
ARTICLE

SOUL OF A WOMAN: THE SEX STEREOTYPING PROHIBITION AT WORK

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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 Title VII's coverage and to 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 and 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 burden-shifting framework that turns on the compliance costs for the worker. I conclude by arguing that the sex stereotyping prohibition has not lived up to its rhetorical promise. Indeed, the implications of the prohibition are both dangerous and ironic in ways that scholars have yet to recognize. While the prohibition has extended Title VII's protection to new classes of workers, it has done so by relying on and reinforcing traditional gender categories. The result is that the prohibition protects some individuals at the expense of the class whose subordination—stemming from socially salient gender norms—remains intact.

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INTRODUCTION

In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*¹ declared that sex stereotyping was a prohibited form of sex discrimination at work.² This seemingly simple declaration has been the most important development in sex discrimination jurisprudence since the passage of Title VII.³ It has been the tool used to protect effeminate men and masculine women from harassment in the workplace.⁴ More recently, it has been the catalyst for a sea change in courts' treatment of transsexuals.⁵ Transsexuals have gone

¹ 490 U.S. 228 (1989) (plurality opinion).

² In fact, the Supreme Court had condemned sex stereotyping since the 1970s. 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 that rendered them unfit. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (striking down a federal statute that provided dependent benefits for all spouses of male service members, but provided the same benefits to the spouses of female service members only upon their showing of actual dependence on their wives for over one-half of their support, because it was based on an assumption that women do not support their husbands); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198-99 (7th Cir. 1971) (striking down an employer's no-marriage rule, which applied only to female flight personnel, because it was based on sex stereotypes about women's domestic role). 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 stereotyping, see *infra* Part I. *See also* 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) (explaining that the stereotyping "that applied to Hopkins was prescriptive—it centered on how she ought to behave"); Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 *NW. U. L. REV.* 1, 7-8 (2010) ("Prescriptive stereotyping occurs when an employer insists that an individual possess or exhibit certain traits and attributes because of her group membership.").

³ 42 U.S.C. § 2000e et seq. (2006).

⁴ *See infra* text accompanying notes 21-43.

⁵ Transsexualism was first listed as a condition in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* published in 1980. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 261-64 (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

from being outside antidiscrimination protection altogether,⁶ to being at the forefront of courts' evolving and expanding interpretation of federal sex discrimination law.⁷

Astonishingly, the precise contours, dimensions, and requirements of the sex stereotyping prohibition have never been articulated clearly either by courts or by scholars. Courts tend simply to restate the language of *Price Waterhouse* as though its meaning were self-evident.⁸ Scholars most often

genitals and to live as a member of the other sex." *Id.* at 261-62. The fourth edition of the DSM, published in 2000, replaced the term "transsexualism" with "Gender Identity Disorder (GID)," 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." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 537-38 (4th ed. 1994) [hereinafter DSM-IV]. The revised edition of the DSM-IV, the DSM-IV-TR, published in 2004, retained the same diagnostic criteria. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576, 581 (4th ed., text rev. 2000) [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 & SOC. INQUIRY 1, 2 (2003) ("[T]he term 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." (emphasis omitted)).

⁶ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085-87 (7th Cir. 1984) (determining that Title VII's legislative history indicates that it does not protect transsexuals); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977), (refusing to extend Title VII protection to transsexuals because "Congress has not shown any intent other than to restrict the term 'sex' [in Title VII] to its traditional meaning").

⁷ See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (noting that *Price Waterhouse* extends Title VII protection to sex-stereotyped transsexuals); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is transsexual . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.").

⁸ See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006) (en banc) (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" (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989))); *Barnes*, 401 F.3d at 741 (explaining that "[a] claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'"); *Smith*, 378 F.3d at 571 (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." (citation omitted)); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("The Supreme

presume what the prohibition *should* mean,⁹ sometimes then chastising courts for their failure to apply the prohibition “correctly.”¹⁰

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 admonition of 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.

I begin in Part I with an introduction to the sex stereotyping prohibition announced in *Price Waterhouse* and its more recent jurisprudential progeny. In Parts II and III, I consider the interpretations of the prohibition most often offered by scholars—namely that the prohibition requires either

Court’s decision in *Price Waterhouse v. Hopkins* 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.” (citation omitted), *vacated*, 532 U.S. 1001 (1998).

A few courts have, however, noted the ambiguity of the prohibition. Indeed, when *Price Waterhouse* came 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 “[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, J., dissenting), *rev’d*, 490 U.S. 228 (1989). *See also* *Schroer v. Billington (Schroer I)*, 424 F. Supp. 2d 203, 208-09 (D.D.C. 2006) (identifying the lack of consensus among lower courts on the meaning of the “*Price Waterhouse* approach to sex stereotyping,” and explaining that the prohibition was actually “considerably more narrow than its sweeping language suggests”).

⁹ *See, e.g.*, Case, *supra* note 2, at 37 (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”); Andrew Gilden, *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.”); Laura Grenfell, *Embracing Law’s Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 62 (2003) (explaining that after *Price Waterhouse*, “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII” (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000))); 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.”).

¹⁰ *See, e.g.*, Case, *supra* note 2, at 4 (“[S]hocking 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.”); Romeo, *supra* note 9, at 740-41 (“While the reasoning inherent in *Hopkins* would appear to cover discrimination against a wide spectrum of gender nonconforming people[,] . . . [c]ourts seemingly went out of their way to exclude transgender litigants from succeeding under claims of sex discrimination on these grounds.”).

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 permitted 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 IV, I consider whether the prohibition demands instead a narrower commitment to category neutrality whereby employers may require gender code compliance, but must remain neutral as to which gender code employees adopt. In Part V, I consider whether the sex stereotyping prohibition is best understood as a pragmatic burden-shifting framework rather than as a distinct antidiscrimination principle. I argue that the burden-shifting framework—in which conformity demands viewed as highly costly by the court trigger a presumption of protection that the employer then bears the burden of overcoming—provides the most coherent and comprehensive account of the sex stereotyping prohibition at work. Finally, in Part VI, I examine the implications of the prohibition in light of Title VII's broad antidiscrimination goals. Title VII operates on both an individual and a group level.¹¹ Individuals are to be evaluated on their own merits rather than on their group membership.¹² Traditional group hierarchies are to be dismantled, in part, by challenging the norms, stereotypes, and prejudices that justify and legitimize them.¹³ 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. The implications of the

¹¹ 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, 474 (2002) (explaining that “[a]s clear as it is that the [Civil Rights] Act was intended as an anti-differentiation principle, it is equally clear that the purpose of the Act was to improve the economic condition” of protected groups).

¹² See 110 *CONG. REC.* 6549 (1964) (statement of Sen. Hubert Humphrey) (“Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.”).

¹³ See *Price Waterhouse*, 490 U.S. at 251 (“[W]e 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 L.A. 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.” (citation omitted)); *Dothard v. Rawlinson*, 433 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 (7th 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.”).

prohibition are both dangerous and ironic in ways that scholars have not previously recognized. While the prohibition has extended Title VII's protection to workers who had previously been excluded, it has done 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.¹⁴ Indeed, the partner who was responsible for informing 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."¹⁵

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.¹⁶ Hopkins was required to be feminine, while the successful performance of her job required her to 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.¹⁷

¹⁴ 490 U.S. at 235.

¹⁵ *Id.* (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (1985) (quotation marks omitted)).

¹⁶ For similar readings, see Case, *supra* note 2, at 45, 60 (noting that "[t]he *Hopkins* plurality seems . . . 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 *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *10 (6th Cir. Jan. 15, 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."); *Schroer I*, 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" (citation omitted)).

¹⁷ *Price Waterhouse*, 490 U.S. at 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.").

Yet the Court's rhetoric extended well beyond double-binds. Indeed, the Court declared all sex stereotyping to be a prohibited form of sex discrimination. It explained:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹⁸

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 that render her unqualified for a particular position. This is the most traditional form of sex stereotyping, and was the Court's initial target.¹⁹ 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.²⁰ It was the Court's novel and broad

¹⁸ *Id.* at 251 (citation omitted) (alteration in original).

¹⁹ Yuracko, *supra* note 2, at 7 (explaining that "[a]scriptive sex stereotyping had been illegal well before *Price Waterhouse*"). *Phillips v. Martin Marietta Corp.* serves as an example of ascriptive stereotyping. See 400 U.S. 542 (1971) (per curiam) (holding 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).

²⁰ See J. Cindy Eson, *In Praise of Macho Women: Price Waterhouse v. Hopkins*, 46 U. MIAMI L. REV. 835, 851 (1992) (suggesting that the evaluation of Hopkins's interpersonal skills drew on essentialized notions of gender 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*, 14 DUKE J. GENDER L. & POL'Y 205, 211 (2007) ("Under what is now referred to as the sex-stereotyping principle, the [*Price Waterhouse*] Court 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 A. 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, 202 (2002) ("[I]n *Price Waterhouse*, a majority of the Justices of the United States Supreme Court agreed that discrimination against an employee for failure to conform to gender stereotypes violates Title VII's prohibition against discrimination because of . . . sex." (citation and internal quotation marks omitted)); Bonnie H. Schwartz, Case Note, *Price Waterhouse v. Hopkins*, 57 U.S.L.W. 4469 (U.S. May 1, 1989) (No. 87-1167): *Causation and Burdens of Proof in Title VII Mixed Motive Cases*, 21 ARIZ. ST. L.J. 501, 539 (1989) ("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 that they were unable to see that she could in fact do the job.

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.²¹ 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.²² In concluding that the boys 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*.²³ 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 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.²⁴

The Ninth Circuit provided similar protection to the plaintiff in *Nichols v. Azteca Restaurant Enterprises, Inc.*²⁵ Antonio Sanchez worked as a host and then as a food server at Azteca restaurants in Washington State.²⁶ During his four-year employment with the restaurant chain, Sanchez was the target of a steady stream of taunts and insults focusing on his perceived effeminacy.²⁷ Relying on *Price Waterhouse*, the Ninth Circuit held that Sanchez had

²¹ Cases involving harassment of women perceived as inappropriately masculine are less frequent, but incorporated the sex stereotyping prohibition to similar effect. See, e.g., *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1228-29 (D. Or. 2002) (denying the employer's motion for summary judgment because the plaintiff had presented sufficient evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance).

²² 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). *Belleville* involved the harassment of two teenage 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." *Id.* at 567. The next year, the Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.*, that "same-sex sexual harassment is actionable under Title VII." 523 U.S. 75, 82 (1998). The Court vacated the Seventh Circuit's *Belleville* opinion for further consideration in light of that decision. 523 U.S. at 1001. *Belleville* settled before there was a decision on remand. *Oncale* did not undermine *Price Waterhouse*'s gender-stereotyping logic, upon which the *Belleville* Court relied in its decision. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001) (finding 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).

²³ *Belleville*, 119 F.3d at 580-82.

²⁴ *Id.* at 581.

²⁵ 256 F.3d 864 (9th Cir. 2001).

²⁶ *Id.* at 870.

²⁷ *Id.*

suffered actionable sex discrimination.²⁸ “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 squarely applies to preclude the harassment here.”²⁹

More recent, and perhaps more dramatic, has been courts’ use of the prohibition to protect transsexuals from discrimination, beginning with the Sixth Circuit’s 2004 decision, *Smith v. City of Salem*.³⁰ The court in *Smith* relied on the Supreme Court’s sex stereotyping prohibition from *Price Waterhouse* to hold that a preoperative male-to-female transsexual had a cause of action³¹ for sex discrimination based on allegations that she³² was penalized for expressing feminine attributes at work.

Jimmie Smith worked as a lieutenant in the Salem Fire Department in Salem, Ohio.³³ She was a biological male who had been diagnosed with Gender Identity Disorder (GID). Shortly after Smith began expressing a more feminine appearance at work, her coworkers started commenting on her appearance and claiming that her mannerisms “were not ‘masculine enough.’”³⁴ After Smith told her supervisor about her GID and her intention to transition from male to female, the Chief of the Fire Department held a

²⁸ 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, 877-78.

²⁹ *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, 264 (3d Cir. 2001) (explaining that harassment aimed at punishing an employee for noncompliance with gender stereotypes is actionable discrimination because of sex, but concluding that the plaintiff “did not claim that he was harassed because he failed to comply with societal stereotypes of how men out to appear or behave”); *Simonton v. Runyon*, 232 F.3d 33, 38-39 (2d Cir. 2000) (recognizing that discrimination based on a failure to conform to sex stereotypes is actionable but holding that the plaintiff had failed to plead sufficient facts for the court to consider whether he was harassed because of his perceived effeminacy); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (explaining that “just 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)). For an example of the protection courts have offered to female workers harassed for their perceived masculinity, see *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, 1229 (D. Or. 2002).

³⁰ 378 F.3d 566, 568 (6th Cir. 2004).

³¹ *Id.* at 578.

³² In this and other cases involving transsexuals, I refer to the plaintiff using the plaintiff’s chosen pronoun as opposed to the pronoun chosen by the court.

³³ *Id.* at 568.

³⁴ *Id.* Smith’s transition to a more feminine self-presentation was “in accordance with international medical protocols for treating GID.” *Id.*

meeting to find a basis for terminating her employment.³⁵ Smith sued, alleging that it was a form of sex discrimination to penalize her for her failure to conform to masculine stereotypes.³⁶ The Sixth Circuit agreed and invoked the sex stereotyping prohibition to reverse the district court's dismissal of her claims.³⁷ As the court 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."³⁸

One year later, the Sixth Circuit affirmed a jury finding of sex discrimination in *Barnes v. City of Cincinnati*.³⁹ Philecia Barnes was a preoperative male-to-female transsexual who worked as a police officer in the Cincinnati Police Department.⁴⁰ She presented evidence at trial showing that she was denied a promotion to the position of sergeant because she violated masculine stereotypes.⁴¹ The jury ruled in Barnes's favor on her sex discrimination claim.⁴² 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 her failure to conform to masculine gender norms.⁴³

³⁵ The court noted that the Chief of the Fire Department and the Law Director of the City of Salem "arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment." *Id.* Shortly thereafter, Smith was suspended for one twenty-four hour shift due to an alleged infraction of department policy. *Id.* at 569.

³⁶ *Id.* at 572 ("[Smith's] complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave.").

³⁷ *Id.* ("Having 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.").

³⁸ *Id.* at 575.

³⁹ 401 F.3d 729, 747 (6th Cir. 2005).

⁴⁰ *Id.* at 733.

⁴¹ For example, during her probationary period, Barnes was told by a supervisor that she was not "sufficiently masculine." *Id.* at 738.

⁴² *Id.* at 735.

⁴³ *Id.* at 737-38. The Ninth Circuit has endorsed similar protection for transsexuals. *See Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that the Gender Motivated Violence Act parallels Title VII in prohibiting victimization of a transsexual because "the victim was a man who 'failed to act like' one"); *see also Kastl v. Maricopa Cnty. Comm. Coll. Dist.*, 325 F. App'x. 492, 493-94 (9th Cir. 2009) (explaining that "[a]fter *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 an employer's ban on a transsexual plaintiff's use of a women's restroom for safety reasons did not constitute sex discrimination).

Several district courts in other circuits have recognized similar protections for transsexual workers.⁴⁴ In *Creed v. Family Express Corp.*, the plaintiff, a preoperative 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.⁴⁵ In assessing the plaintiff's sex discrimination claim and denying the defendant's motion to dismiss, the court explicitly recognized sex stereotyping as the basis for such a claim.⁴⁶ 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."⁴⁷ 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."⁴⁸

⁴⁴ See, e.g., *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1299, 1305 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2001) (finding that the 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"); *Trevino v. Ctr. for Health Care Servs.*, No. 08-0140, 2008 WL 4449939, at *1 (W.D. Tex. Sept. 29, 2008) (determining that the plaintiff could state a claim for sex discrimination because she alleged discrimination under Title VII based on gender, not transsexualism); *Lopez v. River Oaks Imaging & Diagnostic Grp, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (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" (citation omitted)); see also *Lie v. Sky Publ'g Corp.*, No. 013117, 2002 WL 31492397, at *5 (Mass. Super. Ct. Oct. 7, 2002) ("The plaintiff [a preoperative male-to-female transsexual] contends that the defendant's conduct [requesting that the plaintiff wear only traditionally male attire at work and subsequently firing the 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.").

⁴⁵ No. 06-465, 2007 WL 2265630, at *1-2 (N.D. Ind. Aug. 3, 2007).

⁴⁶ *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.").

⁴⁷ *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.*

⁴⁸ *Id.* The court subsequently 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. *Id.* at *3. Certainly, real tension exists in the district court's opinion. It is unclear how the plaintiff, a transitioning male-to-female transsexual, could be protected from sex stereotypes while

In *Mitchell v. Axcan Scandipharm, Inc.*, the court likewise relied on sex stereotyping logic in denying the defendant's motion to dismiss the plaintiff's sex discrimination claim.⁴⁹ The plaintiff, a preoperative male-to-female transsexual, alleged that she was fired after she began to present as female in public.⁵⁰ The court explained that "[h]aving included facts showing that [her] 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."⁵¹

More recently in *Schroer v. Billington*, the District Court for the District of Columbia 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.⁵² The plaintiff, a male-to-female transsexual, applied for and was offered a job as a terrorism specialist

being punished for failing to satisfy her employer's grooming code for men. As this tension suggests, the courts' prohibition on sex stereotyping is complicated and nuanced in ways the courts themselves have not yet explicitly articulated.

⁴⁹ No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

⁵⁰ *Id.* at *1.

⁵¹ *Id.* at *2.

⁵² (*Schroer III*), 577 F. Supp. 2d 293, 305-06 (D.D.C. 2008). Although the court ultimately relied on the sex stereotyping theory in ruling for the plaintiff, it 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 [the opinion's] sweeping language suggests." *Schroer I*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) (ruling on the defendant's first motion to dismiss). The court noted that cases involving discrimination based on sexual orientation and those involving sex-based dress codes "partake in some measure of sex stereotyping, and yet the courts deciding them . . . have not clearly articulated what, if anything, distinguishes any of the 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.* 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 rather 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 212-13. After the court's initial ruling, Schroer amended her complaint to allege that her "non-selection resulted from [her supervisor's] reaction on seeing photographs of Schroer in women's clothing—specifically, that [the supervisor] believed that Schroer looked 'like a man in women's clothing rather than what she believed a woman should look like.'" *Schroer v. Billington (Schroer II)*, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) (ruling on the defendant's 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 [her supervisor's] sex stereotypical notions about women's appearance and behavior." *Id.* at 63.

with the Library of Congress while presenting herself as a man.⁵³ 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.⁵⁴ Shortly thereafter, the supervisor withdrew the offer, admitting at trial that “when she viewed the photographs of Schroer in traditionally feminine attire . . . she saw a man in women’s clothing.”⁵⁵ According to the court, this admission provided direct evidence that the Library’s decision “was infected by sex stereotypes.”⁵⁶

Neither the effeminate men nor the transsexual discrimination cases involve 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 these cases.

II. LIBERTARIANISM

The broadest reading of the sex stereotyping prohibition is that it is 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.

Pointing to the expansiveness of courts’ stereotyping rhetoric, several scholars have adopted this broad reading of the prohibition. Thomas Ling, for example, asserts that *Smith* guarantees to all individuals the right “to

⁵³ *Schroer I*, 424 F. Supp. 2d at 205-06.

⁵⁴ *Schroer III*, 577 F. Supp. 2d at 297.

⁵⁵ *Id.* at 305.

⁵⁶ *Id.* The *Schroer III* court found sex discrimination based both on its conclusion 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 court explained:

Ultimately, I do not think that 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.

control their own gender expression.”⁵⁷ Similarly, Johnny Lo contends that the *Smith* decision “preserve[s] liberty of self-identity in our 21st Century world.”⁵⁸

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.”⁵⁹ Highly gendered workplace performances continue to be demanded in a wide range of jobs—think, for example, of the kind of gender performance typically required of elementary school teachers and litigators. Courts have done nothing to protect workers from such demands.⁶⁰ Even more starkly antilibertarian is courts’ enforcement of employers’ sex-based grooming codes. Consider, for example, the Ninth Circuit’s enforcement in *Jespersen v. Harrah’s Operating Co.* of a requirement that female, but not male, bartenders wear makeup at work.⁶¹

Yet even as a 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

⁵⁷ Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 285 (2005).

⁵⁸ Johnny Lo, Case 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). For additional expressions of this view see Amanda Raflo, Comment, *Evolving Protections for Transgender Employees Under Title VII’s Sex Discrimination Prohibition: A New Era Where Gender is More Than Chromosomes*, 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 . . . gender nonconforming behavior is impermissible irrespective of the cause of the behavior, whether it be gender expression or affectional preferences”); and Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562-63 (2007) (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 court as a man who is insufficiently masculine, a woman who is insufficiently feminine, or someone who falls in between those seemingly binary categories”).

⁵⁹ Case, *supra* note 2, at 3.

⁶⁰ See generally Yuracko, *supra* note 2, at 15-16 (citing cases where courts deemed reasonable employers’ gender-normative workplace demands).

⁶¹ 444 F.3d 1104, 1107-08, 1113 (9th Cir. 2006) (en banc).

that are transient. Under this view, 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,⁶² not discrimination based on a whole host of other traits and attributes.⁶³ 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 of expression experienced by the actor as gender expressions that do not satisfy the category requirements.⁶⁴ 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 lies 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.

⁶² See *Ballance 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.”); *Smith v. City of Salem*, 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”).

⁶³ See 110 CONG. REC. 7212-13 (1964) (interpretive memorandum of Title VII submitted by Sens. Clark and Case) (“To discriminate is to make a distinction, to make a difference in treatment or favor and those distinctions or differences in treatment or favor which are prohibited . . . are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.”); 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.”).

⁶⁴ External criteria for identifying gender expressions are necessary. Two seem most plausible. Gender expressions might be defined by and limited to “standard” performances of 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 an external judge or expert. Scholars have argued for versions of both approaches to identity in the race context. See, e.g., Juan F Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994) (calling for revision of Title VII to make unlawful discrimination based on ethnicity, meaning “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 Piercing*, 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.”).

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 fail under Title VII. Title VII does not provide blanket protection for personal expression, even for 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 treatment⁶⁵—it only protects against treatment based on protected characteristics.⁶⁶

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 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 gender guidelines 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 hiring criteria.⁶⁷ Race and sex per se are not relevant to (though they may be highly correlated with) whether one

⁶⁵ By "job-irrational," I mean treatment that is not based on one's ability or inability to do a particular job. An employer's decision to refuse to hire anyone who shows up to an interview wearing green would, for example, be job-irrational and would not be prohibited by Title VII.

⁶⁶ See *supra* note 63.

⁶⁷ 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 (2006).

possesses the range of skills and attributes necessary for (almost all) jobs.⁶⁸ 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* prior to 9/11) expected by employers to be warm, friendly, helpful, and at least somewhat deferential to customers.⁶⁹ Elementary school teachers are expected to be nurturing, empathetic, and sensitive to children's needs.⁷⁰ They are also expected to be collegial and cooperative in their dealings with other teachers and administrators.⁷¹ 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.⁷²

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.⁷³ Debt collectors are expected, indeed encouraged,

⁶⁸ 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).

⁶⁹ See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 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) (“[F]light attendants’ friendliness takes the form of deference: their relationship to passengers is supportive and subordinate.”).

⁷⁰ See JIM ALLAN, *Male Elementary Teachers: Experiences and Perspectives*, in *DOING “WOMEN’S WORK”: MEN IN NONTRADITIONAL OCCUPATIONS* 113, 123-26 (Christine L. William ed., 1993) (“For even as [male elementary teachers interviewed in the author’s study] were expected to be male role models, they were simultaneously stereotyped as feminine—because of the kind of work they do.”).

⁷¹ See *id.* at 119 (“Since teaching on the elementary level requires a high degree of flexibility, collegiality, and cooperation, men who don’t ‘prove themselves,’ or don’t ‘get along,’ don’t get rehired.”).

⁷² See Pierce, *supra* note 69, at 86 (describing the “emotional labor” paralegals undertake in supporting the attorneys with whom they work and characterizing such labor as “feminized”).

⁷³ *Id.* 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.

to be aggressive and intimidating toward debtors.⁷⁴ Marines are celebrated for their “strength, aggressiveness, [and] emotional detachment.”⁷⁵

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.⁷⁶ 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.⁷⁷

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 for reasons independent of the fact that most elementary school teachers are female.⁷⁸ The same may hold true of the role demands for 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, in terms of the clothes and appearance they require. Construction and other forms of physical labor, for example, often require not just a kind of

⁷⁴ See Hochschild, *supra* note 69, at 1146 (describing that “open aggression was the official policy for wringing money out of debtors”).

⁷⁵ See CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 1 (1989).

⁷⁶ See Rosemary Pringle, *Male Secretaries*, in *DOING “WOMEN’S WORK”*, *supra* note 70, at 128, 132-33 (Christine L. Williams ed., 1993) (noting the emergence of a “sexual dynamic” in the relationship between secretaries and their bosses that “largely exclude[s] men from being defined as secretaries”); see also ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 70 (1977) (“The secretarial job involved the most routine of tasks in the white-collar world, yet the most personal of relationships.”).

⁷⁷ 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.

⁷⁸ It certainly may be 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 (of 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.

masculine strength, but also the adoption of masculine dress and grooming styles in order for these 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 coworker, 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 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.⁷⁹ It follows that if the trait-neutrality reading of the sex stereotyping prohibition is implausibly expansive, then the narrow libertarian principle is implausible as well.

⁷⁹ The narrow libertarian principle could be broader than the trait-neutrality principle in instances where 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 that would not be protected under the trait-neutrality principle if consistently prohibited for both sexes by the employer.

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 by 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.⁸⁰ 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.”⁸¹ Indeed, trait neutrality simply restates a conventional understanding of the sex discrimination prohibition that has been used in a range of contexts.⁸² 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 terminated from her job at a university library who claims that she was terminated because her employer found her manner of dress too “sexy.”⁸³ 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

⁸⁰ See Ling, *supra* note 57, at 285 (“*Smith* upturns rigid sex categories and allows both sexes to participate in the full range of gender expressions.”); Turner, *supra* note 58, 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”).

⁸¹ Case, *supra* note 2, at 7; see also Brief for *NOW Legal Defense and Education Fund and Equal Rights Advocates as Amici Curiae Supporting Plaintiff-Appellant*, *Lucas Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (No. 99-2309), reprinted in 7 MICH. J. GENDER & L. 163, 170 (2001) (interpreting the *Price Waterhouse* 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”).

⁸² 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 generally 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).

⁸³ See, e.g., *Goodwin v. Harvard Univ.*, No. 03-11797, 2005 WL 2148515 (D. Mass. Apr. 5, 2005); *Harvard Librarian Sues University*, N.Y. TIMES, Mar. 23, 2005, at A13.

incompetent and unintellectual.⁸⁴ 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.

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.⁸⁵ 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 probably open to disagreement.⁸⁶ 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?

Finally, one could compare the employer's treatment of women who dress in a sexy manner 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.

⁸⁴ See Peter 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).

⁸⁵ 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).

⁸⁶ 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.

The indeterminacy problem is particularly apparent in cases involving transsexuals. Imagine a preoperative 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?⁸⁷ Gender norms complicate cross-sex comparisons 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 work, then men must be permitted to do so as well,⁸⁸ 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, the discomfort of such gender bending would be too great. For them, compliance might instead take the form of highly circumscribed gender codes confined to a banal androgynous core. Discomfort with gender bending would be minimized, but

⁸⁷ Several courts have struggled with the problem of appropriate cross-sex comparators in transsexual discrimination cases. See *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, at *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, shoes, 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 n.4 (D. Kan. 1995) (explaining that in order to evaluate a plaintiff's sex discrimination claim, the court would have to compare the treatment of the plaintiff as a male-to-female transsexual with the treatment of a female-to-male transsexual).

⁸⁸ Case, *supra* note 2, at 7.

at the cost of a loss of freedom for gender conformists and nonconformists alike.⁸⁹

Perhaps not surprisingly, courts have not interpreted the sex stereotyping prohibition to require trait neutrality of this formalistic sort.⁹⁰ After *Price Waterhouse*, as before, courts have routinely upheld sex-specific grooming codes such as those requiring that men but not women wear their hair short⁹¹ and those requiring that men but not women refrain from wearing earrings.⁹² Similarly, in *Jespersen* the court paid lip service to the

⁸⁹ 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, 198-204 (2004).

⁹⁰ 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 v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (“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* 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.”).

⁹¹ See, e.g., *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (per curiam) (holding that a male employee terminated for not complying with the employer’s hair-length requirement for men could not state a claim for sex discrimination); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (affirming that “[e]mployer grooming codes requiring different hair lengths for men and women” are not a violation of Title VII); *Earwood v. Cont’l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) (finding hair-length regulation to not be a violation of Title VII, in part because hair length is not an immutable characteristic); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) (holding that “requiring short hair on men and not on women does not violate Title VII”); *Knott v. Mo. Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (finding that an employer’s grooming requirements did not constitute sex discrimination because the policies were “reasonable” and “evenhanded”); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (holding that a male plaintiff’s allegation of dismissal on the basis of hair length was not sex discrimination as hair length is neither immutable nor a protected characteristic); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974) (holding that an employer may impose standards of grooming on males that are inapplicable to females); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (“We do not believe that Title VII was intended to invalidate grooming regulations which have no significant effect upon the employment opportunities afforded one sex in favor of the other.”).

⁹² See, e.g., *Kleinsorge v. Eyeland Corp.*, No. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000) (agreeing with other federal courts that a grooming code allowing female but not male employees to wear earrings did not violate Title VII); *Capaldo v. Pan Am. Fed. Credit Union*, No. 86-1944, 1987 WL 9687, at *2-3 (E.D.N.Y. Mar. 30, 1987) (determining that an allegedly unwritten grooming code prohibiting men but not women from wearing earrings does not constitute sex discrimination); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 804 (Iowa 2003) (“Personal grooming codes that reflect customary modes of grooming having only an insignificant impact on employment opportunities do not constitute sex discrimination within the meaning of [Title VII].”); *MacIssac v. Remington Hospitality, Inc.*, No. 03-1015, 2004 WL 1541807, at *2 (Mass. App. Ct. July 9, 2004) (affirming a lower court judgment that enforcement of a grooming code prohibiting male but not female employees from wearing earrings did not constitute sex

prohibition on sex stereotyping, but did not interpret it to demand formal gender neutrality in any literal sense.⁹³ Jespersen could be fired for not wearing makeup even though male employees were permitted—indeed required—to not wear makeup.⁹⁴

Reading the prohibition on sex stereotyping as a demand for trait neutrality may seem appealing because it maps easily 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. Such neutrality in practice would 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 into which workers fall. 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.⁹⁵

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.⁹⁶ 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.⁹⁷ In *Schroer*, the plaintiff was a male-to-female transsexual who was offered a position while expressing a masculine

discrimination); *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 604 (Or. Ct. App. 1990) (holding that a grooming code prohibiting male but not female employees from wearing facial jewelry did not constitute sex discrimination).

⁹³ *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc).

⁹⁴ *Id.* at 1107. Indeed, it is likely that a man would have been fired for wearing makeup, as this was in violation of the “Personal Best” guidelines for men.

⁹⁵ For a reading of the sex stereotyping prohibition consistent with this approach, see *Gilden*, *supra* note 9, at 99. *Gilden* notes that “[w]hether 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.” *Id.*

⁹⁶ *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

⁹⁷ *Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (6th Cir. 2005).

gender identity and was subsequently denied the position when she told her supervisor that she would be expressing a feminine gender identity on the job.⁹⁸ 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 into which workers fall can explain courts’ protection of such plaintiffs.

The category-neutrality reading can also explain courts’ often heavy reliance in the transsexual cases on medical evidence regarding 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.”⁹⁹ The court went on to explain that when Smith “began expressing a more feminine appearance on a full-time basis” she did so “in accordance with international medical protocols for treating GID.”¹⁰⁰

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.¹⁰¹ The expert testified that Schroer had GID and that she “has a female gender identity and is a woman.”¹⁰² The result of such testimony was the court’s confident assertion 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.”¹⁰³

Similarly, in *Doe v. Yunits*, a case involving a claim of sex discrimination in education, rather than employment, the court referenced testimony from

⁹⁸ *Schroer III*, 577 F. Supp. 2d 293, 295-99 (D.D.C. 2008).

⁹⁹ *Smith*, 378 F.3d at 568.

¹⁰⁰ *Id.* (internal quotation marks omitted)

¹⁰¹ Expert Report of Martha L. Harris, LCSW at para. 22(b), *Schroer I*, 424 F. Supp. 2d 203 (D.D.C. 2006) (No. 05-01090), 2006 WL 4517048 [hereinafter Harris Report].

¹⁰² *Id.* at para. 22(a). 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. Expert Report of Walter O. Bocking, PhD at paras. 13-32, *Schroer I*, 424 F. Supp. 2d 203 (No. 05-01090), 2006 WL 4517046 [hereinafter Bocking Report]. 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. Expert Report of Chester W. Schmidt, Jr., MD at paras. 5-8, *Schroer I*, 424 F. Supp. 2d 203 (No. 05-01090), 2006 WL 4517051.

¹⁰³ *Schroer III*, 577 F. Supp. 2d at 295.

Doe's treating psychologist, a professor of social work with expertise on transgendered children, in assessing Doe's likelihood of success on the merits of her sex discrimination claim.¹⁰⁴ Doe was a fifteen-year-old student who, although biologically male, began wearing "girls' make-up, shirts, and fashion accessories to school."¹⁰⁵ When she arrived at school in girls' apparel, the principal would often send her home to change.¹⁰⁶ The following year, the principal instructed Doe, then an eighth grader, to come by his office every day so that he could approve her appearance. The principal would send Doe home when he found her appearance to be too feminine.¹⁰⁷ At the start of the following year, when Doe was to repeat eighth grade due to her many absences, the principal told Doe that she "would not be permitted to enroll if she wore any girls' clothing or accessories."¹⁰⁸ Doe sued for sex discrimination under the Massachusetts Constitution and also filed a motion for preliminary injunction.¹⁰⁹

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."¹¹⁰ 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."¹¹¹ 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."¹¹² In other words, the school could force Doe to comply with a sex-specific gender code, but it could not force her into the

¹⁰⁴ No. 00-1060-A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

¹⁰⁵ *Id.* at *1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *2.

¹⁰⁹ 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. *Id.* at *7.

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.

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.* at *6.

¹¹² *Id.* at *6 n.6.

wrong gender category. Medical evidence was critical to determining the right category.

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. School Board of Hillsborough County*,¹¹³ 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 GID or that she 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.¹¹⁴ As the Ninth Circuit stressed, Jespersen objected to the makeup requirement because "wearing it would conflict with her self image."¹¹⁵ 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.¹¹⁶

Consider as well the case of *Youngblood v. School Board of Hillsborough County*.¹¹⁷ Nikki Youngblood was a seventeen-year-old high school senior in Hillsborough County, Florida who objected to wearing a scoop neck drape for her senior yearbook picture.¹¹⁸ Youngblood wore a shirt and tie to her senior photo and was told that the school's dress code for the yearbook photos required that all girls wear a "velvetlike, scoop-neck drape."¹¹⁹ Youngblood refused to wear the drape and the school left her picture out of

¹¹³ No. 02-1089-24 (M.D. Fla. Sept. 24, 2002) (order granting motion to dismiss).

¹¹⁴ 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.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

¹¹⁵ *Id.* at 1108. Jespersen also stated that the makeup requirement undermined her "self-dignity." *Id.*

¹¹⁶ *Id.* at 1113.

¹¹⁷ *Youngblood*, No. 02-1089-24 (M.D. Fla. Sept. 24, 2002) (order granting motion to dismiss).

¹¹⁸ *See id.* at 1; *see also* Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 7 (Paisley Currah et al. eds., 2006).

¹¹⁹ *See* Currah, *supra* note 115.

the yearbook.¹²⁰ Youngblood sued for sex discrimination and lost. Indeed, the court held that she was not even able to state a claim.¹²¹

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 GID. Instead, they could only "describe [Youngblood's] aversion to feminine clothing as 'deepseated' and 'longlasting.'"¹²² Yet, for the court, such testimony—unsupported as it was by medical evidence or clear diagnosis—was insufficient to establish any legal right.¹²³

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, but it cannot 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*,¹²⁴ *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹²⁵ and *Rene v. MGM Grand Hotel, Inc.*¹²⁶ In *Doe*, the plaintiffs were two sixteen-year-old brothers who were taunted because their older male coworkers perceived them to be effeminate.¹²⁷ In *Nichols*, the plaintiff was a man whose male coworkers referred to him using female pronouns and mocked him for walking and carrying his serving tray "like a woman."¹²⁸ Similarly, in *Rene*, the plaintiff

¹²⁰ *Id.*

¹²¹ *See id.* 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 senior portraits.'").

¹²² *Id.* at 10 (quoting plaintiff's Appeal of a Final Order of the District Court for the Middle District of Florida at 2-3, *Youngblood v. Hillsborough Cnty. Sch. Bd.*, No. 02-15924 (11th Cir. May 5, 2003)).

¹²³ As Paisley Currah has noted, the ruling in *Youngblood*:

depended on and reproduced the same commonsense 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 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.

Id. at 11-12.

¹²⁴ 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

¹²⁵ 256 F.3d 864 (9th Cir. 2001).

¹²⁶ 305 F.3d 1061 (9th Cir. 2002) (en banc).

¹²⁷ 119 F.3d at 566-67.

¹²⁸ 256 F.3d at 870 (internal quotation marks omitted).

was a gay man whose male coworkers teased him because of the way that he walked, referred to him using female terms of endearment, and touched him in sexual ways.¹²⁹ None of these plaintiffs was a man seeking to become, or claiming to be, a woman. None challenged sex-specific grooming codes.¹³⁰ Instead, all were men 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 alleged harassment violated Title VII's prohibition on sex stereotyping.¹³¹ 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 implicates some of the same conceptual problems raised by 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 as a biological woman, and when is she occupying some third gender category?¹³² Indeterminacy in naming what the plaintiff is doing leads, as it did with the trait-neutrality requirement, to indeterminacy in assessing whether neutrality is violated or achieved.

Perhaps courts' focus in applying the sex stereotyping prohibition is not on avoiding the narrow harm of gender miscategorization, but on avoiding the more general harm of highly burdensome gender demands that make workplace participation for some workers particularly difficult. In the next Part, I suggest that, while not doing so explicitly, courts have in fact

¹²⁹ 305 F.3d at 1064.

¹³⁰ One of the brothers in *Doe*, H., did wear an earring, which seemed 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 any formal and informal dress and grooming codes applied to men in these workplaces.

¹³¹ *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring) (“[T]his is a case of actionable gender stereotyping harassment.”); *Nichols*, 256 F.3d at 874-75 (“*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here.”); *Doe*, 119 F.3d at 581 (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”).

¹³² This question of whether a cross-dressing plaintiff occupies a conventional gender category or some new category was a critical one for the court in *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, at *5 (E.D. La. Sept. 16, 2002) (finding the plaintiff had not failed to conform to a gender stereotype, but rather “disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity”).

adopted a burden-shifting framework for analyzing and applying the sex stereotyping prohibition, with the compliance costs for the plaintiff being the prime trigger for switching the evidentiary burden to the employer.

V. BURDEN SHIFTING

It may be that the sex stereotyping prohibition in practice reflects not a discrete principle, but instead a process for evaluating employee challenges to gender conformity demands. In assessing a claim, courts first look to see how burdensome the conformity demand is for the plaintiff. Only if a threshold level is reached does a presumption of impermissibility attach. Even then, however, the presumption can be overcome if the employer can show a business justification for the demand. Although never stated explicitly, the sex stereotyping prohibition operates, in effect, as a burden-shifting framework.

While a violation of neither gender freedom nor neutrality *alone* triggers protection from a conformity demand under the sex stereotyping prohibition, both factors contribute to the overall burdensomeness of a conformity demand, and hence may play a role in the burden-shifting framework. It certainly did matter to the Sixth Circuit in *Smith*, for example, that the behavior for which the plaintiff sought protection was recognized by the court as a conventional expression of gender.¹³³ Had Smith sought protection for some entirely idiosyncratic form of personal expression—like wearing a Barney costume—she certainly would have lost. The fact that gender expression is at stake matters. It may help the plaintiff reach the threshold needed for protection, but it simply does not get the plaintiff there on its own.

The fact that a plaintiff is using the sex stereotyping prohibition to redress nonneutral treatment is likewise significant. 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 challenged grooming code 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.

The factor that seems most critical to whether the employee reaches the threshold necessary to raise a presumption of illegality is the one about

¹³³ See *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2001) (noting that Smith "began 'expressing a more feminine appearance' at work and was challenged by coworkers because her 'appearance and mannerisms were not 'masculine enough'").

which courts have been least explicit—namely, the level of difficulty for the plaintiff to comply with the gender demand at issue. High compliance costs—physical, emotional, or professional¹³⁴—seem essential to reaching the threshold level necessary to shift the evidentiary burden. When compliance with a gender demand is very difficult for an employee, the presumption of illegality attaches. Plaintiffs then win protection unless the employer is able to name a business justification of some special weight.¹³⁵ When compliance with a gender demand appears easy or trivial, the threshold is not met, and courts never even look to see whether the employer has a business justification for the conformity demand.

Courts' concern with 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 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*, where the court relied on expert medical testimony to conclude that forcing the plaintiff to come to school in boys' clothes would actually "endanger her psychiatric health."¹³⁶ Moreover, the medical evidence helped the court to distinguish *Doe* from *Harper v. Edgewood Board of Education*¹³⁷ 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. *Doe*, the *Yunits* court emphasized, in contrast to Harper, "is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity . . ."¹³⁸ As such, the costs of compliance for *Doe*, with her school's gender conformity demands, were significantly higher, and it was these costs that were critical to her ultimate victory.

Medical evidence appeared to play a similar role in *Smith*. *Smith*, the court emphasized, suffered from Gender Identity Disorder. Her female gender expression, through dress and grooming, was part of the accepted

¹³⁴ A gender conformity demand would be professionally difficult for the plaintiff to comply with if it conflicted with actual job demands. This situation would capture the narrow set of double-bind cases with fact patterns similar to that in *Price Waterhouse*.

¹³⁵ By some "special" weight, I mean some justification beyond a generalized desire for comfort on the part of the employer and its customers.

¹³⁶ No. 00-1060, 2001 WL 664947, at *6 (Mass. Super. Ct. Feb. 26, 2001).

¹³⁷ 655 F. Supp. 1353, 1356 (S.D. Ohio 1987).

¹³⁸ *Doe v. Yunits*, No. 001060, 2000 WL 33162199, at *6 n.5 (Mass. Super. Ct. Oct. 11, 2000) (granting the plaintiff's motion for a preliminary injunction).

medical treatment of her condition.¹³⁹ 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.¹⁴⁰

Likewise in *Lie v. Sky Publishing Corp.*,¹⁴¹ 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.¹⁴² 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.¹⁴³

Again, it was plaintiff's lack of control over her own noncompliance that seemed critical to Lie's ultimate protection.

A burden-shifting framework can explain not only transsexuals' recent victories, but also the one type of case that 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 burden-shifting framework. 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. Although the transsexual plaintiffs are able to show compli-

¹³⁹ *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

¹⁴⁰ 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.")

¹⁴¹ 15 Mass. L. Rptr. 412 (Super. Ct. 2002).

¹⁴² *Id.* at 413.

¹⁴³ *Id.*

ance costs necessary to establish a presumption of illegality, employers in the bathroom cases are able to rebut the presumption and avoid liability by raising concerns about coworker and customer privacy.

Consider, for example, *Etsitty v. Utah Transit Authority*.¹⁴⁴ Etsitty was a preoperative male-to-female transsexual who had been diagnosed with GID.¹⁴⁵ At the time Etsitty began working as a bus operator with the Utah Transit Authority (UTA) she presented herself as a man.¹⁴⁶ Soon thereafter, however, Etsitty informed her employer that she was transsexual and would begin to present as female at work and to use female restrooms while on her route.¹⁴⁷ The UTA terminated Etsitty explaining that it was unable to “accommodate her restroom needs.”¹⁴⁸ Etsitty sued for sex discrimination and lost.¹⁴⁹ The Tenth Circuit affirmed the lower court’s grant of summary judgment for the defendants on plaintiff’s sex discrimination claim.¹⁵⁰

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.¹⁵¹ 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 the plaintiff’s gender expression in this way.¹⁵² The court’s reference in *Etsitty* to a “prima facie” case is strange, but revealing. The language nominally tracks the burden-shifting framework from *McDonnell Douglas*,¹⁵³ which was designed to help courts identify the true reason behind the employer’s adverse employment action. In *Etsitty*, however, there was no dispute over the reason for the employer’s decision. It was clear that the employer made its decision about bathroom usage because of Etsitty’s sex. The *Etsitty* court’s use of *McDonnell Douglas*-type language does suggest, however, that it is using a similar burden-shifting framework to determine liability, albeit with different underlying evidentiary assessments at stake. Even though the UTA had not received any complaints about Etsitty’s bathroom usage,¹⁵⁴ the

¹⁴⁴ 502 F.3d 1215 (10th Cir. 2007).

¹⁴⁵ *Id.* at 1218.

¹⁴⁶ *Id.* at 1219.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1219-20

¹⁵⁰ *Id.* at 1228.

¹⁵¹ *Id.* at 1218.

¹⁵² *Id.* at 1224.

¹⁵³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden . . . of establishing a prima facie case of . . . discrimination.”).

¹⁵⁴ *Etsitty*, 502 F.3d at 1226.

UTA's "legitimate" concerns about potential liability from having a biological male use women's public restrooms justified its prohibition on her doing so and overcame any presumption of illegality.¹⁵⁵ In terms of outcome, the *Etsitty* ruling is typical. Preoperative transsexual plaintiffs routinely lose sex discrimination cases in which they challenge their employers' bathroom assignments.¹⁵⁶

It is worth emphasizing how 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*,¹⁵⁷ as well as

¹⁵⁵ *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 users.

¹⁵⁶ See *Johnson v. Fresh Mark, Inc.*, 98 F. App'x 461, 462 (6th Cir. 2004) (per curiam) (affirming without explanation the district court's dismissal of a female transsexual worker's Title VII sex discrimination claim based on the employer's requirement that she use the men's rather than the women's restroom); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. 02-1531, 2006 WL 2460636, at *6 (D. Ariz. Aug. 22, 2006) (granting the defendant's motion for summary judgment on a male-to-female transsexual worker's claim of sex discrimination stemming from her 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). *But see* *Michaels v. Akal Sec., Inc.*, No. 09-01300, 2010 WL 2573988, at *4 (D. Colo. 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 pleaded pretext to survive a motion to dismiss). Bathroom discrimination claims brought under state statutes prohibiting sexual orientation discrimination have been similarly unsuccessful. See *Goins v. W. Grp.*, 635 N.W.2d 717, 722-23 (Minn. 2001) (holding that an employer's requirement that a male-to-female transsexual use only a unisex restroom rather than the 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" (quoting MINN. STAT. § 363.01 (2000)). This provision of the Minnesota Human Rights Act has been renumbered as § 363A.03. See MINN. STAT. ANN. § 363A.03 (West 2008).

Certainly these are not the first cases in which courts have subordinated employees' anti-discrimination 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 coworkers. See *Yuracko*, *supra* note 68, at 156-57.

¹⁵⁷ Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009).

Anna Kirkland, in her book *Fat Rights*,¹⁵⁸ 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 men who simply like to wear women's clothes and reduces the protection they seek to mere protection for cross-dressing. Glazer and Kramer, for example, argue that under the court's approach in *Smith*, "Smith's reasons 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."¹⁵⁹ 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."¹⁶⁰

In contrast, I argue that transsexuals are successful 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 compliance with sex-based gender norms would be particularly painful and difficult for them.¹⁶¹ Such evidence of pain creates a presumption of illegality and switches the burden of proof to the employer.

Indeed, the burden-shifting framework helps explain why transsexuals are succeeding in their challenges to sex-based grooming requirements while

¹⁵⁸ ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008).

¹⁵⁹ Glazer & Kramer, *supra* note 157, at 666.

¹⁶⁰ KIRKLAND, *supra* note 158, at 86; see also Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination?*, 32 SIGNS 83, 94 (2006) ("The [*Smith*] case reduces the story of gender oppression to a story about stereotypes and makes [male-to-female transsexuals] into men who wear dresses and makeup.")

¹⁶¹ The instrumental importance of medical evidence in these cases has not been lost on transsexual advocates. See Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1758 (2002) (noting that "[t]he explanation of transgender identities in medical and diagnostic terms is common throughout the case law, even in cases that do not deal specifically with sex-reassignment surgery 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 to highlight for the court "the essentialism of gender identity and its inelasticity for a specific individual"); Romeo, *supra* note 9, at 733 ("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.").

nontranssexuals are not. Under a burden-shifting framework, non-transsexual gender benders lose precisely because courts view the burden of the conformity demands imposed on them as trivial. They do not reach the threshold level necessary even to warrant a response or justification by their employer. In *Pecenka v. Fareway Stores, Inc.*, for example, the Iowa Supreme Court upheld an employer's right to terminate a male employee for refusing to remove his ear stud; it emphasized that the requirement was one with which the employee could easily comply.¹⁶² "Wearing an ear stud is not an immutable characteristic," the court noted.¹⁶³ "Pecenka can remove his ear stud or cover it with a bandage."¹⁶⁴ 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."¹⁶⁵ "[D]iscrimination based on factors of personal preference" the court explained, "do not necessarily restrict employment opportunities and thus are not forbidden."¹⁶⁶ In *Jespersen* as well, the court seemed to belittle the burden of the makeup requirement on Jespersen by emphasizing that compliance, or lack thereof, was simply a matter of personal choice.¹⁶⁷ According to the court, Jespersen's desire not to wear makeup was based on her "subjective reaction"¹⁶⁸ and desire "to be true to herself and to the image that she wishe[d] to project to the world."¹⁶⁹

¹⁶² 672 N.W.2d 800 (Iowa 2003).

¹⁶³ *Id.* at 805.

¹⁶⁴ *Id.* The court also emphasized that the employer's male-only earring ban did not reinforce women's or men's subordination in the workplace. The court noted that Pecenka did not "contend that the unwritten personal grooming code perpetuates a sexist or chauvinistic attitude in employment that significantly affects his employment opportunities." *Id.*; see also *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 603 (Or. Ct. App. 1990) (upholding a 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" (quoting *Albertson's, Inc. v. Wash. Human Rights Comm'n*, 544 P.2d 98, 100 (Wash. Ct. App. 1976))).

¹⁶⁵ 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998).

¹⁶⁶ *Id.* at 1256. The *Austin* court also emphasized that the sex-specific grooming requirement at issue did not raise antistatutory-oriented concerns. See *id.* ("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" (citation omitted)).

¹⁶⁷ See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) (refusing to extend Title VII's prohibition on sex stereotyping to "every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image").

¹⁶⁸ *Id.* at 1113.

¹⁶⁹ *Id.* at 1112.

Unlike the category-neutrality reading, the burden-shifting framework 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 particular gender expectations. As a result, such plaintiffs would not 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 discrete trait that they can easily change. Instead, they are harassed because of how they walk, talk, and stand—traits that are largely unconscious and difficult to alter. Moreover, employers in such cases do not claim a business need for enforcing masculinity.

Consider, for example, the harassment suffered by Antonio Sanchez in *Nichols v. Azteca Restaurant Enterprises, Inc.*¹⁷⁰ Sanchez, a food server, was harassed for “walking and carrying his serving tray ‘like a woman.’”¹⁷¹ Whatever it was about Sanchez’s movement that made Sanchez’s coworkers refer to him as “she” and “her”¹⁷² was not susceptible to easy identification or a quick fix. Indeed, the harassers themselves would 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. Changing one’s comportment and mannerisms 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*.¹⁷³ H. Doe was subjected to repeated physical and verbal harassment focused on his inadequate masculinity.¹⁷⁴ Certainly, H. Doe’s earring was a focal point of harassment.¹⁷⁵ Yet it is unlikely that the harassment would have ceased, or never started, if H. Doe had simply removed the earring.¹⁷⁶ The harassment was prompted not by a discrete, easily identifiable action on H. Doe’s part. It was prompted and driven by the

¹⁷⁰ 256 F.3d 864, 869-71 (9th Cir. 2001).

¹⁷¹ *Id.* at 870.

¹⁷² *Id.* (quotation marks omitted).

¹⁷³ 119 F.3d 563 (7th Cir. 1997), *vacated*, 532 U.S. 1001 (1998).

¹⁷⁴ *Id.* at 566-67. 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.* (internal quotation marks omitted).

¹⁷⁵ *Id.*

¹⁷⁶ Indeed, H.’s brother J. was also harassed, albeit less severely, despite not wearing an earring. *See id.* (describing incidents of harassment of J., including being referred to as “fat boy”).

gestalt of how H. Doe presented himself—the way in which he occupied and moved his body.¹⁷⁷ As with Sanchez, identifying what exactly it was about H. Doe's self-presentation, much less getting H. Doe to change it, would likely be impossible.¹⁷⁸

This reading of the sex stereotyping prohibition as establishing a burden-shifting framework for analyzing claims is certainly more modest than courts' rhetoric suggests, yet it has real explanatory power. The prohibition-as-burden-shifting framework provides the most comprehensive and coherent account of how the sex stereotyping prohibition currently operates. With this model in mind of how the prohibition works in practice, rather than in theory, I turn in the next Part to the likely legal and cultural implications of the sex stereotyping prohibition at work.

VI. IMPLICATIONS

Certainly, prohibiting sex stereotyping through a burden-shifting framework will not, as some scholars have hoped, lead to an end of 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 compliance relatively easy for workers. Employees may win protection from such demands only when courts believe that compliance is particularly burdensome.

In practice this means that those to whom I refer 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 conformity with others—will (continue to) lack protection. Male workers who are generally comfortable with their masculinity will not be 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

¹⁷⁷ 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[;]” rather, he sued because “his gender had something to do with the harassment heaped upon him.” *Id.* at 582.

¹⁷⁸ 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 “[q]uite possibly . . . were engaging in subversive judging—namely, enacting a minor rebellion against the Congressional refusal to provide any protection against sexual orientation discrimination.” Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 137 (Joel Wm. Friedman ed., 2006).

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 non-compliance 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, is that the burden-shifting framework may actually reinforce gender stereotypes and encourage highly stereotypical behavior in the workplace. Given the courts' 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 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 expression of the opposite sex gender.

This pressure to overperform 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 gender script, including stories of childhood participation in stereotypically gender-inappropriate behavior,¹⁷⁹

¹⁷⁹ 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."). Spade further notes that

[t]he diagnostic criteria for GID produces a fiction of natural gender in which normal, non-transsexual people grow up with minimal to no gender trouble or exploration, do not crossdress as children, do not play with the wrong-gendered toys, and do not like the wrong kinds of toys and characters. This story is not believable.

Id. at 25. The DSM-IV-TR characterizes "boys" with GID as those who "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" DSM-IV-TR, *supra* note 5, at 576. The DSM-IV-TR characterizes "girls" with GID as those who "display intense negative reactions to parental . . . attempts to have them wear dresses, . . . prefer boys' clothing and short hair," are interested in "contact sports, [and] rough-and-tumble play."). DSM-IV-TR, *supra* note 5, at 576-77.

evidence of “a strong and persistent cross-gender identification”¹⁸⁰ and “the ability to inhabit and perform the new gender category ‘successfully.’”¹⁸¹ The diagnosis pressures transsexuals to downplay or reject aspects of their gender identity that conform readily to their biological sex. As Franklin Romeo 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 of gender 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 experiences of a great number of gender nonconforming people, and fail to recognize the complexity of experiences among gender transgressive people.¹⁸²

Transsexual workers are pushed to play the part of highly stylized men and women even if they would be more comfortable with mixed or ambiguous gender packages.¹⁸³

The pressure faced by nontranssexual workers is similar, though less obvious. Under a burden-shifting approach, a plaintiff seeking protection for gender-nonconforming conduct must convince a court that abandoning

¹⁸⁰ DSM-IV-TR, *supra* note 5, at 576. Such an identification “must not merely be a desire for any perceived cultural advantages of being the other sex.” *Id.*

¹⁸¹ Spade, *supra* note 179, at 26. Spade is critical that “success” necessarily means adherence to established gender norms. *Id.* For a female-to-male transsexual, tips for successful performance of masculinity

focus on an adherence to traditional aesthetics of masculinity, warning [female-to-male transsexuals] 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, thereby discouraging gender disruptive behavior.

Id. at 27 (describing the work of Judith Halberstam in her article, *Transgender Butch: Butch/FTM Border Wars and the Masculine Continuum*, 4 GAY & LESBIAN Q. 287 (1998)).

¹⁸² Romeo, *supra* note 9, at 731.

¹⁸³ 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.”).

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 makeup requirement for female bartenders. Under a burden-shifting test, Jespersen would need to convince the court that compliance with the rule would be psychically, if not physically, painful for her. Transgender advocates in fact made precisely this argument 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] own innate identity and sense of self" and was "a serious, invasive, and demeaning experience and may be as debilitating to an individual as being subjected to sexual or gender-based harassment."¹⁸⁴ The court was unconvinced and instead treated Jespersen's desire to leave her face makeup-free as simply a matter of personal preference.¹⁸⁵ The court's skepticism may have stemmed in part from Jespersen's failure to object to any of the other feminine grooming requirements Harrah's imposed on her. Had Jespersen objected to all of Harrah's feminine grooming requirements and instead consistently sought to present herself according to Harrah's masculine grooming code, the court might have viewed her opposition to makeup with a bit more respect. Certainly, such an unyielding position

¹⁸⁴ Brief for Nat'l Ctr. for Lesbian Rights & Transgender Law Ctr. as Amici Curiae Supporting Plaintiff-Appellant, at 12, *Jespersen v. Harrah's Operating Co.*, 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.

Id. at 11-12.

¹⁸⁵ See *Jespersen*, 444 F.3d at 1112 ("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.").

would have approached that of the plaintiffs in *Smith* and *Yunits*, both of whom were granted gender nonconformity protection.

Indeed, the burden-shifting framework, with its high threshold for protection, not only encourages a particular kind of gender performance, it actually reinforces 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 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.¹⁸⁶ Certainly, it is possible that narratives about how transsexuals experience gender may be erroneous or, at least, too narrow.¹⁸⁷ Nonetheless, once

¹⁸⁶ See Randi Ettner, *The Etiology of Transsexualism*, in PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 1, 9 (Randi Ettner et al. eds., 2007) (asserting that “the 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” and noting that “[i]t is conceivable that this dichotomy is just the tip of the iceberg and holds also true for many other sexually dimorphic brain areas”); see also GEND. IDENTITY RESEARCH & EDUC. SOC’Y, DEFINITION & SYNOPSIS OF THE ETIOLOGY OF GENDER VARIANCE 3 (July 18, 2009), available at <http://www.gires.org.uk/assets/Research-Assets/etiology.pdf> (hypothesizing that “hormones significantly influence” the “dimorphic development” of gender though noting that “the exact mechanism is incompletely understood”); GEND. IDENTITY RESEARCH & EDUC. SOC’Y, GENDER VARIANCE (DYSPHORIA) 4 (Aug. 31, 2008), available at <http://www.gires.org.uk/assets/gdev/gender-dysphoria.pdf> (discussing how “[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”).

¹⁸⁷ See, e.g., LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL 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 13 (1997) (“Under the broad label of *transpeople* . . . —there is an extraordinarily rich and vibrant diversity.”); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 332-33 (1999) (“Transsexuals vary widely in their embrace or rejection of a specific ‘transsexual identity,’ and in the creative manner in which they combine or separate that identity, gender identity (whether they consider themselves ‘men’ or ‘women’), and sexual orientation identity. Those writings about transsexuality are similarly varied in their characterization of the phenomenon.”); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280, 296 (Julia Epstein & Kristina Straub eds., 1991) (“To foreground the practices of inscription

courts rely on a particular medicalized conception of transsexualism, that understanding becomes entrenched in law and society more generally.¹⁸⁸ As a result, those who do not experience transsexualism in the traditionally prescribed ways will either be (newly) pathologized or discredited. Either way, they are likely to be excluded from the current antidiscrimination framework.¹⁸⁹ Those who seek to avoid such exclusion must articulate, if not actually experience, their gender in the ways courts say that they do.¹⁹⁰

Courts' reliance on the prevailing medical narrative about transsexualism reifies not only transsexualism, but also gender more generally.¹⁹¹ Specifically, when medical experts testify that a plaintiff suffers from GID, they

and reading which are part of this deliberate invocation of dissonance, I suggest constituting transsexuals not as a class or problematic 'third gender,' but rather as a *genre*—a set of embodied texts whose potential for *productive* disruption of structured sexualities and spectra of desire has yet to be explored.”); Vade, *supra* note 183, at 260 (“[S]ome 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 [as] trans or boy-girl, just to name a few.”).

¹⁸⁸ For a general discussion of the effect of such categorization in antidiscrimination law, see Grenfell, *supra* note 9, at 52 (“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 . . .”).

¹⁸⁹ Academics have taken note of this trend. See, e.g., Gilden, *supra* note 9, at 103 (“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.”).

¹⁹⁰ 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.

Vade, *supra* note 183, at 256. 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, 735-36 (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”).

¹⁹¹ Cf. Gilden, *supra* note 9, 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.”).

are saying something not only about transsexualism but about femininity and masculinity more generally.¹⁹²

Consider, for example, the court's effort in *Doe v. Yunits* to translate the documented medical evidence about transsexualism into "non-medical terminology."¹⁹³ According to the court, a diagnosis of GID signifies that "Doe has the soul of a female in the body of a male."¹⁹⁴ Having the soul of a female meant that Doe needed to wear stereotypically female clothing,¹⁹⁵ and that coming to school in boys' clothing would "endanger her psychiatric health."¹⁹⁶ While Doe made this latter contention and did not need to prove it 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."¹⁹⁷

In *Schroer*, the plaintiff presented testimony from two expert witnesses. The first was a medical doctor and the second was a licensed social worker who served as Schroer's treating therapist during her transition. The medical doctor testified that "gender identity can be viewed as the sex of the brain, which, once established, cannot be changed."¹⁹⁸ Transsexuals, he explained, "experience incongruence between their sex assigned at birth and their gender identity."¹⁹⁹ 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."²⁰⁰ The therapist explained that she had reached her conclusion by "continually assess[ing] [Schroer's] female

¹⁹² See Keller, *supra* note 187, at 353 ("The 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."); Levi, *supra* note 190, at 736 (describing the "classic description" of transsexuals as "being trapped in the 'wrong body'"); Vade, *supra* note 183, at 285 ("Transgender people often are defined as 'having a mismatch of gender and sex.'").

¹⁹³ No. 00-1060, 2001 WL 664947, at *1 (Mass. Super. Ct. Feb. 26, 2001) (denying in part defendants' motion to dismiss).

¹⁹⁴ *Id.* Similarly, in ruling on a motion for preliminary injunction in the *Doe v. Yunits* litigation, the court asserted that the "[p]laintiff has been diagnosed with gender identity disorder, which means that, although plaintiff was born biologically male, she has a female gender identity." *Doe v. Yunits*, No. 00-1060, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-638, 2000 WL 33342399, at *1 (Mass. App. Ct. Nov. 30, 2000).

¹⁹⁵ For Doe, female clothing involved "such items as skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts." *Id.* at *1.

¹⁹⁶ *Yunits*, 2001 WL 664947, at *6.

¹⁹⁷ *Id.*

¹⁹⁸ See Bockting Report, *supra* note 102, at ¶ 32.

¹⁹⁹ See Supplemental Report of Walter O. Bockting, PhD at para. 5, *Schroer II*, 525 F. Supp. 2d 58 (D.D.C. 2007) (No. 05-1090), 2006 WL 4517047.

²⁰⁰ Harris Report, *supra* note 101, at para. 22.

feelings and expression” and “evaluat[ing] Ms. Schroer’s life story.”²⁰¹ She found evidence of Schroer’s womanhood in “Ms. Schroer’s level of cross-dressing, her internal feelings about being female, [and] her inherent need to present as female.”²⁰² 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.

However, 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.²⁰³ It is possible, for example, that transsexuals may have particularly strong gender associations that make cross-gender manifestations particularly painful.²⁰⁴ Transsexuals may experience gender more acutely than nontranssexuals. Nontranssexuals may have weaker gender commitments than transsexuals.²⁰⁵

Alternatively, even if transsexuals and nontranssexuals experience their core gender identity in similar ways, outward manifestations of gender may be more important for transsexuals than they are for nontranssexuals. Transsexuals may find that highly traditional outward gender manifestations are critically important to their gender identity because they simply cannot be recognized as their true gender unless their outward manifestations

²⁰¹ *Id.* at paras. 26 & 28.

²⁰² *Id.* at para. 28.

²⁰³ For example, male-to-female transsexuals may not in fact experience their gender in the same ways that nontranssexual women experience theirs. See SHERRY F. COLB, *WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW* 140 (2007) (describing her observation of a conference, during which female academics reacted to a transsexual scholar by complaining that the scholar did not understand what made them “women,” but instead mistook being a woman for wearing “a lot of makeup and very stereotypically feminine clothing”).

²⁰⁴ See WORLD PROF’L ASS’N OF TRANSGENDER HEALTH, INC., *THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION’S STANDARDS OF CARE FOR GENDER IDENTITY DISORDER 2* (6th ed. 2001), available at <http://www.wpath.org/documents2/socv6.pdf> (“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.”); see also Cohen-Kettenis & Gooren, *supra* note 186, at 319-20 (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”).

²⁰⁵ There exist highly divergent views about how nontranssexuals experience their gender. Compare Romeo, *supra* note 9, at 738-39 (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 Levi, *supra* note 161, at 91 (“[U]ntil courts understand the inelasticity of gender for most individuals alongside its social construction, sex discrimination claims will have limited utility.”).

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, 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, courts may be too willing to believe that women experience pain or discomfort from performing nontraditional jobs. This belief may make it more likely that courts will accept employers' claims of a lack-of-interest defense in cases in which women have been 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."²⁰⁶ Schultz explained that acceptance of the lack-of-interest defense often followed "merely as a matter of 'common sense'" from the courts' acceptance of such a job description.²⁰⁷ 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 appear, at least plausibly, to be a matter of women's choice.

Perhaps even more troubling, however, is the fact that judicial conceptions of gender may become real—affecting how people view themselves, what they aspire to, and what they ultimately accomplish. Those who identify as gender female may, for example, come to believe that they really are, and must be, most comfortable wearing 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 that require nurturing and caregiving.²⁰⁸ Legal scripts about

²⁰⁶ 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, 1801-02 (1990) (arguing that, by using "heavily gendered terms" to describe nontraditional work, employers invoke masculine images that influence courts' decisionmaking).

²⁰⁷ *Id.* at 1802.

²⁰⁸ Richard Ford has identified a similar danger in the race context, explaining:

[T]he 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,

gender do have the power to shape the actual lives of women and men.²⁰⁹ 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 incentive to adopt highly essentialized and traditional conceptions of masculinity and femininity.

CONCLUSION

The sex stereotyping prohibition certainly has brought about dramatic changes in antidiscrimination law. It has led to 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 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. Instead, its change has been more incremental.

Courts have interpreted the prohibition in a highly pragmatic fashion—hewing to a middle road that responds to demands both for employee inclusion and for employer control. Under this compromise approach, gender conformity demands are loosened only when they are particularly

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.

Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38, 55 (Wendy Brown & Janet Halley eds., 2002).

²⁰⁹ For a similar point about the dangers of entrenched categories in other contexts, see K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 149, 162 (Amy Gutmann ed., 1994) (“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 will be made.”); Richard T. Ford, *Race as Culture? Why Not?*, 47 *UCLA L. REV.* 1803, 1811 (2000) (“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.”); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 117 (David Kairys ed., 3d 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.”).

burdensome or debilitating—either personally or professionally—for an individual worker. Only then are employers required to justify the demand. When the demands instead seem modest, courts avoid a fight, leave societal norms intact, and simply tell employees to play along. Employers need offer no justification for the demand.

Although disappointing for those hoping for more radical change, the burden-shifting framework actually has much to recommend it. It will neither transcend gender, nor radically transform the workplace, but it does protect those who are most in need of 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-burden-shifting framework raises its own risks—risks which have not been previously recognized. In particular, it encourages gender nonconformists to adopt more highly dysphoric gender packages than they otherwise might, in order 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. However, the pressure reinforces that—for those who do care deeply about free and authentic gender expression—the prohibition will not be a panacea, and that other sources of protection, whether legal or social, should be pursued.²¹⁰

More troubling is the fact that the burden-shifting framework, with its focus on compliance costs and threshold tests, encourages a medicalization of gender that threatens to entrench traditional notions of masculinity and femininity. The danger here flows not from burden shifting per se but from the type of medical evidence on which courts have been encouraged to rely in sex stereotyping cases. The result is a pitting of the interests of the individual plaintiff against the interests of women as a group, with individual plaintiffs relying on medical evidence that reinforces the very stereotypes that have been instrumental in women's subordination.

²¹⁰ 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” (footnote omitted)) and Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 488 (2007) (suggesting that strengthening unions could provide protection to workers like Jespersen, even when antidiscrimination law does not, because it is “the current imbalance of power that allows employers to impose many oppressive conditions that individual employees are left largely powerless to confront”).

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 burden-shifting framework even if they do not experience their gender identity in precisely the same ways as nontranssexuals. Treating transsexualism as a distinctive gender experience will reduce 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 Article 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 sex stereotyping prohibition at work is correct, it suggests that not only is the prohibition's protection likely to be narrower than generally thought, but also that this incremental change may come at the expense of a subtle hardening of gender expectations for everyone.