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The New Gender Essentialism

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THE NEW GENDER ESSENTIALISM

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In the 19th and early 20th Century women were often excluded from jobs and opportunities because of their sex. Sex, it was thought, defined individuals’ abilities and interests in ways that rendered women fit for certain tasks and unfit for many others. Fortunately, such sexual essentialism has been repudiated by courts. No longer, for example, may employers make assumptions about how women must or should behave because of their sex. Nonetheless, I contend that the sexual essentialism of the past is being replaced by a new form of gender essentialism whereby courts not only permit but in fact enforce dichotomous and socially loaded conceptions of gender. Perhaps surprisingly, the seeds of this new essentialism are being sown in a recent wave of cases providing sex discrimination protection to transsexuals. While these cases are most often heralded as progressive and expansive, I argue that in fact the cases are highly reactionary. They rely upon and necessarily promote essentialized conceptions of masculinity and femininity that threaten to define and constrain the options available to women and men, transsexual and nontranssexual, alike. Indeed, I contend that the new essentialism, while more subtle than the old, is similarly pernicious.
INTRODUCTION

In 1873 the Supreme Court in Bradwell v. State held that Illinois could deny an otherwise qualified woman admittance to the state bar because of her sex.¹ In his concurring opinion, Justice Bradley, explained that such exclusion was justified by women’s nature and role. “The natural and proper timidity and delicacy which belongs to the female sex,” he explained, “evidently unfits it for many of the occupations of civil life.”²

Such ideas about women’s nature or essence were common in the 19th Century. Women were viewed as passive, dependent, emotional and impulsive. Perhaps more flatteringly, they were also viewed as self-sacrificing, nurturing and intuitive.³ Woman’s nature, it was believed, was a product of her biology or, more specifically, her uterus.⁴

As the Bradwell case indicates, what flowed from this gender essentialism⁵ was the severe curtailment of opportunities for women outside the home. Women, it

¹ Bradwell v. State, 83 U.S. (16 Wall) 130 (1873).
² Id. at 141.
⁴ See Rosenberg, supra note 3, at 41 (“The superior physiological irritability of woman, whether we call it sensibility, feeling, emotionality or affectability, is due to the fact of the large development of her abdominal zone, and the activity of the physiological changes located there in connection with the process of reproduction”), quoting William I. Thomas, On Differences in the Metabolism of the Sexes, 3 Am. J. SOCIOLOGY 31, 61 (1897). See also Richards, supra note 3, at 63 (describing the fast implications accorded to the possibility of pregnancy in the 19th century).
⁵ By gender essentialism, I mean the view that women (and men) have a distinct set of attributes and aptitudes that are determined by biology and culture. See Catharine A. McKinnon, WOMEN’S LIVES; MEN’S LIVES 85 (2005) (defining essentialism as the view that biological sex determine “social outcomes and individual qualities”); David S. Cohen, No Boy Left Behind? Single-Sex Education and the
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seemed, needed protection from men, paid work and even education. All posed a threat to their delicate constitutions. Biology was indeed destiny.

Nineteenth Century feminists challenged the exclusion and subordination that flowed from these beliefs about women’s nature, but they did not publicly challenge the essentialization of sex per se. Indeed, suffrage feminists relied on claims of women’s difference to advance their political goals. Women’s moral superiority—stemming from their self-sacrifice as wives and mothers—not only justified, but demanded, their public sphere participation. Women’s participation, the suffragists argued, would elevate political discourse and civilization more generally.

Second wave feminists did launch an attack on gender essentialism. They challenged not only women’s exclusion from the public sphere but the idea that women

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Essentialist Myth of Masculinity, 84 IND. L. J. 135, 142 (2009) (“Essentialism incorporates the notion that all women, as members of the group women, necessarily have certain characteristics in common and that all men, as members of the group men, necessarily have other characteristics in common.”); Michelle A. McKinley, Cultural Culprits, 24 BERKELEY J. GENDER L. & JUST., Fall 2009 at 91, 121 (“Essentialism is used to connote the idea that things, women, culture, races, have fixed, innate, and identifiable properties or essences.”).

6 See Goasaert v. Cleary, 335 U.S. 464 (1948) (holding as constitutional state law prohibiting women from working as bartenders except when supervised by her husband or father); Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding maximum hours laws designed to protect women workers because of “the inherent difference between the two sexes, and ... the different functions in life which they perform”); EDWARD H. CLARKE, SEX IN EDUCATION 127 (1973) (“Identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over.”).

7 See SIGMUND FREUD, The Dissolution of the Oedipal Complex in ON SEXUALITY 313, 320 (1976).

8 See Rosenberg, supra note 3, at 77-78 (describing suffrage feminists’ views of women’s moral superiority); Rosenberg, supra note 3, at 16 and Chapter 4 (discussing the suffrage movement’s reliance on ideas about women’s moral superiority to gain women the vote).

9 See Richards, supra note 3, at 77-78 (describing suffrage feminists’ views of women’s moral superiority); Rosenberg, supra note 3, at 16 and Chapter 4 (discussing the suffrage movement’s reliance on ideas about women’s moral superiority to gain women the vote).

10 Ann C. McGinley, Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender Race, and Class on the Campaign Trail, 86 DENVER U. L. REV. 709, 716 n.41 (2009) (“‘Second Wave Feminism’ is the term used to describe the feminist movement of the late 1960s and the 1970s.”); Orly Rachmilovitz, Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse, 14 WM. & MARY J. WOMEN & L. 495, 523 n.225 (2008) (“The feminist movement of the 1960s-80s known as second-wave feminism, focused mainly on women’s equal civil rights.”); Richards, supra note 3, at 62 (“Second wave feminism arises from skepticism about the abusive use of uncritical conceptions of gender roles to
and men have different natures and roles as well. This attack has been highly successful. For the last thirty years courts have rejected such essentialism and struck down laws based on stereotypes about the kinds of traits and attributes that flow from biological sex. As the Supreme Court made clear in *U.S. v. Virginia*: “State actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”

Nonetheless, the old essentialism is not as far gone as such language suggests. It has, instead, merely mutated shape. Increasingly gender has replaced sex as the metric by which individuals are socially judged. It is by gender, rather than sex, that one is categorized and identified, and it is gender, rather than sex, that determines one’s acceptable range of interests, aesthetics and attributes. Sex may no longer determine destiny, but gender still does.

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11 Richards, *supra* note 3 at 231 (explaining with regard to Second Wave Feminism that “[r]ather than idealizing these gender roles as the source of a higher morality . . . the roles themselves and their idealization were now critically examined in the light of morally independent values of human rights.”). Certainly, not all feminists have rejected essentialist commitments. See Michelle A. McKinley, *Cultural Culprits*, 24 BERK. J. GENDER L. & JUSTICE 91, 122 n. 151 (“[C]ultural feminists like Mary Daly, Kathleen Barry, Adrienne Rich, and Andrea Dworkin have embraced notions of essentialism, unleashing concepts of ‘woman’ as mother/nurturer, pacifist, creative and irrational to construct alternative modes of social practice, politics and aesthetics.”).

12 See *Craig v. Boren*, 429 U.S. 190 (1976) (striking down law providing lower drinking age for women than men); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down federal law permitting male members of the armed forces to automatically claim dependency allowance for their wives but requiring female members of the armed services to prove their husbands were dependent in order to receive the allowance); *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional a state’s mandatory preference for men over women as the administrator of decedent’s estate).

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Ironically, the new gender essentialism is most pronounced in a series of recent cases that are generally read as transcending gender norms—those providing sex discrimination protection to transsexuals. In 2004, in Smith v. City of Salem, Ohio a circuit court for the first time held that penalizing a preoperative male-to-female transsexual for expressing feminine attributes at work was an actionable form of sex discrimination under Title VII. A year later, the Sixth Circuit reaffirmed its protection of transsexuals in Barnes v. City of Cincinnati. District courts in other circuits have begun to follow suit. In other contexts too—most notably schools and prisons—courts

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14 Transsexualism first appeared as a condition in the third edition of the Diagnostic and Statistical Manual of Mental Disorders published in 1980. See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders 261-62 (3d ed., 1980) [hereinafter DSM-III]. The DSM-III identified the features of transsexualism as “a persistent sense of discomfort and inappropriateness about one’s anatomic sex” accompanied by a “persistent wish to be rid of one’s genitals and to live as a member of the other sex.” Id. The fourth edition of the DSM, published in 2000, replaced the term transsexualism with Gender Identity Disorder, but the basic diagnostic criteria remained the same. A diagnosis of GID required “strong and persistent cross-gender identification” and “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role.” American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders 535-37 (4th ed. 2000) [hereinafter DSM-IV]. The revised edition of the DSM-IV, the DSM-IV-TR, published in 2004, retained the same diagnostic criteria. See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision 576, 581 (4th ed. Rev. 2004) [hereinafter DSM-IV-TR]. For an explanation of how the term “transsexual” and 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) (“[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.”).

15 Smith v. City of Salem, Ohio, 378 F.2d 566 (6th Cir. 2004).

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

are beginning to treat discrimination against transsexuals who do not conform to the gender norms of their birth sex as a form of sex discrimination.\textsuperscript{18}

Certainly these cases look and sound transformative.\textsuperscript{19} The decisions represent a dramatic shift from prior case law in which courts often excluded transsexuals altogether from the protective scope of sex discrimination laws.\textsuperscript{20} Moreover, in reasoning as well as outcome they seem to signal a new degree of legal acceptance of and protection for gender ambiguity and flexibility.

Nonetheless, I contend that the standard reading of these cases as promoting gender diversity is implausible while a plausible reading of the cases is considerably

\textsuperscript{18} See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that plaintiff, a prisoner who was a male-to-female transsexual could state a cause of action under the Gender Motivated Violence Act because she presented evidence showing that defendant’s actions were motivated “by her assumption of a feminine rather than a typically masculine appearance or demeanor” and the GMVA, like Title VII, prohibits both “discrimination based on gender as well as sex”); Doe v. Yunits, No. 0010060A, 2000 WL 33162199, at *6 (Mass. Super. Oct. 11, 2000) (holding that plaintiff, a biologically male junior high school student who had been diagnosed with gender identity disorder showed a likelihood of success on the merits of her sex discrimination claim brought under the Massachusetts Constitution because the plaintiff presented evidence showing that “defendants prevented plaintiff from attending school in clothing associated with the female gender solely because plaintiff is male”).

\textsuperscript{19} For readings of the cases as transformative see Melinda Chow, Comment, Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination under Title VII, 28 Harv. J. L. & Gender 207, 208 (2005) (“The reasoning in Smith is also significant because it expands the sex discrimination prohibited by Title VII to include discrimination based on both sex and gender”); Thomas Ling, Note, Smith v. City of Salem: Title VII Protects Contra-Gender Behavior, 40 HARV. C.R.-C.L. L. REV. 277, 284-85 (2005) (“[T]he court extended protection to Jimmie Smith, not because he was diagnosed with a GID, or because of some configuration of his genitalia, but rather because Title VII and the Equal Protection Clause prohibit ‘sex stereotyping based on a person’s gender-nonconforming behavior.’ . . . Thus, individuals need not identify as transsexual, be diagnosed with GID, or in any other way conform with medical evaluations of the mind or body in order to control their own gender expression.”); Johnny Lo, Note, Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004), 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 277, 282 (2005) (“[T]he Court’s unanimous holding [in Smith] seems to include not only transsexual and transgendered people, but also seems to strengthen Price Waterhouse’s reasoning to strike against all types of sex stereotyping.”).

\textsuperscript{20} See Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not protect transsexuals); Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982) (holding that Title VII does not prohibit discrimination against transsexuals); Holloway v. Arthur Andersen, 566 F.2d 659 (9th Cir. 1977) (refusing to extend Title VII protection to transsexuals because discrimination against transsexuals is discrimination because of “gender” rather than “sex”).
more reactionary. The cases rely on notions of gender as fixed, loaded and socially
meaningful, and they push individuals to conform their behavior to one of two existing
gender norms. In this way, the new essentialism, like the old, actually helps create the
very binary gender reality it presupposes—a reality which then limits who and what
people can become.

In the first part of the paper, I describe the new wave of cases in which courts use
established sex discrimination doctrine—specifically the prohibition on sex
stereotyping—to protect transsexuals from workplace harms. In the second part of the
paper, I reject the dominant reading of these cases as adopting a broad conception of
sex stereotyping and promoting a view of gender as diverse, flexible, and fluid. In the
third part, I contend that the cases instead adopt narrow conceptions of sex stereotyping
and find protection for transsexuals only by relying on binary, fixed and highly
conventional conceptions of femininity and masculinity. In the final part of the paper, I
explore the broader implications of the transsexual cases and explain why the vision of
nondiscrimination and the underlying conception of gender at work in the cases is
likely to lead to less gender freedom and more tightly drawn gender boundaries for
everyone.

I. PROTECTING TRANSSEXUAL WORKERS

For three decades after Title VII was passed, courts consistently excluded
transsexuals from the scope of the Act’s protection. The prohibition on sex
discrimination, courts explained, protected women from discrimination because they
are women and men from discrimination because they are men. It did not protect
transsexuals from discrimination stemming from their gender identity disorder.\textsuperscript{21} By the turn of the 20\textsuperscript{th} Century, however, courts began to view sex discrimination claims brought by transsexuals more sympathetically.

\textbf{A. The Doctrinal Foundations}

The Supreme Court’s decision in \textit{Price Waterhouse v. Hopkins} provided the basis for such protection. \textit{Price Waterhouse} involved a woman, Ann Hopkins, who despite her great success in bringing in new business, was denied entry to the partnership.\textsuperscript{22} Evidence suggested that while her interpersonal skills were not ideal, Hopkins’ aggressive personality was judged more harshly because of her sex.\textsuperscript{23} Indeed, the partner who was responsible for telling her of the firm’s decision to put her candidacy on hold advised her that in order to improve her chances the following year, Hopkins

\begin{itemize}
\item \textsuperscript{21} See Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male . . . .”); Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982) (holding that “the plain meaning must be ascribed to the term ‘sex’” and “the legislative history does not show any intention to include transsexualism in Title VII”); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) (holding that the purpose of Title VII was to ensure that “men and women are treated equally” and that the Act did not protect plaintiff from discrimination because she was a transsexual transitioning from male-to-female).
\item \textsuperscript{22} \textit{Price Waterhouse v. Hopkins}, 490 U.S. 229 (1989). At the time Hopkins was considered for partnership in 1982, Price Waterhouse had 623 partners of whom 7 were women. Of the 88 people proposed for partnership, Hopkins was the only woman. “Forty-seven of the candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were ‘held’ for reconsideration the following year.” \textit{id.} at 233. The district court judge found that “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.” \textit{id.} at 234.
\item \textsuperscript{23} “One partner described her as ‘macho’ . . . ; another suggested that she ‘overcompensated for being a woman’ . . . ; a third advised her to take ‘a course at charm school’ . . . . Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only ‘because it’s a lady using foul language.’ . . . Another supporter explained that Hopkins ‘ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.’” \textit{id.} at 235.
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should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.””

Hopkins sued for sex discrimination.

In its plurality opinion, the Supreme Court proclaimed sex stereotyping to be a prohibited form of sex discrimination.

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

This prohibition actually encompassed two distinct types of sex stereotyping—ascriptive stereotyping and prescriptive stereotyping. Ascriptive stereotyping occurs when an employer assumes that an individual possesses certain traits and attributes because of her sex and that she is, as a result, unqualified for a particular position. This is the most traditional form of sex stereotyping and was the Court’s initial target. In Phillips v. Martin Marietta Corp., for example, the Court held that an employer could not refuse to hire female, but not male, employees with young children based on the assumption that such workers would have heavy child care responsibilities.

Prescriptive stereotyping occurs

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24 Id. at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (1985)).
25 Both the district court and the court of appeals concluded that Price Waterhouse had engaged in sex discrimination. Id. at 237.
26 Id.
27 Id. at 251.
28 Phillips v. Martin Marietta Corp., 400 U.S. 542,543 (1971) (holding that having different hiring policies for men and one for women, each having pre-school aged children, violates Title VII’s
when an employer insists that an individual possess or exhibit certain traits and attributes because of her group membership. *Price Waterhouse* is typically read as a case involving prescriptive stereotyping.\(^{29}\) It was the Court’s prohibition on sex stereotyping of this sort that was novel and expansive, and which has been critical to courts’ new protection of transsexuals.

Although the Court’s prohibition on prescriptive sex stereotyping is often invoked as though it is self-explanatory, the meaning and scope of the prohibition is ambiguous. A prohibition on prescriptive stereotyping may be understood in at least five ways with significantly different ramifications.

First, and most broadly, a prohibition on prescriptive sex stereotyping might mean that employees may not be forced to comply with gendered behavior demands of any sort. Under this interpretation, employers would be

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\(^{29}\) See J. Cindy Elson, *In Praise of Macho Women*: *Price Waterhouse* v. Hopkins, 46 U. MIAMI L. REV. 835, 851 (1992) (suggesting that the evaluation of Hopkins’ interpersonal skills was also imbued with discrimination as evidenced by her “deviation from the feminine stereotype,” and “the exaggerated perception of her ‘aggressive’ behavior by her male peers.”); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 36 DUKE J. GENDER L. & POL’Y 205, 211 (2007) (“Under what is now referred to as the sex-stereotyping principle, the Court [in *Price Waterhouse v. Hopkins*] declared that a plaintiff could demonstrate that she had been the victim of sex-based discrimination by establishing that the employer’s challenged action had been triggered by her failure to conform to its sex-stereotyped expectations.”); Jonathan Hardage, Nichols v. Azteca Restaurant Enterprises, Inc. *and the Legacy of Price Waterhouse* v. Hopkins: *Does Title VII Prohibit Effeminacy Discrimination*, 54 ALA L. REV. 193, 201 (2002) (“[I]n *Price Waterhouse v. Hopkins*, a majority of justices of the United States Supreme Court agreed that discrimination for failure to conform to ‘gender stereotypes’ violates Title VII’s prohibition against discrimination ‘because of…sex.’”); Bonnie H. Schwartz, *Price Waterhouse v. Hopkins: Causation and Burdens of Proof in Title VII Mixed Motive Cases*, 21 ARIZ. ST. L.J. 501, 539 (“Hopkins showed that stereotypes factored into the partnership selection process and that her failure to conform to them substantially motivated *Price Waterhouse*’s decision.”). Although far less common, it is possible to read *Price Waterhouse* itself as involving a kind of ascriptive stereotyping. It may have been that the partners were so flustered when Hopkins did not meet their expectations of proper femininity—which themselves would have made her ill qualified for the partnership—that they were unable to see that she could in fact do the job.
prohibited from requiring employees to engage in any kind of specifically  
gendered conduct. Employees would be free to express their gender however  
they saw fit. I refer to this as the libertarian reading of the sex stereotyping  
prohibition.

Second, and more narrowly, the prohibition on prescriptive sex  
stereotyping might mean that employees may not be forced to comply with the  
gender conventions of their own sex. Under this interpretation, female  
employees must be permitted to express their gender in whatever ways male  
employees are permitted to, and vice versa. I refer to this as the formal neutrality  
reading of the sex stereotyping prohibition.

Third, the prohibition on sex stereotyping might mean that employees  
may not be forced into the “wrong” gender box simply because of their  
biological sex. Under this interpretation, a biologically male employee who has a  
female gender must be permitted to comply with the conventions normally  
associated with female employees. While individuals may be required to “fit”  
within a gender category, they may not be required to fit within the category  
normally associated with their biological sex. I refer to this as the gender  
miscategorization prohibition.

Fourth, the prohibition on sex stereotyping might incorporate an implicit  
balancing of the burdensomeness of conformity demands on employees against  
the importance of compliance for employers. Under this approach, employers  
may not demand conformity with sex-specific gender norms when compliance is
particularly costly for an employee and the demand is not reasonably business-related. Employers may, however, demand sex-specific gender norms when compliance is easy or when the employer’s business justification for the demand is strong. I refer to this as the balancing reading of the prohibition.

Finally, and most narrowly, the prohibition on sex stereotyping might prohibit only those sex-specific gender conformity demands that impede an employee’s professional success. Such was the case with the sex stereotyping at issue in *Price Waterhouse*. The company’s demand that Ann Hopkins behave in a traditionally feminine manner made success at her job, which required competitiveness and aggressiveness, significantly less likely. I refer to this as the double-bind interpretation of the Courts’ sex stereotyping prohibition.

It is clear that the Supreme Court intended to prohibit sex stereotyping that places workers in a double-bind. As the Court itself explained: “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.” 30 What is not clear from *Price Waterhouse*, is whether the double-bind defined the limits of the Court’s prohibition on prescriptive sex stereotyping, or whether the Court intended more expansive protection.

B. *The New Cases*

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Without explicitly endorsing any particular interpretation of the sex stereotyping prohibition, lower courts have relied on the Supreme Court’s language from *Price Waterhouse* to protect transsexuals from workplace discrimination. Increasingly, courts treat discrimination against transsexual workers who are penalized for atypical or inadequate gender presentations as a form of sex stereotyping prohibited by Title VII.

In 2004, for example the Sixth Circuit in *Smith v. City of Salem, Ohio,* 31 held that a pre-operative male-to-female transsexual who alleged that he was penalized for expressing feminine attributes at work could state a cause of action for sex discrimination. Jimmie Smith worked as a lieutenant in the Salem Fire Department in Salem, Ohio. 32 He was a biological male who had been diagnosed with Gender Identity Disorder. 33 “After being diagnosed with GID,” the court explained, “Smith began ‘expressing a more feminine appearance on a full-time basis’—including at work—in accordance with international medical protocols for treating GID.” 34 Shortly after Smith began expressing a more feminine appearance at work his co-workers began to comment on his appearance and his inadequate masculinity. 35 In addition, after Smith told his supervisor about his GID and his intention to transition from male to female,

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31 Smith v. City of Salem, Ohio, 378 F.2d 566 (6th Cir. 2004).
32 Id. at 568.
33 The court explained that according to the American Psychiatric Association, GID is “a disjunction between an individual’s sexual organs and sexual identity.” Id. at 568.
34 Id. at 568.
35 Id. at 568.
the Chief of the Fire Department held a meeting to find a basis for terminating his employment.\footnote{The court noted that the Chief of the Fire Department “arranged a meeting of the City’s executive body to discuss Smith and devise a plan for terminating his employment.” \textit{Id.} at 568. Shortly thereafter, Smith was suspended for an alleged infraction of department policy. \textit{Id.} at 569.}

Smith sued alleging that it was a form of sex discrimination to penalize him for his failure to conform to stereotypes about how a man should behave.\footnote{\textit{Id.} at 569. See also \textit{id.} at 572 ("[Smith’s] complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employer’s and co-workers’ sex stereotypes of how a man should look and behave.").} The Sixth Circuit agreed, reversing the district court’s dismissal of his claims and extending the Supreme Court’s prohibition on sex stereotyping to employers’ treatment of transsexuals.\footnote{\textit{Id.} at 572 ("[H]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.").} As the Sixth Circuit explained, “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”\footnote{\textit{Id.} at 575.}

The Sixth Circuit affirmed a jury finding of such discrimination one year later in \textit{Barnes v. City of Cincinnati}.\footnote{\textit{Barnes v. City of Cincinnati,} 401 F.3d 729 (6th Cir. 2005).} Barnes was a pre-operative male-to-female transsexual who worked as a police officer in the Cincinnati Police Department.\footnote{\textit{Id.} at 733.} He presented evidence at trial showing that he was denied a promotion to sergeant because he
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violated masculine stereotypes. The jury ruled in Barnes’ favor on his sex discrimination claim. Relying on its prior ruling in Smith for support, the court explained that a jury could have reasonably concluded that Barnes was discriminated against because of his failure to conform to masculine gender norms.

Several district courts in other circuits have asserted similar protection for transsexual workers. In Creed v. Family Express Corporation, for example, the plaintiff, a pre-operative male-to-female transsexual alleged that she was terminated after she began presenting a more feminine appearance at work and rejected her employer’s demand that she return to a more masculine appearance. 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. 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]...

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42 Barnes, for example, was told by a supervisor that he was not masculine enough and was told by another superior officer that he was going to fail probation because he was not acting masculine enough. Id. at 738.

43 Id. at 733.

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


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.”).
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

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. The plaintiff, a pre-operative male-to-female transsexual, alleged that he was fired after he began to present as female in public.49 The court explained that “[h]aving included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, plaintiff has sufficiently pleaded claims of gender discrimination.”50

More recently in *Schroer v. Billington*, the District of Columbia district court held that the Library of Congress had engaged in sex discrimination by revoking its job offer to the plaintiff because she failed to satisfy stereotypes of what a woman should look

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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. at *4.

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


50 Id. at *2.
THE NEW GENDER ESSENTIALISM

like. The plaintiff, a male-to-female transsexual, applied for and was offered a job as a terrorism specialist with the Library of Congress while presenting herself as a man.

Before beginning work, Schroer notified her new supervisor that she would begin work as a woman and showed her three photographs of herself dressed as a woman. 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.” According to the court, this admission provided direct evidence that the Library’s decision “was infected by sex stereotypes.”

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

52 Schroer, 577 F. Supp. 2d at 297.

53 Id. at 299, 305.

54 Id. 305. The Schroer court found sex discrimination both because it concluded that the employer had engaged in sex stereotyping and because it concluded that that discrimination against a worker because of his plan to change his anatomical sex was “literally discrimination ‘because of . . . sex.’” Id. at 308. The judge in the Schroer case explained: “Ultimately, I do not think it matters for purposes of
Certainly this new wave of cases marks a dramatic shift in antidiscrimination law. Increasingly transsexuals, formerly excluded from Title VII protection altogether, are finding protection under the Act’s prohibition on sex discrimination. Yet the broader meaning and impact of these cases depends on their underlying bases for protection. It is to this question that I turn in the next two Parts.

II. READING TRANSSEXUAL CASES AS RADICAL

The two most common interpretations of the transsexual sex discrimination cases read them as radically expanding protection for gender nonconformists of all stripes.

The first interpretation views the cases as adopting a libertarian principle granting employees total freedom of gender expression. The second interpretation views the

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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.

55 *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (“[W]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals . . . ”).

56 *See also* Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299, 1305 (N.D. Ga. 2010) (finding that plaintiff had shown a violation of the Equal Protection Clause based on sex stereotyping and noting that “[t]his Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to confirm to gender stereotypes constitutes discrimination on the basis of sex”); Lopez v. River Oaks Imaging Diagnostic Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (denying defendant’s motion for summary judgment and explaining that “Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer”); Trevino v. Center for Health Care Services, Civil Action No. SA-08-CV-0140 NN, 2008 WL 4449939 (W.D. Tex. Sept. 29, 2008) (holding that plaintiff could state a claim for sex discrimination because she alleged discrimination based on gender and not discrimination based on transsexualism); Myers v. Cuyahoga County, Ohio, 182 F. App’x. 510 (6th Cir. 2006) (explaining that “Title VI protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender,” but finding ruling against plaintiff, a post-operative transsexual, on her sex discrimination claim because no evidence that plaintiff was treated differently because of her gender nonconformity); Lei v. Sky Publishing Corp., No. 013117J., 2002 WL 31492397, at *5 (Mass. Super. Oct. 7, 2002) (“The plaintiff [a pre-operative male to female transsexual] contends that the defendant’s conduct [requesting that plaintiff only wear traditionally male attire at work and subsequently firing plaintiff upon her refusal] was based on stereotyped notions of ‘appropriate’ male and female behavior in the same manner as the conduct of the defendant in Price Waterhouse. Accordingly, the plaintiff has set forth a prima facie case of sex discrimination . . . sufficient to survive summary judgment.”).
cases as adopting a trait neutrality principle ensuring employees freedom to adopt the
traits and attributes typically associated with the other sex. Either mandate would
provide significant protection from gender conformity demands for transsexuals and
nontranssexuals alike and push society toward greater acceptance of gender flexibility
and diversity.

Under either mandate employers could no longer designate binary dress and
appearance codes for women and men. Workers would be free not only to adopt the
norms generally associated with the other sex, but to combine gender norms creatively.
The result of such gender flexibility in the workplace would likely be a further
breakdown of binary gender categories in society more generally. Without traditional
gender constraints in the workplace, individuals would be more likely to adopt varied
and nontraditional gender expressions both on and off the job. Certainly both
interpretations of the transsexual sex discrimination cases are suggested by their broad
anti sex stereotyping rhetoric. However neither, I argue, is plausible.

A. Libertarianism

The most expansive reading of the transsexual sex discrimination cases is as
demanding a kind of gender libertarianism—freedom from all forced gender conduct.
Under this view, 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.57

57 For expressions of this view see Ilona M. Turner, Comment, Sex Stereotyping Per Se: Transgender
Employees and Title VII, 95 CAL. L. REV. 561, 562-63 (arguing that under the Price Waterhouse sex-
stereotyping theory “[d]iscrimination against someone for being transgender is discrimination based on
Several scholars have recently adopted such a reading of the cases. Thomas Ling, for example, asserts that Smith guarantees to all individuals the right “to control their own gender expression.”58 Similarly, Johnny Lo contends that the Smith decision “preserve[s] liberty of self-identity in our 21st Century world.”59

There is good reason to doubt, however, that the transsexual cases are really endorsing a broad liberty interest in gendered expression. First, it is not clear that such a principle is coherent. The libertarian principle seeks to transcend traditional gender categories and protect diverse and atypical expressions of gender identity. Yet one cannot know whether something is a gender expression, as opposed to a mere expression of personal preference, without some definition of gender. Defining gender, however, necessarily limits the principle’s libertarian potential. Only accepted or

that person’s non-conformity with gender stereotypes. This is true whether the individual is viewed by the employer or the courts as a man who is insufficiently masculine, a woman who is insufficiently feminine, or someone who falls in between these seemingly binary categories”; Ling, supra note 19, at 284-85 (explaining that the Smith court’s prohibition on sex stereotyping guarantees to all individuals, transsexual and nontranssexual, the right “to control their own gender expression”); Lo, supra note 19, at 277 (“Title VII was written to protect people from the debilitating effects of discrimination. The decision in [Smith] follows the standard of Price Waterhouse and helps eliminate out-of-date gender classifications and preserve liberty of self-identity in our 21st Century world”). Not all scholars have read the new transsexual cases so optimistically. See Elizabeth M. Glazer & Zachary A. Kramer, Transitional Discrimination, 18 TEMPLE POL. & CIV. RTS. L. REV. 651, 665 (2009) (criticizing the Smith court’s analysis and arguing “that the court’s analysis, while seemingly progressive on its face, is potentially harmful to Smith— and by extension, all transgender plaintiffs— because of its reductionist approach to Smith’s identity”). See also Kirkland, supra note 14.

58 Ling, supra note 19, at 285.

59 Lo, supra note 19, at 282. See also Chow, supra note 19, at 214 (explaining that the Smith decision “represents a significant victory for transgendered people” by expanding Title VII protection by expanding Title VII protection to discrimination based on gender as well as that based on sex); Amanda Raflo, Comment, Evolving Protections for Transgender Employees under Title VII’s Sex Discrimination Prohibition, 2 CHARLOTTE L. REV. 217, 248 (2010) (stating that after Smith, “it seems clear, or should be clear, that a transgender plaintiff would be protected under Title VII for failing to conform to traditional gender stereotypes of men and women under a Price Waterhouse theory.”); William C. Sung, Note, Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity, 84 S. CAL. L. REV. 487, 537 (2011) (explaining that after Smith, “discrimination or harassment based on their gender nonconforming behavior is impermissible irrespective of the cause of the behavior, whether it be gender expression or affectional preferences”).
recognized expressions of gender will be protected, truly atypical expressions are likely to remain unprotected. The libertarian principle both rejects and relies on gender categories, and it is this tension that renders the principle incoherent.

To make the point more vivid, consider the following. Imagine that instead of objecting to a requirement that she wear makeup at work, Darlene Jespersen objected to a requirement that she smile at customers. She objected not on the grounds that smiling violated her gender identity, but on the grounds that smiling inauthentically at strangers violated her self-image and sense of self. Jespersen’s challenge to the smile-at-customers rule would clearly lose under Title VII. Title VII does not provide blanket protection for personal expression, even for those forms of personal expression that are consistent with technical job requirements. Title VII is not a just cause requirement.60

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. If one accepts Jespersen’s self-description of her gender identity, her refusal to smile would be protected under a libertarian model. So too, however, would be any attribute that a worker labeled or identified as an expression of gender. The line between gender and personal taste or preference would disintegrate. Title VII, in turn, would be left without

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60 Employers may require traits or attributes that are unrelated to an applicant’s ability to perform job requirements. See 100 Cong. Rec. 7213 (1964) (explaining the limitations of Title VII to prohibit difference in treatment or favor based on race, color, religion, sex, and national origin and noting that employers’ use of other criterion or qualifications for employment is not affected).
form, predictability or limit. Such protection is contrary to Title VII’s confined purpose and is impractical as a matter of law and policy.

In order for the libertarian principle to be theoretically meaningful, as well as practically plausible, the restriction of protection to “gendered” expressions must be real. External criteria for identifying gender expressions are necessary. Two seem most plausible. Gender expressions might be defined and limited to those commonly associated with masculinity or femininity. Gender would, in other words, be defined by those expressions that are socially group-identified. Alternatively, gender expressions might be limited to those that are deemed integral to one’s gender identity as determined not by self-proclamation but by external judge or expert.61

Yet while external criteria are necessary to give the libertarian reading form and meaning, external criteria also constrict the scope of protection. Certain self-proclaimed forms of gender expression will not be recognized as such under the external criteria. In particular, idiosyncratic or impermanent gender expressions are unlikely to be recognized and protected. It is simply impossible to structure protection in a way that both relies on the category of gender and simultaneously transcends it.

Second, the libertarian principle would dramatically transform Title VII from an antidiscrimination statute into a far more costly accommodation statute. The most

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61 Versions of both approaches have been argued for in the race context. See, e.g., Juan Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994) (proposing that Title VII protect against discrimination based on ethnicity meaning protection of the “physical and cultural characteristics that make a social group distinctive, either in group members’ eyes or in the view of outsiders”); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercings*, 66 MD. L. REV. 11, 19 (2006) (“[P]ersonal appearance choices play a unique and crucial role in the development and revision of a simultaneously public and personal identity…[and the] law can create a zone in which to better empower individuals to form and reformat identity promoting a dynamic rather than static culture and society.”).
conventional justification for Title VII’s prohibition on race and sex discrimination is that these are job irrelevant hiring criteria.\textsuperscript{62} 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. Sex may (almost) never be job relevant, but gender often is.\textsuperscript{63} Prohibiting employers from requiring conduct that is traditionally gendered would force employers to restructure jobs so as to fit employee’s preferred gender expressions—such accommodations would be costly and, in some cases, impossible.

Consider, for example, three jobs with traditionally feminine role demands—flight attendant, elementary school teacher and paralegal. Flight attendants are (or at least were pre-9/11) expected by employers to be warm, friendly, helpful and at least somewhat deferential to customers.\textsuperscript{64} Elementary school teachers are expected to be sensitive to children’s needs, nurturing and empathetic.\textsuperscript{65} They are also expected to be collegial and cooperative in their dealings with other teachers and administrators.\textsuperscript{66} 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\textsuperscript{67}

\textsuperscript{62} For a discussion of different definitions of the antidiscrimination norm see Mark Kelman, \textit{Defining the Antidiscrimination Norm to Defend It}, 43 SAN DIEGO L. REV. 735, 736 (2006).
\textsuperscript{63} For instances in which sex is job relevant, see Kimberly A. Yuracko, \textit{Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination}, 92 CALIF. L. REV. 147 (2004).
\textsuperscript{64} See ARLE RUSSELL HOCCHILD, \textit{THE MANAGED HEART}: \textit{COMMERCIALIZATION OF HUMAN FEELINGS} 8 (1983) (“For the flight attendant, the smiles are a part of her work.”); JENNIFER L. PIERCE, \textit{GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS} 52 (1995) (“Flight attendants’ friendliness takes the form of deference: their relationship to passengers is supporting and subordinate.”).
\textsuperscript{66} See id. at 119.
\textsuperscript{67} See Pierce, \textit{supra} note 64, at 86.
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.”  Bill collectors are expected, indeed encouraged, to be intimidating and aggressive toward debtors. Marines are expected to be strong, aggressive and emotionally detached.

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. 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.

Yet 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

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68 See Pierce, supra note 64, 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.

69 See Hochschild, supra note 64, at 1146 (describing that “open aggression was the official policy for wringing money out of debtors”).


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

72 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.
female. The same may hold true of the role demands of Marines. The core functions of a Marine may simply be performed better by one who is physically strong, aggressive and unemotional. Men may dominate the Marines because they have these qualities to a higher degree than women, but the role demands themselves may be defined this way for reasons independent of men’s past or present dominance.

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

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

Other than the courts’ broad sex stereotyping rhetoric, there is nothing in the case law indicating such a radical and costly transformation of Title VII. Indeed, Price
Waterhouse, on which the transsexual cases are based, strongly suggests that the Supreme Court did not equate its prohibition on sex stereotyping with gender libertarianism. Hopkins was protected from discrimination based on her masculine gender expressions in a context in which male colleagues behaved similarly and masculinity seemed to be necessary for the job. There was no suggestion in the case that had a hyperfeminine woman been denied partnership on the grounds that she was unassertive, quiet and obsequious, she would have been protected.  

While a broad libertarian reading of the transsexual cases is implausible, there is a narrower libertarian reading that might more accurately describe the principle motivating the recent transsexual sex discrimination cases. 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 principle 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. The narrower libertarian principle would continue, however, to suffer from ambiguity about what constitutes an expression of “gender.”

Although theoretically distinct, the narrower libertarian principle is similar in scope to the trait neutrality principle. Under the trait neutrality principle, an employer

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73 Mary Anne Case has made precisely this point. She explains, “Ann Hopkins, I fear, may have been protected only because of the doubleness of her bind: It was nearly impossible for her to be both as masculine as the job required and as feminine as gender stereotypes require. But the Supreme Court seems to have had no trouble with the masculine half of Hopkins’ double bind; there is little indication, for example, 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.” Mary Anne Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 3 (1995).
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 principle would, therefore, protect all gender expressions protected by the trait neutrality principle, and potentially more.\textsuperscript{74} It follows that if the trait neutrality principle is an implausibly expansive reading of the sex stereotyping prohibition at work in the transsexual cases, then the narrow libertarian principle is implausible as well. It is to the trait neutrality principle that I now turn.

B. Trait Neutrality

A somewhat narrower, but still transformative, reading of the transsexual sex discrimination cases is as adopting a trait neutrality principle. Employers must be indifferent to whether gendered traits are adopted by women or men. As a result, any gendered expression permitted by women, must be permitted by men as well, and vice versa.\textsuperscript{75}

Even before the recent wave of cases providing sex discrimination protection to transsexuals, this was a common interpretation of the Supreme Court’s sex stereotyping

\textsuperscript{74} The narrow libertarian principle could be broader than the trait neutrality principle in instances in which an employer rigidly restricts the gender expressions of both sexes such that there are some job irrelevant gender expressions that would be protected under the narrow libertarian principle but would not be protected under the trait neutrality principle if consistently prohibited for both genders by the employer.

\textsuperscript{75} See, e.g., Colleen C. Keaney, Comment, Expanding the Protectional Scope of Title VII “Because of Sex” to include Discrimination Based on Sexuality and Sexual Orientation, 51 St. Louis U. L. J. 581, 594 (2007) (“Smith upturns rigid sex categories and allows both sexes to participate in the full range of gender expressions.”); Turner, supra note 57, 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”).
prohibition in *Price Waterhouse*. For example, Mary Anne Case has explained 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.”

It is a reading that does not in fact rely on or demand the existence of stereotypes at all. The trait neutrality interpretation of the sex stereotyping prohibition simply restates a conventional reading of sex discrimination doctrine more generally — women must be permitted to do whatever men can do and vice versa. Indeed, the neutrality principle has long been used to frame discrimination based on sexual orientation as a form of sex discrimination. 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.

Nonetheless, despite its popular appeal, there are two problems with reading the transsexual sex discrimination cases as adopting such a principle. First, although the principle sounds clear and concrete, it is in fact highly indeterminate. Because of the

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6 See Case, supra note 73, at 7. See also Katherine M. Franke, *Amicus Curiae Brief of NOW Legal Defense and Education Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal Brief: Lucas Rosa v. Park West Bank and Trust Company*, 7 Mich. J. Gender & L. 163 (2001) (interpreting *Price Waterhouse*’s sex stereotyping prohibition to mean that “for a man to be denied access to credit on the basis of traits that would have been welcome if found in a woman is sex discrimination, plain and simple”).

indeterminacy, it is difficult, if not meaningless, to say that a commitment to neutrality is driving recent victories for transsexual plaintiffs. 78

The trait neutrality principle demands that employers be indifferent to whether a particular kind of gender expression or attribute is held by a female or male employee. Violations of the principle result when an employer tolerates a particular gendered expression in employees of one sex but not the other. The difficulty comes in determining when women and men are engaged in the same gendered conduct or expression. The impossibility of perfect cross-sex comparisons renders the trait neutrality principle fraught.

78 The indeterminacy of cross-sex comparisons is most clear in instances in which sex-specific biological traits, like pregnancy are involved. Pregnancy has no identical cross-sex parallel. As a result, under a rigid, yet theoretically pure, neutrality requirement, pregnancy discrimination would never constitute sex discrimination. This was in fact the conception of neutrality the Supreme Court adopted, and the conclusion it reached, in Geduldig v. Aiello, 417 U.S. 484 (1974) and General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Congress responded to Gilbert and Geduldig by passing the Pregnancy Discrimination Act (PDA), in which it told courts that the appropriate comparison in pregnancy discrimination cases was between the treatment of pregnancy women and that of nonpregnant persons similar in terms of their “ability or inability to work.” See 42 U.S.C.§ 2000e(k) (1998). In a sense, Congress renamed the trait at issue from pregnancy per se to the more generalized trait of physical disability and then reframed the cross-sex comparison in terms of this non-sex-specific trait. According to Congress, pregnant women were treated neutrally only when they were treated the same as men with similar, though obviously not identical, physical limitations. Framing questions in the pregnancy context remain. Circuit courts are divided as to whether the precise comparison should be to employees similarly situated in their ability or inability to work regardless of the source of their injuries or to only those similarly abled employees suffering from nonoccupational injuries. Compare Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that in order to determine whether there is a PDA violation, the treatment of pregnant women should be compared with the treatment of nonpregnant individuals who are similar in terms of their ability or inability to work regardless of the place of their injury), with Urbano v. Continental Airlines, Inc., 138 F.3d 204, 208 (5th Cir. 1998) (holding that the treatment of pregnant women must be compared with that of similarly abled nonpregnant workers who were injured off the job), and Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999) (holding that the PDA required that pregnant women be treated the same as other similarly abled workers who suffered nonoccupational disabilities). See generally Jamie L. Clanton, Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to “Mean What it Says”, 86 IOWA L. REV. 703 (2001) (analyzing the disagreement among courts over who is similarly situated under the PDA).
To make the problem clear, imagine a female librarian working at a university library who is fired and claims that she was terminated because her employer found her manner of dress too sexy. She sues for sex discrimination arguing that she was the victim of a sex stereotype that deems women, but not men, who present themselves in a sexy manner to be professionally incompetent and unintellectual. 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. Yet even if such a comparator could be found, it is far from clear that this narrowly literalistic framing of the cross-sex

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80 See Glick et al., Evaluations of Sexy Women in Low- and High-Status Jobs, 29 PSYCHOL. OF WOMEN Q. 389, 394 (2005) (finding that female managers who presented themselves in a sexier manner elicited “perceptions of less competence on a subjective rating scale and less intelligence on an objective scale” as compared with female managers who dressed more conservatively).
81 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).
comparison is appropriate. A man dressed in a low-cut blouse and tight skirt might be objectionable to the employer, but it is probably not because he is sexy.

Alternatively, one could compare the woman’s treatment to that of a man dressed in sex-specific sexy clothing. Of course, deciding what constitutes sexy dressing for men is not obvious and is probably open to disagreement. 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 sexy dressing women with its treatment of men who violate appropriate workplace norms. At this level of abstraction, however, the neutrality demand becomes toothless and unable to challenge employers’ endorsement of any gender stereotypes.

The indeterminacy of the trait neutrality principle is particularly apparent in cases involving transsexuals. Imagine a pre-operative male-to-female transsexual who is terminated for wearing skirts and feminine blouses to work. Is the appropriate comparator for purposes of trait neutrality analysis a woman wearing conventionally feminine clothes? Or, is the preoperative male-to-female transsexual better compared to a woman wearing conventionally male clothes, or to a female-to-male transsexual

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82 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.
wearing male clothes? Given its indeterminacy, the trait neutrality principle cannot provide a meaningful account of or explanation for the recent transsexual sex discrimination victories.

Second, even putting the indeterminacy problem aside, there is good reason to doubt that courts ruling in favor of transsexuals do so because they equate the prohibition on sex stereotyping with a commitment to trait neutrality. The cases in which the trait neutrality requirement looks most operational are those in which an employee is penalized for discrete and identifiable conduct that is permitted of individuals of the other sex. Yet both before and after Price Waterhouse, this has been precisely the kind of nonneutrality that courts permit.

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 short

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

and those requiring that men refrain from wearing earrings.\textsuperscript{85} Similarly, in \textit{Jespersen v. Harrah’s}, the en banc Ninth Circuit upheld a requirement by Harrah’s casino that its female, but not male, bartenders wear make-up.\textsuperscript{86} The court paid lip service to the prohibition on sex stereotyping but did not interpret it to demand formal gender neutrality in any literal sense.\textsuperscript{87} According to the Ninth Circuit, Jespersen could be fired for not wearing make-up even though male employees were permitted—indeed required—to not wear makeup.\textsuperscript{88}

Courts granting sex discrimination protection to transsexual workers do not seem to be taking a broader view of Title VII’s impact on sex-specific grooming codes. Indeed, while the transsexual sex discrimination rulings clearly indicate their intention to depart from and overturn prior decisions denying antidiscrimination protection to transsexual workers, the decisions are noticeably silent regarding their impact on nontranssexual gender benders. \textit{Smith}, for example, disavows only prior case law

\begin{footnotes}
\footnotetext{86}{Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1107-08 (9th Cir. 2006) (en banc).}
\footnotetext{87}{Id. at 1106.}
\footnotetext{88}{Indeed, it is likely that a man would have been fired for wearing make-up as such was in violation of the Personal Best guidelines for men.}
\end{footnotes}
denying Title VII protection to transsexuals penalized for their gender nonconformity.\textsuperscript{89}

Smith does not challenge or even address prior case law enforcing gendered grooming codes against nontranssexuals.\textsuperscript{90}

Courts’ protection of transsexuals and rejection of “sex stereotyping” does not therefore plausibly entail a form of libertarian protection for all gender expressions. Nor does it entail even a more limited cross-sex neutrality regarding generally acceptable gender expressions. The cases are neither as radical in principle nor sweeping in impact as scholars have thought. I turn in the next Part to two alternative accounts of the case law.

III. READING TRANSSEXUAL CASES AS REACTIONARY

In this Part, I suggest two alternative interpretations of the transsexual sex discrimination cases that are more plausible than the commonly accepted ones and considerably narrower in their scope of protection. The first reads the cases as protecting individuals from gender miscategorization. Under this account, employers may not force workers into the “wrong” gender box simply because of their biological sex. The second reads the cases as requiring a kind of balancing of the costs imposed on the employee from a gender conformity demand against the employer’s reasons for the

\textsuperscript{89} As the court explained: “we find that the district court erred in relying on a series of pre-\textit{Price Waterhouse} cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection . . . . In this earlier jurisprudence, male-to-female transsexuals . . . – as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity – were denied Title VII protection by courts because they were considered victims of ‘gender’ rather than ‘sex’ discrimination. However, the approach in [these earlier cases] . . . has been eviscerated by \textit{Price Waterhouse}.” Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004).

\textsuperscript{90} The Smith court did not, for example, mention its holding in Barker v. Taft Broadcasting Company, 549 F.2d 400 (6th Cir. 1977), upholding a hair length restriction on male but not female employees against a claim of sex discrimination.
demand. Under this account, only those gender conformity demands that are particularly difficult for the employee to satisfy and are job irrelevant are prohibited. Both interpretations find support in the substance, not simply the rhetoric, of the case law.

A. Gender Miscategorization

It may be that the prohibition on sex stereotyping driving the transsexual sex discrimination cases is, in fact, a prohibition only on gender miscategorization. Employers may be prohibited from forcing employees into the “wrong” gender box because of their biological sex but permitted to demand that employees comply with either feminine or masculine gender norms.91

The gender miscategorization account of sex discrimination is most explicitly suggested by a case involving discrimination in education rather than employment. Doe v. Yunits involved a fifteen year old student, Pat Doe, who was biologically male but had been diagnosed with Gender Identity Disorder and had, according to the court, “a female gender identity.”92 In 1998, as a seventh grader in a Massachusetts public junior high school, Doe began wearing “girls’ make-up, shirts, and fashion accessories

91 See Romero describing the new medical model of gender: “The medical model of gender has emerged over the past two decades as one alternative to the strict biological model previously employed by courts. The medical model explains gender nonconformity through the psychiatric diagnosis of Gender Identity Disorder (GID) and relies upon medical evidence—both in the form of psychological diagnoses and physical treatments such as hormone therapy and gender-related surgeries—in order to establish gender transgressions as legitimate and therefore worthy of recognition and protection under the law. Like the biological model, the medical model assumes that two genders exist and enforces the norms typically associated with these genders.” Franklin H. Romero, Note, Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law, COLUM. HUM. RTS. L. REV., 713, 724-25 (2004-2005).

to school.” When Doe arrived at school in girls’ apparel, the principal would often send Doe home to change. The following year, as an eighth grader, Doe was instructed to come by the principal’s office every day so that the principal could approve Doe’s appearance. Doe would again be sent home when the principal found Doe’s appearance to be too feminine. Often Doe did not return to school after being sent home. Over the course of the two years, Doe “sometimes arrived at school wearing such items as skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts.” At the start of the following school year, when Doe was to repeat eighth grade due to her many absences, the principal told Doe that she would not be permitted to attend junior high wearing “padded bras, skirts or dresses, or wigs.”

Doe sued for sex discrimination under the Massachusetts Constitution. Doe also filed a request for preliminary injunction seeking an order to allow her to attend school “wearing clothes and fashion accouterments that are consistent with her gender identity.”

The district court granted Doe’s motion for preliminary injunction finding a likelihood of success on Doe’s sex discrimination claim. Doe, the court explained,
“although . . . born biologically male . . . has a female gender identity.”

Given her female gender identity, the court concluded, Doe would experience pain and distress if forced to comply with the stereotypes of the male gender. Indeed, the court seemed to defer to the determination of Doe’s treating therapist “that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff’s mental health.”

Sex discrimination doctrine protected Doe from this pain by preventing the school from requiring that she comply with male gender stereotypes when it did not require the same from other female students. “[P]laintiff is likely to establish that defendants have discriminated against her on the basis of sex,” the court explained, “by applying the dress code against her in a manner in which it would not be applied to female students.”

The school could, in other words, force Doe to comply with the demands of a gender category; it simply could not force her into the wrong category.

The miscategorization conception of sex discrimination also helps explain why Yunits was decided differently than the factually similar case of Youngblood v.

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102 Id. at *1. This female gender identity was, it seemed, defined and determined by Doe’s compliance with highly stereotyped notions of feminine dress and behavior.

103 Id. at *1. In response to a subsequent motion by defendants to dismiss other, non-sex discrimination claims, a different trial court judge reiterated a similar understanding of what it meant for Doe to have Gender Identity Disorder. Doe, the court explained, “has the soul of a female in the body of a male.” Doe v. Yunits, No. 00-1060A, 2001 WL 664947 at *1 (Mass. Supp. Feb. 26, 2001). As a result, Doe needed to express his female soul through feminine stereotypes or risk serious psychic harm. Deferring again to plaintiff’s expert witnesses, the court noted that plaintiff had presented evidence indicating that for Doe “coming to school in boys’ clothing is not a viable choice for her, because doing so would endanger her psychiatric health.” Id. at *6. As the court explained: “In essence, the plaintiff alleges that requiring Doe to wear boy’s clothing to school would be as injurious to her psychiatric health as requiring a psychologically masculine boy to wear a dress to school.” Id. at *6.

104 Id. at *6 n.6. The court explained that “[s]ince plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear.” Id. at *6.

105 Id. at 6.
Hillsborough County School Board. Nikki Youngblood was a 17 year old high school senior in Hillsborough County Florida who objected to wearing a scoop neck drape for her senior yearbook picture.\(^{106}\) Youngblood showed up for her senior yearbook photo wearing a shirt and tie and was told that the school’s dress code policy for the yearbook photos required that all girls wear a “velvet like, scoop neck drape.”\(^{107}\) Youngblood refused to wear the drape and her picture was left out of the yearbook.\(^{108}\) Youngblood sued for sex discrimination and lost. Indeed, the court held that she was not even able to state a claim.\(^{109}\)

Unlike in Yunits, Youngblood’s lawyers could not, and did not try to, convince the judge that Youngblood’s gender was actually male. Youngblood’s attorneys could not rely on a diagnosis of Gender Identity Disorder. Instead, they could only describe Youngblood’s “‘deepseated’” and “‘longstanding’” “aversion to feminine clothing.”\(^{110}\) Yet her aversion was not enough to protect Youngblood from such demands. Given that Youngblood’s gender was female, there was, for the court, neither harm nor discrimination in forcing her to comply with the stereotypes of her gender.

As Paisley Currah has noted, the ruling in Youngblood:

depended on and reproduced the same common sense notions about gender that undergirded the judge’s reasoning in Doe v. Yunits: Pat Doe

\(^{106}\) Paisley Currah, *Gender Pluralisms under the Transgendered Umbrella*, in *Transgender Rights* 7 (Paisley Currah et al. eds., 2006).

\(^{107}\) Id.

\(^{108}\) Id.

\(^{109}\) See Currah, *supra* note 106, at 11 (“Ruling on the school board’s motion to dismiss the case, the federal district court judge in Youngblood’s case . . . found ‘no constitutionally protected right for a female to wear a shirt and tie for her senior portraits.’”).

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.\footnote{Currah, supra note 106, at 11-12.}

Antidiscrimination law protected Doe from being forced into the wrong gender box. It did not protect Doe, or Youngblood, from being forced into a gender box at all.

This gender miscategorization conception of sex discrimination may also be at work in employment cases. Certainly it would help explain why courts are beginning to carve out protection from sex-based dress and grooming codes for transsexual workers while continuing to enforce such sex-based demands on nontranssexual workers.\footnote{Indeed, this is the conception of discrimination that seemed most plausibly to underlie the broad Employment Non-Discrimination Act legislation proposed in 2007 (H.R. 2015) that would have prohibited discrimination based on both gender identity as well as sexual orientation. The Act made clear that its prohibition on discrimination based on gender identity barred employers not from enforcing gender norms, but on enforcing the wrong gender norms on employees. As the bill explained: “Nothing in this Act shall prohibit an employer from requiring an employee, during the employee’s hours at work, to adhere to reasonable dress or grooming standards . . . provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone gender transition prior to the time of employment and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.” Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007). Although the draft bill confuses gender with sex—transitioning employees are changing their sex not their gender—it is clear that the bill envisions only protecting employees from being forced into the wrong gender box.} Transsexuals may be protected from sex-based grooming codes because they are being forced to comply with the gender norms of the “wrong” sex. Nontranssexual employees may be denied protection because they are not being placed in the wrong gender box.

Consider again Jespersen v. Harrah’s Operating Co. Jespersen could not and did not argue that she had a Gender Identity Disorder or was really a man trapped in a
woman’s body. Like Nikki Youngblood, she did not disavow her female gender completely, but instead objected to particular gender conventions.\footnote{Jespersen did not object to Harrah’s other gendered appearance requirements. Female employees were, for example, required to have their hair “teased, curled, or styled every day” while male employees were simply prohibited from having hair “extend below top of shirt collar.” Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104, 1108 (9th Cir. 2006).} As the Ninth Circuit stressed, Jespersen objected to the make-up requirement because “wearing it would conflict with her self image.”\footnote{Id. Jespersen also stated that the makeup requirement undermined her “self-dignity.” Id.} 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.\footnote{Indeed the court was quite dismissive of the pain and discomfort caused to Jespersen by the make-up requirement. The court explained: “We respect Jespersen’s resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.” Id. at 1112.} As a result, she was not entitled to protection.

Contrast Jespersen’s predicament with that of Smith. While both plaintiffs sought protection from gender conformity demands, only Smith alleged that he was being placed in the wrong gender box. Smith was, as the court emphasized, a transsexual who had been diagnosed with Gender Identity Disorder.\footnote{Smith v. City of Salem, Ohio, 378 F.2d 566, 568 (6th Cir. 2004).} This meant, the court explained, that Smith suffered from “a disjunction between . . . [his] sexual organs and sexual identity.”\footnote{Id. at 568. For this explanation, the court relied on the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DMS-IV) (4th ed. 2000).} Smith’s expression of a more feminine appearance was
consistent with his true gender.\textsuperscript{118} In holding that Smith could state a claim for sex discrimination, the court may then have been protecting Smith from masculine appearance demands in order to allow him to express his “true” feminine gender. Gender miscategorization may explain both the source and scope of the protection.\textsuperscript{119}

Concerns about gender miscategorization may be motivating not only courts’ interpretation of existing antidiscrimination doctrine, but also legislators’ creation of new law. Indeed, miscategorization seemed to be the harm targeted by the Employment Non-Discrimination Act of 2007 which, in its most expansive form, prohibited gender identity discrimination in employment.\textsuperscript{120} The Act defined “gender identity” broadly to include “the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”\textsuperscript{121} Nonetheless, the Act expressly permitted employers to retain gendered dress and grooming standards:

\begin{quote}
provided that the employer permits an employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.\textsuperscript{122}
\end{quote}

\begin{footnotes}
\item[118] Smith, 370 F.2d at 566.
\item[119] In considering whether “Smith has stated a claim for relief, pursuant to Price Waterhouse’s prohibition of sex stereotyping,” the court concluded that “Having alleged 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.” Id. at 571-72.
\item[121] Id. at § 3(a)(6).
\item[122] Id. at § 8(a)(4).
\end{footnotes}
In other words, the Act would not have created a right for all workers to express their gender however they chose. It would instead have created a right for transsexual employees to transition from one gender box to the other.123

At its core, the gender miscategorization prohibition is a kind of neutrality requirement. However, rather than requiring that employers remain neutral regarding the mix of individually gendered traits that employees adopt, the gender miscategorization principle requires only that employers remain neutral as to which gender category employees adopt.

In theory, then, the gender miscategorization principle resembles the trait neutrality principle and raises some of the same conceptual problems. When is a biological male expressing a feminine gender identity in the same way that a biological woman does, and when is he occupying some third gender category?124 As discussed previously, one way around the conceptual indeterminacy of cross-sex comparisons is to adopt a purely formal and literal conception of gendered expressions—a man

123 Representative Barney Frank, too, in his testimony before the Subcommittee on Health, Employment, Labor and Pensions of the Committee on Education and Labor, suggested such a narrow scope of coverage. In describing those who would be protected by the gender identity provision of the Act, he explained “There are people who are born with the physical characteristics of one sex who strongly identify with the other. Some of them have a physical change. Some of them don’t . . . . This is something people are driven to do.” The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 before the Subcomm. on Health, Emp., Lab. & Pensions, 110th Cong. 12-13 (2007) (statement of Rep. Barney Frank, Sponsor, Employment Non-Discrimination Act of 2007). Those protected by the Act, he emphasized, were not gender bending by “choice.” Id. at 13. Because Representative Frank did not believe that the gender identity inclusive ENDA could pass the House, on September 27, 2007 he split the protections against discrimination based on sexual orientation and gender identity into two separate bills, H.R. 3685 and H.R. 3686 respectively. The gender identity antidiscrimination bill never received a vote from the Committee on Education and Labor. Bill Summary & Status, 110th Congress (2007-2008), H.R. 3686, All Congressional Actions, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:H.R.3686: (last visited Aug. 16, 2011) (noting the last major action of H.R. 3686 was its referral to House subcommittee on October 17, 2007).

wearing a short skirt is doing the same thing as a woman wearing a short skirt. This is, in fact, the approach courts have taken in the transsexual sex discrimination cases. Once a biologically male employee convinces a court that she has a feminine gender, she is treated as satisfying feminine gender norms when she does what women do in a formal and literal sense. Yet the fact that courts protect male-to-female transsexuals who do what women do in a formal and literal sense, but do not protect nontranssexual men who do what women do in a formal and literal sense suggests that a commitment to something other than neutrality is driving the courts’ decisions in both sets of cases. In the next section I explore what this alternative commitment may in fact look like.

B. Balancing Benefits and Burdens

It may be that the transsexual sex discrimination cases reflect a commitment neither to libertarianism nor neutrality, either trait- or category-based, but to balancing. Courts may be using sex discrimination doctrine to prohibit gender conformity demands only when the burdensomeness of the demand is high, and the justification for the demand is low. Rather than prohibiting the enforcement of all sex stereotypes in the workplace, courts may be prohibiting only those that seem particularly difficult for an employee to satisfy and which serve no legitimate business purpose.

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125 It may be that the balancing reading of the transsexual cases is in fact simply a modified or more nuanced version of the miscategorization reading. Courts may prohibit miscategorization only because they believe the costs of miscategorization to the employee are high and the benefits to the employer are marginal. Concerns about miscategorization may then simply reflect a broader concern with balancing the costs to the employee of conformity demands against the costs to the employer of nonconformity.
Certainly courts have not engaged in an explicit balancing of costs and benefits in transsexual sex discrimination cases. Nonetheless, the fact that courts routinely focus on the plaintiff’s compliance costs when granting transsexuals protection from gender conformity demands, while emphasizing the employer’s justifications when denying transsexuals protection from such demands at least suggests that such balancing may be taking place.

Consider again courts’ increasing reliance in transsexual sex discrimination cases on medical evidence.\(^{126}\) Such evidence speaks directly to the pain or difficulty a plaintiff would face if required to alter a particular gender expression. It speaks directly, in other words, to the weight on one side of the scale.\(^{127}\)

Evidence of pain seemed, for example, to be the import of the medical testimony in *Doe v. Yunits*. The court relied on such testimony to conclude that forcing Doe to come to school in boys’ clothes would “endanger her psychiatric health.”\(^{128}\) Moreover, the evidence helped the court to distinguish the case from *Harper v. Edgewood Board of Education*\(^{129}\) in which a court upheld a school board’s right to prevent two students from

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\(^{126}\) Advocates representing transsexual clients have recognized the important role that such evidence plays in these cases and have become increasingly reliant on medical evidence regarding gender expressions for particular plaintiffs. See Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals can Help Secure Equality for Transgendered People*, 4 GEO. GENDER & L. 721, 735-36 (2002-2003) (arguing for the continued use of medical professionals to play a key role in litigation to humanize transgendered people and “help litigants secure rights by chipping away at deeply held cultural prejudices that do not reflect medical realities”).

\(^{127}\) Necessarily, underlying this balancing model of sex discrimination seems to be a conception of gender as multifaceted and variable. Gender is multifaceted in the sense that it is made up of numerous types of personal expression and presentation. Gender is variable in the sense that some gender expressions are relatively easy and painless to alter, while others are stable and difficult to change. Gender expressions, in this account, fall along a continuum of mutability.


attending the prom in clothing of the opposite gender. In that case, the court treated the students’ efforts to gender bend as a matter of whimsy or teenage rebellion—an interest which was not very weighty—while emphasizing the school’s important and substantial interest in maintaining order. As the Yunits court explained, in Harper, “[t]he court found the school’s action permissible because it fostered community values and maintained discipline.”130 In contrast, in Yunits, the court emphasized, the “Plaintiff . . . is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity . . . .”131 It was these greater compliance costs in Yunits that seemed to tip the scales in plaintiff’s favor.

Medical evidence appeared to play a similar role in Smith. Smith, the court emphasized, suffered from Gender Identity Disorder. His female gender expression, through dress and grooming, was part of the accepted medical treatment of his condition.132 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.133

Likewise in Lie v. Sky Publishing Corporation,134 the court relied on medical evidence to highlight the involuntary nature of the plaintiff’s gender nonconformity.

131 Id.
132 Smith v. City of Salem, Ohio, 378 F.2d 566, 568 (6th Cir. 2004).
133 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.”). Moreover, Smith’s employer, in response to his discrimination claim, raised no business justification for requiring Smith to conform to masculine rather than feminine modes of grooming and appearance.
Lie, a preoperative male-to-female transsexual, sued for sex discrimination under state law after she was fired for wearing female clothes to work. 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.

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

The balancing model of sex discrimination also helps explain the one type of case where transsexuals continue to routinely lose—cases asserting transsexual workers’ right to use the bathroom appropriate to their gender rather than their sex. These cases are inexplicable under the gender miscategorization model of sex discrimination. 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 the balancing model. Courts permit employers to require employees to use the bathroom associated with their biological sex because they respect

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135 Id. at *2.
136 Id.
employers’ claims that such physically-based categorization is necessary to protect the personal privacy of other restroom users.\textsuperscript{137}

Consider, for example, \textit{Etsitty v. Utah Transit Authority}.\textsuperscript{138} Etsitty was a pre-operative male-to-female transsexual who had been diagnosed with Gender Identity Disorder.\textsuperscript{139} At the time Etsitty began working as a bus operator with UTA she presented herself as a man. Soon thereafter, however, Etsitty informed her employer that she was transsexual and would begin to appear as a female at work and to use female restrooms while on her route.\textsuperscript{140} The UTA terminated Etsitty explaining that it was unable to “accommodate her restroom needs.”\textsuperscript{141} Etsitty sued for sex discrimination and lost. The Tenth Circuit affirmed the lower court’s grant of summary judgment for the defendants on plaintiff’s sex discrimination claim.

Certainly Etsitty’s gender expression was difficult for her to change. In addition to being diagnosed with GID, Etsitty had begun the transition from male to female by taking female hormones.\textsuperscript{142} Nonetheless, the court ruled against Etsitty on her sex discrimination claim. Although Etsitty had made out a “prima facie” case of sex stereotyping, the court concluded that the employer had a legitimate business justification for burdening plaintiff’s gender expression in this way.\textsuperscript{143} Even though the

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\item Such a belief is, however, almost certainly erroneous in the case of male-to-female transsexuals who fear violence when forced to use men’s bathrooms.
\item \textit{Etsitty v. Utah Transit Auth.}, 502 F.3d 1215 (10th Cir. 2007).
\item \textit{Id.} at 1218.
\item \textit{Id.} at 1219.
\item \textit{Id.} at 1218.
\item \textit{Id.} at 1218.
\item \textit{Id.} at 1224. The court’s reference in \textit{Etsitty} to burden switching is confusing and misleading. The \textit{McDonnell Douglas} burden shifting framework, which the \textit{Etsitty} decision nominally tracks, does not make sense in the sex stereotyping context. The burden shifting framework was designed to help courts
\end{itemize}
UTA had not received any complaints about Etsitty’s bathroom usage,\textsuperscript{144} the UTA’s “legitimate” concerns about potential liability from having a biological male use women’s public restrooms justified its prohibition on her doing so.\textsuperscript{145} In terms of outcome, the \textit{Etsitty} ruling is typical. Preoperative transsexual plaintiffs routinely lose sex discrimination cases in which they challenge their employers’ bathroom assignments.\textsuperscript{146}

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\textsuperscript{144} Id. at 1226.
\textsuperscript{145} Id. at 1224. Although the court does not elaborate on the basis for UTA’s potential liability, the intimation is that the liability would stem from invasion of privacy claims brought by other restroom customers. Nonetheless, the court clearly gave significant weight to the employer’s interest in maintaining the bathroom restriction. “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.” \textit{Id.}
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\textsuperscript{146} See Kastle v. Maricopa County Community College District, No. CV-02-1531-PHX-SRB, 2006 WL 2460636 (D. Ariz. Aug. 22, 2006) (granting defendant’s motion for summary judgment on female transsexual worker’s claim of sex discrimination stemming from employer’s requirement that she could not use the women’s restroom until she had presented proof that she had completed a sex change operation), \textit{aff’d}, 325 F.App’x 492 (9th Cir. 2009); Johnson v. Fresh Mark, Inc., 98 F.App’x 461 (6th Cir. 2004) (affirming without explanation district court’s dismissal of female transsexual worker’s Title VII sex discrimination claim based on employer’s requirement that she use men’s rather than women’s restroom). \textit{But see} Michaels v. Akal Security, Inc., No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, at *4 (D. Col. June 24, 2010) (agreeing with \textit{Etsitty} that restrictions on a transsexual worker’s bathroom usage does not itself establish sex discrimination, but holding that the plaintiff had sufficiently pled pretext to survive a motion to dismiss). Similar bathroom discrimination claims brought under state law sexual orientation discrimination statutes have been similarly unsuccessful. \textit{See} Goins v. West Group, 635 N.W.2d 717 (Minn. 2001) (holding that employer’s requirement that female transsexual use only unisex restroom rather than women’s restroom did not constitute discrimination based on sexual orientation under the Minnesota Human Rights Act which defined sexual orientation to include “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness”).

Certainly these are not the first cases in which courts have subordinated employee’s antidiscrimination interests to the privacy interests of customers or coworkers. Courts regularly privilege such privacy interests in cases in which employers seek to engage in sex based hiring of workers engaged
The balancing model of sex discrimination also provides a coherent account of courts’ broader sex discrimination jurisprudence. In particular, it may explain courts’ regular denial of protection to nontranssexual workers challenging sex-based dress and grooming codes.

In Jespersen, for example, the court of appeals viewed Jespersen’s failure to conform to her employer’s sex-specific makeup demands as a matter of mere personal preference or choice. It did not view the expression of gender at issue in that case as one that was physically or psychologically difficult to change. This belittlement of Jespersen’s compliance costs, and implicit balancing of benefits and burdens, seemed critical to the court’s denial of Jespersen’s claim for antidiscrimination protection.\(^{147}\)

Indeed, it was on such burdens and benefits that the National Center for Lesbian Rights and the Transgender Law Center focused in their joint amicus brief on behalf of Jespersen. The burdensomness of the makeup requirement on Jespersen was severe, they contended, because “[f]or 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.”\(^{148}\)

In comparison, the weight on the other side of the scale was trivial, they argued, because “[n]othing about Darlene Jespersen’s job required her to undergo a complete overhaul in positions that involve seeing or touching of unclothed customers or co-workers. See Yuracko, supra note 63, at 156-58.

\(^{147}\) The court minimized the weight and importance of Jespersen’s objection to the makeup requirement when it concluded: “This record . . . is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee . . .” Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104, 1113 (9th Cir. 2006).

of her appearance to look more stereotypically feminine.”\textsuperscript{149} “Surely,” amici concluded, “Title VII should not permit an employer to require workers to adopt an extreme, burdensome stereotypical appearance when doing so is gratuitous and has no bearing on the employee’s ability to perform the job.”\textsuperscript{150} Therefore, although arguing for a different result, the amici simply assumed that the court would use a balancing test to determine the legality of Harrah’s makeup requirement.

A balancing approach can also explain courts’ regular denial of protection to male employees challenging short hair and no earrings rules. Under a balancing approach, such plaintiffs lose precisely because courts view the burdensomeness of the conformity demands as trivial. In \textit{Pecenka v. Fareway Stores, Inc.},\textsuperscript{151} for example, the Iowa Supreme Court upheld an employer’s right to terminate a male employee for refusing to remove his ear stud emphasizing that the requirement was one with which Pecenka could easily comply. “Wearing an ear stud is not an immutable characteristic,” the court noted.\textsuperscript{152} “Pecenka can remove his ear stud or cover it with a bandage.”\textsuperscript{153} Similarly, in \textit{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

\textsuperscript{149} Id. \\
\textsuperscript{150} Id. \\
\textsuperscript{151} Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800 (Iowa 2003). \\
\textsuperscript{152} Id. at 805. \\
\textsuperscript{153} Id. at 805. The court also emphasized that the no earring for men rule did not reinforce women’s or men’s subordination in the workplace. The court noted, “Nor does [plaintiff] contend that the unwritten personal grooming code perpetuates a sexist or chauvinistic attitude in employment that significantly affects his employment opportunities.” \textit{Id.} at 805. \textit{See also} \textit{Lockhart v. La-Pac. Corp.}, 795 P.2d 602, 603 (Or. Ct. App. 1990) (upholding no facial jewelry rule for male but not female employees explaining that “[o]nly those distinctions between the sexes which are based on immutable, unalterable, or constitutionally protected personal characteristics are forbidden”).
that “hair length is not an immutable characteristic, for it may be changed at will.”154

“Discrimination based on factors of personal preference” the court explained, “do not necessarily restrict employment opportunities and are thus not forbidden.”155

Moreover, unlike the gender miscategorization model, the balancing model even offers a plausible explanation for courts’ protection of men harassed because of their perceived effeminacy. The plaintiffs in such cases do not seek to switch gender categories but only to deviate from gender expectations in particular respects. Such plaintiffs would not, as a result, be entitled to protection under the gender miscategorization model. It may be, however, that courts protect effeminate men from harassment because they perceive the gender conformity demands in those cases to be particularly difficult to meet. Typically, male workers harassed for perceived effeminacy are not harassed because of a simple discrete trait that they can easily change and undo. Instead, they are harassed because of how they walk, talk and stand—traits that are all largely unconscious and difficult to alter.

Consider, for example, the harassment suffered by Antonio Sanchez in Nichols v. Azteca Restaurant Enterprises.156 Sanchez, a food server, was harassed for “walking and carrying his serving tray ‘like a woman.’”157 Whatever it was about Sanchez’s

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155 Id. at 1256. Like the court in Pecenka, the Austin court also emphasized that the sex-specific grooming requirement at issue did not raise antisuordination-oriented concerns. As the court explained: “The objective of Title VII is to equalize employment opportunities. Consequently, discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate Title VII because they present obstacles to the employment of one sex that cannot be overcome . . . .” Id.
156 Nichols v. Azteca Restaurant Enter., 256 F.3d 864 (9th Cir. 2001).
157 Id. at 870.
movement that made Sanchez’s co-workers refer to him as “she” and “her” was not susceptible to easy identification or 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. Doing so is not like changing one’s shirt. It is more like changing one’s way of being in the world.

Consider also the harassment faced by sixteen-year-old H. Doe in Doe v. City of Belleville, Illinois. H. was subjected to repeated physical and verbal harassment focused on his inadequate masculinity. Certainly, H.’s earring was a focal point of harassment. Yet it is unlikely that the harassment would have ceased, or never started, if H. had simply removed the earring. The harassment was prompted not by a discrete easily identifiable action on H.’s part. It was prompted and driven by the gestalt of how H. presented himself—the way in which he occupied and moved his

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158 Id.
159 Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1996).
160 In addition to other incidents of physical and verbal harassment, H. Doe was regularly called “queer” and “fag,” was asked, “Are you a boy or a girl?” and was referred to by his primary harasser as his “bitch.” Id. at 566-67.
161 Id. at 567.
162 Indeed, H.’s brother J. was also harassed, albeit less severely, despite not wearing an earring. Id. at 566.
As was the case for Sanchez, identifying what exactly it was about H.'s self-presentation, much less getting H. to change it, would likely be impossible.

As the cases suggest, the compliance costs for the plaintiffs in the effeminate men harassment cases are high. Meanwhile, employers in such cases do not claim a business need for the enforced masculinity. A balancing approach can explain the plaintiffs’ success.

Underlying both the miscategorization and the balancing models of sex discrimination are highly essentialized conceptions of gender. The miscategorization model, for example, only makes sense if one conceives of gender as fixed and binary. All individuals are either masculine or feminine. Moreover, miscategorization is a harm precisely because the categories are discrete and socially salient. The balancing model, similarly, conceives of individuals as having a core gender identity worthy of

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

164 Devon Carbado, Mitu Gulati and Gowri Ramachandran have offered a slightly different status-oriented reading of the effeminate men harassment cases, one focused on the status of homosexuality rather than gender. They contend that by using the sex stereotyping rhetoric of Price Waterhouse to protect effeminate men from harassment, courts “quite possibly, […] were engaging in subversive judging—namely, enacting a minor rebellion against the Constitutional refusal to provide any protection against sexual orientation discrimination.” Devon Carbado, Mitu Gulati & Gowri Ramachandran, The Jespersen Story: Makeup and Women at Work, in EMPLOYMENT DISCRIMINATION STORIES 105, 137 (Joel Wm. Friedman ed., 2006).

165 Consider too the decision in Lewis v. Hartland Inns of America, LLC, 591 F.3d 1033 (8th Cir. 2010), in which the Eighth Circuit reversed the lower court’s grant of summary judgment for the employer and held that the plaintiff had presented sufficient evidence of actionable sex stereotyping by showing that she was criticized by her superior before being terminated for her lack of “prettiness” and the “Midwestern girl look.” 591 F.3d 1033, 1039 (8th Cir. 2010). Such discrimination based on prettiness and femininity more closely resembles that based on effeminacy for men than that based on violation of discrete grooming codes. One’s lack of “prettiness” and a “Midwestern girl look” are more integral to one’s person and presentation and significantly more difficult to alter, or attain, than requirements that simply require one to remove earrings or cut hair.

166 Indeed, employers deny rather than defend the harassment and the gender code enforcement.
protection. Moreover, only traits consistent with traditional and socially coherent gender packages are recognized as part of the core, and hence worthy of protection.

Reading transsexual discrimination cases as reflecting a miscategorization or balancing interpretation of sex discrimination places them in a dramatically different light than the more common readings. It suggests that the scope of protection offered to transsexual workers may be far more constrained than generally recognized. Perhaps more importantly, however, it suggests that courts’ prohibition on “sex stereotyping” may actually both rely on stereotypical conceptions of gender and push individuals seeking protection for their gender expression to adopt more consistent, coherent and stereotypical gender packages. In the next Part, I explore these implications in more detail.

IV. UNINTENDED CONSEQUENCES

Certainly the recent wave of cases providing sex discrimination protection to transsexuals has helped individual plaintiffs keep their jobs. Yet the cases may have unintended consequences that are harmful for all workers. Indeed, if my alternative readings of the cases as reflecting either a miscategorization or balancing conception of Title VII’s sex discrimination prohibition is correct, the ripple effects of the transsexual cases may go well beyond influencing legal strategy in this discrete category of cases. The cases may constrain and construct how transsexuals and nontranssexuals alike experience their gender. In this Part, I focus on two types of unintended consequences: first, the over-performance of gender, and second, the definition of gender by elites, in this case the medical establishment.
A. Over-Performance

Under either of my alternative readings, the transsexual sex discrimination cases are likely to encourage individuals to over-perform their gender—by which I mean adopt more extreme, consistent and stereotypical expressions of gender than they otherwise would.

The miscategorization prohibition is likely to encourage gender over-performance because individuals who want to be freed from the gender norms associated with their birth sex must adopt wholeheartedly the gender norms associated with the other sex. They must convince a court that they are really of the other gender. Doing so requires a diagnosis of GID which itself requires commitment to traditional gender roles.

For example, in order to convince doctors that their true gender differs from the one commonly associated with their sex, individuals must perform a narrative that fits squarely into the medical definition of transsexual, including stories of childhood participation in stereotypically gender-inappropriate behavior, evidence of “[a] strong and persistent cross-gender identification (not merely a desire for any perceived

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167 See Dean Spade, Resisting Medicine, Re/Modeling Gender, 18 BERKELEY WOMEN’S L.J. 15, 24 (2003) (“Symptoms of GID in the Diagnostic and Statistical Manual (DSM-IV) describe at length the symptom of childhood participation in stereotypically gender inappropriate behavior. Boys with GID “particularly enjoy playing house, drawing pictures of beautiful girls and princesses, and watching television or videos of their favorite female characters. . . . They avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks.” Girls with GID do not want to wear dresses, “prefer boys' clothing and short hair,” are interested in “contact sports, [and] rough-and-tumble play.” ).
cultural advantages of being the other sex),”\textsuperscript{168} and “the ability to inhabit and perform the new gender category ‘successfully.’”\textsuperscript{169} As Franklin Romero has explained:

The diagnostic criteria of GID do not challenge gender norms so much as they provide a mechanism for some people to substitute the gender norms of their lived gender for the norms of their birth sex. Moreover, the medical model holds transgender people to hyper-normative standards regarding their lived gender—thereby reifying the idea that ‘real’ men and women look and act a certain way.\textsuperscript{170}

Transsexuals may gain antidiscrimination protection under the miscategorization model, but such protection demands that they “play the part” of highly stylized men and women.\textsuperscript{171}

\textsuperscript{168} DSM-IV, supra note 14 at 537.
\textsuperscript{169} Spade, supra note 167 at 26. Spade is critical that “success” necessarily means adherence to established gender norms. For a female-to-male transsexual, tips for successful performance of masculinity “focus on an adherence to traditional aesthetics of masculinity, warning FTMs to avoid “punky” hair cuts, black leather jackets and other trappings associated with butch lesbians. A preppy, clean-cut look is often suggested as the best aesthetic for passing. Again, this establishes the requirement that gender transgressive people be even more ‘normal’ than ‘normal people’ when it comes to gender presentation.” Id. at 27.
\textsuperscript{170} Romero, supra note 91, 731.
\textsuperscript{171} The problems with a gender miscategorization conception of sex discrimination are similar to those Mary Anne Case has identified with the Native American sex/gender system of berdache—whereby a person of one sex is socially recognized as having the gender typically associated with the other sex. Both impose upon individuals what Case calls a “package deal.” Although one’s gender is no longer determined by one’s sex, individuals are still expected to be gender male or gender female and to not deviate from the package of norms associated with their gender. Gender remains essentialized even as it become detached from biological sex. As Case explains:

Although I do not urge an abolition of conventional gender categories, I am troubled by the alternative of berdache because I am also not committed as either a descriptive or a normative matter to the preservation of these categories. I would neither be particularly surprised nor particularly disappointed if masculinity and femininity as we today define them were to be amalgamated, to be diversified, or to wither away in future generations. I, therefore, worry about two sorts of potential gender essentialism—not merely the essentializing of women as feminine, but the essentializing of the feminine itself. Separate gendered spheres, however open to persons of both sexes, increase the risk of reifying current definitions of masculine and feminine, which I would prefer had more room to develop, even to disappear.

Mary Anne Case, Unpacking Package Deals: Separate Spheres are Not the Answer, 75 DENV. U. L. REV. 1305, 1317 (1998).
Nontranssexual gender-benders are denied all protection under the miscategorization model. The miscategorization model protects no middle ground and no gender ambiguity. As a result, such workers too will be pushed to over-perform their gender—not as an effort to gain the law’s protection, which they cannot—but because, without such protection, they are subject to whatever gender conformity demands their employers choose to impose.

Pressures to over-perform gender are likely to be even stronger, and more widespread, under the balancing principle. Indeed, in some ways, the balancing principle simply extends to nontranssexuals the legal incentive to over-perform that transsexuals feel under the miscategorization approach. Under a balancing approach a plaintiff seeking protection for gender nonconforming conduct must convince a court that abandoning a particular gender expression in order to satisfy workplace conformity demands would be painful and damaging. To do so, the worker must convince the court that the challenged gender expression is a function of her core, stable personality rather than an expression of individual autonomy or personal taste. This need to convince courts of the stability of a plaintiff’s gendered conduct, is however, likely to push plaintiffs toward more extreme forms of gender dysphoric behavior than they would otherwise adopt. A plaintiff’s gender nonconforming conduct is likely to look more stable and immutable or inelastic, to the extent that it is part of a broad, consistent and stereotypical pattern of gender nonconformity.

To see why this is so, consider again Darlene Jespersen’s challenge to Harrah’s make-up requirement for female bartenders. Under a balancing conception of Title VII’s
sex discrimination prohibition, Jespersen would need to convince the court that compliance with the rule would be psychically, if not physically, painful for her. This was precisely the argument that transgender advocates made on her behalf in their amici brief. The National Center for Lesbian Rights and the Transgender Law Center argued that requiring Jespersen to wear makeup was “contrary to [her] innate identity and sense of self” and was “a serious, invasive, and demeaning experience and may be as debilitating to an individual as being subjected to sexual or gender-based harassment.”

The court was unconvinced, instead treating Jespersen’s desire to leave her face make-up free as simply a matter of personal preference. Part of the reason for the court’s skepticism may have been that Jespersen did not object to any of the other feminine grooming requirements imposed on her by Harrah’s. If Jespersen had objected to all feminine grooming requirements, and had sought to present herself consistently according to Harrah’s masculine grooming code, the court might have viewed her opposition to makeup with a bit more respect. Certainly, she would have

\[172\] Brief for Nat’l Center for Lesbian Rights and Transgender L. Center as Amicus Curiae supporting Plaintiff-Appellant, Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104 (9th. Cir. 2006) (No. 03-15045), 2005 WL 1501598. More generally, the groups argued:

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

\[173\] The court explained: “We respect Jespersen’s resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.” Jespersen, 444 F.3d 1104, 1112.
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then looked more like the plaintiffs in *Smith* and *Yunits* who were granted gender nonconformity protection.

The dangers of this pressure to over-perform gender are two-fold. First, to the extent that protection from gender conformity requires individuals to not only highlight their own gender identity but also their distinctness from people of the other gender, the law encourages inauthentic gender performances.174 Such inauthentic performances may, as transgender advocates have argued,175 be difficult and subjectively painful. Perhaps even more worrisome, however, is that rather than being painful, such exaggerated gender performances may come over time to feel authentic and may foreclose what might otherwise be reasonable and real opportunities for workers. Those who identify as gender female may, for example, come to believe that they really are and must be most comfortable in skirts and makeup. Hence they may shy away from jobs that require masculine attire and dirty physical labor. Those who identify as gender male may come to believe that they really are and must be aggressive and competitive. Hence they may shy away from more jobs requiring nurturing and caregiving.176

174 Richard Ford has identified a similar effect on racial minorities stemming from the admissions criteria of colleges and graduate schools post-Bakke. As he explains: “Bakke’s codification of the diversity rationale required institutions that wished to engage in affirmative action and minority groups themselves to emphasize cultural differences. . . . [O]nly by highlighting their own distinctiveness could minority students justify their presence in the universities that admitted them.” See Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1810 (2000).


176 Richard Ford has identified a similar danger in the race context: “the harm of misrecognition is that members of the misrecognized group may internalize the deprecating stereotypes of others. Such individuals, then, may not always appropriately determine what is fundamental to their identity, or
Second, the push to over-perform gender is likely to result in a loss of gender diversity in society generally and with it a decrease in tolerance for those who cannot or will not conform. For decades researchers have studied the relationship between intergroup contact and prejudice by testing variations of the “contact hypothesis” — the claim that prejudice can be reduced by contact between groups. In what is perhaps still the most influential account of the contact hypothesis, Gordon Allport in *The Nature of Prejudice* argued that intergroup contact reduced racial and ethnic prejudice when four conditions were met: 1. equal status between the groups in the situation in which contact occurs; 2. common goals between the groups, 3. intergroup cooperation in the contact situation, and 4. the support of authorities, law or custom. More recent studies have found that intergroup contact reduces racial prejudice even when not all of Allport’s contact conditions are met. The contact theory has also been extended and tested with a range of other targeted groups such as gays, the elderly, the physically

better put, what should be fundamental to their identity. If misrecognition can lead people to fail to take advantage of opportunities even after ‘objective obstacles to their advancement fall away,’ then misrecognition might also lead those same people to push for rights to self-detrimental traits and adopt misconceived legal strategies in the name of safeguarding an identity that was shaped by the misrecognition of others.” See Richard T. Ford, *Beyond ‘Difference’: A Reluctant Critique of Legal Identity Politics, in LEFT LEGALISM/LEFT CRITIQUE* 55 (Wendy Brown & Janet Halley eds., 2002).


178 See Allport, supra note 177, at 281 (“Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.”). See also Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory, 90 J. OF PERSONALITY AND SOC. PSYCHOL. 751, 752 (2006).*

179 Pettigrew & Tropp, supra note 178, at 761 (a meta analysis of 515 individual studies on the contact theory); See also JOHN F. DOVIDIO ET AL., EDS., ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT (2005).
disabled and the mentally ill with similar results.  

180 The contact hypothesis suggests that workplace contact with gender nonconformists would lead to a similar decrease in prejudicial attitudes toward such individuals and an increase in tolerance of gender diversity. If gender nonconformists are pushed to conform in the workplace, then this critical context for intergroup contact—along with its benefits—is lost.  

B. Definition by Elites

Both the miscategorization and the balancing interpretations of sex discrimination are also likely to encourage the definition of gender by elites—in this case the medical establishment. Since determination of a plaintiff’s true or core gender identity is required under either approach, plaintiffs are likely to rely on, and courts are likely to defer to, the testimony of medical experts. 

This deference to elites raises two additional dangers—misrecognition and entrenchment. First, there is the danger that doctors testifying about what gender

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181 See CYNTHIA ETLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 5 (2003) (exploring the importance of workplace bonds in a diverse society and arguing that because workplaces are more socially diverse and integrated than most places where adults spend time, it is at work, where people are forced to interact to get things done, that “we have the best chance of meeting some of the most profound challenges facing American society”).

182 Such reliance is already apparent in recent sex discrimination cases involving transsexuals. See e.g., Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (noting plaintiff’s reliance on a clinical professor of social work who was also a professor of psychiatry and behavioral sciences); Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008) (relying on three expert opinions from a licensed social worker, medical doctor, and licensed psychologist and professor); Doe v. Yunits, No. 0010060A, 2000 WL 33162199, at *6 (Mass. Super. Oct. 11, 2000) (noting that use of female pronoun to refer to plaintiff is consistent with practice of mental health and other professionals who work closely with transgendered patients).
means may simply get it wrong—both in the specific case and generally.\textsuperscript{183}

Misrecognition seems a particular danger in this context where the causes of the gender
dysphoria from which transsexuals suffer is not well understood\textsuperscript{184} and diagnosis is
necessarily subjective.\textsuperscript{185} In particular, if doctors testify, and courts accept, that male-to-
female transsexuals are simply women trapped in men’s bodies, they may be misstating
the gender experience of transsexuals and nontranssexuals alike. It may be that
transsexualism is a distinct gender pathology that involves more than just a disconnect
between sex and gender. Transsexuals may not in fact experience gender the way

\begin{footnotesize}
\textsuperscript{183} Ford has identified this problem in the race context as well. “If misrecognition is a serious
harm then we must be concerned that legal recognition may go wrong, misrecognizing already
subordinated groups and codifying that misrecognition with the force of law and the intractability of
stare decisis. We’d better be pretty sure that the traits the law recognizes are the right ones.” Ford, supra
note 176, at 53.

\textsuperscript{184} See 2.0 GENDER IDENTITY RESEARCH & EDUCATION SOCIETY, GENDER VARIANCE (DYSPHORIA) 4
(Dysphoria)] (“[T]he experience of extreme gender variance is increasingly understood in scientific and
medical disciplines as having a biological origin. The current medical viewpoint . . . is that this condition .
. . is strongly associated with unusual neurodevelopment of the brain at the fetal stage.”); 2.1 GENDER
IDENTITY RESEARCH & EDUCATION SOCIETY, DEFINITION & SYNOPTIC OF THE ETIOLOGY OF GENDER VARIANCE
3 (July 18, 2009), available at http://www.gires.org.uk/etiology.php [hereinafter Etiology of Gender
Variance] (hypothesizing that hormones significantly influence the “dimorphic development” of gender
though noting that “the exact mechanism is incompletely understood”); Randi Ettner, The Etiology of
Transsexualism, in PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 1, 9 (Randi Ettner et al. eds.,
impeinds a strictly biological explanation.”); P.T. Cohen-Kettenis & L.J.G. Gooren, Transsexualism: A
Review of Etiology, Diagnosis and Treatment, 46 J. PSYCHOSOMATIC RES. 315, 318-19 (1999) (describing
studies linking transsexualism to prenatal hormone exposure or to sex differences in the hypothalamus);
Frank P.M. Kruijver, et al., Male-to-Female Transsexuals Have Female neuron Numbers in a Limbic Nucleus, 85
J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2041 (2000) (presenting data “supporting the view that
transsexualism may reflect a form of brain hermaphroditism such that this limbic nucleus itself is
structurally sexually differentiated opposite to the transsexual’s genetic and genital sex. It is conceivable
that this dichotomy is just the tip of the iceberg and holds also true for many other sexually dimorphic
brain areas”).

\textsuperscript{185} See Cohen-Kettenis & Gooren, supra note 184, at 322 (“Presently, it is impossible to diagnose
transsexualism on the basis of objective criteria. Because psychometrically sound psychological
instruments to measure transsexualism do not exist, one is dependent on the subjective information given
by the applicants for the diagnosis.”).
\end{footnotesize}
nontranssexuals do. ¹⁸⁶ It is possible, for example, that transsexuals may have particularly strong gender associations which make cross gender manifestations particularly painful.¹⁸⁷ Nontranssexuals may not have as strong gender commitments. As a result, cross gender manifestations for them may be psychically trivial.

Second, once courts rely on a particular medicalized conception of gender, that conception becomes entrenched in law and society more generally. Those who do not experience their gender in the prescribed ways will either be pathologized or discredited.¹⁸⁸ Either way, they are likely to be excluded from the antidiscrimination framework. Those who seek to avoid such exclusion must articulate, if not actually experience their gender in the ways courts say that they do.

Just as courts’ transsexual sex discrimination cases reflect conventional conceptions about the fixidity and dichotomy of gender categories, so too do the cases

¹⁸⁶ Indeed it is possible that transsexuals experience gender in a way that differs, perhaps in intensity and/or in kind, not only from nontranssexuals but also from those who experience other forms of gender dysphoria. See Etiology of Gender Variance, supra note 184, at 3 (“A very small number of children experience their gender identity as being incongruent with their phenotype. Adult outcomes in such cases are varied and cannot be predicted with certainty. It is only a minority of these children that, regardless of phenotypical socialization and nurture, this incongruence will persist into adulthood and manifest as transsexualism.”).

¹⁸⁷ See Cohen-Kettenis, supra note 184, at 320 (noting that “[n]ot all children with GID will turn out to be transsexuals after puberty” and explaining that it might be that “only very few extreme cases would become transsexuals, whereas the mild cases would become homo- or heterosexuals”); THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, 2 (6th ed. Feb. 2001) (“A clinical threshold [for transsexualism] is passed when concerns, uncertainties, and questions about gender identity persist during a person’s development, become so intense as to seem to be the most important aspect of a person’s life, or prevent the establishment of a relatively unconflicted gender identity.”).

¹⁸⁸ For a similar point see Ford, supra note 174, at 1811 (“The rights argument that protects culture as the authentic expression of the individual litigant must invite—in fact it must require—courts to determine which expressions are authentic and therefore deserving of protection. The result will often be to discredit anyone who does not fit the culture style ascribed to her racial group.”).
actually encourage more conventionally gendered consciousness and behavior in transsexuals and nontranssexuals alike. Law and culture are circular in this way.\textsuperscript{189}

CONCLUSION

In this paper I have presented an alternative, and less sanguine, interpretation of recent sex discrimination case law. I have argued that recent decisions providing antidiscrimination protection to transsexuals do not signal new found protection for workers’ gender expressions, nor a move beyond traditional gender categories. Instead, they reflect the pairing of a constrained antidiscrimination model with a conviction that gender is binary, fixed and socially salient. In short, to the extent the decisions reflect any coherent ideological project, it is one that essentializes and reinscribes gender.

Certainly this new essentialism differs in important respects from the old. While the essentialism of the 19th Century justified women’s formal exclusion from the public sphere, the new essentialism is unlikely to lead to or support any such categorical rules. Instead, the new essentialism is likely to work at a more insidious level by creating women and men who are in fact suited to and suitable for different jobs. The new essentialism promotes gender dichotomy and division through self-selection rather than formal exclusion. The mechanics are different, but the effect is likely to be the

\textsuperscript{189} See Janet E. Halley, \textit{Gay Rights and Identity Imitation: Issues in the Ethics of Representation}, in \textit{THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE} 126 (David Kairys ed., 3d ed. 1998) (criticizing arguments by gay rights advocates based on “some preliminary and equivocal scientific studies suggesting human sexual orientation might have some biological components” and hence “was a biological trait like race” on the grounds that the arguments “may have ‘made up people’ in the sense that they persuaded gay men and lesbians that they were ‘like that.’”); Ford, \textit{supra} note 174, at 1809 (describing “the propensity of social discourse and scientific practices . . ., to produce rather than simply to reflect their objects . . .”).
same: women and men, or those who are masculine and feminine, will have very
different aspirations, experiences and opportunities.

It is worth emphasizing that my point is not to discourage antidiscrimination
protection for transsexuals. It is instead to provide a more accurate reading of the case
law and to caution scholars and activists against adopting a “use any strategy that
works approach.” As currently conceived there seems little that is truly radical or even
progressive about the reasoning of the new transsexual sex discrimination victories, and
there is much in the case law that should give progressive scholars and advocates cause
for concern.