "development of the individual's powers and abilities" and "the individual's control of his or her own destiny through making life-affecting decisions."[220]

Implicit in these descriptions is that self-realization is advanced not only by speech but also by conduct, or symbolic expression. Baker argues that certain nonverbal conduct is "inherently expressive" and "clearly contributes to" First Amendment values.[221] Building off of Emerson's work, he points to meetings and assemblies as everyday examples: it is not only the speaking but also the nonverbal conduct, presumably such as standing and waving one's arms or congregating, that manifests the message.[222] The First Amendment refers to "speech," Baker posits, not because verbal conduct is inherently special, but because it is "a particularly good embodiment of a concern for expressive, nonviolent, noncoercive conduct that promotes self-realization and self-determination."[223] Guided by these principles, it is clear that the First Amendment's protection does not extend to "an individual doing whatever she chooses."[224] "[R]espect for autonomy involves respect for a person's choices about herself," Baker explains, "until her choice involves taking away choice from another about himself."[225] Therefore, as Redish adds, it is not inconsistent to view self-realization as the paramount—or even the lone—First Amendment value while also choosing to limit free expression when there are certain "competing social concerns," such as physical safety.[226]

Scholars have also connected the autonomy rationale to systemic and communitarian interests. For Baker, the legitimacy of government depends on respect for individual autonomy. "Obligation," he argues, "exists only in relationships of respect."[227] Likewise, without respect for individual autonomy, people lose the ability to contribute their perspectives to the marketplace of ideas on equal footing, making equality impossible.[228] In this view, the autonomy rationale is the most

220. Redish, *supra* note 214, at 593.

221. Baker, *supra* note 210, at 966, 1019.

222. *See id.* at 1011.

223. Baker, *supra* note 210, at 1029.

224. Baker, *supra* note 212, at 252.

225. *Id*. at 257–58.

226. *See* Redish, *supra* note 214, at 595. While the autonomy-based approach to the First Amendment has drawn some criticism for presenting a difficult line-drawing problem, the boundaries are not difficult to discern—nor do they require a judge fulfilling her role to do anything differently than she would in other legal contexts that require making difficult decisions. *See id.* at 624–25 ("The point, however, is to balance with a 'thumb on the scales' in favor of speech. Although the [F]irst [A]mendment cannot practically be interpreted to provide absolute protection, the constitutional language and our political and social traditions dictate that the [F]irst [A]mendment right must give way only in the presence of a truly compelling governmental interest. To be sure, such an analysis places a good deal of faith in the ability of judges to exercise their authority with wisdom and discretion, both in establishing and applying general rules of [F]irst [A]mendment construction and, where necessary, in engaging in *ad hoc* balancing. But, after all, that is what they are there for, and in any event we appear to have little choice.").

227. Baker, *supra* note 210, at 991.

228. *See id.* at 984.

coherent of the three prevailing First Amendment theories because it is a prerequisite to the societal goods—recognition of greater truth and effective functioning of government—that undergird the other two rationales. In recognizing both the individual and collective dimensions of autonomy-based rationales for protecting free speech, First Amendment theory mirrors social science research in the workplace context. Both grasp that individual (or employee) authenticity is a good in its own right and an essential ingredient in optimal societal (or workplace) functioning.

B. Jurisprudential Examples

The importance of the autonomy theory of the First Amendment is manifest throughout the Supreme Court's First Amendment jurisprudence. Courts have developed and applied the autonomy theory in how they structure their First Amendment analyses, in their protection of pure speech and expressive conduct, and in their rejection of compelled speech.

1. Doctrine

Before looking at the substantive ways the First Amendment jurisprudence protects authenticity, it is helpful to summarize the method of legal analysis courts use when assessing First Amendment issues. In general, the government bears the burden of justifying a restriction on expression. When analyzing a government regulation, a court first determines whether the restriction targets speech because of its communicative content.[229] If it does, the court ascertains whether the regulated expression falls into one of a few historically excepted categories, such as advocacy of illegal action, true threats, and fighting words, among others.[230] If the targeted speech does not fit into one of the categories but is regulated because of its content, the court applies "strict scrutiny": the law must serve a compelling government interest and be the least restrictive means available to obtain the desired result.[231] That is, the First Amendment requires that the government's chosen restriction be "actually necessary" to achieve its interest.[232] As in most contexts where strict scrutiny is applied, this is typically a death knell for the regulation.

If, on the other hand, a court concludes that the government is regulating speech for reasons unrelated to its communicative impact, the government bears a lesser burden. In circumstances where a law regulates conduct that incidentally affects speech, the court applies the four-part *O'Brien* test: (1) the regulation must

229. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

230. *See* Virginia v. Black, 538 U.S. 343, 358–59 (2003). Because the rationales behind these categories are rooted more in history than in logic, I will not address them.

231. *See McCullen*, 134 S. Ct. at 2530; Boos v. Barry, 485 U.S. 312, 321 (1988).

232. Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 799 (2011).

be within the constitutional power of the government; (2) it must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of free speech; and (4) the incidental restriction on the alleged First Amendment freedom can be no greater than is essential to the furtherance of that interest.[233]

Finally, if a court concludes that the law is aimed at speech in a content-neutral way, such as laws that prohibit using megaphones in residential areas, it applies a "time, place, and manner" analysis.[234] It asks whether the government has shown that the regulation is "justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant governmental interest, and [whether it] leave[s] open ample alternative channels for communication of the information."[235]

Most pertinent to this article is the burden-shifting in First Amendment cases: simply put, when the government chooses to regulate individual expression, it must justify its actions.[236] This contrasts with Title VII, where an employee must first make out a prima facie case and her employer then has wide latitude to rebut her argument.[237] Moreover, the First Amendment's burden-shifting applies regardless of whether the government specifically targets speech or incidentally burdens it while seeking to regulate conduct. In both cases, First Amendment law recognizes the fundamental nature of the right being infringed through a structure that offers greater protection to the individual. While First Amendment law recognizes competing government interests and adjusts the standard of scrutiny accordingly, courts do not simply take officials at their word. In this context, they recognize that the interest at stake—the ability of individuals to express themselves—is far too precious.

2. Speech

The Supreme Court has often emphasized the importance of preserving individual autonomy when justifying its protection of speech. The best known early articulation of this idea comes from Justice Louis D. Brandeis's concurrence in *Whitney v. California*:

Those who won our independence believed that the final end of the state

233. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

234. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

235. *Id.* (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

236. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part and dissenting in part) ("As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.").

237. *See supra* Section III.A.

> was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.[238]

Since then, the Court has repeatedly emphasized the significance of self-expression.[239] For example, the Supreme Court in *Procunier v. Martinez* confronted the question of whether the First Amendment forbids prison officials from censoring letters sent by prisoners.[240] Observing that the First Amendment serves not only the public but also the "human spirit," Justice Thurgood Marshall argued in a concurring opinion that self-expression is central to human flourishing—it is "an integral part of the development of ideas and a sense of identity"—and to suppress it "is to reject the basic human desire for recognition and affront the individual's worth and dignity."[241]

The Court has gone so far as to protect an individual's use of specific words, viewing word choice as an integral part of an individual's message and identity. In *Cohen v. California,* for example, Paul Robert Cohen was convicted of disturbing the peace for wearing a jacket with the words "Fuck the Draft" on it while in the corridor of the Los Angeles County Courthouse.[242] In stark contrast to Title VII cases dealing with self-expression, the Court found nothing trivial about the issues presented in *Cohen.*[243] Finding for Cohen, the Court stressed that the First Amendment was "designed and intended to remove governmental restraints from the arena of public discussion" based on "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[244] The Court treated Cohen's jacket as if the message it bore were an extension of Cohen himself, impossible to remove without wounding his "individual dignity and choice."[245]

In *Cohen*, the Court also commented on the emotive function of speech. It defended Cohen's ability to use the specific "distasteful" word that he did, recognizing that expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[246] In so doing,

238. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

239. *See, e.g.*, Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 503 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself. . . .").

240. 416 U.S. 396 (1974) (holding that the "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards"), *overruled in part*, Thornburgh v. Abbott, 490 U.S. 401, 412–13 (1989).

241. *Id.* at 427 (Marshall, J., concurring).

242. 403 U.S. 15, 16 (1971).

243. *Id.* at 15 ("This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.").

244. *Id.* at 24.

245. *Id.*

246. *Id.* at 25–26.

the Court acknowledged the importance of protecting and deferring to the specific choices an individual makes to present herself.

3. Symbolic Speech and Expressive Conduct

In addition to speech, the Supreme Court has extended First Amendment protections to conduct that has expressive elements.[247] In these "expressive conduct" cases, the Court determines whether the law under review targets certain conduct *because* of its message or in spite of it. To do this, the Court assesses whether the conduct possessed sufficient expressive elements to be considered on par with speech by asking whether "[a]n intent to convey a particularized message was present," and whether, "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[248] Context, therefore, helps determine whether conduct is sufficiently expressive to warrant First Amendment protection.[249] In more recent cases, the Court has articulated a broader standard, requiring only that the activity be "sufficiently imbued" with communicative elements.[250] While the government generally has greater leeway to restrict conduct than it does language, it cannot prohibit conduct *because* it has expressive elements.

In some cases, the Court has found conduct clearly expressive. In *Tinker v. Des Moines School District*, three students wore black armbands to school to protest the Vietnam War and, pursuant to a school policy forbidding them from doing so, were suspended.[251] The school district justified the policy on the grounds that it was necessary "to prevent disturbance of school discipline."[252] Describing the students' wearing of armbands as "a silent, passive expression of opinion," the Court characterized their actions as "closely akin to 'pure speech'" and said that they merited "comprehensive protection."[253] While the Court emphasized the political nature of the armbands, it also underscored the students' interest in self-expression: students "may not be confined to the expression of those sentiments that are officially approved. . . . [S]tudents are entitled to freedom of expression

247. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

248. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

249. *See id.*

250. *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 409); *see also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB), 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.") (internal citations omitted).

251. 393 U.S. 503, 504 (1969).

252. *Id.* at 504-05.

253. *Id.* at 508, 505–06.

of their views."[254] Ultimately, it held that the school could not censor the students unless they could show that their conduct would "materially and substantially" interfere with the operation of the school.[255]

The Court's holding demonstrates its willingness to balance core values—such as order versus individuality—in the First Amendment context when self-expression is at stake. Throughout its opinion, the Court acknowledged the uniqueness of academic environments and "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[256] Nevertheless, the Court refused to defer to the unsubstantiated fears of those whom it conceded had authority in the educational context. For the restriction to pass muster, the Court said that the school district "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[257] Unlike the employers in *Rogers* and *Jespersen*, the school officials could not simply rely on their authority over students to demand compliance. Finding no evidence of disorder or disruption, the Court held that the school could not suppress the students' expression.[258]

This is not to say that First Amendment jurisprudence is uniformly protective of symbolic speech. In the context of clothing, litigants have achieved mixed success when bringing symbolic speech claims.[259] Lower courts have dismissed First Amendment claims on the grounds that an individual's clothing choices are not sufficiently communicative to overcome even a nominal state interest justifying the restriction. These decisions, however, are at odds with other First Amendment doctrine.

In *Zalewska v. County of Sullivan*, for example, the Second Circuit upheld a municipal transit authority's dress code, mandating all employees wear pants as part of the driver's uniform, when applied to Grazyna Zalewska, for whom "the wearing of a skirt constitute[d] . . . an expression of a deeply held cultural

254. *Id.* at 511. As Baker has argued, "A person sometimes participates in a political demonstration or a religious ritual not, or not only, to communicate with another but to establish herself as having openly embodied self-defining commitments." C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 984 (1997).

255. *Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

256. *Id.* at 507.

257. *Id.* at 509.

258. *See id.* at 514.

259. RONNA GREFF SCHNEIDER, EDUCATION LAW § 2.23 (2004 & Supp. 2018) ("Lower courts have been mixed as to whether hairstyles, particularly hair length, or general clothing styles have sufficient communicative impact to warrant protection under the Free Speech Clause of the First Amendment."). Notably, the Supreme Court has not directly confronted the issue of hairstyle regulations. *See* Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1869 n.115 (1997) (explaining that the Court has denied certiorari to cases that have both upheld and invalidated regulations of hairstyle); *see also* E.E.O.C. v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016), cert. denied, 138 S. Ct. 2015 (2018) (denying review of an Eleventh Circuit ruling that an employer's decision to rescind its offer of employment to a woman who refused to cut off her dreadlocks did not constitute discrimination based on race).

value."[260] The court acknowledged that "for most people—clothing and personal appearance are important forms of self-expression."[261] However, it found that Zalewska's message was "not a specific, particularized message" and upheld the dress code under rational basis review based on the government's purported interest in safety.[262]

The Second Circuit's holding in *Zalewska* arguably violates Supreme Court precedent and is inimical to First Amendment values. Despite acknowledging that the standard for what constitutes sufficiently communicative speech had become more forgiving, the court nevertheless required Zalewska to provide "a particularized message."[263] Even if such a "particularized message" were required, it is not clear why Zalewska's message of femininity was not comprehensible.[264] As Klare has said, "[a]ll dress and appearance practices create and communicate meaning, not just special dress items like the black protest armband."[265] The court's conclusion that "no particularized communication can be divined simply from a woman wearing a skirt" was also incorrect for another reason.[266] In a workplace context where skirts were forbidden, Zalewska represented the nonconformist the First Amendment typically protects.

While the First Amendment does not prohibit employers from implementing new safety requirements, it requires courts reviewing the legality of those requirements to consider whether they single out conduct because of the message it expresses. In *Zalewska*, the Second Circuit allowed traditional gender norms to influence its analysis—Zalewska's dress was somehow less communicative because women typically wear skirts—while also ignoring that this position placed Zalewska as an outsider in her specific work environment. Even if reasonable minds could disagree over whether the First Amendment protects Zalewska's decision to wear a skirt regardless of if others understood what "message" she was expressing, it is beyond reasonable dispute that the First Amendment protects conduct that expresses alternative norms, as it did in this case. That Zalewska's nonconforming appearance choice, in this context, aligned with traditional gender norms does not change this fact.

Other courts have been more willing to protect appearance choices as symbolic speech, especially when plaintiffs have demonstrated the centrality of those choices to their identities. In *Doe ex rel. Doe v. Yunits*, a Massachusetts state court found that a transgender high school student's decision to wear traditionally female clothes to school as an expression of female gender identity was protected

260. 316 F.3d 314, 318 (2d Cir. 2003).

261. *Id.* at 319.

262. *Id.* at 319–20, 322. The government said that it instituted the policy because it was safer for employees to operate vans while wearing pants but did not mention having any safety issues when Zalewska wore a skirt. *See id.* at 317.

263. *Id.* at 319.

264. *Compare id.* with Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991).

265. Klare, *supra* note 127, at 1410 (emphasis omitted).

266. *Zalewska*, 316 F.3d at 320.

speech and enjoined the school from prohibiting her enrollment.[267] The court described the plaintiff's clothing as "a necessary symbol of her very identity" and found that "the school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly ha[d] been received."[268] For similar reasons, a federal district court in South Dakota found a student's wearing of his traditional native tribal clothing expressive under the First Amendment.[269] "Mr. Dreaming Bear sees himself as a Lakota warrior who takes pride in who he is and where he comes from," the court wrote.[270] "Clothing is an integral part of his identity."[271]

In contrast to the lengths many courts go to protect expression when confronted with a First Amendment challenge, courts have often failed to grasp the importance of identity and to protect it in the Title VII context. For example, when evaluating a Title VII claim, courts routinely dissect an individual's presentation to determine what is "natural" versus "artifice," as the court did in *Rogers.* When evaluating First Amendment claims, however, courts show more deference to how individual plaintiffs characterize their appearance choices and articulate their meaning. Accordingly, where individuals can demonstrate the centrality of their choices to their identities, they may succeed in securing First Amendment protection.[272] While plaintiffs may not ultimately prevail on their First Amendment claims if the government's justification for a regulation is important and unrelated to expression, courts are more deferential to an individual's articulation of the importance of their expression to their identity than they are in the Title VII context.

This difference in deference is particularly evident in cases that implicate an individual's expression of a marginalized identity, as in *Doe*. In such cases, courts are even more aware of the socially constructed nature of identity and are most protective of expressions that subvert the status quo. Without overtly saying so, courts addressing First Amendment claims in this context have gleaned—and found worthy of protection—messages of protest inherent in identities of difference.[273] They grasp that the "very act of differentiation" imbues certain identities with meaning and that the First Amendment must protect those expressions of difference.[274]

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267. No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (granting an injunction because the plaintiff is likely to succeed on the merits and "is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender.").

268. *Id.* at *3–*4.

269. *See* Bear v. Fleming, 714 F. Supp. 2d 972, 983 (D.S.D. 2010).

270. *Id.*

271. *Id.*

272. *See, e.g.*, *Doe*, 2000 WL 33162199 at *3; *Bear*, 714 F. Supp. 2d at 983.

273. *See* Nan Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 5 (2000) ("Claims of equality based on identities of difference are intrinsically a kind of protest.").

274. *Id.* at 3.

4. Compelled Speech

The Supreme Court has a particular distaste for instances where the government compels individuals to support, verbally or otherwise, messages with which they disagree. In *West Virginia Board of Education v. Barnette*, the Court held that public schools could not require students to recite the Pledge of Allegiance or salute the American flag.[275] The case arose in the context of Jehovah's Witnesses who, because of their religious beliefs, refused to salute the flag and were expelled.[276] The Court primarily relied on autonomy justifications to justify its holding, invoking the First Amendment's role in "guard[ing] the individual's right to speak his own mind."[277] It chastised local authorities for "invad[ing students'] sphere of intellect and spirit" and portrayed the First Amendment as a pivotal protection against forced conformity.[278] "If there is any fixed star in our constitutional constellation," wrote Justice Jackson for the majority, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or . . . opinion or force citizens to confess by word or act their faith therein."[279] Notably, the Court did not look to the religion clauses to solve the issues at hand. Instead, it expressed profound concern about having a pledge that required "affirmation of a belief" at odds with what the students *actually* thought, without limiting that concern to circumstances where the compelled belief clashed with religious conviction.[280] The Court also noted that this was not a case of colliding rights.[281] To allow the students to refuse to participate did not affect the rights of others to do so; the students' choices caused no disruption. The Court saw the "sole conflict" as being "between authority and rights of the individual."[282]

The Court employed a similar rationale in *Wooley v. Maynard*, where it struck down a New Hampshire statute that required individuals to display the state motto, "Live Free or Die," on their license plates.[283] As in *Barnette*, the *Wooley* Court was concerned with the individual's "freedom of thought," describing the "right to speak and the right to refrain from speaking" as "complementary components of the broader concept of 'individual freedom of mind.'"[284] It emphasized that the intrusion into the "sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control" happened "constantly while [the] automobile is in public view."[285]

275. 319 U.S. 624, 642 (1943).
276. *Id.* at 629–30.
277. *Id.* at 634.
278. *Id.* at 642.
279. *Id.*
280. *Id.* at 633–34.
281. *Id.* at 630.
282. *Id.*
283. 430 U.S. 705, 717 (1977).
284. *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637).
285. *Id.* at 715 (quoting *Barnette*, 319 U.S. at 642).

Seana Valentine Shiffrin has described this repeated indoctrination aspect of compelled speech as perhaps its most disturbing. In her view, compelled speech, especially that which is frequent and presented as "normal," can have a corrupting influence on "the autonomous agent's control over her mind."[286] If one is forced to repeatedly say something, such as a pledge, or present oneself in a particular way, the individual will likely be affected, even if not consciously. According to Shiffrin, this may be true even if the individual is aware that she is being compelled to do something. In an effort to avoid what she calls "performative dissonance,"—"states of conflict or tension between what one says or appears to say and what one thinks"—an individual may unconsciously alter her thoughts to conform to the content of what she is forced to say or do.[287] Shiffrin also argues that compelled speech undermines "the value of sincerity, a virtue that is integrally related to the well-functioning of a robust First Amendment culture."[288] For both the individual speaker and broader society, the ripple effects of compelled speech may "encourage cynicism and ambivalence about the value of truth," negatively impacting everyone.[289]

Although abundant social science research shows that Shiffrin's fears about compelled expression also apply to the workplace, the decision in *Jespersen* exemplifies how courts express less concern about its consequences in the employment context.[290] This dichotomized approach is illogical and contrary to judicial decisions that acknowledge the essential nature of personhood. If an individual should be free from indoctrination because of the surreptitious ways it negatively influences one's self, that right should not depend on who does the compelling. Moreover, as Shiffrin has emphasized, courts in the First Amendment context recognize that society at large suffers when those in authority have an unfettered right to demand expressions from people that they do not believe.

As free speech theory and jurisprudence demonstrate, First Amendment law recognizes autonomy—and, I have argued, authenticity—as foundational elements in American society. Although the First Amendment prohibits what government, and not private employers, may do with respect to its citizens, the values it protects do not vanish when individuals go to work.

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286. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association*?, 99 NW. U. L. REV. 839, 854, 859 (2005).

287. *Id.* at 859.

288. *Id.* at 860.

289. *Id.* at 862. Shiffrin argues that, from the individual's perspective, "[o]ne may reasonably object to having to stand in a relation of distrust to oneself." *Id.* at 861. But there are implications for broader society as well. Even if the speaker and audience know that the speaker does not believe what she is saying, Shiffrin contends that "[o]ther kinds of significant performances may be cheapened if people engage in them insincerely or in pretense." *Id.*

290. *See supra* Section III.B.

V.
LESSONS, LIMITS, AND SUGGESTIONS FOR HEALTHIER WORKPLACES

> We generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights you enjoy as a citizen. There's no process for challenging—or changing—bad decisions made by the authorities. There's no mechanism to vote for people to represent you in decision-making bodies . . . . We take for granted that such rights and protections don't apply to the workplace partly because most of us have never seen examples to the contrary.[291]

In a society whose commitment to autonomy is constitutionally enshrined and whose citizens, perhaps now more than ever before, demand that their workplaces also honor that value, the courts and the public must critically rethink their approach to employment law. While management best practices related to authenticity cannot serve as the standard for determining discrimination in the workplace, they should not be irrelevant. Research on authenticity in the workplace demonstrates that the ability to bring one's whole self to work has a substantial positive impact on employees—on their happiness, job performance, attachment to their employer, and so on. To the extent that laws should protect the ever-evolving realities of people's lives—lives which are spent, for the most part, at work—the law must concomitantly evolve to support and protect employees who are forced to cover and require employers to structure healthier workplaces.[292]

But, more than that—and of most significance to those in the legal profession—the notion of elevating and protecting the value of authenticity is not foreign to U.S. law. As free speech theory and jurisprudence make clear, treating as fundamental the right to be one's authentic self is not a radical idea. It is a foundational one. This section explains how the valuable insight that the First Amendment provides can be applied in the employment context to better foster employees' abilities to be themselves in the workplace. It then provides doctrinal suggestions for how to actualize these authenticity goals. Finally, it addresses potential critiques.

A. Lessons

First and foremost, authenticity matters to individual, organizational, and societal wellbeing. Employment law should be grounded in social science research

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291. ROBERT LEVERING, A GREAT PLACE TO WORK 62 (1988).

292. As Rosabeth Moss Kantor wrote in her seminal work *Men and Women of the Corporation*, "Employment practices that enhance individual welfare and the quality of work life should not be private decisions based on the voluntary goodwill or *noblesse oblige* of employers but rather a question of vital social concern to those outside the enterprise." ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 10 (2d ed. 1993).

and follow First Amendment law in reflecting this fact. Unlike the Title VII context where courts often remark on the triviality of issues related to self-expression, courts in the First Amendment context take questions related to self-determination seriously. As numerous theorists have argued, self-determination is an important—if not the principal—justification for the First Amendment's protection of expression. The Supreme Court has demonstrated the significance of autonomy interests in cases like *Cohen v. California*,[293] where the Court went out of its way to underscore the importance of the autonomy issues presented by the writing on the back of a jacket, and *West Virginia Board of Education v. Barnette*,[294] where it stood guard against the invasion of children's minds. It is not enough for courts to acknowledge autonomy interests in passing, as the Fifth Circuit did in *Gloor* when it allowed the plaintiff's employer to prohibit him from speaking Spanish at work.[295] It is illogical that protection and promotion of an individual's right to self-expression should be limited solely to the First Amendment context: if autonomy matters to First Amendment interpretation and enforcement, it should similarly matter to Title VII interpretation and enforcement.

Second, though there may be competing interests that warrant the tempering of protection of an employee's authenticity in the workplace, those interests should be substantial; the presumption should be in favor of protecting the employee's authenticity. As the Supreme Court implied in *Barnette*, the assertion of authority does not itself justify intrusion into fundamental rights. The nature of fundamental rights is such that the intruder's identity—whether government or private employer—is irrelevant. The *Tinker* Court's "substantial disruption" balancing test[296] better reflects the importance of authenticity than that used by courts in the private workplace. Although *Tinker* is well-known for its holding in an educational context, the Court's analysis is no less applicable in the employment context with respect to the values being protected: while an employer has a valid interest in stopping conduct that would "materially and substantially" interfere with her business, she has no legitimate interest in controlling her employee's self-expression absent such a disruption.

To ensure that employers are not unfairly trampling on employee self-expression, courts must scrutinize employers' rationales for regulating employee expression. They cannot deem a business's desire for a "conservative" image legitimate, as the *Rogers* court did,[297] without evaluating what is meant by the asserted interest and determining whether an employee's expression actually impedes it. In *Tinker*, the Court found that the school had a legitimate interest in the school's proper functioning but went on to hold that there was no evidence of substantial disruption: students had not broken out into fistfights or arguments until class

293. *See supra* Section IV.B.2.
294. *See supra* Section IV.B.4.
295. *See supra* Section III.B.
296. *See supra* Section IV.B.3.
297. *See supra* Section III.B.

could not continue. Moreover, other political and controversial symbols, such as the Iron Cross associated with Nazism, apparently caused no problem.[298] Therefore, the Court found it obvious that what the school was trying to stop was only the anti-Vietnam opinion symbolized by the black armband. If the *Rogers* court had engaged in a similarly thorough analysis, it seems unlikely that it would have been able to ignore the racial dimension of American Airlines's purportedly neutral interest in maintaining a "conservative" business image. As Yoshino has argued, forcing employers to explain their reasoning will "encourage a culture of greater rationality."[299] Where employers cannot justify their regulations based on legitimate business concerns, the presumption in favor of an employee's right to free expression should stand. More rationality, therefore, will lead to more authenticity in the workplace.

Third, protecting authenticity in the workplace requires protecting an individual's decision about how to express her identity. As the court in *Doe* recognized,[300] individuals are the experts on what constitutes authentic representations of themselves. Courts have no business evaluating whether an individual's presentation is "natural" or "artificial," as the *Rogers* court did, and social scientists have made abundantly clear that individual identity is simply too complex for them to do so. The Supreme Court recognized this fact in *Cohen* when it protected Cohen's speech not only for its specific message but also for its "inexpressible" emotive content. More importantly, courts do not need to make this distinction to determine whether an employee's expression is in tension with her employer's ability to run its business effectively.

Fourth, businesses and courts should be suspicious of regulations that compel specific expression. Social science research demonstrates that both employees and their employers suffer when employees are forced to act inauthentically. As the Supreme Court insinuated in *Maynard*,[301] and as Seana Valentine Shiffrin argues,[302] there is something particularly unnerving about those in authority forcing their subordinates to daily parrot their messages, especially when those messages relate solely to an individual's self-expression. While an employer may undoubtedly require that its employees say or do things that are substantially related to the business's functioning, it should not be able to demand that its employees present themselves in ways that *have no bearing* on the success of the business. Darlene Jespersen received positive performance reviews for twenty years before Harrah's Casino forced her to wear makeup, giving her no choice but to leave her job or stand up for what she believed in. While there was no reason to believe that a painted face would have made Jespersen a more valuable employee, there was plenty of evidence that compelling her to essentially wear a mask would cause her

298. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510, 514 (1969).
299. YOSHINO, *supra* note 14, at 178.
300. *See supra* Section IV.B.3.
301. *See supra* Section IV.B.4.
302. *See supra* Section IV.B.4.

real harm.

Taken together, these lessons highlight the need for the law to protect nonconforming self-expression in the workplace.

B. Solutions and Critiques

Companies at the forefront of authenticity efforts know that creating an environment where people can be themselves at work is not solely about compliance with the law. Of great additional importance are both an organization's decision to embrace employee authenticity as an institutional value—whether because companies believe it is the right thing to do or because it enhances profitability[303]—and society's willingness to elevate its importance as a cultural value. The law, however, is the ultimate guardian of individual workers' rights: it must express those values and rights so that they are not misunderstood and provides the mechanism to ensure that those rights are not violated. To harmonize the free speech and Title VII jurisprudence and provide the means to counter forced conformity and celebrate individuality at work, I suggest the following changes to Title VII enforcement.

Individual employees should have a statutory right to challenge any workplace regulation that burdens an authentic—or, in legal vernacular, "sincere"—expression of their identity in the workplace—whether that regulation limits their ability to appear, speak, or conduct themselves as they wish. Building off Yoshino's argument that employers should be required to engage in "reason-forcing conversation[s]"[304] to justify burdens placed on protected groups, I argue that courts should scrutinize all limitations on an employee's authentic representations of self, whether or not that employee is a member of one of the traditionally protected groups.

To that end, a new statutory scheme would require courts to apply the following intermediate scrutiny test: If an employee establishes a prima facie case that a workplace regulation burdens a sincere expression of self, then the employer must prove that the challenged workplace rule is necessary to further an important business interest and that the rule furthers that interest by using means substantially related to that interest. Only when an employer proves that a challenged workplace regulation is necessary to its business will a court uphold an employer rule that burdens employee expression. The assumption—and intended goal—is that, as in the religion context, courts would defer to individuals that their expressions are sincere unless patently unreasonable.[305] The meat of the test would be the application of intermediate scrutiny that follows. In this framework, the burden would effectively be flipped; instead of an employee of a protected class being unable to

303. *See supra* Section II.A.2.

304. YOSHINO, *supra* note 14, at 178 (emphasis omitted).

305. *See* Ramachandran, *supra* note 195, at 42 ("Identity is something which, like religion, is unstable and mutable, yet it structures and colors our entire experience of the world.").

make out a prima facie case of discrimination because her employer inhibits a mutable rather than an immutable characteristic, courts would, upon a minimal showing by the employee, assume that the employee is sincerely expressing her authentic self.

As a corollary, this new statutory scheme would also expand the protections already afforded to suspect classifications under Title VII to presumptively shield *all employees* from adverse employment actions premised on an employer's consideration of that employee's expression of individuality. However, an employer could rebut this by, again, showing that the employee's expression interferes with an important business interest and no accommodation was available.

Although limiting protection to "sincere" expressions of identity is purposefully not burdensome on the employee, it nevertheless ensures that employees at least articulate a reasonable rationale for their challenge.[306] More importantly, the scheme obviates the need for courts to engage in any rigorous process of determining what qualifies as authentic—or, as we saw in *Rogers*, what expressions are sufficiently integral to one's identity as a Black woman to qualify for protection under Title VII—by placing the onus on the employer to justify its workplace regulation. Presuming the expression is authentic alleviates fears associated with line drawing and minimizes the specter of essentialism that currently lurks in a scheme dependent upon group categorization.

The adoption of intermediate scrutiny, rather than strict scrutiny, also acknowledges that employers have important interests linked to the success of their businesses. Even still, intermediate scrutiny ensures that employers will not have *carte blanche* to require their employees to do more than is necessary to successfully fulfill their work responsibilities. As Yoshino writes, "[t]he goal is not to eliminate assimilation altogether, but to reduce it to the necessary minimum."[307] By expanding the scope of Title VII protection beyond suspect classes, individuals would be able to express their identities—not only cultural traits but also, for example, political beliefs—without fear of adverse employment action.

Where the job requires certain expression in appearance or action, such as a fashion model or an actor, the employer would face little difficulty in prevailing under the proposed scheme. However, where an employer simply decides that she

306. As in the religion context where an employer may challenge whether a belief is "sincerely held," as opposed to the truth of the belief, the employer would still be able to challenge whether the employee's authentic expression was integral to her identity. *See* United States v. Seeger, 380 U.S. 163, 185 ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'") The question of sincerity generally depends on a factual assessment of an employee's credibility. *See* E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 56 (1st Cir. 2002). For example, if an employee said that she was a vegan and, therefore, could not wear leather work shoes and needed instead to wear flip flops, an employer could challenge this expression of self on the grounds that the employee often ate meat at work. *Cf. id.* at 56–57 (finding an employee's conduct that was contrary to the tenets of his professed religious belief important to an assessment of whether the belief was "sincerely held").

307. YOSHINO, *supra* note 14, at 186.

would rather her employees cut their hair short because of personal preference, the employer would face pressure to justify her decision. In the context of uniforms, for example, Ramachandran has made the obvious but still important point that "[c]ustomers go to restaurants primarily for food, not to be served by people in uniforms. If there were few restaurants with waitstaff in uniforms, customers would still eat out."[308] For identification purposes, employers could require that employees wear nametags—something less intrusive than a uniform requirement—and life would go on.[309]

But not all uniforms would be so easily done away with under the proposed approach. To show how this scheme would work in practice, I present the following examples.

1. Six Flags requires its ride operators to wear a specific uniform. One such operator objects to the uniform because it quashes her authentic expression of self, which she argues includes wearing her own clothes. This employee has made out a prima facie case. The employer argues that the uniform is critical because members of the public need to know who has the authority to operate rides so that they only trust the correct person. Because of the crowds, a nametag would not be a sufficiently obvious way to signal who that person is. Here, the employer's uniform requirement would likely survive intermediate scrutiny.
2. A dental hygienist has numerous piercings. Her employer says that her piercings are inappropriate because she works closely with patients. The employee refuses to remove the piercings and is fired. She argues that she was fired because of an authentic expression of herself, making out a prima facie case. The employer argues that piercings seem unclean, and she just does not want anyone who works for her to have them. The employer might be able to survive intermediate scrutiny if she can show that the appearance of cleanliness is an important business interest and that forbidding body piercings substantially furthers that interest. While the employer may be able to show the former, she would have a harder time proving that prohibiting body piercings substantially furthers the interest in the appearance of cleanliness, and she could not rely on unfounded stereotypes about people with piercings. If she cannot prove that her rule substantially furthers the business interest in cleanliness, she will be found to have discriminated against the employee.
3. An associate at a law firm wears a pin signaling gay pride. Her employer advises her to take the pin off, but she does not do so. She is passed over for a promotion. She alleges discrimination based on her

308. Ramachandran, *supra* note 195, at 62–63.
309. *See id.* at 63.

> refusal to take off the pin, which she argues is essential to her identity. The employee has made out a prima facie case. The employer argues that the political statement is distracting and the law firm has an interest in ensuring its associates are focused solely on their work and not distracted by political or personal concerns. While the employer could show that having its employees focus is an important business interest, it would have to show that was truly the interest as opposed to another, such as merely protecting the comfort of the other employees. This would be a factual determination. If a court determined that "distraction" was code for, or at least partially based on, the prejudice of other employees or the employer, the employer would not prevail. If the employer argued that it prohibited all forms of workplace political expression by its employees because it believed that political expression would alienate clients, the employer would have to demonstrate that this fear was well-founded and objectively supportable—it could not simply assert it. Moreover, the employer would have to show that restricting the employee's ability to wear the pin *substantially* furthers the firm's interest in appearing apolitical, assuming the court found such an interest objectively valid. While this is a closer call, it is still unlikely that the employer would prevail. Unless the firm could show that it specifically marketed itself as apolitical—that such a lack of ideology was part and parcel of the legal services it provided—the burden would be too heavy.

In all of these cases, the sincerity of the employee is all but assumed and the burden to justify the rule is on the employer. The employer only has a chance of succeeding on a challenge to the employee's prima facie case in the last scenario because there is factual evidence that calls her assertion into doubt. Nevertheless, these examples show that applying intermediate scrutiny significantly alters which restrictive workplace scenarios can be justified by employers.

The dual action of expanding the scope of the protection under Title VII and shifting the burden of proof to employers raises legitimate concerns about an increase in litigation and a diminution of employers' rights. With respect to worries about unceasing litigation, more litigation is precisely the point: the new scheme gives employees private rights of action with the expectation that they will seek the protection of the laws in court.[310] That said, courts will develop a body of case law designed to exclude truly frivolous claims or Congress will enact additional requirements, such as requiring employees to exhaust administrative-like remedies before turning to litigation, that will keep the amount of litigation under control.[311]

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310. I also join the scholars who echo Justice William J. Brennan Jr. in dismissing concerns of "too much justice." *See, e.g.*, YOSHINO, *supra* note 14, at 181.

311. *See* Niedrich, *supra* note 25, at 96 (arguing that courts will develop a body of case law designed to exclude truly frivolous claims and noting that administrative procedures are already in

Regarding arguments about diminishing employer rights, there are a few responses. To the extent that one believes that an employer should be able to do whatever she wants simply by virtue of her position as business-owner, First Amendment jurisprudence and existing anti-discrimination law provide the appropriate response: naked assertions of power are insufficient justifications for trampling individual liberty. To that end, incorporating authentic self-representation into Title VII's already existing protective scheme is the logical next step. Title VII proscribes what an employer can do; it should be the employer who justifies its assertion of power over an employee if such assertion constrains an employee's authentic expression. With respect to an employer's right to make decisions based on customer preferences, Deborah Rhode notes that we must be wary of succumbing to preferences that merely "reflect and reinforce" the dominant bias of the day.[312] As she writes, "Customers who want what a Hooters' spokeswoman described as a 'little good clean wholesome female sexuality' are no more worthy of deference than the Southern whites in the 1960s who didn't want to buy from [B]lacks, or the male airline passengers in the 1970s who liked stewardesses in hot pants."[313]

Ultimately, although some might find it hard to believe that legal protections for authentic expression of individuality in the workplace could ever become a reality, society is already shifting in the direction of providing more flexibility to workers to be themselves in the workplace. It is time for the law to catch up and, in doing so, bring up to speed the employers who are straggling behind some of America's more innovative businesses.

VI.
CONCLUSION

America's workforce is changing: it is becoming more diverse in terms of cultures, nationalities, religions, philosophies, and lifestyles. With these changes, what American workers want from work is shifting as well: they want to perform their jobs without losing themselves. To do so, employees must be able to bring their multi-faceted identities to work, and employers must accept and hopefully embrace the reality that their employees are simultaneously members of many groups and also unique individuals. While some companies have heeded employees' calls for greater opportunities to be authentically themselves at work, many have not. And with reason—collaboration across differences is difficult. Nevertheless, as recent research has found, the difficulty of fostering authenticity in the workplace reaps rewards for employees and employers alike. Beyond their instrumental value, autonomy and authenticity are bedrock principles of American law

place).

312. Rhode, *supra* note 163, at 1065.

313. *Id.* at 1066.

guaranteed by the First Amendment. They are the steel that supports our fundamental values as Americans. Just as they merit protection in our constitutional jurisprudence, they must be defended from harm in the crucible of the workplace.