

Soul of a Woman:  
The Sex Stereotyping Prohibition at Work

Kimberly A. Yuracko\*

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\* Professor, Northwestern University School of Law. I am grateful for comments and suggestions on earlier drafts from Michael Barsa, David Dana, Zev Eigen, Liz Glazer, Mark Kelman, and Andy Koppelman. I would like to thank my library liaison, Marcia Lehr, for her many contributions and my outstanding research assistant Sharon Makowsky for her unflagging energy and optimism while working on this project.

SOUL OF A WOMAN:  
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*In 1989 the Supreme Court in Price Waterhouse v. Hopkins declared that sex stereotyping was a prohibited form of sex discrimination at work. This seemingly simple declaration has been the most important development in sex discrimination jurisprudence since the passage of Title VII. It has been used to extend the Act's coverage and protect groups that were previously excluded. Astonishingly, however, the contours, dimensions and requirements of the prohibition have never been clearly articulated by courts or scholars. In this paper I evaluate four interpretations of what the sex stereotyping prohibition might mean in order to determine what it actually does mean in courts' current sex discrimination jurisprudence. I reject the interpretations most often offered by scholars – namely that the prohibition requires either freedom of gender expression or sex-blind neutrality. I argue that the prohibition reflects not a coherent antidiscrimination principle but a pragmatic balancing test. I conclude by arguing that the prohibition has not lived up to its rhetorical promise. Indeed, the implications of the prohibition are both dangerous and ironic in ways not previously recognized. While the prohibition has extended Title VII's protection to workers who had previously been excluded, it does so by relying on and reinforcing traditional gender categories. Moreover, by doing so the prohibition actually protects some individuals at the expense of the class whose subordination stemming from socially salient gender norms remains intact.*

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# The Sex Stereotyping Prohibition at Work

## INTRODUCTION

In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*<sup>1</sup> declared that sex stereotyping was a prohibited form of sex discrimination at work.<sup>2</sup> This seemingly simple declaration has been the most important development in sex discrimination jurisprudence since the passage of Title VII. It has been the tool used to protect effeminate men and masculine women from harassment in the workplace.<sup>3</sup> More recently, it has been the catalyst for a sea change in courts' treatment of transsexuals.<sup>4</sup>

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<sup>1</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 229 (1989).

<sup>2</sup> In fact, the Supreme Court had condemned sex stereotyping since the 1970's. However, the sex stereotyping at issue in the cases preceding *Price Waterhouse* involved ascriptive sex stereotyping whereby women were excluded from certain opportunities because they were presumed to have certain traits and attributes rendering them unfit. In *Price Waterhouse*, by contrast, the Court took aim at prescriptive sex stereotyping whereby a woman was penalized because she did not in fact possess the traits and attributes expected of her sex. For a more extensive discussion of different types of sex see Part I. See also stereotyping see Kimberly A. Yuracko, *The Antidiscrimination Paradox*, 104 Nw. L. Rev. 1, 6-8 (2010); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 36-41 (1995).

<sup>3</sup> See *infra* notes 21-41.

<sup>4</sup> Transsexualism first appeared as a condition in the third edition of the Diagnostic and Statistical Manual of Mental Disorders published in 1980. See AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261-62 (3d ed., 1980) [hereinafter DSM-III]. The DSM-III identified the features of transsexualism as "a persistent sense of discomfort and inappropriateness about one's anatomic sex" accompanied by a "persistent wish to be rid of one's genitals and to live as a member of the other sex." *Id.* The fourth edition of the DSM, published in 2000, replaced the term transsexualism with Gender Identity Disorder, but the basic diagnostic criteria remained the same. A diagnosis of GID required "strong and persistent cross-gender identification" and "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role." AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535-37 (4th ed. 2000) [hereinafter DSM-IV]. The revised edition of the DSM-IV, the DSM-IV-TR, published in 2004, retained the same diagnostic criteria. See AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION - TEXT REVISION 576, 581 (4th ed. Rev. 2004) [hereinafter DSM-IV-TR]. For an explanation of how the term "transsexual" differs from the term "transgender" see Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW &

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Transsexuals have moved from being excluded from antidiscrimination protection altogether,<sup>5</sup> to being at the forefront of courts' evolving and expanding interpretation of federal sex discrimination law.<sup>6</sup>

Astonishingly, however, the precise contours, dimensions and requirements of the prohibition have never been clearly articulated either by courts or by scholars.

Courts tend to simply restate the language as though its meaning is self-evident.<sup>7</sup>

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SOC. INQUIRY 1, 2 (2003) (“[Transsexual] refer[s] to people who identify as such and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status. The term transgendered . . . captures a broader category of gender variant people who have not necessarily sought to alter their bodies but nonetheless feel a disjunction between their biologically and socially gendered selves.”).

<sup>5</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not protect transsexuals); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982) (holding that Title VII does not prohibit discrimination against transsexuals); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977) (refusing to extend Title VII protection to transsexuals because discrimination against transsexuals is discrimination because of “gender” rather than “sex”).

<sup>6</sup> See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.2d 566 (6th Cir. 2004).

<sup>7</sup> See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (2006) (explaining that after *Price Waterhouse*, “in establishing that gender played a motivating part in an employment decision, a plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (explaining that “a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on “sexual stereotypes.”); *Smith v. City of Salem, OH*, 378 F.3d 566, 571 (6th Cir. 2004) (explaining that *Price Waterhouse* “held that Title VII’s prohibition of discrimination “because of . . . sex” bars gender discrimination, including discrimination based on sex stereotypes”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”); *Doe v. City of Belleville, IL*, 119 F.3d 563, 580 (7th Cir. 1997) (“The Supreme Court’s decision in *Price Waterhouse* . . . , makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles”).

A few courts have, however, noted the ambiguity of the prohibition. Indeed, when *Price Waterhouse* was before the D.C. Circuit, Judge Williams dissented from the majority’s holding that the employer had engaged in prohibited sex stereotyping on the grounds that that “[t]he majority implicitly adopts a novel theory of liability under Title VII, but neither confronts the novelty of the theory nor gives it any intelligible bounds.” *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987) (Williams, dissenting) rev’d, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). See also *Schroer v. Billington*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) (ruling on first motion to dismiss) (noting the judicial confusion surrounding the Supreme Court’s sex stereotyping language in *Price Waterhouse* and explaining that the prohibition was actually “considerably more narrow than its sweeping language suggests”).

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Scholars most often simply presume what the prohibition should mean,<sup>8</sup> sometimes then chastising courts for their failure to apply the prohibition “correctly.”<sup>9</sup>

In this paper I take a position of greater deference to the judiciary with the aim of achieving greater clarity. By looking at recent case law invoking or ignoring the Supreme Court’s admonishment against sex-stereotyping, I seek to uncover the demands, and limits, of the prohibition as it is actually being applied, rather than as it should be applied in some normatively ideal jurisprudential universe. After defining the prohibition, I explore its likely implications for antidiscrimination law, workplace freedom, and social conceptions of gender.

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<sup>8</sup> See e.g., Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 62 (2003) (explaining that after *Price Waterhouse*, “Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”); Franklin H. Romeo, *Beyond A Medical Model: Advocating for A New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 740 (2005) (“Sex-stereotyping claims allege discrimination on the basis of a person’s failure to conform to the expected behavior of their sex.”) Andrew Gildea, *Toward A More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 92 (2008) (“Under [the sex stereotyping] theory it is impermissible for an employer to discriminate against an employee for failure to conform to the stereotypes attached to his or her biological sex.”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 37 (1995) (explaining that the sex stereotyping prohibition stated in *Price Waterhouse* protected individuals from being “penalized because their gender behavior did not conform to stereotypical expectations”).

<sup>9</sup> See, e.g., Romeo, *id.* at 740-41 (“While the reasoning inherent in *Hopkins* would appear to cover discrimination against a wide spectrum of gender nonconforming people--such as “butch” women, effeminate men, cross-dressers, and people who identify or live as a gender other than that assigned to them at birth--for many years this reasoning remained conspicuously absent in cases involving transgender litigants. Courts seemingly went out of their way to exclude transgender litigants from succeeding under claims of sex discrimination on these grounds.”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995) (“shocking though it may be to some sensibilities, not only masculine women such as *Hopkins*, but also effeminate men, indeed even men in dresses, should already unequivocally be protected under existing law from discrimination on the basis of gender-role-transgressive behavior.”).

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I begin in Part 1 with an introduction to the sex stereotyping prohibition announced in *Price Waterhouse* and its more recent jurisprudential progeny. In Parts 2 and 3 I consider the interpretations of the prohibition most often offered by scholars—namely that the prohibition requires either gender libertarianism or trait neutrality. According to the gender libertarianism view, the sex stereotyping prohibition guarantees full freedom of gender expression in the workplace. According to the trait neutrality view, the sex stereotyping prohibition requires that employees be free to adopt whatever gendered traits are permitted of the other sex. Both interpretations suggest the transformative potential of the prohibition. Neither, I argue, is plausible. In Part 4, I consider whether the prohibition requires instead a narrower commitment to category neutrality whereby employers may require gender code compliance, but they must be neutral as to which gender code employees adopt. In Part 5, I consider whether the sex stereotyping prohibition is best understood as a pragmatic balancing test rather than as a distinct antidiscrimination principle. I argue that the balancing approach—in which the plaintiff's interests in being protected from a sex-based conformity demand are balanced against the employer's interests in enforcing the demand—provides the most coherent and comprehensive account of the sex stereotyping prohibition at work. Finally, in Part 6, I examine the implications of the prohibition in light of Title VII's broad antidiscrimination goals. Title VII operates on

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both an individual and group level.<sup>10</sup> Individuals are to be evaluated on their own merits rather than on their group membership.<sup>11</sup> Traditional group hierarchies are to be dismantled, in part, by challenging the norms, stereotypes and prejudices that justify and legitimize them.<sup>12</sup> In practice, the sex stereotyping prohibition encourages plaintiffs to endorse and adopt highly stereotyped gender packages in order to convince courts of the steep costs associated with their forced gender expression at work. The implications of the prohibition are both dangerous and ironic in ways not previously recognized. While the prohibition has extended Title VII's protection to workers who had previously been excluded, it does so by relying on and reinforcing traditional gender categories. By doing so, moreover, the prohibition actually protects some individuals at the expense of the class whose subordination stemming from socially salient gender norms remains intact.

### I. *Price Waterhouse* and its Progeny

*Price Waterhouse v. Hopkins* involved a woman who was denied admittance to the partnership at Price Waterhouse because she was deemed insufficiently feminine.<sup>13</sup>

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<sup>10</sup> See, e.g., John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 475 (2002) (explaining that “[a]s clear as it is that the [Civil Rights] act was intended to as an anti-differentiation principle, it is equally clear that the purpose of the Act was to improve the economic condition” of protected groups).

<sup>11</sup> See Hasnas, *supra* note 10 at 473 (describing the original purpose of Title VII as “to encourage hiring on the basis of ability and qualifications” not group membership).

<sup>12</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”); *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (“It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”); *Dothard v. Rawlinson*, 430 U.S. 321, 333-34 (1977) (noting that “the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes”). See also *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7<sup>th</sup> Cir. 1971) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”)

<sup>13</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 229 (1989).

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Indeed, the partner who was responsible for telling her of the firm's decision to put her candidacy on hold advised her that in order to improve her chances the following year, Hopkins should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"<sup>14</sup>

There is language in the case suggesting that what the Court found problematic about the employer's femininity demands was that they placed Hopkins in a double-bind.<sup>15</sup> Hopkins was being required to be feminine while the successful performance of her job required that she adopt more traditionally masculine traits and behaviors. As the Court explained, given the demands placed on her, Hopkins would be out of a job if she behaved aggressively, and out of a job if she did not.<sup>16</sup>

Yet the Court's rhetoric extended well beyond double-bind situations. Indeed, the Court declared all sex-stereotyping to be prohibited sex discrimination. The Court explained:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n

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<sup>14</sup> *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (1985)).

<sup>15</sup> For similar readings see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 45, 60 (1995) (while Case does not adopt such a narrow reading of the case she does note that "[t]he *Hopkins* plurality seems, however, to have placed a great deal of weight on the doubleness of Hopkins's bind . . . . This raises the intriguing question of what would have happened had the double bind been dissolved."). See also *Schroer*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) (surmising that what was problematic in *Price Waterhouse* was that the sex stereotyping at play "had created an intolerable 'Catch-22' for its female employees"); *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992) ("In our case, Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a "Catch-22. Thus, the discussion of sexual stereotyping in *Price Waterhouse* does not support a holding that discrimination "on account of sex" was involved in this case.").

<sup>16</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.").



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forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>17</sup>

The Court's prohibition actually encompassed two distinct types of sex stereotyping – ascriptive stereotyping and prescriptive stereotyping. Ascriptive stereotyping occurs when an employer assumes that an individual possesses certain traits and attributes because of her sex and that she is, as a result, unqualified for a particular position. This is the most traditional form of sex stereotyping and was the Court's initial target. In *Phillips v. Martin Marietta Corp.*, for example, the Court held that an employer could not refuse to hire female, but not male, employees with young children based on the assumption that such workers would have heavy child care responsibilities.<sup>18</sup> Prescriptive stereotyping occurs when an employer insists that an individual possess or exhibit certain traits and attributes because of her group membership. *Price Waterhouse* involves prescriptive stereotyping.<sup>19</sup> It was the Court's

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<sup>17</sup> *Id.* at 251.

<sup>18</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542,543 (1971) (holding that having different hiring policies for men and one for women, each having pre-school aged children, violates Title VII's requirement that persons of like qualifications be given employment opportunities irrespective of their sex).

<sup>19</sup> See J. Cindy Elson, *In Praise of Macho Women: Price Waterhouse v. Hopkins*, 46 U. MIAMI L. REV. 835, 851 (1992) (suggesting that the evaluation of Hopkins' interpersonal skills was also imbued with discrimination as evidenced by her "deviation from the feminine stereotype," and "the exaggerated perception of her 'aggressive' behavior by her male peers."); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 36 DUKE J. GENDER L. & POL'Y 205, 211 (2007) ("Under what is now referred to as the sex-stereotyping principle, the Court [in *Price Waterhouse v. Hopkins*] declared that a plaintiff could demonstrate that she had been the victim of sex-based discrimination by establishing that the employer's challenged action had been triggered by her failure to conform to its sex-stereotyped expectations."); Jonathan Hardage, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit Effeminacy Discrimination*, 54 ALA L. REV. 193, 201 (2002) ("[I]n *Price Waterhouse v. Hopkins*, a majority of justices of the United States Supreme Court agreed that discrimination for failure to conform to 'gender stereotypes' violates Title VII's prohibition against discrimination 'because of...sex.'"); Bonnie H. Schwartz, *Price*

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novel and broad declaration against prescriptive sex-stereotyping that set the stage for the dramatic expansion of courts' protection of gender nonconformists under Title VII.

The first significant development came in the use of the prohibition to protect men harassed because of their perceived effeminacy.<sup>20</sup> In *Doe v. City of Belleville*, for example, the Seventh Circuit ruled that the harassment of two boys who were perceived by their male coworkers to be insufficiently masculine constituted sex discrimination.<sup>21</sup> In concluding that the plaintiffs had presented evidence sufficient to show that they had been harassed because of sex, the Seventh Circuit relied on the Supreme Court's anti-sex stereotyping language from *Price Waterhouse*.<sup>22</sup> As the court explained:

[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his

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*Waterhouse v. Hopkins: Causation and Burdens of Proof in Title VII Mixed Motive Cases*, 21 ARIZ. ST. L.J. 501, 539 ("Hopkins showed that stereotypes factored into the partnership selection process and that her failure to conform to them substantially motivated Price Waterhouse's decision."). Although far less common, it is possible to read *Price Waterhouse* itself as involving a kind of ascriptive stereotyping. It may have been that the partners were so flustered when Hopkins did not meet their expectations of proper femininity – which themselves would have made her ill qualified for the partnership--that they were unable to see that she could in fact do the job.

<sup>20</sup> Cases involving harassment of women perceived as inappropriately masculine are less frequent, but have used the sex stereotyping prohibition to similar effect. See, e.g., *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, 1229 (D. Or. 2002) (denying the employer's motion for summary judgment because the plaintiff had presented evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance).

<sup>21</sup> 119 F.3d 563, 566 (7<sup>th</sup> Cir. 1997). *Belleville* involved the harassment of two sixteen-year-old brothers working for the city as summer groundskeepers. Both brothers were subject to taunts and abuse by their male coworkers, but one of the brothers, H. Doe, was the main target. The harassment of H. focused on the fact that he wore an earring and was perceived as overly feminine. *Id.* at 567. The Seventh Circuit's opinion in *Belleville* was vacated by the Supreme Court for further consideration in light of its decision in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998), which held that same-sex harassment could be actionable under Title VII. *City of Belleville v. Doe*, 523 U.S. 1001, 1001 (1998). The case then settled before there was a decision on remand. The Supreme Court's decision in *Oncale* did not, however, directly challenge or retract the gender stereotyping logic set forth in *Price Waterhouse*, upon which the *Belleville* decision relied. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n. 5 (3d Cir. 2001) (opining that "there is nothing in *Oncale* . . . that would call into question" the holding in *Belleville* that harassment based on a failure to live up to gender stereotypes is sex discrimination).

<sup>22</sup> *Belleville*, 119 F.3d at 580.

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masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.<sup>23</sup>

The Ninth Circuit provided similar protection to the plaintiff in *Nichols v. Azteca Restaurant Enterprises, Inc.*<sup>24</sup> Antonio Sanchez worked as a host and then a food server at Azteca restaurants in Washington State.<sup>25</sup> During his four-year tenure, Sanchez was subjected to a steady stream of taunts and insults focusing on his perceived effeminacy.<sup>26</sup> Relying on *Price Waterhouse*, the Ninth Circuit held that Sanchez had suffered actionable sex discrimination.<sup>27</sup> "At its essence," the court explained, "the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. . . . *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule applies to preclude the harassment here."<sup>28</sup>

More recent, and perhaps more dramatic, has been courts' use of the prohibition to protect transsexuals from discrimination. The first circuit court to do so was the

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<sup>23</sup> *Id.* at 581.

<sup>24</sup> 256 F.3d 864, 875 (9<sup>th</sup> Cir. 2001).

<sup>25</sup> *Id.* at 870.

<sup>26</sup> *Id.*

<sup>27</sup> The Ninth Circuit concluded that the harassment was sufficiently severe to violate Title VII, that it was because of sex, and that the employer was liable for the harassment for failing to take adequate steps to stop it. *Id.* at 873, 874-75, 877.

<sup>28</sup> *Id.* at 874-75. Several other circuits have endorsed similar protection in principle. *See, e.g.,* *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) ("[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) ("The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1<sup>st</sup> Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citation omitted)). Female workers harassed for their perceived masculinity have also received protection. *See, e.g.,* *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, 1229 (D. Or. 2002) (denying the employer's motion for summary judgment because the plaintiff had presented evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance).

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Sixth Circuit in its 2004 decision in *Smith v. City of Salem, Ohio*.<sup>29</sup> In *Smith*, the court relied on the Supreme Court's sex stereotyping prohibition from *Price Waterhouse* to hold that a pre-operative male-to-female transsexual who alleged that he was penalized for expressing feminine attributes at work could state a cause of action for sex discrimination.

Jimmie Smith worked as a lieutenant in the Salem Fire Department in Salem, Ohio.<sup>30</sup> He was a biological male who had been diagnosed with Gender Identity Disorder (GID).<sup>31</sup> Shortly after Smith began expressing a more feminine appearance at work, in accordance with international protocols for treating GID, his co-workers began to comment on his appearance and his inadequate masculinity.<sup>32</sup> In addition, after Smith told his supervisor about his GID and his intention to transition from male to female, the Chief of the Fire Department held a meeting to find a basis for terminating his employment.<sup>33</sup> Smith sued alleging that it was a form of sex discrimination to penalize him for his failure to conform to stereotypes about how a man should behave.<sup>34</sup> The Sixth Circuit agreed, relying on the Supreme Court's prohibition on sex

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<sup>29</sup> *Smith v. City of Salem, Ohio*, 378 F.2d 566 (6th Cir. 2004). My use of pronouns in this and other cases involving transsexuals follows that of the court.

<sup>30</sup> *Id.* at 568.

<sup>31</sup> The court explained that according to the American Psychiatric Association, GID is "a disjunction between an individual's sexual organs and sexual identity." *Id.* at 568.

<sup>32</sup> *Id.* at 568.

<sup>33</sup> The court noted that the Chief of the Fire Department "arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment." *Id.* at 568. Shortly thereafter, Smith was suspended for an alleged infraction of department policy. *Id.* at 569.

<sup>34</sup> *Id.* at 569. *See also id.* at 572 ("[Smith's] complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employer's and co-workers' sex stereotypes of how a man should look and behave.").

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stereotyping to reverse the district court's dismissal of his claims.<sup>35</sup> As the Sixth Circuit explained, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>36</sup>

One year later the Sixth Circuit affirmed a jury finding of sex discrimination in *Barnes v. City of Cincinnati*.<sup>37</sup> Philecia Barnes was a pre-operative male-to-female transsexual who worked as a police officer in the Cincinnati Police Department.<sup>38</sup> He presented evidence at trial showing that he was denied a promotion to sergeant because he violated masculine stereotypes.<sup>39</sup> The jury ruled in Barnes' favor on his sex discrimination claim.<sup>40</sup> Relying on its prior ruling in *Smith* for support, the court explained that a jury could have reasonably concluded that Barnes was discriminated against because of his failure to conform to masculine gender norms.<sup>41</sup>

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<sup>35</sup> *Id.* at 572 ("[H]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.").

<sup>36</sup> *Id.* at 575.

<sup>37</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729 (6<sup>th</sup> Cir. 2005).

<sup>38</sup> *Id.* at 733.

<sup>39</sup> Barnes, for example, was told by a supervisor that he was not masculine enough and was told by another superior officer that he was going to fail probably because he was not acting masculine enough. *Id.* at 738.

<sup>40</sup> *Id.* at 738.

<sup>41</sup> *Id.* at 737-38. The Ninth Circuit has endorsed similar protection for transsexuals. See *Kastle v. Maricopa County Community College District*, 325 Fed. Appx. 492, 493-94 (9<sup>th</sup> Cir. 2009) (explaining that "after *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women," but, nonetheless, holding that employer's ban on transsexual plaintiff's use of women's restroom for safety reasons did not constitute sex discrimination); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9<sup>th</sup> Cir. 2000) (holding that the Gender Motivated Violence Act parallels Title VII in prohibiting victimization of a transsexual because he was "a man who 'failed to act like' one").

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Several district courts in other circuits have asserted similar protection for transsexual workers. In *Creed v. Family Express Corporation*, for example, the plaintiff, a pre-operative male-to-female transsexual alleged that she was terminated after she began presenting a more feminine appearance at work and rejected her employer's demand that she return to a more masculine appearance.<sup>42</sup> In assessing the plaintiff's sex discrimination claim and denying the defendant's motion to dismiss, the court

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Several district courts have asserted similar protection for transsexual workers. *See Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A 05-234, 2006 WL 456173 \*1 (W.D. Pa., Feb. 17, 2006) (explaining that “[h]aving included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, plaintiff has sufficiently pleaded claims of gender discrimination”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-05 (D.D.C. 2008) (finding sex discrimination against transitioning male-to-female transsexual explaining: “Ultimately, I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.”); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1299, 1305 (N.D. Ga. 2010) (finding that plaintiff had shown a violation of the Equal Protection Clause based on sex stereotyping and noting that “[t]his Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex”); *Lopez v. River Oaks Imaging Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (denying defendant’s motion for summary judgment and explaining that “Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer”); *Trevino v. Center for Health Care Services*, Civil Action No. SA-08-CV-0140 NN, 2008 WL 4449939 (W.D. Tex. Sept. 29, 2008) (holding that plaintiff could state a claim for sex discrimination because she alleged discrimination based on gender and not discrimination based on transsexualism); *Myers v. Cuyahoga County, Ohio*, 182 F. App’x. 510 (6th Cir. 2006) (explaining that “Title VI protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender,” but finding ruling against plaintiff, a post-operative transsexual, on her sex discrimination claim because no evidence that plaintiff was treated differently because of her gender nonconformity); *Lei v. Sky Publishing Corp.*, No. 013117J., 2002 WL 31492397, at \*5 (Mass. Super. Oct. 7, 2002) (“The plaintiff [a pre-operative male to female transsexual] contends that the defendant’s conduct [requesting that plaintiff only wear traditionally male attire at work and subsequently firing plaintiff upon her refusal] was based on stereotyped notions of ‘appropriate’ male and female behavior in the same manner as the conduct of the defendant in *Price Waterhouse*. Accordingly, the plaintiff has set forth a prima facie case of sex discrimination . . . sufficient to survive summary judgment.”).

<sup>42</sup> *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind., Aug. 3, 2007).

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explicitly recognized sex stereotyping as the basis for such a claim.<sup>43</sup> The court noted that “Ms. Creed’s allegation she was terminated after refusing to present herself in a masculine way permits the inference she was terminated as a result of [her employer’s] stereotypical perceptions, rather than simply her gender dysphoria.”<sup>44</sup> As a result, the court concluded, “Ms. Creed’s factual allegations supporting her claim she was terminated because of her failure to comply with male stereotypes support a plausible claim she suffered discrimination because of her sex.”<sup>45</sup>

In *Mitchell v. Axcán Scandipharm, Inc.* the court likewise relied on sex stereotyping logic in denying the defendant’s motion to dismiss the plaintiff’s sex discrimination claim. The plaintiff, a pre-operative male-to-female transsexual, alleged that he was fired after he began to present as female in public.<sup>46</sup> The court explained that “[h]aving included facts showing that his failure to conform to sex stereotypes of how a man

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<sup>43</sup> *Id.* at \*3 (“A transgender plaintiff can state a sex stereotyping claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer, but such a claim must actually arise from the employee’s appearance or conduct and the employer’s stereotypical perceptions.”).

<sup>44</sup> *Id.* at \*4. The court explained: “From Ms. Creed’s allegations in the complaint, it can . . . reasonably be inferred that Family Express perceived Ms. Creed to be a man while she was employed as a sales associate. That her managers requested she appear more masculine during business hours allows the inference that the managers harbored certain stereotypical perceptions of how men should dress.” *Id.* at \*4.

<sup>45</sup> *Id.* Subsequently the court granted the defendant’s motion for summary judgment holding that the plaintiff had not presented evidence sufficient to show that she was terminated because of her gender nonconformity rather than her failure to satisfy the company’s sex-specific grooming codes. Certainly there is real tension in the district court’s opinions. It is unclear how the plaintiff, a transitioning male-to female transsexual could be protected from sex stereotypes while being punished for failing to satisfy her employer’s grooming code for men. As this tension suggests, the court’s prohibition on sex stereotyping is complicated and nuanced in ways the courts themselves have not yet explicitly articulated.

<sup>46</sup> *Mitchell v. Axcán Scandipharm, Inc.*, No. Civ. A 05-234, 2006 WL 456173 \*1 (W.D. Pa., Feb. 17, 2006).

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should look and behave was the catalyst behind defendant's actions, plaintiff has sufficiently pleaded claims of gender discrimination."<sup>47</sup>

More recently in *Schroer v. Billington*, the District of Columbia district court held that the Library of Congress had engaged in sex discrimination by revoking its job offer to the plaintiff because she failed to satisfy stereotypes of what a woman should look like.<sup>48</sup> The plaintiff, a male-to-female transsexual, applied for and was offered a job as a terrorism specialist with the Library of Congress while presenting herself as a man. Before beginning work, Schroer notified her new supervisor that she would begin work as a woman and showed her three photographs of herself dressed as a woman.<sup>49</sup>

Shortly thereafter, the supervisor withdrew the offer admitting at trial that "when she

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<sup>47</sup> *Id.* at \* 2.

<sup>48</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). Although the Court ultimately relied on the sex stereotyping theory in ruling for the plaintiff, the court struggled with the ambiguity of that theory in responding to the defendant's first motion to dismiss. The court noted the judicial confusion surrounding the Supreme Court's sex stereotyping language in *Price Waterhouse* and explained that the prohibition was actually "considerably more narrow than its sweeping language suggests." *Schroer v. Billington*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) (ruling on first motion to dismiss). The court noted that both cases involving discrimination based on sexual orientation and those involving sex-based dress codes "partake in some measure of sex stereotyping, and the courts deciding them . . . have not clearly articulated what, if anything, distinguishes any of these cases from *Price Waterhouse*." *Id.* What was problematic in *Price Waterhouse*, the *Schroer* court surmised, was that the sex stereotyping at play "had created an intolerable 'Catch-22' for its female employees." *Id.* at 209. Indeed, in ruling on the defendant's first motion to dismiss, the court concluded that Schroer had not stated a sex stereotyping claim of sex discrimination because Schroer was not being penalized for failing to satisfy conventional gender stereotypes, but for seeking "to express her female identity . . . as a woman. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave – she adopts those norms." *Id.* at 211. Nonetheless, the court denied the defendant's motion to dismiss on the grounds that Title VII should be understood to prohibit antitranssexual animus in addition to sex stereotyping. *Id.* at 212. After the court's initial ruling, Schroer amended her complaint to allege that her "non-selection resulted from Preece's reaction on seeing photographs of Schroer in women's clothing – specifically, that Preece believed that Schroer looked 'like a man in women's clothing rather than what she believed a woman should look like.'" *Schroer v. Billington*, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) (ruling on second motion to dismiss). The amended complaint, the court concluded, did state a sex stereotyping claim because "Schroer now asserts that she was discriminated against because, when presenting herself as a woman, she did not conform to Preece's sex stereotypical notions about women's appearance and behavior." *Id.* at 62-63.

<sup>49</sup> *Schroer*, 577 F. Supp. 2d at 297.



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viewed the photographs of Schroer in traditionally feminine attire . . . she saw a man in women's clothing."<sup>50</sup> According to the court, this admission provided direct evidence that the Library's decision "was infected by sex stereotypes."<sup>51</sup>

Neither the effeminate men nor the transsexual discrimination cases involves double-binds like the one at issue in *Price Waterhouse*. These are not cases in which the demands of masculinity conflict with actual job requirements. To the contrary, in cases like *Smith* and *Barnes*, masculine gender performances were likely to complement and even enhance job performance. There must then be a broader conception of the sex stereotyping prohibition at work in the cases.

### II. LIBERTARIANISM

The broadest reading of the sex stereotyping prohibition is as a demand for gender libertarianism in the workplace. Freedom from sex stereotypes, under this view, means freedom for workers from all forced gender conduct. All gender expressions – those that are group-identified as well as those that are idiosyncratic, those that are innate and fixed as well as those that are chosen and changing – are entitled to protection.

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<sup>50</sup> *Id.* at 299, 305.

<sup>51</sup> *Id.* 305. The *Schroer* court found sex discrimination both because it concluded that the employer had engaged in sex stereotyping and because it concluded that that discrimination against a worker because of his plan to change his anatomical sex was "*literally* discrimination 'because of . . . sex.'" *Id.* at 308. The judge in the *Schroer* case explained: "Ultimately, I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself." *Id.* at 305-06.

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Pointing to the expansiveness of courts' stereotyping rhetoric, several scholars have adopted such a broad reading of the prohibition. Thomas Ling, for example, asserts that *Smith* guarantees to all individuals the right "to control their own gender expression."<sup>52</sup> Similarly, Johnny Lo contends that the *Smith* decision "preserve[s] liberty of self-identity in our 21st Century world."<sup>53</sup>

As a statement of current legal reality, such a reading of the prohibition is clearly fanciful. In *Price Waterhouse*, the Supreme Court saw no problem with the masculine job demands placed on prospective partners. As Mary Anne Case has noted "there is little indication . . . that the Court would have found it to be sex discrimination if a prospective accounting partner had instead been told to remove her makeup and jewelry and to go to assertiveness training class instead of charm school."<sup>54</sup> Highly gendered workplace performances continue to be demanded in a wide range of jobs—think, for example, of the kind of gender performance

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<sup>52</sup> Thomas Ling, Note, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 285 (2005) (explaining that the *Smith* court's prohibition on sex stereotyping guarantees to all individuals, transsexual and nontranssexual, the right "to control their own gender expression").

<sup>53</sup> Johnny Lo, Note, *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 277, 282 (2005) ("Title VII was written to protect people from the debilitating effects of discrimination. The decision in [*Smith*] follows the standard of *Price Waterhouse* and helps eliminate out-of-date gender classifications and preserve liberty of self-identity in our 21st Century world"). For additional expressions of this view see Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562-63 (arguing that under the *Price Waterhouse* sex-stereotyping theory "[d]iscrimination against someone for being transgender is discrimination based on that person's non-conformity with gender stereotypes. This is true whether the individual is viewed by the employer or the courts as a man who is insufficiently masculine, a woman who is insufficiently feminine, or someone who falls in between these seemingly binary categories"); Amanda Raflo, Comment, *Evolving Protections for Transgender Employees under Title VII's Sex Discrimination Prohibition*, 2 CHARLOTTE L. REV. 217, 248 (2010) (stating that after *Smith*, "it seems clear, or should be clear, that a transgender plaintiff would be protected under Title VII for failing to conform to traditional gender stereotypes of men and women under a *Price Waterhouse* theory."); William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 537 (2011) (explaining that after *Smith*, "discrimination or harassment based on their gender nonconforming behavior is impermissible irrespective of the cause of the behavior, whether it be gender expression or affectional preferences").

<sup>54</sup> Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995).

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typically required of elementary school teachers and litigators. Courts have done nothing to protect workers from such demands.<sup>55</sup> Even more starkly antilibertarian is courts' enforcement of employers' sex-based grooming codes. Consider, for example, the *en banc* Ninth Circuit's enforcement in *Jespersen v. Harrah's Operating Company* of a requirement that female bartenders (but not male ones) wear makeup at work.<sup>56</sup>

Yet even as normative ideal, the libertarian reading of the prohibition is impractical and unappealing. At its most expansive, gender libertarianism requires protection for all forms of gender expression—those that are stereotypical, atypical, and idiosyncratic; those that are persistent and those that are transient. Gender becomes whatever people say it is. As gender becomes solely a matter of self-identification, the distinction between gender and personal idiosyncrasy becomes one of mere nominalism, and all conduct becomes potentially entitled to protection.

Title VII, however, prohibits discrimination on the basis of sex and gender,<sup>57</sup> not discrimination based on a whole host of other traits and attributes.<sup>58</sup> This distinction, to be meaningful, requires a definition of gender more stable than simple self-declaration. Yet, once gender is defined using external or objective criteria, there will be some forms

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<sup>55</sup> See generally, Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race*, 104 Nw. L. Rev. 1, 15-16 (2010).

<sup>56</sup> *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107-08 (9th Cir. 2006) (*en banc*).

<sup>57</sup> See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 571 (6th Cir. 2004) (asserting that *Price Waterhouse* "held that Title VII's prohibition of discrimination 'because of . . . sex' bars gender discrimination"); *Balance v. City of Springfield*, 424 F.3d 614, 617 (7th Cir. 2005) ("Title VII prohibits employers from discriminating against employees on the basis of sex or gender").

<sup>58</sup> See 100 CONG. REC. 7213 (1964) (explaining the limitations of Title VII to prohibit difference in treatment or favor based on race, color, religion, sex, and national origin and noting that employers' use of other criterion or qualifications for employment is not affected). See also *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120 (8th Cir. 1997) ("[The ADEA and Title VII] serve the narrow purpose of prohibiting discrimination based on certain, discreet classifications such as age, gender, or race. These statutes do not prohibit employment decisions based upon poor job performance, erroneous evaluations, personal conflicts between employees, or even unsound business practices.")

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of expression experienced by the actor as gender expressions which do not satisfy the category requirements.<sup>59</sup> Protection for gender expressions will necessarily be limited to a proscribed set and some forms of “gender” expression will be defined out of the box. In particular, idiosyncratic or impermanent gender expressions are unlikely to be recognized and protected. Herein lays the core tension within the libertarian interpretation of Title VII’s prohibition on sex stereotyping: complete gender freedom is incompatible with any kind of stable and workable definition of gender, but Title VII requires such a definition.

To make this tension more vivid, consider the following. Imagine that instead of objecting to a requirement that she wear makeup at work, Darlene Jespersen objected to a requirement that she smile at customers. She objected not on the grounds that smiling violated her gender identity, but on the grounds that smiling inauthentically at strangers violated her self-image and sense of self.

Jespersen’s challenge to the smile-at-customers rule would clearly lose under Title VII. Title VII does not provide blanket protection for personal expression, even for

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<sup>59</sup> External criteria for identifying gender expressions are necessary. Two seem most plausible. Gender expressions might be defined and limited to those commonly associated with masculinity or femininity. Gender would, in other words, be defined by those expressions that are socially group-identified. Alternatively, gender expressions might be limited to those that are deemed integral to one’s gender identity as determined not by self-proclamation but by external judge or expert. Versions of both approaches have been argued for in the race context. *See, e.g.,* Juan Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994) (proposing that Title VII protect against discrimination based on ethnicity meaning protection of the “physical and cultural characteristics that make a social group distinctive, either in group members’ eyes or in the view of outsiders”); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercings*, 66 MD. L. REV. 11, 19 (2006) (“[P]ersonal appearance choices play a unique and crucial role in the development and revision of a simultaneously public and personal identity...[and the] law can create a zone in which to better empower individuals to form and reform identity promoting a dynamic rather than static culture and society.”).

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those forms of personal expression that are consistent with technical job requirements. Title VII is not a just cause requirement. It does not protect against job irrational treatment, only treatment based on protected characteristics.<sup>60</sup>

Imagine next that Jespersen objected to the smile-at-customers rule on the grounds that it violated her gender identity. Smiling at strangers, Jespersen might argue, is a particularly feminine attribute signaling deference and servility. It is in conflict with her more masculine and assertive gender identity.

Under a libertarian interpretation of the sex stereotyping prohibition, Jespersen's refusal to smile would now be protected under Title VII. So too, of course, would be any attribute that Jespersen labeled or identified as an expression of her gender.

Without some guidelines for what differentiates an expression of gender from an expression of personal taste, Title VII would be left without form, predictability or limit. With guidelines regarding gender in place, however, plaintiffs, like my second hypothetical Jespersen, will likely find their idiosyncratic expressions of gender unprotected. It is impossible to structure protection in a way that both relies on the category of gender and simultaneously transcends any conventional understanding of it.

True gender libertarianism would also impose dramatic costs, and constraints, on both employers and society more generally. The most conventional justification for Title VII's prohibition on race and sex discrimination is that these are job irrelevant

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<sup>60</sup> See *supra* note 58.

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hiring criteria.<sup>61</sup> Race and sex *per se* are not relevant to (though they certainly may be highly correlated with) whether one possesses the range of skills and attributes necessary for (almost all) jobs.<sup>62</sup> Such is not the case with gender. Many jobs are distinctly gendered. That is, they demand a set of traits and attributes that are typically recognized as masculine or feminine. Prohibiting employers from requiring conduct that is traditionally gendered would force employers to restructure jobs so as to fit employees' preferred gender expressions – such accommodations would be costly and, in some cases, impossible.

Consider, for example, three jobs with traditionally feminine role demands-- flight attendant, elementary school teacher and paralegal. Flight attendants are (or at least were pre-9/11) expected by employers to be warm, friendly, helpful and at least somewhat deferential to customers.<sup>63</sup> Elementary school teachers are expected to be sensitive to children's needs, nurturing and empathetic.<sup>64</sup> They are also expected to be collegial and cooperative in their dealings with other teachers and administrators.<sup>65</sup> Paralegals are expected to be organized and analytical. They are also expected to be deferential toward and emotionally supportive of the lawyers with whom they work<sup>66</sup>

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<sup>61</sup> For a discussion of different definitions of the antidiscrimination norm see Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735, 736 (2006).

<sup>62</sup> For instances in which sex is job relevant, see Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (2004).

<sup>63</sup> See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELINGS* 8 (1983) (“For the flight attendant, the smiles are a *part of her work.*”); JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 52 (1995) (“Flight attendants’ friendliness takes the form of deference: their relationship to passengers is supporting and subordinate.”).

<sup>64</sup> See JIM ALLAN, *Male Elementary Teachers: Experiences and perspectives*, in *DOING “WOMEN’S WORK”: MEN IN NONTRADITIONAL OCCUPATIONS* 123-26 (Christine L. William ed., 1993).

<sup>65</sup> See *id.* at 119.

<sup>66</sup> See Pierce, *supra* note 63, at 86.

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These jobs differ significantly from those with traditionally masculine role demands such as litigation associate, debt collector, and Marine. Litigation lawyers are “expected to be tough, aggressive, and intimidating toward their opponents.”<sup>67</sup> Bill collectors are expected, indeed encouraged, to be aggressive and intimidating toward debtors.<sup>68</sup> Marines are expected to be strong, aggressive and emotionally detached.<sup>69</sup>

Certainly, some jobs seem gendered for no reason other than social convention. The role of secretary, for example, came to include both caretaking and sexual titillation only after the job became dominated by women.<sup>70</sup> Such expectations were not part of the job when it was performed predominantly by men. As women came to dominate the profession, its norms changed so as to essentially preclude further male occupation.<sup>71</sup>

Other jobs seem gendered for reasons more intrinsic to the job itself. Nurturing treatment, for example, probably is important to the healthy development of young children. A nurturing disposition may then be required of elementary school teachers

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<sup>67</sup> See Pierce, *supra* note 63, at 2. As Pierce describes, the lawyers in her study “boast about ‘destroying witnesses,’ ‘playing hard-ball,’ and ‘taking no prisoners’ and about the size and amount of their ‘win.’” *Id.* at 60.

<sup>68</sup> See Hochschild, *supra* note 63, at 1146 (describing that “open aggression was the official policy for wringing money out of debtors”).

<sup>69</sup> See CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS 1* (1989).

<sup>70</sup> See ROSEMARY PRINGLE, *Male Secretaries*, in *DOING “WOMEN’S WORK”*: MEN IN NONTRADITIONAL OCCUPATIONS 133 (Christine L. Williams ed., 1993) (describing how secretaries came to be defined in the twentieth century in “familial and sexual terms”). See also ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 69 (1977) (“[T]he secretarial job involved the most routine of tasks in the white-collar world, yet the most personal of relationships.”).

<sup>71</sup> Such preclusion was primarily by gender – the requirement of feminine deference weeding out the more traditionally masculine--and only to a lesser degree by sex – to the extent that sexual titillation was also being demanded.

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for reasons independent of the fact that most elementary school teachers are female.<sup>72</sup>

The same may hold true of the role demands of Marines. The core functions of a Marine may simply be performed better by one who is physically strong, aggressive and unemotional. Men may dominate the Marines because they have these qualities to a higher degree than women, but the role demands themselves may be defined this way for reasons independent of men's past or present dominance.

Jobs may be gendered not only in terms of the attributes they seek, but also, more simply, in terms of the clothes and appearance they require. Construction, and other forms of physical labor, for example, often requires not just a kind of masculine strength, but also the adoption of masculine dress and grooming styles in order for the jobs to be performed safely.

An employer who is unable to force a femininely gendered construction worker to tie her hair back and wear pants to work will be unable to safely assign the worker to a range of duties. An employer who is unable to force a femininely gendered bill collector to scowl and talk in an aggressive manner may have to pair the feminine worker with a more masculine co-worker, in a good-cop/bad-cop kind of ploy, in order for the worker to be effective. An employer who cannot force a masculinely gendered elementary school worker to smile and coo at his charges may not be able to create the

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<sup>72</sup> It certainly may be, however, that the gendered aspects of the role are reaction qualifications rather than technical qualifications. See Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 100 (1983) (explaining that “[r]eaction qualifications refer to those abilities or characteristics which contribute to job effectiveness by causing or serving as the basis of the appropriate reaction in the recipients. Technical qualifications refer to all other qualifications (or an ordinary sort)”). It may be, in other words, that being soft of voice and touch is important for elementary school teachers only because of the positive response such treatment elicits from young subjects. Yet for teachers of young children, being able to elicit happy and positive student reactions may be the most important qualification for the job.



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kind of warm and nurturing atmosphere in which children thrive. In all cases, the costs to employers, and society more generally, of true gender libertarianism for workers would be significant.

Perhaps, however, there is a narrower libertarian principle at work in courts' sex stereotyping jurisprudence. It may be that although not all gender expressions are protected, those gender expressions that are consistent with technical job requirements are entitled to protection. This narrower libertarian reading would lessen the costs imposed on employers by the broader principle, since employers would not be required to hire individuals whose gender expressions were incompatible with successful job performance. It would continue, however, to suffer from ambiguity about what constitutes an expression of "gender."

Although theoretically distinct, this narrower libertarian reading would be similar in its scope to a reading of the prohibition as requiring trait neutrality from employers. Under a trait neutrality reading, an employer must permit female employees to express their gender in any ways permitted of male employees and vice versa. Presumably, all gender expressions an employer permits of either sex are compatible with job performance, otherwise the employer would not permit them for anyone. The narrow libertarian reading would, therefore, protect all gender expressions protected by the trait neutrality reading, and potentially more.<sup>73</sup> It follows

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<sup>73</sup> The narrow libertarian principle could be broader than the trait neutrality principle in instances in which an employer rigidly restricts the gender expressions of both sexes such that there are some job irrelevant gender expressions that would be protected under the narrow libertarian principle but would not be protected under the trait neutrality principle if consistently prohibited for both sexes by the employer.

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then that if the trait neutrality reading of the sex stereotyping prohibition is implausibly expansive then the narrow libertarian principle is implausible as well. It is to the trait neutrality reading that I now turn.

### III. TRAIT NEUTRALITY

Under a trait neutrality reading, the prohibition on sex stereotyping requires employers to be indifferent to whether gendered traits are adopted by women or men. As a result, any gendered expression permitted of women must be permitted of men, and vice versa.

Both before and after the recent transsexual victories, trait neutrality has been a popular interpretation of the prohibition on sex stereotyping.<sup>74</sup> Mary Anne Case has endorsed this reading most clearly, explaining that under *Price Waterhouse* “[i]f their employer tolerates feminine behavior or attire in women but not in [men], the employer is subjecting them to disparate treatment in violation of Title VII.”<sup>75</sup> Indeed, trait neutrality simply restates a conventional understanding of the sex discrimination prohibition that has been used in a range of contexts--namely women must be

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<sup>74</sup> See, e.g., Colleen C. Keaney, Comment, *Expanding the Protectional Scope of Title VII “Because of Sex” to include Discrimination Based on Sexuality and Sexual Orientation*, 51 ST. LOUIS U. L. J. 581, 594 (2007) (“*Smith* upturns rigid sex categories and allows both sexes to participate in the full range of gender expressions.”); Turner, *supra* note 53, at 590 (interpreting *Smith* to mean that “discrimination against a person for acting ‘like’ the other sex—no matter what the reason—is sex discrimination”).

<sup>75</sup> See Case, *supra* note 54, at 7. See also Katherine M. Franke, *Amicus Curiae Brief of NOW Legal Defense and Education Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal Brief: Lucas Rosa v. Park West Bank and Trust Company*, 7 MICH. J. GENDER & L. 163 (2001) (interpreting *Price Waterhouse*’s sex stereotyping prohibition to mean that “for a man to be denied access to credit on the basis of traits that would have been welcome if found in a woman is sex discrimination, plain and simple”).

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permitted to do whatever men can do and vice versa.<sup>76</sup> It is a reading that extends beyond situations involving sex stereotypes and does not rely on them.

Yet in a world of richly textured gender norms, demands of trait neutrality are more complex and indeterminate than often recognized. Gender norms give traits socially loaded meanings and these meanings make finding cross sex comparators difficult if not impossible.

Imagine, for example, a female librarian working at a university library who is fired and claims that she was terminated because her employer found her manner of dress too sexy.<sup>77</sup> She sues for sex discrimination arguing that she was the victim of a sex stereotype that deems women, but not men, who present themselves in a sexy manner to be professionally incompetent and unintellectual.<sup>78</sup> To determine whether the employer is in fact violating the principle of trait neutrality, a court would need to compare the employer's treatment of the plaintiff with its treatment of a man engaged in similarly gendered conduct. What is unclear, however, is what constitutes similarly gendered conduct in a man.

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<sup>76</sup> Andrew Koppelman, for example, has argued that discrimination because of sexual orientation is sex discrimination because it penalizes women for doing something that men are permitted to do (namely partnering with women) and vice versa. *See e.g.*, ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53-71 (2002); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

<sup>77</sup> For such a case *see* *Goodwin v. Harvard Coll.*, No. 03-11797JLT (D. Mass. May 17, 2005); *Harvard Librarian Sues University*, N.Y. TIMES, Mar. 23, 2005, at A13.

<sup>78</sup> *See* Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 PSYCHOL. OF WOMEN Q. 389, 394 (2005) (finding that female managers who presented themselves in a sexier manner elicited "perceptions of less competence on a subjective rating scale and less intelligence on an objective scale" as compared with female managers who dressed more conservatively).

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There is no exact male equivalent to the female trait of sexy dressing. One could identify the trait at issue in a narrow and literal way. The trait might be described as wearing particular types of clothes – for instance, low-cut blouses and tight skirts. By naming the trait in this way, the woman is the victim of discrimination if she is treated worse than a man who wore the same types of blouses and skirts to work. Framing the issue in this way, however, is unlikely to result in a finding of sex discrimination because of the likely absence of a cross-sex comparator.<sup>79</sup> Yet even if such a comparator could be found, it is far from clear that this narrowly literalistic framing of the cross-sex comparison is appropriate. A man dressed in a low-cut blouse and tight skirt might be objectionable to the employer, but it is probably not because he is sexy.

Alternatively, one could compare the woman's treatment to that of a man dressed in sex-specific sexy clothing. Of course, deciding what constitutes sexy dressing for men is not obvious and is probably open to disagreement.<sup>80</sup> Is the parallel to the sexy dressing woman in revealing skirts and blouses a man in revealing open-chested shirts and tight pants? Or, because of the significantly different social and symbolic meanings of women and men in revealing clothing, are tight and revealing clothes considered sexy in women but strange and nonsexy in men such that this too may not be an appropriate comparison?

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<sup>79</sup> For an outstanding discussion of the difficulties in finding comparators in antidiscrimination cases and a critique of courts' reliance on comparator methodology, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

<sup>80</sup> I suspect there is significantly less social consensus regarding what constitutes sexy dressing for men than there is about what constitutes sexy dressing for women.

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Finally, one could compare the employer's treatment of sexy dressing women with its treatment of men who violate appropriate workplace norms. At this level of abstraction, however, the neutrality demand becomes toothless and unable to challenge employers' endorsement of any gender stereotypes.

The indeterminacy problem is particularly apparent in cases involving transsexuals. Imagine a pre-operative male-to-female transsexual who is terminated for wearing skirts and feminine blouses to work. Is the appropriate comparator for purposes of trait neutrality analysis a woman wearing conventionally feminine clothes? Or, is the preoperative male-to-female transsexual better compared to a woman wearing conventionally male clothes, or to a female-to-male transsexual wearing male clothes?<sup>81</sup> Gender norms eliminate cross sex comparators and make trait neutrality demands virtually impossible to operationalize.

For the trait neutrality requirement to be workable, gender norms must be ignored or rejected. Trait neutrality must be defined in a literal and formalistic way without regard to the actual social meaning of the traits and attributes at issue. To use Mary Anne Case's colorful example, if women are free to wear "frilly pink dresses" at

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<sup>81</sup> Several courts have struggled with this problem of the appropriate cross-sex comparator in transsexual discrimination cases. See *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, \*5 (E.D. La. Sept. 16, 2002) ("[T]his is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. . . . The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shows, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna.'"); *James v. Ranch Mart Hardware*, 881 F. Supp. 478, 481 (D. Kan. 1995) (explaining that in order to evaluate a plaintiff's sex discrimination claim, the court would have to compare how the plaintiff was treated as a male-to-female transsexual with the treatment of a female-to-male transsexual).

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work then so must men be permitted to do so as well,<sup>82</sup> despite the fact that a frilly pink dress signals conservatism in a woman and transgression in a man. For advocates of trait neutrality, such rejection, or transcendence of gender norms, may seem not only appealing, but the very point of the prohibition on sex stereotyping.

Yet rejecting gender norms is costly. Gender norms are not only pervasive, they are also, often, comfortable and comforting. Formal trait neutrality would require that if female employees are permitted to wear dresses, long hair and makeup, male employees must be permitted to do so as well. Certainly, some employers might follow this approach thereby expanding the range of permissible traits and attributes open to employees of both sexes. For other employers, or their customers, however, the discomfort of such gender bending would be too great. For them, compliance might instead take the form of highly circumscribed gender codes limited to a banal androgynous core. Discomfort with gender bending would be minimized, but at the cost of a loss of freedom for gender conformists and nonconformists alike.<sup>83</sup>

Perhaps not surprisingly, courts have not interpreted the sex stereotyping prohibition to require trait neutrality of this formalistic sort.<sup>84</sup> After *Price Waterhouse*, as

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<sup>82</sup> Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 7 (1995).

<sup>83</sup> For a more extensive discussion of the likely results of trait neutrality see Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 199-204 (2004).

<sup>84</sup> Certainly the Sixth Circuit in *Smith* did use language suggesting a formalistic trait neutrality requirement of this sort, yet the broad language used in *Smith*, like that used by the Supreme Court in *Price Waterhouse*, is more accurately viewed as judicial rhetoric than legal reality. See *Smith* 378 F.3d at 574 (“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they do

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before, courts have routinely upheld sex-specific grooming codes such as those requiring that men but not women wear their hair short<sup>85</sup> and those requiring that men refrain from wearing earrings.<sup>86</sup> Similarly, in *Jespersen* the court paid lip service to the prohibition on sex stereotyping but did not interpret it to demand formal gender neutrality in any literal sense.<sup>87</sup> *Jespersen* could be fired for not wearing make-up even though male employees were permitted – indeed required – to not wear makeup.<sup>88</sup>

Reading the prohibition on sex stereotyping as a demand for trait neutrality may seem appealing because it maps well onto conventional legal and social conceptions of nondiscrimination. Yet, to be workable in a society with rich gender norms, trait neutrality requires a kind of gender-blind formalism. Trait neutrality in practice would

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wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination because the discrimination would not occur but for the victim's sex.”).

<sup>85</sup> See, e.g., *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996) (holding that male employee fired for not complying with employer's short hair requirement for men could not state a claim for sex discrimination); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (holding that “requiring short hair on men and not women does not violate Title VII”); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Willingham v. Macon Tel. Publ'n Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Knott v. Mo. Pac. Railway Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

<sup>86</sup> See, e.g., *Kleinsorge v. Eyeland Corp.*, No. CIV. A. 99-5025, 2000 WL 124559 (E.D. Pa. Jan. 31, 2000) (grooming code allowing female but not male employees to wear earrings did not violate Title VII); *Capaldo v. Pan Am. Fed. Credit Union*, No. 86 CV 1944, 1987 WL 9687 (E.D.N.Y. Mar. 30, 1987) (grooming code prohibiting men but not women from wearing earrings did not constitute sex discrimination); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 804 (Iowa 2003) (holding in response to sex discrimination claim brought by male employee fired for refusing to stop wearing an earring that “personal grooming codes that reflect customary modes” of distinctly gendered grooming do not constitute sex discrimination); *Macissac v. Remington Hospitality, Inc.*, 811 N.E.2d 524 (Mass. App. Ct. 2004) (enforcement of grooming code prohibiting male but not female employees from wearing earrings did not constitute sex discrimination); *Lockhart v. La-Pac. Corp.*, 795 P.2d 602 (Or. Ct. App. 1990) (holding that grooming code prohibiting male but not female employees from wearing facial jewelry did not constitute sex discrimination).

<sup>87</sup> *Id.* at 1106.

<sup>88</sup> Indeed, it is likely that a man would have been fired for wearing make-up as such was in violation of the Personal Best guidelines for men.

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be culturally transformative, not conservative. It is this fact that perhaps best explains why courts have not applied the prohibition as a trait neutrality requirement.

### IV. CATEGORY NEUTRALITY

It may be that the sex stereotyping prohibition does not require trait neutrality but a narrower form of category neutrality. Under this reading, the prohibition on sex stereotyping requires that employers be neutral as to the gender category that workers fall into. Workers may be required to comply with the norms of one gender or the other, but workers may not be forced into the “wrong” gender box simply because of their biological sex.<sup>89</sup>

Certainly there is much about the recent transsexual sex discrimination case law that is suggestive of, or at least consistent with, a reading of the sex stereotyping prohibition as requiring category neutrality. In *Smith*, for example, the plaintiff, a male-to-female transsexual, began expressing a more feminine appearance at work and told his supervisor of his intention to transition completely to a fully feminine appearance.<sup>90</sup> Similarly, in *Barnes*, the plaintiff was a male-to female transsexual who lived as a woman off duty and who began to adopt a more feminine appearance at work as well as part of her overall transition.<sup>91</sup> In *Schroer*, the plaintiff was a male-to-female transsexual who was offered a position while expressing a masculine gender identity

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<sup>89</sup> For a reading of the sex stereotyping prohibition consistent with this approach see Andrew Gilden, *Toward A More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 99 (2008) (“Whether an individual brings sex-stereotyping claims as either male or female, she is forced to make some claim of truth about who she really is within an unexamined binary biological framework.”).

<sup>90</sup> *Smith*, 378 F.3d at 568.

<sup>91</sup> *Barnes*, 401 F.3d at 733-34.



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and was subsequently denied the position when he told his supervisor that he would be expressing a feminine gender identity on the job.<sup>92</sup> In all cases, the plaintiffs sought the right to express their “true” gender on the job despite its disconnect with their biological sex. None of the plaintiffs challenged gender categories *per se*, only their assignment between them. A requirement that employers be neutral as to the gender category workers fall into, can explain well courts’ protection of such plaintiffs.

The category neutrality reading can also explain courts’ often heavy reliance in the transsexual cases on medical evidence regarding Gender Identity Disorder (GID). Such evidence serves to substantiate the plaintiff’s “true” gender and to identify the appropriate gender code to which she may be subject at work. In *Smith*, for example, the court noted at the outset that Smith was “a transsexual and has been diagnosed with Gender Identity Disorder . . . which the American Psychiatric Association characterizes as a disjunction between an individual’s sexual organs and sexual identity.”<sup>93</sup> The court went on to explain that when Smith “began expressing a more feminine appearance on a full-time basis” he did so “in accordance with international medical protocols for treating GID.”<sup>94</sup>

In *Schroer*, the court received expert testimony from a clinical social worker with expertise in gender identity issues who had been providing counseling to the plaintiff. The expert testified that Schroer has Gender Identity Disorder and that she “has a

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<sup>92</sup> *Schroer*, 577 F.Supp.2d at 2930300

<sup>93</sup> *Smith*, 378 F.3d at 568.

<sup>94</sup> *Smith*, 378 F.3d at 568.

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female gender identity and is a woman.”<sup>95</sup> The result of such testimony was the court’s confident assertion in the first sentence of its findings of fact that “Diane Schroer is a male-to-female transsexual. Although born male, Schroer has a female gender identity—an internal, psychological sense of herself as a woman.”<sup>96</sup>

Similarly, in *Doe v. Yunits*,<sup>97</sup> a case involving a claim of sex discrimination in education, rather than employment, the court relied on testimony from Does’ treating psychologist regarding the plaintiff’s gender identity disorder in assessing Doe’s likelihood of success on the merits of her sex discrimination claim. Doe was fifteen year old student who, although biologically male, began wearing “girls’ make-up, shirts, and fashion accessories to school.”<sup>98</sup> When Doe arrived at school in girls’ apparel, the principal would often send Doe home to change.<sup>99</sup> The following year, as an eighth grader, Doe was instructed to come by the principal’s office every day so that the principal could approve Doe’s appearance. Doe would again be sent home when the principal found Doe’s appearance to be too feminine.<sup>100</sup> At the start of the following year, when Doe was to repeat eighth grade due to her many absences, the principal told

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<sup>95</sup> *Schroer v. Billington*, Expert Report of Martha L. Harris, 2006 WL 4517048 (D.D.C., Sept. 15, 2006). The Schroer court also received more general testimony from two other experts. Walter Bocking, a clinical psychologist, served as a second expert for the plaintiff and provided general background information about gender identity and the diagnosis and treatment of Gender Identity Disorder. *Schroer v. Billington*, Expert Report of Walter O. Bocking, 2006 WL 4517046 (D.D.C. Sept. 14, 2006). Chester Schmidt, a psychiatrist, served as an expert for the defendant. He emphasized the distinction between one’s sex and one’s gender role. He also testified that the causes of Gender Identity Disorder were not known. *Schroer v. Billington*, Expert Report of Chester W. Schmidt, Jr., 2006 WL 4517051 (D.D.C., Nov. 20, 2006).

<sup>96</sup> 577 F.Supp.2d at 294.

<sup>97</sup> *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super., Oct. 11, 2000).

<sup>98</sup> 2000 WL 33163199 at \* 1.

<sup>99</sup> *Id.* at \*2.

<sup>100</sup> *Id.* at \*1.

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Doe that she “would not be permitted to enroll if she wore any girls’ clothing or accessories.”<sup>101</sup> Doe sued for sex discrimination under the Massachusetts’ Constitution and also filed a motion for preliminary injunction.<sup>102</sup>

Relying on the testimony of Doe’s therapist, the court explained that she had been “diagnosed with gender identity disorder, which means that, although plaintiff was born biologically male, she has a female gender identity.”<sup>103</sup> In light of such medical evidence, the court explained that the “right question,” in assessing Doe’s sex discrimination claim was “whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear.”<sup>104</sup> The court concluded that the “[P]laintiff is likely to establish that defendants have discriminated against her on the basis of sex by applying the dress code against her in a manner in which it would not be applied to female students.”<sup>105</sup> The school could, in other words, force Doe to comply with a sex specific gender code; it simply could not force her into the wrong gender category.

Medical evidence was critical to determining the right category.

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<sup>101</sup> *Id.* at \*2.

<sup>102</sup> Doe sued for sex discrimination under the Massachusetts Constitution. In interpreting the sex discrimination provision of the Massachusetts Constitution, the Massachusetts Superior Court found “persuasive” the plaintiff’s reliance on the sex stereotyping prohibition articulated in *Price Waterhouse v. Hopkins*. *Id.* at \*6. In response to the Plaintiff’s Motion for Preliminary Injunction, the court found that Doe had shown a likelihood of success on her sex discrimination claim. In addition to the sex discrimination claim, Doe also brought state law claims alleging a denial of freedom of expression, disability discrimination, denial of liberty interest in appearance, denial of due process, and denial of the right to personal dress and appearance. *Id.* at \*2.

<sup>103</sup> *Id.* at \*1.

<sup>104</sup> *Id.* at \*6.

<sup>105</sup> *Id.* at \*6, n. 6.

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Finally, the category neutrality reading can help explain why courts have been using the sex stereotyping prohibition to protect transsexual workers from sex-based dress and grooming codes while denying similar protection to nontranssexual workers. Compare, for example, the results in *Smith* and *Doe* with those in *Jespersen* and *Youngblood v. Hillsborough County School Board*, a case with facts similar to those in *Doe*.

In both *Smith* and *Doe*, the plaintiffs claimed that they were really women trapped in men's bodies. They argued that they were being forced into the wrong gender category as a result of their biological sex. The courts in both cases found such allegations to state actionable claims of sex discrimination.

In contrast, *Jespersen* could not and did not argue that she had a Gender Identity Disorder or was really a man trapped in a woman's body. She did not disavow her female gender completely, but instead objected to particular gender conventions.<sup>106</sup> As the Ninth Circuit stressed, *Jespersen* objected to the make-up requirement because "wearing it would conflict with her self image."<sup>107</sup> *Jespersen* was not being forced into the wrong gender box; she was merely being forced to comply more fully with the demands associated with the gender to which she ascribed. In other words, although *Jespersen* was being sex stereotyped in a colloquial sense, she was not being miscategorized. She was, of course, denied antidiscrimination protection.

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<sup>106</sup> *Jespersen* did not object to Harrah's other gendered appearance requirements. Female employees were, for example, required to have their hair "teased, curled, or styled every day" while male employees were simply prohibited from having hair "extend below top of shirt collar." *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1108 (9th Cir. 2006).

<sup>107</sup> *Id.* *Jespersen* also stated that the makeup requirement undermined her "self-dignity." *Id.*

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Consider as well, the case of *Youngblood v. Hillsborough County School Board*.

Nikki Youngblood was a 17 year old high school senior in Hillsborough County, Florida who objected to wearing a scoop neck drape for her senior yearbook picture.<sup>108</sup> Youngblood showed up for her senior yearbook photo wearing a shirt and tie and was told that the school's dress code policy for the yearbook photos required that all girls wear a "velvet like, scoop neck drape."<sup>109</sup> Youngblood refused to wear the drape and her picture was left out of the yearbook.<sup>110</sup> Youngblood sued for sex discrimination and lost. Indeed, the court held that she was not even able to state a claim.<sup>111</sup>

As in *Jespersen*, and unlike in *Smith* and *Doe*, Youngblood's lawyers could not, and did not try to, convince the judge that Youngblood's gender was actually male. Youngblood's attorneys could not rely on a diagnosis of Gender Identity Disorder. Instead, they could only describe Youngblood's "'deepseated'" and "'longstanding'" "aversion to feminine clothing."<sup>112</sup> Yet, for the court, such testimony about discomfort with particular types of feminine attire, unsupported as it was by medical evidence or clear diagnosis, was insufficient to establish any legal right.<sup>113</sup>

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<sup>108</sup> Paisley Currah, *Gender Pluralisms under the Transgendered Umbrella*, in *TRANSGENDER RIGHTS 7* (Paisley Currah et al. eds., 2006).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Currah, *supra* note 108, at 11 ("Ruling on the school board's motion to dismiss the case, the federal district court judge in Youngblood's case . . . found 'no constitutionally protected right for a female to wear a shirt and tie for her senior portraits.'").

<sup>112</sup> Currah *supra* note 108, at 10 (quoting Plaintiff's Appeal of a Final Order of the District Court for the Middle District of Florida, *Youngblood v. School Bd. of Hillsborough County* at 2-3, *Youngblood v. Hillsborough County School Bd. of Education*, No. 8:02-cv-1089-T-24-MAP (M.D. Fla. Sept. 24, 2002).

<sup>113</sup> As Paisley Currah has noted, the ruling in *Youngblood*:

depended on and reproduced the same common sense notions about gender that undergirded the judge's reasoning in *Doe v. Yunits*: Pat Doe and Nikki Youngblood are both girls, and girls do and should wear girls' clothes. *Doe v. Yunits* was a legal victory because the judge . . . affirmed

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A category neutrality reading cannot, however, make sense of the full range of cases implicating the sex stereotyping prohibition. The reading can explain why courts deny protection to nontranssexuals who violate sex specific grooming codes. It cannot, however, explain why courts have used the sex stereotyping prohibition to protect effeminate men (and masculine women) from harassment. Like the plaintiffs who challenge discrete sex-specific grooming codes, the plaintiffs in these cases are not seeking to switch gender categories. Consider, for example, the plaintiffs in *Doe v. City of Belleville*,<sup>114</sup> *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>115</sup> and *Rene v. MGM Grand Hotel*.<sup>116</sup> In *Doe*, the plaintiffs were two sixteen year old brothers who were taunted because their older male co-workers perceived them to be effeminate.<sup>117</sup> In *Nichols* the plaintiff was a man who was repeatedly referred to by his male co-workers using female pronouns and was mocked for walking and carrying his serving tray “like a woman.”<sup>118</sup> Similarly, in *Rene*, the plaintiff was a gay man who was teased by his male co-workers because of the way that he walked, referred to using female terms of endearment and touched in sexual ways.<sup>119</sup> None of these plaintiffs was a man seeking to become, or claiming to be, a woman. None challenged sex-specific grooming

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Doe’s gender identity. *Youngblood v. School Board of Hillsborough County* was a legal defeat because the judge in this case found the gender expression claim unfathomable. Currah, *supra* note 108, at 11-12.

<sup>114</sup> *Doe v. City of Belleville, IL.*, 119 F.3d 563 (1997).

<sup>115</sup> *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (2001).

<sup>116</sup> *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (2002).

<sup>117</sup> 119 F.3d at 566-67.

<sup>118</sup> 256 F.3d at 870.

<sup>119</sup> 305 F.3d at 1064, 1068.

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codes.<sup>120</sup> Instead, all were men who were perceived to fit imperfectly within the male gender category and who became, as a result, a target of harassment and discrimination. The courts in all three cases held that the harassment alleged violated Title VII's prohibition on sex stereotyping.<sup>121</sup> A principle of category neutrality cannot explain courts' willingness to invoke the prohibition on sex stereotyping to protect these workers who blur rather than jump gender categories.

A category neutrality requirement also raises some of the same conceptual problems as did the trait neutrality requirement. Category neutrality requires that employers be neutral as to which gender category workers satisfy. It does not require employers to accept new or blurry gender categories. When, however, is a male-to-female transsexual expressing a feminine gender identity in the same way that a biological woman does, and when is she occupying some third gender category?<sup>122</sup> Indeterminacy in naming what the plaintiff is doing leads, as it did with the trait neutrality requirement, to indeterminacy in determining when neutrality is violated or achieved.

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<sup>120</sup> One of the brothers in *Doe, H*, did wear an earring which did seem to incite some harassment. 119 F.3d at 566-67. In doing so, however, H did not violate any workplace grooming code, and H, like the other plaintiffs in these cases, seemed to comply with both the formal and informal dress and grooming codes applied to men in these workplaces.

<sup>121</sup> *Doe*, 119 F.3d at 581-82 (relying on *Price Waterhouse's* prohibition on sex stereotyping to conclude that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"); *Sanchez*, 256 F.3d at 874-75 (explaining that "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here."); *Rene*, 305 F.3d at 1068 (explaining that this is a case of "actionable gender stereotyping harassment") (J. Pregerson, concurring).

<sup>122</sup> This question of whether a crossdressing plaintiff is occupying a conventional gender category or some new category was a critical one for the court in *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, \*5 (E.D. La. Sept. 16, 2002).

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Perhaps courts' focus in applying the prohibition is not on avoiding the narrow harm of gender miscategorization but avoiding the more general harm of highly burdensome gender demands that make workplace participation for some workers very difficult. In the next Part, I suggest that an intuitive and inexplicit balancing of the burdens and benefits of gender conformity, in which the costs of compliance for the plaintiff figure heavily, may be driving courts' application of the sex stereotyping prohibition.

### V. BALANCING INTERESTS

It may be that the sex stereotyping prohibition does not reflect a commitment to a discrete principle, but instead a pragmatic balancing test in which all the interests discussed thus far are implicated. Concerns about a plaintiff's costs of compliance weigh in favor of judicial protection from gender conformity demands. Concerns about gender freedom and neutrality respectively, while clearly not outcome determinative, may too place a thumb on the scale in favor of protection. On the other side of the scale, weighing against protection, are the employer's business-related reasons for the gender conformity demand. Protection from conformity demands in this view are never a matter of discrete right, but instead the possible product of a delicate balancing act.

Although neither a commitment to gender freedom nor sex-based neutrality alone can explain courts' decisions in sex stereotyping cases, these factors are probably not wholly irrelevant. It certainly did matter to the Sixth Circuit in *Smith*, for example, that the behavior the plaintiff sought protection for was recognized by the court as a



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conventional expression of gender.<sup>123</sup> Had Smith sought protection for some entirely idiosyncratic form of personal expression – like wearing a Barney costume--he certainly would have lost. The fact that gender expression is at stake matters, it simply does not ensure the plaintiff a right to protection.

Similarly, the fact that a plaintiff is using the sex stereotyping prohibition to redress nonneutral treatment matters. A transsexual male-to-female plaintiff who wants to wear a dress to work in contravention of her employer's grooming code is more likely to win if the grooming code she is challenging allows women, but not men, to wear dresses, than if the grooming code requires that all employees wear blue pants and white oxford shirts to work. Courts' commitment to neutral treatment is real, it is simply not outcome determinative in the way courts' rhetoric suggests. Neutrality is an interest not a requirement.

The factor that seems to be doing the most work in the balancing test, is the one about which courts have been least explicit – namely the difficulty of compliance for the plaintiff with the gender demand at issue. When compliance with a gender demand is very difficult for an employee – either physically, psychically or professionally<sup>124</sup> – plaintiffs are likely to win protection. When they lose, it is because the employer has named a business justification of some special weight.

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<sup>123</sup> See *Smith*, 378 F.3d at 568 (noting that Smith “began ‘expressing a more feminine appearance’ at work and was challenged by coworkers because his “appearance and mannerisms were not ‘masculine enough.’”).

<sup>124</sup> A gender conformity demand would be professionally difficult for the plaintiff to comply with when it conflicted with actual role demands. This situation would capture the narrow set of double-bind cases with fact patterns similar to that in *Price Waterhouse*.

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Courts' concern about the difficulty of compliance provides an alternative explanation to the category neutrality reading for courts' heavy reliance on medical evidence in these cases. Medical testimony regarding GID points not only to one's gender category, but also necessarily to the pain one would experience if one were forced to alter a particular gender expression.

Indeed evidence of the plaintiff's pain seemed critical to the court's ruling in *Doe v. Yunits*. The court relied on expert medical testimony to conclude that forcing Doe to come to school in boys' clothes would actually "endanger her psychiatric health."<sup>125</sup> Moreover, the medical evidence helped the court to distinguish *Doe* from *Harper v. Edgewood Board of Education*<sup>126</sup> in which a court upheld a school board's right to prevent two students from attending the prom in clothing of the opposite gender. In that case, the court treated the students' efforts to gender bend as a matter of whimsy or teenage rebellion—an interest which was not very weighty--while emphasizing the school's important and substantial interest in maintaining order. As the *Yunits* court explained, in *Harper*, "[t]he court found the school's action permissible because it fostered community values and maintained discipline."<sup>127</sup> In contrast, in *Yunits*, the court emphasized, the "Plaintiff . . . is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity . . .

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<sup>125</sup> *Doe v. Yunits*, No. 00-1060A, 2001 WL 664947 (Mass. Supp. Feb. 26, 2001).

<sup>126</sup> *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353 (S.D. Ohio 1987).

<sup>127</sup> *Doe v. Yunits*, No. 0010060A, 2000 WL 33162199, at \*6 n.5 (Mass. Super. Oct. 11, 2000).

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.<sup>128</sup> It was these greater compliance costs in *Yunits* that seemed to tip the scales in plaintiff's favor.

Medical evidence appeared to play a similar role in *Smith*. Smith, the court emphasized, suffered from Gender Identity Disorder. His female gender expression, through dress and grooming, was part of the accepted medical treatment of his condition.<sup>129</sup> As in *Yunits*, this information seemed important to the court because it reinforced that for Smith cross-dressing was not a voluntary choice but a medical necessity – one that could be avoided only with great pain and hardship.<sup>130</sup>

Likewise in *Lie v. Sky Publishing Corporation*,<sup>131</sup> the court relied on medical evidence to highlight the involuntary nature of the plaintiff's gender nonconformity. Lie, a preoperative male-to-female transsexual, sued for sex discrimination under state law after she was fired for wearing female clothes to work.<sup>132</sup> The trial court, in denying defendant's motion for summary judgment emphasized the plaintiff's evidence showing her lack of control over her gender expressions. The court explained:

The plaintiff avers that she is a biological male who has desired to live as a woman for a number of years, that she has been diagnosed with gender identity disorder, that she engages in psychotherapy, and that she takes hormones as part of her treatment. . . . Consequently, the plaintiff has alleged sufficient facts to establish she is a transsexual, not simply a man who prefers traditionally female attire.<sup>133</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Smith v. City of Salem, Ohio*, 378 F.2d 566, 568 (6th Cir. 2004)..

<sup>130</sup> See Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 179 (2005) ("Although the [*Smith*] court did not say so explicitly, this medical authority seemed to influence the court in seeing Smith's behavior as pursuant to trustworthy medical advice, and therefore less her fault or choice.").

<sup>131</sup> *Lie v. Sky Publ'g Corp.*, No. 013117J., 2002 WL 31492397 (Mass. Super. Oct. 7, 2002)

<sup>132</sup> *Id.* at \*2.

<sup>133</sup> *Id.*

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Again, it was plaintiff's lack of control over her own noncompliance that seemed to tip the scales in favor of protecting Lie from gender conformity demands.

The balancing interpretation explains not only transsexuals' recent victories, it also helps explain the one type of case where transsexuals continue to routinely lose – cases asserting transsexual workers' right to use the bathroom appropriate to their gender rather than their sex. These cases are inexplicable under the category neutrality reading of the prohibition. Courts continue to permit employers to “miscategorize” transsexual employees when it comes to bathroom usage by requiring transsexual workers to use the bathroom associated with their biological sex rather than their true gender. The cases are, however, explicable under a balancing model. Courts permit employers to require employees to use the bathroom associated with their biological sex because they respect employers' claims that such physically-based categorization is necessary to protect the personal privacy of other restroom users.

Consider, for example, *Etsitty v. Utah Transit Authority*.<sup>134</sup> Etsitty was a pre-operative male-to female transsexual who had been diagnosed with Gender Identity Disorder.<sup>135</sup> At the time Etsitty began working as a bus operator with UTA she presented herself as a man. Soon thereafter, however, Etsitty informed her employer that she was transsexual and would begin to appear as a female at work and to use female restrooms while on her route.<sup>136</sup> The UTA terminated Etsitty explaining that it

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<sup>134</sup> *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

<sup>135</sup> *Id.* at 1218.

<sup>136</sup> *Id.* at 1219.

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was unable to “accommodate her restroom needs.”<sup>137</sup> Etsitty sued for sex discrimination and lost. The Tenth Circuit affirmed the lower court’s grant of summary judgment for the defendants on plaintiff’s sex discrimination claim.

Certainly Etsitty’s gender expression was difficult for her to change. In addition to being diagnosed with GID, Etsitty had begun the transition from male to female by taking female hormones.<sup>138</sup> Nonetheless, the court ruled against Etsitty on her sex discrimination claim. Although Etsitty had made out a “prima facie” case of sex stereotyping, the court concluded that the employer had a legitimate business justification for burdening plaintiff’s gender expression in this way.<sup>139</sup> Even though the UTA had not received any complaints about Etsitty’s bathroom usage,<sup>140</sup> the UTA’s “legitimate” concerns about potential liability from having a biological male use women’s public restrooms justified its prohibition on her doing so.<sup>141</sup> In terms of outcome, the *Etsitty* ruling is typical. Preoperative transsexual plaintiffs routinely lose

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1218.

<sup>139</sup> *Id.* at 1224. The court’s reference in *Etsitty* to burden switching is confusing and misleading. The *McDonnell Douglas* burden shifting framework, which the *Etsitty* decision nominally tracks, does not make sense in the sex stereotyping context. The burden shifting framework was designed to help courts make findings about what actually happened in cases in which facts or motivations were contested. In *Etsitty* there was no dispute over the employer’s actions or motives. It was clear that the employer made a decision about bathroom usage because of Etsitty’s sex. Nonetheless, the employer won, because the employer’s reason for making this sex-based decision was deemed more important than the plaintiff’s right to be free from sex-based classification.

<sup>140</sup> *Id.* at 1226.

<sup>141</sup> *Id.* at 1224. The court explained: “The record also reveals UTA believed, and Etsitty has not demonstrated otherwise, that it was not possible to accommodate her bathroom usage because UTA drivers typically use; public restrooms along their routes rather than restrooms at the UTA facility. UTA states it was concerned the use of women’s public restrooms by a biological male could result in liability for UTA. This court agrees with the district court that such a motivation constitutes a legitimate, nondiscriminatory reason for Etsitty’s termination under Title VII.” *Id.* Although the court does not elaborate on the basis for UTA’s potential liability, the intimation is that the liability would stem from invasion of privacy claims brought by other restroom customers.

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sex discrimination cases in which they challenge their employers' bathroom assignments.<sup>142</sup>

It is worth emphasizing how significantly different my reading of the transsexual sex discrimination cases is from that offered by scholars who adopt a more libertarian view of the prohibition at work in the cases. Elizabeth Glazer and Zachary Kramer, in their article, *Transitional Discrimination*,<sup>143</sup> as well as Anna Kirkland, in her book *Fat Rights*,<sup>144</sup> criticize courts' decisions in the transsexual sex discrimination cases for not giving enough weight to plaintiffs' transsexualism. They argue that the sex stereotyping prohibition reduces these plaintiffs to simply men who like to wear women's clothes and their protection to just protection for crossdressing. Glazer and Kramer, for example, argue that under the court's approach in *Smith*, "Smith's reasons

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<sup>142</sup> See *Kastle v. Maricopa County Community College District*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636 (D. Ariz, Aug. 22, 2006) (granting defendant's motion for summary judgment on female transsexual worker's claim of sex discrimination stemming from employer's requirement that she could not use the women's restroom until she had presented proof that she had completed a sex change operation), *aff'd*, 325 F.App'x 492 (9th Cir. 2009); *Johnson v. Fresh Mark, Inc.*, 98 F.App'x 461 (6th Cir. 2004) (affirming without explanation district court's dismissal of female transsexual worker's Title VII sex discrimination claim based on employer's requirement that she use men's rather than women's restroom). *But see* *Michaels v. Akal Security, Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, at \*4 (D. Col. June 24, 2010) (agreeing with *Etsitty* that restrictions on a transsexual worker's bathroom usage does not itself establish sex discrimination, but holding that the plaintiff had sufficiently pled pretext to survive a motion to dismiss). Bathroom discrimination claims brought under state law sexual orientation discrimination statutes have been similarly unsuccessful. See *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (holding that employer's requirement that female transsexual use only unisex restroom rather than women's restroom did not constitute discrimination based on sexual orientation under the Minnesota Human Rights Act which defined sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness").

Certainly these are not the first cases in which courts have subordinated employee's antidiscrimination interests to the privacy interests of customers or coworkers. Courts regularly privilege such privacy interests in cases in which employers seek to engage in sex-based hiring of workers engaged in positions that involve the seeing or touching of unclothed customers or co-workers. See *Yuracko*, *supra* note 62, at 156-58.

<sup>143</sup> Elizabeth Glazer and Zachary Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009).

<sup>144</sup> Anna Kirkland, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008).

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for wanting to change her appearance in the workplace simply did not matter; the only thing that did matter for the court's theory to work is that Smith wanted to dress and behave in a way that is incompatible with stereotypical expectations of masculinity."<sup>145</sup> Similarly, Kirkland contends that "[t]ranssexuals or transgender people *per se* do not really exist in the *Smith* opinion; there just happen to be some men out there who want to wear dresses."<sup>146</sup>

I argue, in contrast, that transsexuals are winning under the sex stereotyping prohibition precisely because they are not simply men wearing women's clothes and, in large part, because they are transsexual. Transsexuals are winning because they are able to use medical evidence of their GID to convince courts that for them compliance with sex-based gender norms would be particularly painful and difficult.<sup>147</sup>

Indeed the balancing test helps explain why transsexuals are winning their challenges to sex-based grooming requirements while nontranssexuals are not. Under a

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<sup>145</sup> Glazer and Kramer, *Transitional Discrimination*, 18 TEMP POL & CIV RTS L REV. at 666 (2009).

<sup>146</sup> Kirkland, FAT RIGHTS at 68. See also Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination*, 32 SIGNS 83, 94-95 (2006) ("The [Smith] case reduces the story of gender oppression to a story about stereotypes and makes MTFs into men who wear dresses and makeup.").

<sup>147</sup> The instrumental importance of medical evidence in these cases has not been lost on transsexual advocates. See Jerry L. Dasti, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1758 (2002) (noting "[t]hat the explanation of transgender identities in medical and diagnostic terms is common throughout the case law, even in cases that do not deal specifically with gender related medical care or sex designation," and that "it is the transgender party who inserts the medical analysis into the record" as a strategic way to give "legitimacy to a transgender identity"). See also Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 90-91 (2006) (explaining that the recent success of some transgender litigants is due to their ability to introduce medical evidence of their GID which highlights to the court "the essentialism of gender identity and its inelasticity for a specific individual." Franklin H. Romeo, *Beyond A Medical Model: Advocating for A New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 733 (2005) ("The result of courts' reliance on the medical model of gender is that those instances of gender nonconformity recognized by the medical establishment are portrayed as real and legitimate--and therefore worthy of at least some legal protections--while other transgressive experiences of gender are viewed as unreal, fraudulent, or illegitimate.").

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balancing approach, non transsexual gender benders lose precisely because courts view the burdensomeness of the conformity demands as trivial. In *Pecenka v. Fareway Stores, Inc.*,<sup>148</sup> for example, the Iowa Supreme Court upheld an employer's right to terminate a male employee for refusing to remove his ear stud emphasizing that the requirement was one with which Pecenka could easily comply. "Wearing an ear stud is not an immutable characteristic," the court noted.<sup>149</sup> "Pecenka can remove his ear stud or cover it with a bandage."<sup>150</sup> Similarly, in *Austin v. Wal-Mart Stores, Inc.*, the district court upheld an employer's sex-specific requirement that male employees keep their hair above the collar emphasizing that "hair length is not an immutable characteristic, for it may be changed at will."<sup>151</sup> "Discrimination based on factors of personal preference" the court explained, "do not necessarily restrict employment opportunities and are thus not forbidden."<sup>152</sup> In *Jespersen* as well, the court seemed to belittle the burdensomeness of the makeup requirement on Jespersen by emphasizing that compliance, or lack thereof, was simply a matter of personal choice. According to the court, Jespersen's

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<sup>148</sup> *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003).

<sup>149</sup> *Id.* at 805.

<sup>150</sup> *Id.* at 805. The court also emphasized that the no earring for men rule did not reinforce women's or men's subordination in the workplace. The court noted, "Nor does [plaintiff] contend that the unwritten personal grooming code perpetuates a sexist or chauvinistic attitude in employment that significantly affects his employment opportunities." *Id.* at 805. See also *Lockhart v. La-Pac. Corp.*, 795 P.2d 602, 603 (Or. Ct. App. 1990) (upholding no facial jewelry rule for male but not female employees explaining that "[o]nly those distinctions between the sexes which are based on immutable, unalterable, or constitutionally protected personal characteristics are forbidden").

<sup>151</sup> *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp.2d 1254, 1258 (N.D. Ind. 1998).

<sup>152</sup> *Id.* at 1256. Like the court in *Pecenka*, the *Austin* court also emphasized that the sex-specific grooming requirement at issue did not raise antistatutory subordination-oriented concerns. As the court explained: "The objective of Title VII is to equalize employment opportunities. Consequently, discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate Title VII because they present obstacles to the employment of one sex that cannot be overcome . . ." *Id.*



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desire not to wear makeup was based on her “subjective reaction”<sup>153</sup> and desire “to be true to herself and to the image that she wishes to project to the world.”<sup>154</sup>

Unlike the category neutrality reading, the balancing approach even offers a plausible explanation for courts’ protection of men harassed because of their perceived effeminacy. The plaintiffs in such cases do not seek to switch gender categories but only to deviate from gender expectations in particular respects. Such plaintiffs would not, as a result, be entitled to protection under the category neutrality principle. It may be, however, that courts protect effeminate men from harassment because they perceive the gender conformity demands in those cases to be particularly difficult to meet.

Typically, male workers harassed for perceived effeminacy are not harassed because of a simple discrete trait that they can easily change and undo. Instead, they are harassed because of how they walk, talk and stand--traits that are all largely unconscious and difficult to alter. Moreover, employers in such cases do not claim a business need for the enforced masculinity.

Consider, for example, the harassment suffered by Antonio Sanchez in *Nichols v. Azteca Restaurant Enterprises*.<sup>155</sup> Sanchez, a food server, was harassed for “walking and carrying his serving tray ‘like a woman.’”<sup>156</sup> Whatever it was about Sanchez’s movement that made Sanchez’s co-workers refer to him as “she” and “her”<sup>157</sup> was not susceptible to easy identification or quick fix. Indeed, the harassers themselves would

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<sup>153</sup> *Jespersen*, 444 F.3d at 1113.

<sup>154</sup> *Id.* at 1112.

<sup>155</sup> *Nichols v. Azteca Restaurant Enter.*, 256 F.3d 864 (9th Cir. 2001).

<sup>156</sup> *Id.* at 870.

<sup>157</sup> *Id.*

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probably have struggled to describe precisely what about Sanchez's movements they found objectionable. Even if they could, it would have been extremely difficult for Sanchez to alter his walk and movements so as to eliminate the offending affect. Doing so is not like changing one's shirt. It is more like changing one's way of being in the world.

Consider also the harassment faced by sixteen-year-old H. Doe in *Doe v. City of Belleville, Illinois*.<sup>158</sup> H. was subjected to repeated physical and verbal harassment focused on his inadequate masculinity.<sup>159</sup> Certainly, H.'s earring was a focal point of harassment.<sup>160</sup> Yet it is unlikely that the harassment would have ceased, or never started, if H. had simply removed the earring.<sup>161</sup> The harassment was prompted not by a discrete easily identifiable action on H.'s part. It was prompted and driven by the gestalt of how H. presented himself--the way in which he occupied and moved his body.<sup>162</sup> As was the case for Sanchez, identifying what exactly it was about H.'s self-presentation, much less getting H. to change it, would likely be impossible.<sup>163</sup>

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<sup>158</sup> *Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1996).

<sup>159</sup> In addition to other incidents of physical and verbal harassment, H. Doe was regularly called "queer" and "fag," was asked, "Are you a boy or a girl?" and was referred to by his primary harasser as his "bitch." *Id.* at 566-67.

<sup>160</sup> *Id.* at 567.

<sup>161</sup> Indeed, H.'s brother J. was also harassed, albeit less severely, despite not wearing an earring. *Id.* at 566.

<sup>162</sup> As the court explained: "H. Doe [did] not su[e][ ] Belleville in order to challenge a workplace rule that forbade him from wearing an earring," he sued because "his gender had something to do with the harassment heaped upon him." *Id.* at 582.

<sup>163</sup> Devon Carbado, Mitu Gulati and Gowri Ramachandran have offered a slightly different status-oriented reading of the effeminate men harassment cases, one focused on the status of homosexuality rather than gender. They contend that by using the sex stereotyping rhetoric of *Price Waterhouse* to protect effeminate men from harassment, courts "quite possibly, [ ] were engaging in subversive judging—namely, enacting a minor rebellion against the Constitutional refusal to provide any protection against sexual orientation discrimination." Devon Carbado, Mitu Gulati & Gowri

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This reading of the sex stereotyping prohibition as really a balancing of interests is certainly more modest than courts' rhetoric suggests, yet it has real explanatory power. The prohibition as balancing test provides the most comprehensive and coherent account of how the sex stereotyping prohibition currently operates. With this model of how the prohibition works in practice, rather than theory, in mind, I turn in the next part to consider more fully the likely legal and cultural implications of the sex stereotyping prohibition at work.

### VI. Implications

Certainly the prohibition as balancing test will not, as some scholars have hoped, lead to an end to gender code enforcement in the workplace. Courts' heavy focus on compliance costs means that employers may continue to enforce sex-based gender codes, even when such codes are grounded in stereotypes, as long as courts deem them relatively easy for workers to comply with. Employees are protected from such demands only when courts believe that compliance is particularly burdensome for them.

In practice this means that those whom I refer to as "garden variety gender benders" – those who do not seek to switch gender categories but instead to reject discrete aspects of their prescribed gender code while maintaining allegiance to, or at least conformity with, other aspects of the code – will (continue to) lack protection. Male workers who are generally comfortable with their masculinity will not be

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Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 137 (Joel Wm. Friedman ed., 2006).

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protected if they want to express their feminine side through dangling earrings or nail polish in violation of their employer's grooming code for men. Female workers who are generally comfortable with their femininity will not be protected if they want to express a more masculine side by rejecting such adornments in violation of their employer's grooming code for women. Such workers will be unable to convince courts that noncompliance reflects some essential gender core rather than more transient personal preference. Without new medical evidence to the contrary, courts will continue to view noncompliance as a matter of personal taste, and compliance as relatively painless.

What may be less clear, and more pernicious, however, is that the balancing test may actually reinforce gender stereotypes and encourage highly gender stereotypical behavior in the workplace. Given the focus on compliance costs, employees must prove that the gender attribute at issue is a core part of their gender identity. An attribute looks more core and essential to the extent that it fits within a coherent gender package. As a result, in the quest for protection, gender bending workers have an incentive to exaggerate their gender dysphoria by conforming those traits about which the worker feels less strongly to the gender of the traits for which the worker seeks protection. The result, somewhat oddly, is that workers may adopt a more extreme gender dysphoria than they actually feel, and manifest this dysphoria through more consistent and coherent expressions of the opposite sex gender.

This pressure to over perform dysphoria to the point of adopting a stereotypical gender package is clear in the transsexual cases. Indeed, the very diagnosis of GID, which has been so important to transsexual victories, requires allegiance to a traditional

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gender script, including stories of childhood participation in stereotypically gender-inappropriate behavior,<sup>164</sup> evidence of “[a] strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex),”<sup>165</sup> and “the ability to inhabit and perform the new gender category ‘successfully.’”<sup>166</sup> It pressures transsexuals to downplay or reject aspects of their gender that conform readily to their biological sex. As Franklin Romero has explained:

The diagnostic criteria of GID do not challenge gender norms so much as they provide a mechanism for some people to substitute the gender norms of their lived gender for the norms of their birth sex. Moreover, the medical model holds transgender people to hyper-normative standards regarding their lived gender – thereby reifying the idea that ‘real’ men and women look and act a certain way. These hyper-normative standards do not reflect the experience of a great number of gender nonconforming people, and fail to recognize the complexity of experiences among gender transgressive people.<sup>167</sup>

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<sup>164</sup> See Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 24 (2003) (“Symptoms of GID in the Diagnostic and Statistical Manual (DSM-IV) describe at length the symptom of childhood participation in stereotypically gender inappropriate behavior. Boys with GID “particularly enjoy playing house, drawing pictures of beautiful girls and princesses, and watching television or videos of their favorite female characters. . . . They avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks.” Girls with GID do not want to wear dresses, “prefer boys’ clothing and short hair,” are interested in “contact sports, [and] rough-and-tumble play.”).

<sup>165</sup> DSM-IV, *supra* note 4, at 537.

<sup>166</sup> Spade, *supra* note 164 at 26. Spade is critical that “success” necessarily means adherence to established gender norms. For a female-to-male transsexual, tips for successful performance of masculinity “focus on an adherence to traditional aesthetics of masculinity, warning FTMs to avoid “punk” hair cuts, black leather jackets and other trappings associated with butch lesbians. A preppy, clean-cut look is often suggested as the best aesthetic for passing. Again, this establishes the requirement that gender transgressive people be even more ‘normal’ than ‘normal people’ when it comes to gender presentation.” *Id.* at 27.

<sup>167</sup> Franklin H. Romero, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, COLUM. HUM. RTS. L. REV., 713, 731(2004-2005).

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Transsexual workers are pushed to play the part of highly stylized men and women even if they would be more comfortable with more mixed or ambiguous gender packages.<sup>168</sup>

The pressure on nontranssexual workers is similar, though less obvious. Under a balancing approach, a plaintiff seeking protection for gender nonconforming conduct must convince a court that abandoning the trait at issue would be painful and difficult. One way to do so is to show that the challenged gender expression is a function of the plaintiff's core, stable personality rather than an expression of individual autonomy or personal taste. A plaintiff's gender nonconforming conduct is likely to look more stable and immutable to the extent that it is part of a broad, consistent and stereotypical pattern of gender nonconformity.

To see why this is so, consider again Darlene Jespersen's challenge to Harrah's make-up requirement for female bartenders. Under a balancing test, Jespersen would need to convince the court that compliance with the rule would be psychically, if not physically, painful for her. This was, in fact, precisely the argument that transgender advocates made on her behalf in their amici brief. The National Center for Lesbian Rights and the Transgender Law Center argued that requiring Jespersen to wear makeup was "contrary to [her] innate identity and sense of self" and was "a serious,

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<sup>168</sup> See Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 297 (2005) ("In my experience, a person who was assigned male at birth and identifies as female has the best chance of having her self-identified gender confirmed by the courts if her medical experts testify that she is a feminine woman, a woman who played with dolls when she was young, a heterosexual woman, a woman with genital surgery, and so on. A gender non-conforming transgender person stands very little chance of having their self-identified gender recognized by the courts.").

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invasive, and demeaning experience and may be as debilitating to an individual as being subjected to sexual or gender-based harassment.”<sup>169</sup> The court was unconvinced, instead treating Jespersen’s desire to leave her face make-up free as simply a matter of personal preference.<sup>170</sup> Part of the reason for the court’s skepticism may have been that Jespersen did not object to any of the other feminine grooming requirements imposed on her by Harrah’s. If Jespersen had objected to all feminine grooming requirements, and had sought to present herself consistently according to Harrah’s masculine grooming code, the court might have viewed her opposition to makeup with a bit more respect. Certainly, she would have then looked more like the plaintiffs in *Smith* and *Yunits* who were granted gender nonconformity protection.

Indeed the prohibition as balancing test not only encourages a particular kind of gender performance, it actually entrenches a particular understanding of gender. Again such entrenchment for transsexuals is clear. Reliance by courts on the medical definition of GID entrenches in law and society a particular understanding of how

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<sup>169</sup> Brief for Nat’l Center for Lesbian Rights and Transgender L. Center as Amicus Curiae supporting Plaintiff-Appellant, *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th. Cir. 2006) (No. 03-15045), 2005 WL 1501598. More generally, the groups argued:

Just as a person’s core gender identity as male or female is innate, a person’s relative degree of masculinity or femininity is also deep-seated and generally impervious to manipulation or change. . . . [W]orkplace rules affecting a person’s core gender identity and outward expression of masculinity or femininity are not trivial, but rather touch on profound and fundamental aspects of the self. For an employer to require a person to adopt a gendered appearance that conflicts with the person’s core identity is intrusive and humiliating and may seriously impair a person’s well-being and ability to function.

<sup>170</sup> The court explained: “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. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.” *Jespersen*, 444 F.3d 1104, 1112.

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transsexuals experience their gender. Transsexuals must experience and express a strong commitment to the gender norms typically associated with the other sex.

There remains a great deal that is unknown about transsexualism.<sup>171</sup> Certainly, it is possible that this narrative about how transsexuals experience gender may be erroneous or, at least, too narrow.<sup>172</sup> Nonetheless, once courts rely on a particular medicalized conception of transsexualism, that conception becomes entrenched in law

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<sup>171</sup> See 2.0 GENDER IDENTITY RESEARCH & EDUCATION SOCIETY, GENDER VARIANCE (DYSPHORIA) 4 (Aug. 31, 2008), available at <http://www.gires.org.uk/dysphoria.php> [hereinafter *Gender Variance (Dysphoria)*] (“[T]he experience of extreme gender variance is increasingly understood in scientific and medical disciplines as having a biological origin. The current medical viewpoint . . . is that this condition . . . is strongly associated with unusual neurodevelopment of the brain at the fetal stage.”); 2.1 GENDER IDENTITY RESEARCH & EDUCATION SOCIETY, DEFINITION & SYNOPSIS OF THE ETIOLOGY OF GENDER VARIANCE 3 (July 18, 2009), available at <http://www.gires.org.uk/etiology.php> [hereinafter *Etiology of Gender Variance*] (hypothesizing that hormones significantly influence the “dimorphic development” of gender though noting that “the exact mechanism is incompletely understood”); Randi Ettner, *The Etiology of Transsexualism*, in PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 1, 9 (Randi Ettner et al. eds., Hawthorne Press, 2007) (“[T]he sheer sweeping heterogeneity of the condition [transsexualism] itself impends a strictly biological explanation.”); P.T. Cohen-Kettenis & L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 J. PSYCHOSOMATIC RES. 315, 318-19 (1999) (describing studies linking transsexualism to prenatal hormone exposure or to sex differences in the hypothalamus); Frank P.M. Kruijver, et al., *Male-to-Female Transsexuals Have Female neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2041 (2000) (presenting data “supporting the view that transsexualism may reflect a form of brain hermaphroditism such that this limbic nucleus *itself* is structurally sexually differentiated opposite to the transsexual’s genetic and genital sex. It is conceivable that this dichotomy is just the tip of the iceberg and holds also true for many other sexually dimorphic brain areas”).

<sup>172</sup> See e.g. Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 260 (2005) (Explaining that “some male-to-female transgender people are butch lesbians. Some female-to-male transgender people like to cook and bake. And there are many transgender people who do not identify as either female or male, but as a third or other gender, such trans or boy-girl, just to name a few.”); Leslie Feinberg, TRANSGENDER WARRIORS ix (1996) (“[T]here are no pronouns in the English language as complex as I am, and I do not want to simplify myself in order to neatly fit one or the other.”); Riki Ann Wilchins, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER (1997); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS 292, 299 (Julia Epstein & Kristina Straub eds., 1991) (encouraging transsexuals to speak openly about the complexities of their gender experiences); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 332-33 (1999) (describing the varied ways in which transsexuals themselves understand transsexual identity).



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and society more generally.<sup>173</sup> Those who do not experience transsexualism in the prescribed ways will either be (newly) pathologized or discredited. Either way, they are likely to be excluded from the current antidiscrimination framework.<sup>174</sup> Those who seek to avoid such exclusion must articulate, if not actually experience, their gender in the ways courts say that they do.<sup>175</sup>

Courts' reliance on a medical narrative about transsexualism, however, reifies not only transsexualism, but gender more generally.<sup>176</sup> When medical experts testify

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<sup>173</sup> For a general discussion of the effect of categorization in antidiscrimination law see Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 52 (2003) ("Through the process of categorization, legal narratives effectively strip the subject of agency by denying the subject the possibility of self-definition--for example, the agency to assert whether one is female, male, or neither. In this way, legal categories become constitutive of one's identity (e.g. not male equals female, not white equals black, not middle- (or upper-) class equals poor)").

<sup>174</sup> See Andrew Gilden, *Toward A More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 103 (2008) ("Much as an essentialized male/female binary renders unintelligible alternative gender identities, the articulation of an essentialized tertiary identity similarly marginalizes radical alternatives. If transsexuality only encompasses those trans people like Schroer who have been medically diagnosed as transsexuals and who conform to sex-stereotypes, then those trans people who most challenge normative sex/gender ideologies remain marginalized by trans jurisprudence.")

<sup>175</sup> Dylan Vade makes this point quite concretely:

When courts only recognize as 'real' those transgender people who fit narrow gender stereotypes, have multiple medical interventions, and engage in heterosexual intercourse, then courts only grant custody, health benefits, and employment protections to transgender people who fit narrow gender stereotypes, have multiple medical interventions, and engage in heterosexual intercourse. Those clients of mine who do not fit the above requirements cannot make use of the legal protections. As a legal advocate for transgender people, this is a concern I face every day.

Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 256 (2005). For a more positive account of the role medical professionals play in improving the social and legal treatment of transsexuals see Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER & L. 721, 735 (2003) (explaining that "medical experts can help to develop empathy in the greater community toward transgender litigants and, more specifically, help individual litigants to secure rights by chipping away at deeply held cultural prejudices that do not reflect medical realities.").

<sup>176</sup> For a similar point see Gilden, *supra* note 174 at 96-97 ("In describing a "biologically male" transsexual as performing feminine acts, it furthers the construction of particular acts as inherently feminine and normatively conflated with biological femaleness.).

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that a plaintiff suffers from GID the experts are saying something not only about transsexualism but about femininity and masculinity more generally.<sup>177</sup>

Consider, for example, the court's effort in *Doe v. Yunits* to translate the medical evidence about transsexualism into "non-medical terminology."<sup>178</sup> According to the court, a diagnosis of GID means that "Doe has the soul of a female in the body of a male."<sup>179</sup> Having the soul of a female meant that Doe needed to wear stereotypically female clothing,<sup>180</sup> and that coming to school in boys' clothing would "endanger her psychiatric health."<sup>181</sup> While this latter contention was made by Doe and did not need to be proven in the context of a motion to dismiss, the court did note approvingly that "there is evidence in the court file to support this allegation."<sup>182</sup>

In *Schroer*, the Plaintiff presented testimony from two experts. The first was a medical doctor and the second was a licensed social worker and Schroer's treating therapist during her transition. The medical doctor testified that "gender identity can

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<sup>177</sup> See Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER & L. 721, 736 (2003) (describing the "classic description" of transsexuals as being "trapped in the 'wrong body.'"); Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 285 (2005) ("Transgender people often are defined as "'having a mismatch of gender and sex.'"); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 353 (1999) (explaining that "[t]he most common or notorious model for describing the transsexual condition, by academics writing about transsexuals, by transsexuals themselves, and by judges, is a vision of the transsexual as a woman/man trapped in a man/woman's body").

<sup>178</sup> 2001 WL 664947 at \*1

<sup>179</sup> 2001 WL 664947 at \*1. Similarly, in ruling on a motion for preliminary injunction in the case, a different judge explained that "Plaintiff has been diagnosed with gender identity disorder, which means that, although plaintiff was born biologically male, she has a female gender identity." 2000 WL 33162199 at \*1.

<sup>180</sup> For Doe, female clothing involved "such items as skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts." 2000 WL 33162199 at \*1.

<sup>181</sup> 2001 WL 664947 at \*6.

<sup>182</sup> *Id.* at \*6.

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be viewed as the sex of the brain, which, once established, cannot be changed.”<sup>183</sup>

Transsexuals, he explained, “experience incongruence between their sex assigned at birth and their gender identity.”<sup>184</sup> The therapist spoke more specifically about her diagnosis of Schroer as transsexual. She testified that Schroer “has a female gender identity and is a woman.”<sup>185</sup> The therapist explained that she had reached her conclusion, that Schroer “is a woman” by “continually assess[ing] [Schroer’s] female feelings and expression” and “evaluat[ing] Ms. Schroer’s life story.”<sup>186</sup> Evidence of Schroer’s womanhood, was found in “Ms. Schroer’s level of crossdressing, her internal feelings about being female, [and] her inherent need to present as female.”<sup>187</sup> In other words, in order to reach her conclusion that Schroer was transsexual, Schroer’s therapist needed to conclude that Schroer was a woman trapped in a man’s body. Schroer was a woman, the therapist knew, because Schroer did and thought what women do and think.

Even if the current medical establishment is correct about how most transsexuals experience their gender, it may still be mistaken in equating transsexuals’ experience of gender with that of nontranssexuals. It may be, for example, that male-to-female transsexuals are not in fact experiencing their gender in the same ways that nontranssexual women experience their gender.<sup>188</sup> It is possible, for example, that

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<sup>183</sup> Expert Report of Walter O. Bockting, PhD., 2006 WL 4517046 (D.D.C. Sept. 14, 2006).

<sup>184</sup> Supplemental Report of Walter P. Bockting, 2006 WL 4517047 (D.D.C. 2006).

<sup>185</sup> Expert Report of Martha L. Harris, LCSW, 2006 WL 4517048 (D.D.C. 2006).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See Sherry F. Colb, *When Sex Courts: Making Babies and Making Law* 140 (2007) (describing a reaction she observed at a conference by female academics to a transsexual scholar presenting a paper

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transsexuals may have particularly strong gender associations which make cross gender manifestations particularly painful.<sup>189</sup> Transsexuals may experience gender more acutely than nontranssexuals. Nontranssexuals may not have as strong gender commitments.<sup>190</sup>

Alternatively, even if transsexuals and nontranssexuals experience their core gender identity in similar ways, outward manifestations may be intensely more important for transsexuals than they are for nontranssexuals. Transsexuals may find highly traditional outward gender manifestations critically important to their gender identity because they simply cannot be recognized as their true gender unless their outward manifestations of gender are clear, strong and uniform. Nontranssexuals may have much less difficulty having their gender recognized even if they send a range of more mixed and ambivalent signals through their outward manifestations – clothes,

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where the female academics complained that the transsexual did not understand what made them “women” and mistook being a woman for wearing very stereotypically feminine clothing.)

<sup>189</sup> See Cohen-Kettenis, *supra* note 171, at 320 (noting that “[n]ot all children with GID will turn out to be transsexuals after puberty” and explaining that it might be that “only very few extreme cases would become transsexuals, whereas the mild cases would become homo- or heterosexuals”); THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, 2 (6th ed. Feb. 2001) (“A clinical threshold [for transsexualism] is passed when concerns, uncertainties, and questions about gender identity persist during a person’s development, become so intense as to seem to be the most important aspect of a person’s life, or prevent the establishment of a relatively unconflicted gender identity.”).

<sup>190</sup> There exist highly divergent views about how nontranssexuals experience their gender. Compare Franklin H. Romeo, *Beyond A Medical Model: Advocating for A New Conception of Gender Identity in the Law*, 36 Colum. Hum. Rts. L. Rev. 713, 738-39 (2005) (arguing that gender should be recognized as “a fundamental aspect of human life, which every person has the capacity and inherent right to control”); with Jennifer L. Levi, 15 Colum J. Gender & L. at 91 (“until courts understand the inelasticity of gender for most individuals alongside its social construction, sex discrimination claims will have limited utility”).

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hair, makeup jewelry, etc. For both reasons, cross-gender manifestations may be trivial for nontranssexuals while being truly painful for transsexuals.

If, however, courts believe that women have female souls and that such souls require women to wear stereotypically feminine clothing, then the pain of women like Jespersen, who seek to challenge some but not all feminine gender conventions, will always be invisible. For Jespersen, wearing makeup should be pleasing and certainly could not be painful. Similarly, the alleged pain or discomfort caused to women in nontraditional jobs may be too easily believed by courts making them far too willing to accept employers' claims of a lack of interest defense in cases in which women are excluded from nontraditional jobs. In her seminal article about the lack of interest defense, Vicki Schultz described the importance for blue-collar employers of describing jobs as physically "dirty."<sup>191</sup> Particularly for conservative courts, Schultz explained, acceptance of the lack interest defense often followed "merely as a matter of 'common sense'" from courts' acceptance of such a job description.<sup>192</sup> To the extent that femininity continues to be associated with concerns about dress, beauty and appearance, women's exclusion from "dirty" jobs will continue to look, at least plausibly, like a matter of choice.

Perhaps even more troubling, however, is that judicial conceptions of gender may in fact become real and come to affect how people view themselves, what they aspire to, and what they ultimately accomplish. Those who identify as gender female

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<sup>191</sup> Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1800-1803 (June 1990).

<sup>192</sup> *Id.* at 1802.

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may, for example, come to believe that they really are and must be most comfortable in skirts and makeup. Hence they may shy away from jobs that require masculine attire and dirty physical labor. Those who identify as gender male may come to believe that they really are and must be aggressive and competitive. Hence they may shy away from jobs requiring nurturing and caregiving.<sup>193</sup> Legal scripts about gender do have the power to shape the actual lives of women and men.<sup>194</sup> The irony of the recent sex discrimination victories of gender nonconforming workers is that the sex stereotyping prohibition is being applied in such a way as to give even progressive courts an

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<sup>193</sup> Richard Ford has identified a similar danger in the race context explaining: the harm of misrecognition is that members of the misrecognized group may internalize the deprecating stereotypes of others. Such individuals, then, may not always appropriately determine what is fundamental to their identity, or better put, what should be fundamental to their identity. If misrecognition can lead people to fail to take advantage of opportunities even after 'objective obstacles to their advancement fall away,' then misrecognition might also lead those same people to push for rights to self-detrimental traits and adopt misconceived legal strategies in the name of safeguarding an identity that was shaped by the misrecognition of others.

See Richard T. Ford, *Beyond 'Difference': A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 55 (Wendy Brown & Janet Halley eds., 2002).

<sup>194</sup> For a similar point about the dangers of entrenched categories in other contexts see Ford, *Race as Culture? Why Not?* at 1811 ("The rights argument that protects culture as the authentic expression of the individual litigant must invite—in fact it must require—courts to determine which expressions are authentic and therefore deserving of protection. The result will often be to discredit anyone who does not fit the culture style ascribed to her racial group."); K. Anthony Appiah, *Identity, authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM*, ed. Amy Gutmann (1994) 162-63 ("Demanding respect for people as blacks and as gays requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black and gay, there will be expectations to be met, demands to be made."); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 124 (David Kairys ed., 1998) ("[I]f advocacy constructs identity, if it generates a script that identity bearers must heed, and if that script restricts group members, then identity politics compels its beneficiaries. Identity politics suddenly is no longer mere or simple resistance: It begins to look like power . . . . [W]henever activists invoke identity in ways that transform it, they may approach and even cross the dangerous line . . . between advocacy and coercion; they may interpellate subjects just as invidiously as Althusser's imagined cop in the street.").

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incentive to adopt highly essentialized and traditional conceptions of masculinity and femininity.

### CONCLUSION

Certainly the sex stereotyping prohibition has brought about dramatic changes in antidiscrimination law. It has garnered critical workplace protection for groups and individuals who were previously excluded from the law's protection. Yet the prohibition has not delivered on its sweeping rhetorical promise. It has not put an end to gender stereotypes or eviscerated the enforcement of gender codes and categories in the workplace. It has not led to workplaces in which gender is expressed freely, creatively and idiosyncratically. Its change has been more incremental.

Courts have interpreted the prohibition in a highly pragmatic fashion—hewing to a middle road that responds both to demands for employee inclusion and for employer control. Under this compromise approach, gender conformity demands are loosened only when they are particularly burdensome or debilitating (personally or professionally) for an individual worker. When the demands instead seem modest, courts avoid a fight, leave societal norms intact, and simply tell employees to play along.

Although certainly disappointing for those hoping for more radical change, the balancing approach actually has much to recommend it. It will not transcend gender, or radically transform the workplace, but it does protect those who are most in need of

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protection and least able to exercise self-help. Moreover, by limiting the scope of protection, the approach avoids an all-out assault on gender norms and lessens the risk of popular backlash against courts and nonconformists.

Yet the prohibition as balancing test raises its own risks – risks that have not previously been recognized. It encourages gender nonconformists to adopt more highly dysphoric gender packages than they otherwise might as a way to bolster their claims that, for them, noncompliance is necessary. Whether pressure on gender nonconformists to over-perform their dysphoria is any worse than pressure to over-perform their sex-based gender code is a question about which I am agnostic. The pressure reinforces, however, that for those who do care deeply about free and authentic gender expression, the prohibition will not be a panacea and other sources of protection, legal or social, should be pursued.<sup>195</sup>

More troubling is that the balancing test, with its focus on compliance costs, encourages a medicalization of gender that threatens to entrench traditional notions of masculinity and femininity. The danger here flows not from the balancing test *per se* but from the type of medical evidence courts have been encouraged to rely on in sex stereotyping cases. The result is a kind of pitting of the interests of the individual

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<sup>195</sup> For possibilities see Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1112 (2006) (arguing that “the legal framework of autonomy privacy is a necessary supplement to the discrimination analysis that has dominated legal thinking for thirty-five years of challenges to workplace appearance requirements”); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y, 467, 488 (arguing that strengthening unions could provide protection to workers like Jespersen even when antidiscrimination law does not).



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plaintiff against the interests of women (and men) as a group about whom the medical evidence reinforces stereotypes that have been complicit in their subordination.

Given the importance of medical evidence in the transsexual sex discrimination cases, the best, and perhaps the only possible response to this danger is to urge advocates for transsexuals, and other gender nonconformists, to present their expert medical testimony in a more nuanced way – to highlight rather than elide the differences among transsexuals and to avoid linking the gender experiences of transsexuals with those of nontranssexuals. Transsexuals should win under a balancing test even if they do not experience their gender identity in precisely the same ways as nontranssexuals. Treating transsexualism as a distinctive gender experience will weaken the danger that the essentialism so prevalent in the current diagnosis of GID will carry over into courts' thinking about and treatment of women and men generally.

I have tried in this paper to look inside the black box of the sex stereotyping prohibition to see how the prohibition works in practice – as opposed to in theory or aspiration. One benefit of such added clarity is that it may help advocates for nonconformists marshal evidence and structure arguments to help their cases and expand protection for clients. It may also highlight what additional work needs to be done and what precautions should be taken. In this case, greater clarity seemingly does all three. Indeed, if my reading of the prohibition at work is correct, it suggests that not only is the prohibition's protection likely to be narrower than generally thought, even this incremental change may come at the expense of a subtle hardening of gender expectations for everyone.