Toward a More Transformative Approach:

The Limits of Transgender Formal Equality

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I. INTRODUCTION

The recent debates over the inclusion of transgender protections in the Employment Non-Discrimination Act ("ENDA") illustrate an increasing awareness of the widespread injustices wrought by mainstream understandings of sex and gender. Supporters of a trans-inclusive bill have forcefully argued the imperative of explicitly protecting the employment rights of trans people so as to dismantle the binary, biologically-centered gender beliefs that stigmatize gender non-conformity in all people. According to these arguments, without additional transgender anti-discrimination provisions ENDA's sexual orientation protections fail to confront the gender-phobia that stigmatizes gay, lesbian, and bisexual identities. Supporters of a trans-exclusive ENDA do not necessarily refute the vested interest of lesbian, gay, and bisexual ("LGB") people in transgender rights, but they have argued that existing sex discrimination laws provide sufficient protection for gender non-conformity to protect the interests of trans people and lesbian, gay, bisexual, and transgender ("LGBT") people more broadly. In what has become the LGBT communities' most prominent national debate about the construction of gender in our society, transgender rights have been anointed as the key to a broad liberatory transformation of gender.

Implicit in both sides of the ENDA debate is the belief that a robust system

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1. I use the term “transgender” or “trans” throughout this article to refer to persons whose gender does not fit within mainstream understandings of binary male and female gender identities superimposed upon binary biologically-rooted sexes. “Transgender” is an umbrella term that encompasses such self-identifications as transgender, transsexual, transvestite as well as a potentially infinite range of binary-transgressive identities. For an in-depth study of the history of the term “transgender,” its strengths, and its shortcomings, see DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY (2007). Where I specifically use the term “transsexual,” it is primarily to refer to a medical discourse around maleness and femaleness that includes psychological and surgical intervention as a gateway to deviating from one’s birth-assigned sex and gender.


of transgender rights necessarily requires a critical engagement and transformation of unjust gender norms. In order to bring trans people within constitutional and statutory protections that presently incorporate binary, biological understandings of sex and gender, it would seem necessary to dismantle the truth claims that underlie these beliefs and expose the culturally-contingent nature of our sex/gender system.\(^4\) Once this cultural contingency is exposed, advocates could begin to articulate the injustices of our sex/gender system and bring about a reconstruction of gender norms that would mitigate the harms suffered by many trans people. The enduring jurisprudential stigmatization of trans experiences would seem to reflect a refusal by courts to aid in this reconstructive effort. Where courts have finally begun to appreciate the gravity of the injustices often endured by transgender litigants,\(^5\) the emerging body of transgender rights law would seem to have initiated a reexamination of our culture’s understandings of sex and gender.

Unfortunately, recent articulations of transgender rights have instead demonstrated the inherent limitations of a formal equality framework for facilitating meaningful critical engagement with concepts of sex and gender. Recent transgender legal victories are certainly commendable for redressing the harms experienced by trans people; however, it is a mistake to fully conflate short-term victories with a fundamental transformation of unjust gender constructs. Although formal equality—treating trans people the same as non-trans people despite gender non-conformity—may reduce instances of blatant discrimination, it also serves to conceal and perpetuate the underlying stigmatization of non-conformity to gender norms. Because a formal equality articulation of transgender rights requires emphasizing the compatibility of trans people with normative social values and downplaying the challenge trans people might represent to existing belief structures, there is no space within a formal equality framework for affirming the normative desirability of this challenge in and of itself.

Although the lawyers who bring trans-discrimination claims are undeniably

\(^4\) The term “sex/gender system” refers broadly to our society’s categorization and regulation of social roles based upon an interpretation of the body’s physical features. It is meant to encompass the entire process by which an individual is imbued with social categories and expectations associated with particular sex and gender categories. It is also meant to indicate a culturally specific mode of understanding human bodies and related social roles and accordingly the potential variations in such understandings across cultures. The term originated with anthropologist Gayle Rubin. See Gayle Rubin, *The Traffic of Women: Notes on the Political Economy of Sex*, in *Toward an Anthropology of Women* 157 (Rayna R. Reiter ed., 1975). Where I use the term “sex” or “gender” alone, I am consciously dissecting the terms from one another in order to analyze each in isolation.

constrained by the entrenchment of formal equality in our civil rights discourse, it is important to recognize the ways in which transgender claims, even where successful, can serve to reinforce the very gender beliefs that litigants seek to challenge. While the immediate goal in any transgender discrimination case is to obtain judicial accommodation for a plaintiff's claims, if such accommodation requires affirming a binary, biologically based gender ontology, present victories may serve to impede the long-term reconstructive goal that has been increasingly entrusted by the broader LGBT community to a transgender legal movement. If the goal of the transgender movement is to provide a social and legal landscape that truly embraces and values the broad diversity of gendered experiences, success for the movement therefore must be measured in terms of this liberatory goal and not merely in terms of jurisprudential accommodation. Only by maintaining focus on a long-term liberatory goal as the guidepost for present day legal strategies can an emerging transgender movement start to devise creative ways of altering legal discourse to achieve gender-transformative goals, rather than to conform its normative goals to the apparent limitations of legal discourse.

This paper will specifically address the means by which rights-based approaches to transgender advocacy risk undermining its transformative possibilities and will draw from cross-cultural engagement to suggest alternate ways the legal system might be used to dismantle harmful sex/gender norms. It aims not only to critique the potential deterioration of a long-term reconstructive project but also to suggest one possible strategy for shifting away from status quo affirmations and towards developing a common utopian vision. Wary of past writings about trans people that have been critical of their increasing visibility, this article is motivated by a firm belief that valuing trans experiences must be a central characteristic of a more just conceptualization of gender. However, it seeks to emphasize that mainstream anti-discrimination claims on behalf of trans clients fail to engage meaningfully with issues of gender construction in a way that renders gender sufficiently just for all, including trans people.

Although the following critique and proposals may radically diverge from increasingly mainstream transgender legal strategies, the normative goal suggested may not. The concept of "gender fluidity" articulated in the second half of this paper is not intended to serve only the most "radical" gender experiences but rather has the potential to recognize and value the existences and beliefs of a broadly diverse trans population. Gender fluidity does not entail a wholesale erasure of gender differentiation, but it does require the elimination of a conceptual hierarchy between the gender roles we do acknowledge. It does not look to biology or anatomy as necessary determinants of gender roles, but it does acknowledge bodily difference as a potentially material component of gender construction. It does not mandate androgyny or gender ambiguity, but it does provide space for fluidity between and within gender roles. Although preferable

alternatives may exist, gender fluidity has the potential for providing a common utopian vision without requiring an essentialist, reductionist, or exclusionary conception of gender. This paper’s critique of transgender legal strategies is thus not meant to question the goals of trans advocates per se but rather to question the efficacy of current approaches in achieving them.

Part II of this paper will provide a theoretical baseline for the critique that follows by outlining the contributions of postmodern gender scholarship to a deconstruction and potential transformation of mainstream gender norms. Part III will address the dominant legal strategies used by transgender advocates and illustrate how each eschews the deconstructive theories discussed in Part II. Part IV will articulate an alternative approach to transgender advocacy that focuses on the legal rule systems that structure and perpetuate oppressive gender construction by drawing on the cross-cultural insights of the social sciences. This section will demonstrate that by contextualizing gender norms within particular cultural and legal traditions, the transgender movement can acquire necessary insight into both normative alternatives to repressive gender norms and the means by which oppressive gender norms maintain their social legitimacy.

II. THEORETICAL UNDERPINNINGS OF A TRANSGENDER RECONSTRUCTIVE PROJECT

Much scholarship by transgender advocates and legal scholars has embraced the deconstructive project of postmodern feminism and queer theory in the process of challenging our legal system’s rigid binary notions of sex and gender. This work has shown that by focusing on birth-assigned sex as the fundamental determinant of one’s social status and thus legal rights, courts perpetuate mainstream understandings of sex and gender by first insisting that each person is innately either biologically male or female and then conflating that biological sex with the person’s culturally manifested gender identity.7 Under this framework, gender in American jurisprudence has been intransitorily induced8 from one’s biological sex, indelibly and unquestionably assigned at birth.

While the precise means by which the legal system has perpetuated this gender framework is outside the scope of this paper, what is important for the analysis that follows is an understanding of the theoretical bases for challenging

8. See Valdes, supra note 7.
the fundamentality of the categories of birth-assigned sex and cultural gender. By illustrating that gender functions as a regulatory social norm in and of itself and is not merely the cultural manifestation of some fundamental aspect of human existence, postmodern theories provide space for transgender persons to question their marginal status by asserting the contingency of the social norms that condemn deviation from biologically-imposed, gendered expectations.

A. Challenging Biological Essentialism: Sex Does Not Presuppose Gender

In order for gender to be understood as a site for legal and political reform, it cannot be understood as flowing from one's inclusion in one of two biologically determined sexes. Gender is not merely the cultural manifestation of one's biological sex. Rather, it is a normative ideology that creates the appearance of a determinative biological self: "Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being." By insisting from generation to generation that certain bodies must perform particular acts from the moment of birth and throughout the course of one's life, the regulatory framework of gender creates the illusion that it is the body and not the social institution that dictates the performance of these acts. However, bodily sex cannot be prior to, and thus determinative of, gender. One only becomes legible as male or female as a result of the cultural inscription of sex at birth by a medical practitioner acculturated to conflate a particularly stylized body with a particular set of gendered acts:

Consider the medical interpellation which (the recent emergence of the sonogram notwithstanding) shifts an infant from an "it" to a "she" or a "he," and in that naming, the girl is "girled," brought into the domain of language and kinship through the interpellation of gender. But that "girling" does not end there; on the contrary, that founding interpellation is reiterated by various authorities and throughout various intervals of time to reinforce or contest this naturalized effect. The naming is at once the setting of a boundary, and also the repeated inculcation of a norm.


11. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCOURSIVE LIMITS OF SEX 7-8 (1993) [hereinafter BUTLER, BODIES THAT MATTER].
By initiating regulatory practices at the moment of birth (or even beforehand), the sexing of a child through the lens of gender norms perpetuates the illusion that that sex is innate and not the product of interpellation.

Gender’s regulatory effectiveness in our culture largely stems from biologically essentialist understandings of the production of gender identity. By creating the appearance that gender identity is rooted in biology, biological essentialism casts the primary means of gender perpetuation, the category of “sex,” as outside the realm of social construction as an aspect of one’s pre-social self. If situated as prior to being, “sex” cannot be deconstructed and reformulated as more inclusive of human diversity because it appears as if it has never been constructed at all:

When the sex/gender distinction is joined with a notion of radical linguistic constructivism, the problem becomes even worse, for the “sex” which is referred to as prior to gender will itself be a postulation, a construction, offered within language, as that which is prior to language, prior to construction. But this sex posited as prior to construction will, by virtue of being posited, become the effect of that very positioning, the construction of construction. If gender is the social construction of sex, and if there is no access to this “sex” except by means of its construction, then it appears not only that sex is absorbed by gender, but that “sex” becomes something like a fiction, perhaps a fantasy, retroactively installed at a prelinguistic site to which there is no direct access.12

By rooting itself in a biological ontology that limits access to sex as a site of cultural contestation, the regulatory framework of gender effectively limits its own contestation. If gender is understood as a social construction of sex, and is thus alterable only within the limits of one’s assigned sex, gender thus limits its own reconstruction so long as sex remains understood as an uncontestable category.

B. Challenging Identity Essentialism: Gender is Not the Expression of Identity

Even if the illusion of essential biological sex is exposed, gender nevertheless remains incontestable if alternatively understood as rooted in some metaphysical essence of identity. Just as the ascription of gender to a determinative biological sex masks the supervening role of external norms, the conceptualization of one’s gender as reflecting one’s fundamental “self” masks the significance of external norms in constituting gender identity; in other words, similar theoretical concerns arise from asserting that one’s gender expression reflects one’s underlying gender identity. As stated by Judith Butler, “there is no gender identity behind the expression of gender; that identity is performatively

12. BUTLER, BODIES THAT MATTER, supra note 11, at 5.
constituted by the very expressions that are said to be its results.\textsuperscript{13} According to this theory of gender performativity, one can only become a subject within a given culture through the repeated performance of particular acts that become legible within a particular cultural lens:

[\texttt{T}]here is no “I” who stands behind discourse and executes its volition or will through discourse. On the contrary, the “I” only comes into being through being called, named, interpellated . . . and this discursive constitution takes place prior to “I”; it is the transitive invocation of the “I.” Indeed, I can only say “I” to the extent that I have first been addressed, and that address has mobilized my place in speech; paradoxically, the discursive condition of social recognition precedes and conditions the formation of the subject: recognition is not conferred on a subject, but forms that subject.\textsuperscript{14}

In order for one to claim a gender identity within a particular cultural framework, that person must be able to reference particular actions that will be recognized by others as constituting the identity being claimed. It is in this citation to authoritarian norms that gender discursively limits human agency, as only those whose actions cohere with gender norms may become a subject within that culture. “[\texttt{T}]here is no ‘being’ behind doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed—the deed is everything.”\textsuperscript{15} Moreover, the deed only constructs the being when it is within the matrix of intelligibility governing the body performing the deed. One cannot be a gender without citation to the regulatory gender norms that permit certain expression at the exclusion of others.\textsuperscript{16} Over time, these repeated citations to authoritative gender norms through the performance of gender identity “accumulate the force of authority” in and of themselves, so that the citation to gender norms takes the form of citation to a culturally constructed gender identity and not to the norms that constructed that identity.\textsuperscript{17} Just as biological essentialism effectively conceals the regulatory gender norms that appear to flow from the body, identity essentialism masks the performativity of gender as a set of “constitutive conventions” deployed in interpersonal relations among members of our society.\textsuperscript{18}

\textbf{C. Transgender Possibilities}

An increasingly mobilized transgender rights movement would seem well-suited to expose the regulatory practice of gender and question its resulting

\textsuperscript{13} BUTLER, GENDER TROUBLE, supra note 10, at 33.
\textsuperscript{14} BUTLER, BODIES THAT MATTER, supra note 11, at 225-26.
\textsuperscript{15} BUTLER, GENDER TROUBLE, supra note 10, at 25 (quoting FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 45 (Vintage 1969) (1887)).
\textsuperscript{16} See BUTLER, BODIES THAT MATTER, supra note 11, at 225-27.
\textsuperscript{17} See id.
\textsuperscript{18} See id.
injustices.\textsuperscript{19} By performing deeds that fail to conform to those activities that supposedly flow naturally from one's birth-assigned sex, trans people reveal sex is the cultural inscription of meaning on human bodies and is not reflective of a binary biological truth about human experience.\textsuperscript{20} Furthermore, by claiming agency without adhering to a culturally intelligible identity, many trans people illustrate that intelligible gender identities are the product of particular cultural values and do not reflect fundamental limitations on potential human experience.\textsuperscript{21} As trans people increasingly refuse to remain invisible within mainstream society, their conspicuity would seem to inevitably require a large-scale reconsideration of dominant ideologies of sex and gender.

However, rather than forcing the legal system to engage in this reconsideration, the formal equality strategies gaining traction in trans jurisprudence uncritically assimilate transgender individuals into dominant sex

\begin{itemize}
\item \textsuperscript{19} See, e.g., Sandy Stone, \textit{The Empire Strikes Back: A Posttranssexual Manifesto}, in \textit{BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY} 280, 296 (Julia Epstein & Kristina Straub eds., 1991) ("In the transsexual as text we may find the potential to map the refigured body onto conventional gender discourse and thereby disrupt it, to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries.").

Accordingly, Judith Butler argues that it is necessary to encourage the emergence and perpetuation of individuals who do not conform to the matrix of intelligibility underlying the fictions of sex and pre-discursive gender identity:

\begin{itemize}
\item Inasmuch as "identity" is assured through the stabilizing concepts of sex, gender, and sexuality, the very notion of "the person" is called into question by the cultural emergence of those "incoherent" or "discontinuous" gendered beings who appear to be person[s] but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined . . . . The cultural matrix through which gender identity has become intelligible requires that certain kinds of "identities" cannot "exist"—that is, those in which gender does not follow from sex and those in which the practices of desire do not "follow" from either sex or gender . . . . Their persistence and proliferation . . . provide critical opportunities to expose the limits and regulatory aims of that domain of intelligibility.
\end{itemize}

\textit{BUTLER, GENDER TROUBLE, supra} note 10, at 23-24.

\item \textsuperscript{20} It should be noted that many trans people strongly believe in the materiality of the body in producing their gendered selves. The prevalence of sex reassignment surgery and hormone treatment certainly reveals a concern for a legible relationship between identity and anatomy. Accordingly, there has been some hostility to performative understandings of gender that seek to minimize the centrality of the body to one's gendered existence. \textit{See JAY PROSSER, SECOND SKINS} (1998). However, the performativity of gender is in no way incompatible with a materialist understanding of the body. Indeed the body is the vessel which interacts with gendered social norms and which is inscribed with those meanings. The inscription of meaning on the body is very much "real" in the sense that it is acutely experienced, and claims that gender identity emerges from embodiment do not undermine performative claims. What they illustrate instead is the strength and intensity of gender as a system of regulatory norms. Performativity may be incompatible with bodily essentialism, but it is compatible with bodily materiality. \textit{See} Elaine Craig, \textit{Trans-Phobia and the Relational Production of Gender}, 18 \textit{HASTINGS WOMEN'S L.J.} 137, 143-45 (2007).

\item \textsuperscript{21} \textit{See} Susan Stryker, \textit{(De)Subjugated Knowledges: An Introduction to Transgender Studies, in THE TRANSGENDER STUDIES READER} 9 (Susan Stryker & Stephen Whittle eds., 2006) ("Transgender phenomena call into question both the stability and the material referent 'sex' and the relationship of that unstable category to the linguistic, social, and psychical categories of 'gender'.").
\end{itemize}
categories. By failing to question the fundamentality of birth-assigned sex in redressing discrimination—and indeed relying upon the category of sex to win such cases—transgender legal victories have validated the primary manifestation of the very gender norms trans people challenge.22 Even where transgender legal discourse rejects biological essentialism as an anchor for anti-discrimination claims, it is replaced by the essentialist concept of “gender identity,” and gender norms are then similarly concealed by a singular focus on the identities that they construct. Whether framing transgender discrimination as discrimination because of sex or because of a particular gender identity, the marginal status of trans people always appears to stem from their being a particular type of person and never from doing a particularly gendered deed. The sex- and identity-based strategies overlook the insight that one cannot be anything within a society without doing the highly regulated acts that serve as prerequisites to that identity. Protection for a sex or gender identity never requires addressing the norms that produce that identity, and the gendering of various acts allows humans to be hierarchically classified and strictly regulated according to the performance of those acts. If transgender advocacy is actually expected to achieve legitimization for non-binary gender expression, it must directly confront the underlying social meaning attached to such expression. Unfortunately, a formal-equality approach to transgender discrimination evades this necessary confrontation.

III. THE DISCURSIVE LIMITS OF CLASS-BASED APPROACHES

A. Discrimination “Because of Sex”: Price Waterhouse and Sex-Stereotyping under Title VII

In challenging workplace discrimination against trans people, advocates have gotten the most traction out of a Title VII sex-stereotyping theory suggested by the Supreme Court in Price Waterhouse v. Hopkins.23 Under this theory it is impermissible for an employer to discriminate against an employee for failure to conform to the stereotypes attached to his or her biological sex. Although this theory was originally applied to a masculine, self-identified woman, it has become increasingly common for courts to extend this theory to cover transgender litigants.24 However, because sex-stereotyping theories require transgender plaintiffs to “anchor”25 their claims in being either the male or

23. 490 U.S. 228 (1989) (holding that a female employee may state a claim for sex discrimination under Title VII for being subjected to gender stereotyping).
female sex to show non-conformity with that sex, utilization of this theory requires making an explicitly biologically essentialist claim that impedes intervention with the regulatory norms that produce male and females sexes in the first place. It is therefore perhaps unsurprising that courts have increasingly recognized a sex-stereotyping cause of action, as it requires very little reconceptualization of mainstream notions of sex and gender. This section will first briefly outline the evolution of sex-stereotyping claims for transgender litigants and will then critique their failure to promote a reconstruction of sex/gender norms.

1. *Brief History of Sex-Stereotyping under Title VII*

Prior to the Supreme Court’s 1989 decision in *Price Waterhouse*, transgender employees were generally unable to utilize federal anti-discrimination laws. Courts concluded that Title VII’s prohibition on discrimination “because of sex” was intended to reach only “traditional notions of ‘sex’” and refused to give the term an expansive meaning to reach trans people. As explained by the Ninth Circuit in 1977:

[Plaintiff] has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex . . . . A transsexual individual’s decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII.

Discrimination against trans people did not stem from being a member of the male or female class but from their volitional decision to alter their birth sex, and this act was not protected by Title VII. By explicitly refusing to protect the acts constituting transgenderism, these early transgender discrimination cases indicated that advocates would need to find protection for stigmatized acts before trans people could find protection as an overarching class.

This protection for stigmatized gendered acts appeared to arrive in the Supreme Court’s extension of Title VII to the case of Ann Hopkins. Hopkins—a biological and self-identified woman—had spent five years as a senior manager.

86 (2004) for a useful analysis of the *Price Waterhouse* framework as requiring a disjunction between one’s “anchor” and “expressive” gender.


27. *Id.* at 664; *see also* Ulane v. E. Airlines, 742 F.2d 1081, 1085-87 (7th Cir. 1974) (“[A] prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born . . . . It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who take female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”).

at Price Waterhouse and was up for promotion to partner.\textsuperscript{29} However, her supervising partner refused to submit her candidacy to the full partnership and advised Hopkins that in order to make partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."\textsuperscript{30} The Supreme Court subsequently held that this treatment of her partnership candidacy violated her rights under Title VII:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were . . . one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not, has acted on the basis of gender . . . . 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 in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.\textsuperscript{31}

Because Hopkins was denied partnership for failing to act in a manner that conformed to stereotypes attached to her female sex, the Court concluded that Price Waterhouse discriminated against her "because of sex" under Title VII.\textsuperscript{32}

Although several lower courts subsequently found Price Waterhouse inapplicable to transgender employment discrimination,\textsuperscript{33} in 2004 the Sixth Circuit squarely held that one's status as transgender does not bar recourse to a sex-stereotyping claim. In Smith v. City of Salem, the court held:

Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex-stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of the behavior.\textsuperscript{34}

\begin{enumerate}
\item Id. at 235.
\item Id. at 250–51.
\item Id. at 258.
\item See, e.g., Oiler v. Winn-Dixie L.A., Inc., 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002) (holding that plaintiff was terminated because he was a transsexual, not because he was gender non-conforming); Broadus v. State Farm Ins. Co., 2000 WL 1585257 (W.D. Mo. 2000) (same).
\item 378 F.3d 566, 575 (2004).
\end{enumerate}
Because Smith, "biologically and by birth a male," had been effectively terminated for "expressing a more feminine appearance on a full-time basis" after being diagnosed with Gender Identity Disorder, she stated a sex-stereotyping claim under Title VII.\textsuperscript{35} Defendant's belief that Smith's appearance and mannerisms were "inappropriate for his perceived sex" constituted unlawful discrimination "because of sex."\textsuperscript{36} Smith thus apparently shielded expression in ways non-stereotypical of one's biological sex from adverse employment actions. Because sex-stereotyping theory seemingly embraces gender non-conformity, the rationale adopted by Smith has received widespread support before and after the Sixth Circuit's decision.\textsuperscript{37}

2. Critique of Transgender Sex-Stereotyping Claims

Although a sex-stereotyping claim does challenge mainstream understanding that particular behavior must inevitably flow from being labeled a particular sex, the \textit{Price Waterhouse} rationale does nothing to question the validity of these underlying sexes themselves and the oppressive damage their perpetuation confers. In order for a transgender plaintiff such as Smith to prevail on a sex-stereotyping claim, she must "anchor" her claim in a statutorily-protected biological sex from which she behaviorally deviates.\textsuperscript{38} Although transgender litigants disaffirm the authority of medically-inscribed biological sex in their very existence, their legal protection hinges on embracing biologically essentialist description of their identities.\textsuperscript{39} While early transgender discrimination cases denied plaintiffs Title VII protection because their transgenderism took them out of the ambit of "sex" discrimination, the contemporary sex-stereotyping claim folds trans persons into a sexually dimorphic framework. If any plaintiff, even if she is transgender, can potentially

\textsuperscript{35} Id. at 568.

\textsuperscript{36} Id. at 574.


\textsuperscript{38} See Kramer, supra note 25, 484–87.

\textsuperscript{39} See Anna Kirkland, \textit{Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory}, 28 LAW & SOC. INQUIRY 1, 9 (2003) ("Because transsexuals are not protected per se, every lawsuit begins with a descriptive misfit (usually that the discrimination occurred because of "sex," meaning biological status as male or female). This 'check-a-box' type of requirement immediately demands traditional gender classification from a plaintiff whose entire legal problem arises precisely because she does not have one."); Richard Storrow, \textit{Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination}, 55 ME. L. REV. 117 (2003) (noting that in \textit{Rosa v. Park West Bank & Trust Co.}, 214 F.3d 213 (1st Cir. 2000), plaintiff consistently referred to herself as a man, despite self-identifying as a woman).
state a claim for sex-stereotyping discrimination, it seems to be because every plaintiff is cast as fundamentally either male or female. Once transgenderism is reconceptualized in terms of traditional binary notions of sex its ability to uproot sex and gender categories is significantly neutralized.40

The problem with maintaining the primacy of biological sex, even if one’s gendered expressions are allowed to diverge from such sex, is that such maintenance conceals the regulatory social norms that create “sex” and limit the range of normative human behavior. If sex is the construction of gender norms, and sex remains unquestioned in transgender legal discourse, then this discourse similarly fails to question the ways in which restrictive gender norms construct the category of sex.41 If trans plaintiffs must publicly affirm their fundamental status as male or female despite their desired disassociation from that status, they become unable to challenge the legitimacy of imposing a biological sex on all people from birth.42 While such imposition might at first glance seem harmless if it poses no limitations on acceptable gendered behavior, it would be a mistake to equate the prohibition of de jure sex-stereotype discrimination with an elimination of the stigmatizing effects of regulatory gender norms. In order for a formal equality claim to succeed, there must be a normative “other” against which it is unfavorably compared.43 In protecting a plaintiff’s gender non-conformity, a court must articulate those acts which constitute non-conformity and in doing so must delineate the contours of conformity.44 In describing a “biologically male” transsexual as performing feminine acts, it furthers the construction of particular acts as inherently feminine and normatively conflated with biological femaleness.45 Although employers may not base termination

40. Cf. Kirkland, supra note 39, at 10 (“It seems as though we defeat the transgressive power of feminist politics if we rely on traditional ways of constructing legal categories through gestures toward their unchangeable and pre-given status.”).

41. Cf. id. at 30 (“The Price Waterhouse theory pulls us back from the brink of having to figure out, as a matter of legal analysis, how we could treat sex and gender as ontologically disaggregated, and leaves us with the more easily understandable protection for those people who sex and gender are disaggregated in the social norms sense (‘men’ in ‘feminine clothing’).”).

42. See Laura Grenfell, supra note 9, at 94 (“[T]he main problem in this approach’s regulation of the “stereotypical” is that it ultimately aims to eliminate it.”); see also Matthew Gayle, Female By Operation of Law: Feminist Jurisprudence and the Legal Imposition of Sex, 12 WM. & MARY J. OF WOMEN & L. 737 (2006) (“[P]rohibiting discrimination against a person because she is female does nothing to challenge the right of the state to impose femaleness upon that person: the prohibition takes the sex categorization as a given without analyzing the ways in which the categorization itself may be oppressive.”).


44. See id.; Grenfell, supra note 9, at 93 (“[I]n its articulation that certain appearance, conduct, and behavior do not conform to conventional sex stereotypes, the law is effectively reiterating these stereotypes, and possibly entrenching them at the same time . . . .”).

45. Cf. Ben-Asher, supra note 43, at 304 (gender equality claims for trans plaintiffs requires comparing the bodies and actions of trans people to both male bodies performing male acts and female bodies performing female acts, paradoxically stabilizing “true” male and female bodies and acts).
decisions solely on an employee’s failure to adhere to normative constructions of male and female, the dominant construction of gender normativity remains unmistakable in a sex-stereotyping framework. The sex-stereotyping framework may require greater tolerance for employing the gender marginal, but it in no way undermines the marginal construction of trans people.

It should be noted that the distinction between the normative and the abject under the sex-stereotyping approach may directly exclude the most “radical” of gender non-conformists. By requiring plaintiffs to anchor their discrimination claims in the male or female biological sex, *Price Waterhouse* excludes from its protection those individuals who cannot or simply refuse to adhere to sexual dimorphism. For individuals whose gender expression is ambiguous, they may not be able to anchor themselves in either biological sex, because they may not be perceived as either sex, making it impossible to be subjected to sex stereotypes in a legally cognizable way.\(^{46}\) For those who truly challenge the conflation of biological sex and gender expression through their substantial disaggregation of the two categories, sex-stereotyping reaffirms their marginal status due to their inability to fit into a sex non-conformity framework.\(^{47}\)

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46. See Lloyd, *supra* note 9, at 181 (arguing that failure to fulfill the gender stereotypes of either men or women might work against a sex-stereotyping claim).

requiring plaintiffs to make biologically essentialist claims wherever possible in order to receive Title VII protection and denying such protection where such essentialist claims are impossible, the sex-stereotyping claim reaffirms the restrictions of dominant gender norms through the proliferation of the category of sex.

Although the seeming disavowal of biological essentialism in a few Title VII cases would appear to open the door to engagement with gender norms, sex-stereotyping claims inevitably require the articulation of some form of essentialist identity. Courts have not universally required Title VII plaintiffs to bring claims as members of their birth-assigned sex but have allowed them to claim protection as a member of the "opposite" sex with which they now identify. As opposed to the majority of transgender sex-stereotyping plaintiffs, the plaintiff in Kastl, a male-to-female transsexual woman, was characterized by the court as a "biological female" who failed to conform to the stereotypes of how women should behave, and not as a biological male who failed to conform to masculine stereotypes. While this characterization acknowledges that birth-assigned sex is not an essential determinant of one's gender identity, the plaintiff must nonetheless place herself within a binary biological sex framework. This alternative ontology acknowledges the ability of an individual to make claims about one's identity that are contrary to medically-inscribed identities, but these claims are limited to a framework structured by the biological essentialist claims of others. The court acknowledges that "the appearance of genitals at birth is not always consistent with other indicators of sex, such as chromosomes," but there is no contemplation that sex might be derived from entirely external factors. While the articulation of potential alternative sources would seem to illustrate the arbitrariness of sex designation, any "mistake" in assigning sex is

who do not identify as female or male and thus, virtually no explicit protections for people who do not identify as female or male. Further, there is little legal protection available for transgender people who do not fit the most narrow stereotypical gender norms.

48. See Kastl, 2004 WL 2008954 (for purposes of motion to dismiss, accepting plaintiff's allegation that she is "biologically female"); cf. Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997) (recognizing trans woman as female for purposes of Title IX claim).

49. 2004 WL 2008954, at *2 ("The pertinent inquiry asks not whether Defendant must allow biological males to use the women's restroom, but whether Title VII permits an employer to require a biologically female employee believed to possess stereotypically male traits to provide proof of her genitalia or face consignment to the men's restroom.").

50. See Craig, supra note 20, at 161 ("[I]t is remarkable that even where the Court does recognize the transsexual litigant's identity claim and correspondingly their preferred gender, it does so in a manner that discursively leaves intact the notion of gender as static, binary, and biologically determined.").

simply due to the sometimes inadequate proxy of genitalia for the "truth" of sex. Whether an individual brings sex-stereotyping claims as either male or female, she is forced to make some claim of truth about who she really is within an unexamined binary biological framework.

Cases like *Kastl* provide the opportunity to make subjective observations that contradict the "objective" observations of doctors; they do not, however, extinguish a prerequisite essentialist self-description. As discussed earlier, whether an essentialist claim is rooted in biology or in subjective observations of the self, it nevertheless shields gender norms from any meaningful critical engagement. Sex-stereotyping claims may capitulate to an identity essentialist claim in an effort to avoid the requirement of a blatantly disingenuous biological essentialist claim, but in doing so the inability to access gender norms in a critically meaningful way is even further concealed behind a seemingly more sympathetic jurisprudential façade.

Indeed, where plaintiff's non-conformity to sex stereotypes implicates gender as a regulatory structure and not simply as a matter of individuated identity claims, courts routinely refuse to use *Price Waterhouse* to overhaul unjust gender constructs. Most commonly, where a plaintiff's gender non-conformity implicates not only her gender identity but also her sexual orientation, the infusion of homophobia into a claim of transphobia almost always renders transphobia inactionable.52 A societal regime of compulsory heterosexuality has often been cited as the primary means through which male and female gender roles are produced through the relational differentiation of bodies and social roles.53 To the extent that a sex-stereotyping plaintiff challenges both the social limitations on the particular plaintiff and the overall structure of gender differentiation itself, courts have been careful to avoid "bootstrapping" sexual orientation discrimination claims onto sex-stereotyping claims.54 Although homosexuality does not necessarily implicate gender non-conformity, and indeed it may very well stabilize anatomical sex differentiation, where it is coupled with gender non-conformity it produces individuals that are potentially unintelligible within a binary essentialist structure. Protections for such individuals might require acknowledging the ontological incompleteness of gender essentialism in representing the relational dynamics among different

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52. See *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Hamm v. Weyauwega Milk Prods.*, Inc., 332 F.3d 1058 (7th Cir. 2003). Proponents of a trans-exclusive ENDA have used these cases to justify the relative unimportance of gender identity provisions, because sexual orientation, not gender non-conformity, has served as the basis for dismissing the Title VII claim. See *Carpenter*, supra note 3.


54. See *Dawson*, 398 F.3d at 218. See also Andrew N. Sharpe, *From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence*, 8 MURDOCH U. ELECTRONIC J. L., March 2001, at ¶ 10 (noting the "judicial anxiety over proximity to the homosexual body when dealing with transgender sex claims").
people. This acknowledgement undermines the binary sex structure that is the foundation for the sex-stereotyping claim, and it is therefore no surprise that courts faced with Price Waterhouse claims have been hostile to mixed motive sex-stereotyping cases.

A recent decision by the Tenth Circuit Court of Appeals similarly emphasizes the reconstructive limitations on the sex-stereotyping theory. In Etsitty v. Utah Transit Authority, a transsexual woman was fired from her job as a bus operator due to her employer's concerns that her use of women's restrooms would subject the company to civil liability. Although the court assumed that the Price Waterhouse theory was available to Etsitty, it nonetheless determined that her employer had stated a legitimate non-discriminatory reason for her termination. According to the court:

It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual. As discussed above, however, Etsitty may not claim protection under Title VII based upon her transsexuality per se. Rather, Etsitty's claim must rest entirely on the Price Waterhouse theory of protection as a man who fails to conform to sex stereotypes.

As confirmed by the Tenth Circuit's logic, the Price Waterhouse theory will not protect trans people from employment discrimination to the extent that their claimed identities implicate a broader, relational system of gender. The strict sex-differentiated categorization of restrooms—sometimes referred to as "urinary segregation"—provides a significant day-to-day maintenance of binary biological essentialism. If Price Waterhouse were to require access to a bathroom that is consistent with one's gender identity, it would destabilize genital/urinary difference as a foundation for a gender essentialist claim. If non-trans women are forced to share women's restrooms with Etsitty, the juxtaposition of common identification with anatomical differentiation renders problematic the sexed body as a foundation for gender identity. Although problematizing the biological essentialist claim does not necessarily problematize the identity essential claim for the reasons articulated in the Kastl discussion, it is unlikely that this somewhat subtle distinction would provide

55. By no means does this imply that a trans-inclusive ENDA would necessarily accomplish this gender reconstructive goal. Although beyond the scope of this paper, to the extent that a post-ENDA plaintiff might utilize both "gender identity" and "sexual orientation" protections, it is possible that the latter provision's definitional reliance on same-sex attraction might stabilize existing understandings of "sex" as a building block for "gender identity." Gender non-conformity might seem to be protected as performative in that case, but the persistence of "sex" would anchor gender "performance" in biological essentialism.

56. 502 F.3d 1215 (10th Cir. 2007).

57. Id. at 1224.

TOWARD A MORE TRANSFORMATIVE APPROACH

solace for an otherwise trans-suspicious court. The *ETS* decision underscores the limited reach of *Price Waterhouse* in restructuring our fundamental beliefs about sex and gender.

To the extent that trans people deviate from their birth-assigned sex and directly challenge the material regulation of a binary sex framework, *Price Waterhouse*’s sex-stereotyping is unavailing. While protecting Ann Hopkins’ refusal to conform to feminine stereotypes opened the door for employees to express themselves in more diverse ways in the workplace, Hopkins did not make a claim that required any reconsideration of the biological fundamentality of binary sex categories. She asked merely for recognition of the injustice of treating her differently than other masculine co-workers on the basis of her biological sex. Where trans plaintiffs utilize the sex-stereotyping theory, relief is only available to the extent that they can argue that they are no different than Ann Hopkins: a member of a biological sex who shouldn’t be punished for the gendered manifestation of that sex. Although *Price Waterhouse* is commendable for loosening the expressive limitations on male- and female-sexed bodies, it provides little space to challenge the legitimacy of the socially-imposed binary sex/gender system.

B. *Sui Generis* Protections

In light of the sex-stereotyping framework’s explicit reification of biological sex, an alternative transgender legal strategy is to argue for explicit protection for transgender people *qua* transgender people. Rather than shoe-horning trans people into existing binary frameworks, protection against transgender discrimination as distinct from sex discrimination would acknowledge that transgender discrimination stems precisely from a challenge to dominant binary norms. If trans people are explicitly embraced by anti-discrimination laws, they would no longer be legally forced into silence and could openly defy dominant gender norms through the erasure of their prior legal invisibility. However, the two dominant approaches to *sui generis* transgender protection—a “transgender”-specific class or a broader “gender identity/expression” class—nevertheless still fail to reach the underlying norms that structure and regulate the manifestation of these social categories. The following subsections will address the shortcomings of each of these approaches. By delineating gender normativity through an articulation of legally-protected gender deviancy, the existing dominant framework retains its dominant status through an implicit affirmation of its validity. Moreover, by focusing the discrimination inquiry on the identity status of a trans plaintiff, courts are never


60. See id.
forced to confront the underlying hierarchical construction of deeds that constitute that identity.

1. The "Transgender" or "Transsexual" Class

Although this strategy has received less widespread support than a broader "gender identity" class, the explicit protection for "transgender" or "transsexual" persons under the Equal Protection Clause, Title VII, or local anti-discrimination laws has achieved some legislative and judicial support. Acknowledging that a traditional sex-discrimination framework fails to address the heart of the discrimination suffered by trans people, protection against "transgender" or "transsexual" discrimination would seem to address the specific actions being challenged. A recent decision in the District Court for the District of Columbia is illustrative. In Schroer v. Billington, a male-to-female transsexual woman diagnosed with Gender Identity Disorder was denied employment by the Library of Congress upon explaining her transsexual status. In dismissing her Price Waterhouse sex-stereotyping claim, Judge Robertson noted that Schroer's rejection was not due to her non-conformity to male or female stereotypes, as she had every intention to conform to the stereotypes of 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. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex.

Nevertheless, Judge Robertson suggested that Title VII might protect transsexuals as transsexuals under Title VII's "because of sex" provision:

[I]t may be time to revisit Judge Grady's conclusion in Ulane I that discrimination against transsexuals because they are transsexuals is "literally" discrimination "because of . . . sex." That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender.

61. See id. at 51-54.
62. Cf. deManda, supra note 37, at 527 (hoping for more explicit trans protections).
64. See, e.g., Champaign, Ill., Municipal Code ch. 17, art. I, § 17-3 (2000); County of Santa Cruz, Cal., Ordinance 4501 (April 28, 1998); Olympia, Wash., Ordinance 5670 (Feb. 25, 1997).
65. 424 F. Supp. 2d at 213.
66. Id. at 211.
67. Id. at 212-13 (citing Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983)).
Because Schroer’s discrimination was aimed at sexual identity distinguishable from normative male or female identity—but in a manner nonetheless within the contemplation of Title VII—she should be legally protected as a transsexual and not disingenuously protected as a gender non-conforming man or woman.

In contrast with sex-stereotyping theories that require affirmation of the neonatal designation of a biological sex, Judge Robertson’s analysis is receptive to an alternative trans narrative. It is unclear from the opinion, however, whether that narrative would fold trans people into a male/female binary that acknowledges various scientific theories for the source of one’s “true” sex (chromosomes, gonads, hormones, neurology) or whether transsexuals would constitute a third protected sexual category in addition to men and women. If the former approach is adopted, Schroer can be understood as no different than Kastl; it simply permits a subjective biological essentialism that similarly disallows any intervention in the production of binary sex. However, if Schroer creates a third protected sex, plaintiff’s challenge to the production of binary sex remains explicit and could be characterized as openly rejecting biological essentialism. While the articulation of a protected transsexual class would allow critical intervention into the cultural contingency of biologically determined sex, the identity essentialism that remains intact effectively forecloses any deeper inquiry into the cultural production of gender.

Although acknowledging the “descriptive misfit” of applying Price Waterhouse to Schroer highlights her incompatibility with traditional sex/gender norms, protection for transsexuals as transsexuals inevitably involves delineating what it means to “be” transsexual. Much as an essentialized male/female binary renders unintelligible alternative gender identities, the articulation of an essentialized tertiary identity similarly marginalizes radical alternatives. If transsexuality only encompasses those trans people like Schroer who have been medically diagnosed as transsexuals and who conform to sex-stereotypes, then those trans people who most challenge normative sex/gender ideologies remain marginalized by trans jurisprudence. As Dylan Vade relates:

When courts only recognize as “real” those transgender people who fit narrow gender stereotypes, have multiple medical interventions, and engage in heterosexual intercourse, then courts only grant custody, health benefits, and employment protections to transgender people who fit narrow gender stereotypes, have medical interventions, and engage in heterosexual

68. Judge Robertson acknowledged that Title VII reaches beyond the principal evils contemplated at its enactment, and Congress’s silence as to sexual identity should not require a narrow reading of the statute. Id. at 212 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S 75, 79 (1998)).

intercourse. Those clients of mine who do not fit the above requirements cannot make use of the legal protections. 70

If transgender advocates wish to radically challenge dominant gender restrictions, the exclusionary effects upon the movement’s most transgressive members counsels against a full-scale embrace of a specifically defined protected class.

Moreover, beyond excluding potentially transgressive trans people, a narrowly defined “transgender” or “transsexual” class serves further to clarify and solidify normative men and women through the designation of a categorical “other.” Judge Robertson’s analysis illustrates this implicit reaffirmation of gender normativity in distinguishing between Ann Hopkins’s gender non-conformity and Schroer’s transsexuality:

The actionable discrimination in Price Waterhouse proceeded from the opinion of the employer that the plaintiff was not sufficiently feminine for her sex. But there is a difference between “macho” women or effeminate men, whether transsexual or not, and persons such as Schroer whose adoption of a name and choice of clothing is part of an intentional presentation of herself as a person of a different sex than that of her birth. This difference is not simply one of degree. Medical literature recognizes that “Gender Identity Disorder... is not meant to describe a child’s nonconformity to stereotypic sex-role behavior as, for example, in ‘tomboyishness’ in girls or ‘sissyish’ behavior in boys. Rather, it represents a profound disturbance of the individual’s sense of identity with regard to maleness or femaleness.” 71

Because gender non-conformity and medically diagnosed transsexualism are conceptualized as different in kind, defining the scope of legally protected transsexualism requires explication of the border between non-conformity to normative binary sexes and acquisition of gender pathology. 72 To the extent that this border constitutes one between sanity and pathology, the distinction reaffirms the abjection of the transgendered status and normalizes mainstream understanding of maleness and femaleness. As explained by Dean Spade:

The diagnostic criteria for [Gender Identity Disorder] produces [sic] a fiction of natural gender in which normal, non-transsexual people grow up with

70. Vade, supra note 47, at 256; see also Spade, supra note 7, at 19-20 (acknowledging the need for medical treatment in order to be recognized as transsexual and similarly the need to be recognized as transsexual to receive medical treatment); Currah & Minter, supra note 59, at 53-55 (arguing against legislative protection for transsexuals that would exclude those unable or who choose not to obtain medical care).


72. See Megan Bell, Transsexuals and the Law, 98 NW. U. L. REV. 1709, 1715 (2004) (“[T]he legal system plays a vital role in defining sex/gender both by determining what it is as well as what it is not.”).
minimal to no gender trouble or exploration, do not crossdress as children, do not play with the wrong-gendered kids, and do not like the wrong kinds of toys or characters. This story is not believable. Yet, it survives because medicine produces it not through a description of the norm, but through a generalized account of the norm's transgression by gender deviants.  

Through the recognition of a trans-specific class, the legal system establishes a safety valve for dominant sex/gender norms when the normative determinacy of male and female sexes becomes too attenuated from individual expression. Rather than allow the authoritative power vested in biological sex to deteriorate in the presence of this attenuation, the iteration of a deviant "other" prevents the sociological construction of sex from crumbling under the pressure of transgenderism.

2. The "Gender Identity/Expression" Class

Aware of the limitations of delineating specific categories of transgender protection, the dominant legislative strategy for combating transgender discrimination, most notably in the proposed trans-inclusive ENDA bills, has been the creation of a protected "gender identity" class. By protecting "gender identity" as opposed to "transgenderism" or "transsexualism," anti-discrimination statutes that use this terminology would seem to lack the exclusionary effects of having to define who is or is not legally trans. Because "[e]veryone has a gender identity," so the argument goes, the gender identity class makes it clear that everyone is protected from discrimination on the basis of gender non-conformity. Additionally, it is common for statutory protections for gender identity to include protection for the expression of that identity so as not to exclude the acts of sex-reassignment surgery or aesthetic presentation. The City of Boston's definition of protected "gender identity or expression" is representative: "a person's actual or perceived gender, as well as the person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression whether or not that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with a person's sex at birth." By recognizing the status and expressive elements of gender identity, "a fundamental aspect of
personhood," the gender identity/expression class protects against "discrimination on the basis of external as well as internal manifestations of identity."\(^{77}\)

Despite eliminating "any legally proscribed relationship between biological sex, gender identity, and gender expression,"\(^{78}\) the gender identity/expression class nevertheless fails to truly uproot the regulatory gender norms underlying the formation and subsequent marginalization of legally protected gender identity. It never requires an analysis of gender as social practice—as a means of imbuing particular deeds by particular bodies with hierarchically stratified social meaning. It always couches gender in terms of a cultural manifestation of an essential gendered self—a "fundamental aspect of personhood."\(^{79}\) As the gender identity/expression class never conceptually disassociates gender from an individual's essentialized identity, it never explores the process by which gender constructs and marginalizes the acts constituting gender identity. Yet again, gender as a regulatory practice is concealed behind its very construction. The identity/expression framework may displace "sex" as a legitimate authority, but a misplaced adherence to identity essentialism mimics the illusive effects of sex's falsely pre-ontological status.\(^{80}\)

Reliance on gender identity as opposed to gender norms is not merely a theoretical concern and may significantly impede the ability to loosen the expressive restrictions imposed by mainstream sex/gender categories. If gender identity is conceptualized as "fundamental" to personhood, within legal discourse it can be viewed via the lens of immutability provided by the racial civil rights archetype.\(^{81}\) If gender identity is immutable, it cannot be changed, and because it cannot be changed, it should not be punished.\(^{82}\) Although tolerance for the expression of an immutable gender identity may seem

\(^{77}\) Currah & Minter, supra note 59, at 54-55.

\(^{78}\) Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in TRANSGENDER RIGHTS 23 (Currah et al. eds., 2006) [hereinafter Currah, Gender Pluralisms].

\(^{79}\) Currah & Minter, supra note 59, at 54.

\(^{80}\) See Currah, Gender Pluralisms, supra note 78, at 18 ("[T]ransgender advocates stay within the bounds of the logic of civil rights discourse by emphasizing immutability, but, significantly, they reverse the traditional idea that gender is an expression of sexed bodies and instead identify gender identity as the presocial fixed category.").


\(^{82}\) See id. at 124-25; Dunson, supra note 28, at 503 (citing research that people are less willing to help a stigmatized group who are perceived as responsible for their predicament, arguing that "people may favor inclusion in the [protected] category for those who are seen as having no control over their gender identity—i.e., that they were born transgender or have had transgender feelings for a significantly long time."); cf. Hernandez-Montiel v. INS, 225 F.3d 1084 (2000) (in granting asylum to a Mexican man, finding his "female sexual identity" to be immutable because it is a characteristic that one "cannot change, or should not be required to change because it is fundamental to their individual identities or consciences"), overruled on other grounds, Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005); Robinson v. California, 370 U.S. 660 (1962) (prohibiting criminalization of the status of being addicted to narcotics).
commendable, if the expression is protected only because it cannot be changed, then the underlying presumption is that if such expression could be changed, then it would be changed. If the conduct subject to discrimination—e.g. cross-dressing or genital reconstruction—were divorced from identity-based compulsion and thereby completely volitional, it would still be justifiably stigmatized and without legal protection. Thus, by protecting transgender rights within an immutability framework, the marginality of gender transgressive acts persists, perpetuating the marginality of the gender identities constituted by such acts. While legal protection for all gender identities establishes legal tolerance for the existence of transgender identities, and may shelter gender non-conformists from the explicit violence of sanctioned intolerance, it fails to eliminate the implicit badge of inferiority cast upon those whose identities involve the commission of stigmatized binary sex/gender non-conforming acts. A regime of tolerance must be distinguished from a regime of respect, value, and dignity, and the latter regime cannot be achieved so long as gendered acts remain hierarchically constructed. The gender identity/expression class allows the gendered regulation of particular acts to perpetuate, masked by the liberal legal guise of compassion for the immutably afflicted.

The process by which gender identity protection can conceal and perpetuate underlying regulatory norms is well-illustrated by ENDA itself. While there has been much criticism of the decision by ENDA’s sponsors to delete its trans-inclusive provisions, there has been surprisingly little attention given to

84. See Halley, supra note 81, at 126 (arguing that LGBT identity politics relying upon immutability ostracizes bisexuals because “they can switch”); Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503, 520 (1994) (arguing that immutability delegitimizes voluntary conduct).
85. See Dean Spade, Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy, in TRANSGENDER RIGHTS, supra note 78, at 230-31 ("[T]olerance is a far lesser demand than equality and is based on a shallower analysis of how hierarchy and oppression operate than a demand for equality is. It obscures the meaning of oppression and hierarchy and replaces it with a power-neutral concept of difference that makes characteristics of social organization like race, gender or ability into personal qualities that should be tolerated."); see generally WENDY BROWN, REGULATING AVERTION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE (2006).
86. See BROWN, supra note 85.
the inherent limitations of the original bill.

Most notably, the bill contained two explicit exemptions to gender identity discrimination. First, Section 8(a)(5) permits employers to impose "reasonable" gender-based dress codes, so long as employees who have undergone gender transition are permitted "to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning."88 When Representative Barney Frank, one of ENDA’s lead sponsors, announced the original trans-inclusive bill, he clarified that dress code exemptions within the act would make it clear that an employer would not be forced to hire someone "with a beard wearing a dress."89 Frank’s statement indicates that even if the manifestation of one’s gender identity should be protected under ENDA, it would remain permissible for an employer to discriminate on the basis of acts that might constitute non-normative gender identities. An employee assigned a male sex at birth may wear clothing associated with a female gender only after "transitioning" to the same gender as normative women. If it is still permissible to prohibit a person with a beard from wearing a dress because that person has not transitioned to a dress-wearing gender, the desire to present oneself to the world in a way that is purposefully inconsistent with feminine or masculine norms remains stigmatized in a post-ENDA world regardless of its "trans-inclusive" provisions. Mara Kiesling has noted that the proposed ENDA would enable employers to maintain "reasonable dress codes" while at the same time affirming that "gender identity should be respected."90 The glaring inconsistency in requiring respect for all gender identities yet not requiring respect for the acts that constitute non-normative gender identities indicates that the only gender identities truly respected by a trans-inclusive ENDA are those identities that are coherent within existing essentialized notions of binary gender identity.

The limited protection for non-essentialized gender expression is further demonstrated by the bill’s second exemption, whereby employers may deny employees access to shared shower or dressing facilities so long as they provide reasonable access to facilities "not inconsistent with the employee’s gender identity."91 If an employer is entitled to impose gender-specific dress codes and gender-segregated dressing facilities on its employees but is at the same time required to do so in a way that is "not inconsistent" with gender identity, the trans-inclusive ENDA conceptualizes gender identity as a fixed, stable concept that manifests itself in society through "consistent" expression. The trans-inclusive ENDA’s understanding of gender identity is incompatible with gender


88. See H.R. 2015 § 8(a)(5).


90. Id.

91. See H.R. 2015 § 8(a)(3).
performativity, as it fails to acknowledge that wearing particularly gendered clothing is constitutive and not reflective of one's gender identity. Where gendered acts can be conceptualized as volitional and untethered to an immutable identity, the trans-"inclusive" ENDA would have provided no protection for gender-motivated discrimination. Where gendered acts can be conceptualized as "consistent" with an essentialized, immutable gender identity a trans-inclusive ENDA would have required respect for that identity without questioning what cultural norms produce the appearance of consistency.

By protecting transgenderism via the framework of immutable identity, the legal inquiry into a particular discriminatory act will always be whether the stigmatized conduct inevitably flows from that identity; it will never focus on the social meaning attached to that act. If an employee is terminated because he is someone "with a beard wearing a dress," the gender identity/expression framework would analyze whether this expression stems from his underlying identity and would not investigate the reasons why such conduct was disfavored in the first place. The perils of this analytical framework have been exposed analogously in the racial discrimination context. In the much-criticized Rogers v. American Airlines, a black female employee unsuccessfully challenged American Airlines' policy of prohibiting all its employees from wearing their hair in cornrows. In dismissing her Title VII claim, the court reasoned:

[Plaintiff's] hair style] is not the product of natural hair growth but of artifice. An all-braided hair style is an "easily changed characteristic," and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.

Even though cornrows were associated with a particular race, they were not an immutable characteristic of that race, and thus could be validly prohibited as a condition of employment. However, this analysis overlooks the fact that cornrows were prohibited by the employer only because they were associated with Rogers's racial background. It is only because cornrows signified blackness to customers that American Airlines chose to prohibit them, and this conscious and deliberate stigmatization of mutable "black" conduct received the sanction of the Rogers court. American Airlines could not reprimand employees for being black in the ontological sense, but because it could reprimand them for actions conceivably extractable from ontological blackness, it could reprimand

92. See Halley, supra note 81, at 125 ("[immutability argumentation] is bad for the development of equal protection theory, among judges and elsewhere, because it promotes the idea that the traits of subordinated groups, rather than the dynamics of subordination, are the normatively important thing to notice.").
94. Id. at 232.
them for being black in the performative sense. Because it sufficed to address solely immutable blackness, the court was not forced to address the racial constructs underlying American Airlines’ discriminatory practices.

In the transgender context, by not forcing courts to address the performative aspects of gender, whereby the gendered regulation of particular acts constructs gendered beings, the social meaning surrounding particular acts remain unchallenged within legal discourse. If a gender identity/expression framework only requires courts to determine whether an employee has been subjected to discrimination for having a particular gender identity, courts never need to expose the underlying normative justifications motivating discrimination against a particular act whether or not linked to a particular gender identity. If an employee may be terminated for having a beard and wearing a dress but not for being transgendered, courts never need to address the fact that having a beard and wearing a dress is prohibited solely because it is coded as gender non-conforming. If a gender identity framework does not expose the stigma attached to transgendered acts, it cannot fully challenge the marginal status of trans persons.

Applying an immutability framework to gender expression is particularly troubling if, as assumed by LGB proponents of a trans-inclusive ENDA, transgender legal rights are expected to protect gender non-conformity in non-trans identifying people. Non-trans identifying individuals, regardless of their sexual orientation, cannot claim any identity-based compulsion to engage in stigmatized gender non-conforming acts. While many LGBT organizations have rightfully pointed out that homophobia and trans-phobia are often closely intertwined, one’s sexuality does not per se mandate any particular gender performative. Any gender non-conformity claim rooted in trans-focused anti-discrimination provisions requires arguing that non-conformity should be protected in everyone for the same reasons as they are protected in trans people. In other words, the treatment of gendered acts can only be addressed on a broad societal level if a legal claim requires an articulation of the reasons for the stigmatization of that act.

Once again, Rogers is instructive. In explaining why prohibiting cornrows was not race discrimination, the court put significant weight on the increased popularity of cornrows in white women such as Bo Derek. But what if Bo Derek were an employee of American Airlines? She too would be prohibited from wearing cornrows even though the hairstyle might not be constituent of her own racial identity. However, the reason for the prohibition would be the same:


cornrows are stigmatized because of their association with blackness. Where an adverse employment decision is motivated by discriminatory animus, it should be no less deplorable if directed at an individual who does not claim that stigmatized identity. An anti-discrimination inquiry that focuses on the immutable requirements of an essentialized identity limits the ability to meaningfully engage with the normative justifications for adverse treatment. If, as demonstrated by the ENDA debates, non-trans people wish to enjoy the fruits of transgender rights, an immutability framework prevents the necessary broad-based inquiry into the underlying construction of gender-related stigma.

While it may appear that including conduct-based discrimination in anti-discrimination laws explicitly addresses the performative nature of gender identity formation and its expression, it is important to distinguish between the performance of gender protected by these laws and the performativity of gender effectively concealed by them. The protection for “gender-related expression” allows individuals to perform gender “non-conforming” acts under the protection of the state, thus alleviating the need for transgender individuals to “pass” as gender normative. However, the performance of these gender non-conforming acts does not expose the gendered meaning inscribed upon those acts and thus does not expose the performativity of gender as the perpetuation of social norms via repeated human actions over time. By anchoring gendered performance in gender identity and not positing it within a broader matrix of cultural meaning, the social construction of gender identities becomes obscured by their apparently pre-given status. The concealment of the social meaning attached to identity-forming acts perpetuates the regulatory effectiveness of gender regardless of state protection for the end-products of gender construction. The transgender movement cannot radically alter mainstream understandings of gender without a robust investigation of gendered social meaning.

It is unclear that a gender identity/expression class would indeed eliminate

98. In some racial discrimination cases, plaintiffs who were misperceived as being members of a particular race succeeded under Title VII, indicating that discriminatory animus is indeed the focus of the anti-discrimination inquiry. However, in these cases there were “objectively reasonable” bases for the misperception that plaintiff was member of a particular race. They therefore do not address the question of discriminatory animus where plaintiff’s racial identity was clear but plaintiff was fired for acting in ways associated with a different racial identity. See supra accompanying text note 46.

99. See BUTLER, BODIES THAT MATTER, supra note 11, at 234 (“[P]erformance as bounded ‘act’ is distinguished from performativity insofar as the latter consists in a reiteration of norms which precede, constrain and exceed the performer.”).

100. See id. (“The reduction of performativity to performance would be a mistake.”); cf. Kirkland, supra note 39, at 10-11 (“By playing along with the idea that we can choose the sex that best matches our true self, we allow ourselves to forget that there is no self wholly unformed by the power of the state, the community, and the laws, and that it is these forces we must investigate.”).

101. Cf. BUTLER, BODIES THAT MATTER, supra note 11, at 228 (“To recast queer agency in this chain of historicity [by which it is forged] is thus to avow a set of constraints on the past and the future that mark at once the limits of agency and it most enabling conditions.”) (emphasis in original).
“any legally proscribed relationship between biological sex, gender identity, and gender expression.” Presumably, *sui generis* anti-discrimination laws would not fully displace the sex-stereotyping theories provided by *Price Waterhouse* and the other theories described above. To the extent that *Price Waterhouse* protects male and female “anchors” and *sui generis* protections purportedly protect every identity “in between,” a continuum emerges within the legal construction of gender, bounded by the poles of the male and female sexes. This continuum enshrines the normative man and woman via its articulation of the poles by which all gender identities are bounded. Thus, simultaneous implementation of the strategies critiqued in this Part would maintain the legitimacy of binary sex/gender-conformity as the cultural gold-standard against which all human subjects are classified, judged, and thereby constrained.

C. Anticipating the Counter-Critiques

While, as I explain below, mainstream class-based approaches to transgender rights may be justified on grounds distinct from a large-scale reconstruction of dominant sex/gender norms, they nevertheless fail to take into account the long-term perpetuation of these norms, and focus instead on short-term successes for the most gender-conforming plaintiffs. Transgender advocates may determine that these countervailing concerns outweigh their commitments to a reconstructive project, but such a determination should at the very least be informed by its potential consequences.

1. Argument #1: Merely a Short-Term Strategy

Aware of the potential theoretical challenges to mainstream transgender legal strategies, proponents of class-based approaches to transgender rights have cautioned that these strategies are primarily short-term remedies that will pave the way for a long-term reconstructive goal. By bringing “easy” cases—those involving plaintiffs who do not significantly challenge dominant sex/gender norms—right now, courts will become accustomed to gender variance and gradually embrace the most gender-“radical” members of the transgender community. This incremental approach, largely modeled on Charles Hamilton

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104. See Currah, *Gender Pluralisms*, supra note 78, at 20 (“perhaps gender nonconforming practices will be recognized as expressive activity worthy of constitutional protection at some moment in the future . . . ”); Currah, *Defending Genders*, supra note 7, at 1368 (“Rather than challenging the categories themselves, advocates of the rights of sexual minorities ought to have a long-term strategy of challenging the state’s prerogative to define those categories. Let civil society—or what queer theorists call ‘culture’—be the sphere in which identities are believed in, deconstructed, nurtured, undermined, performed, and lived. In the short term, however, rights advocates ought to fight for legislation to protect all sexual minorities, including transgendered and transsexual people.”).
Houston's litigation strategy, is intended to place the transgender movement within civil rights discourse in a manner palatable to both the judiciary and society at large.\(^{106}\)

The difficulty with this incremental strategy is that it assumes that short-term victories for the gender-palatable will have benign effects on more gender-"radical" future plaintiffs. There is good reason to question this assumption. As relatively gender-conforming trans people—i.e. post-operative transsexuals or gender non-conforming "men" or "women" in the *Price Waterhouse* mold—successfully acquire legal protection, they create precedent that will shape and constrain future cases.\(^{107}\) Short-term victories, which only require slight reconfigurations of sex/gender norms, create lenses through which future plaintiffs will be seen and archetypes against which these plaintiffs will be compared. If plausible transgender legal protections emerge in the short run, there will be significant pressure for future plaintiffs to articulate their legal claims so as to fit within these protections. If these protections involve reaffirmation of binary sexes or essentialized identities, victory may very well hinge upon continued reaffirmation. Plaintiffs who truly wish to challenge these ideologies must thus choose whether to describe themselves disingenuously within these dominant frameworks or have their claims dismissed as unsupported by precedent. Through this pressure to articulate publicly one's identity in terms of those already embraced by socio-legal institution, an incremental strategy dissuades, if not stigmatizes,\(^{108}\) the emergence of radical new conceptions of identity.\(^{109}\) If a transgender movement is expected to achieve a long-term reconstructive goal, it must avoid the creation of dominant scripts in the short term that only slightly expand existing gender constructs.

There are signs that this script writing has already begun. In a recent essay, Paisley Currah demonstrates the advisability of using identity-based claims for protecting gender non-conformity through a comparison of the cases of *Doe v. Yunits* and *Youngblood v. School Board of Hillsborough County.*\(^{110}\) Although

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107. *Id.*

108. *See Kirkland, supra* note 39, at 13 ("The ways various plaintiffs pursue legal strategies can wind up causing collateral damage for others down the line.").


110. *See BUTLER, GENDER TROUBLE, supra* note 10, at 21 ("[T]he articulation of an identity within available cultural terms instates a definition that forecloses in advance the emergence of new identity concepts in and through politically engaged actions . . . ."); *Farrell, supra* note 83, at 691 ("The consequence of avoiding the subject of transformation may be giving up on transformation as a goal of the movement—either consciously, by settling for "the best we can do" right now, or unconsciously, through neglect."); *Grenfell, supra* note 9, at 96 ("[T]ransgender people] must weigh the value of present legal recognition of their 'injury' with the danger that this recognition may have the effect of fixing and totalizing the present condition of this identity.").

110. *See Currah, Gender Pluralisms, supra* note 78, at 7-13; *see also Doe v. Yunits, 15 Mass. L.*
grounding discrimination claims in transgender identity yielded success in the former case, and the failure to do so yielded dismissal in the latter, a juxtaposition of the two cases illustrates the emerging incentives to adhere to dominant scripts of essentialized gender identity. In Doe, a trans teenage girl was heavily reprimanded for her gender non-conformity and brought suit against the school district.\footnote{Currah, supra note 78, at 7.} Central to her victorious suit was Doe’s emphasis on her Gender Identity Disorder, making her non-conformity a necessary “expression of her core identity.”\footnote{Id. at 7-8.} Because this formulation posits gender non-conformity as the expression of an immutable characteristic, forcing Doe to conform to gender stereotypes would “endanger [her] psychiatric health” and therefore would be unlawful.\footnote{Id. at 10 (quoting Mem. of Decision and Order on Defendant’s Partial Mot. to Dismiss and Plaintiff’s Mot. for Leave to Amend, Doe v. Yunits, 15 Mass. L. Rep. 278 (2001)).} By contrast, in Youngblood, a non-trans-identifying teenage girl was prohibited from wearing a suit and tie for her school portrait, and the plaintiff largely based her anti-discrimination claim on Free Expression grounds.\footnote{Id. at 9-10.} She did not articulate her gender non-conformity as stemming from a medical condition or fundamental identity, but rather stated that her aversion to feminine clothing was “deep-seated” and “long-lasting.”\footnote{Id. at 10 (quoting Plaintiffs Appeal of a Final Order of the District Ct. for the Middle District of Florida, Youngblood v. Sch. Board of Hillsborough County, at 2, 3 (May 2003)).} As such, the court found that her expression was not constitutionally protected and dismissed her claim.\footnote{Id. at 10-11.} In analyzing these divergent results, Currah infers the advisability of presenting an identity-based claim,\footnote{Id. at 13 (“[T]he different legal outcomes for Doe and Youngblood might tell us something about how identity-based claims can have more traction than conduct-based claims in courts.”).} and most lawyers in search of a successful litigation strategy would likely arrive at the same conclusion. However, this conclusion expressly eschews a legal strategy based upon the intrinsic value of plaintiff’s gender non-conforming conduct in favor of one couched in immutability-based tolerance. As transgender plaintiffs look to precedents such as Doe and Youngblood to determine their most likely means of success, what emerges is a strategy that fails to directly expose and address the permissibility of stigmatizing gender non-conformity. A gender non-conforming plaintiff may indeed view her non-conformity as completely volitional yet nonetheless deserving of legal protection. However, the jurisprudential pressure to formulate such volitional conduct in identity-based terms may yield a strategic misdescription and a resulting perpetuation of conduct-focused stigma.

This analysis illustrates that the perpetuation of gender norms and related identity construction does not come uni-directionally from a central, coercive

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111. Currah, supra note 78, at 7.
112. Id. at 7-8.
113. Id. at 10 (quoting Mem. of Decision and Order on Defendant’s Partial Mot. to Dismiss and Plaintiff’s Mot. for Leave to Amend, Doe v. Yunits, 15 Mass. L. Rep. 278 (2001)).
114. Id. at 9-10.
115. Id. at 10 (quoting Plaintiff’s Appeal of a Final Order of the District Ct. for the Middle District of Florida, Youngblood v. Sch. Board of Hillsborough County, at 2, 3 (May 2003)).
116. Id. at 10-11.
117. Id. at 13 (“[T]he different legal outcomes for Doe and Youngblood might tell us something about how identity-based claims can have more traction than conduct-based claims in courts.”).
TOWARD A MORE TRANSFORMATIVE APPROACH

regulatory state, but also from diffuse inter-subjective constructions privileged by the state. Stated differently, the interpellation of subjects not only “comes from above, from a high center of power,” but also “from below, from within resistant social movements.” Janet Halley has articulated the means by which this advocacy script-writing can coercively construct those who seek protection under a particular identity-based framework:

[I]f advocacy constructs identity, if it generates a script that identity bearers must heed, and if that script restricts group members, then identity politics compels its beneficiaries. Identity politics suddenly is no longer mere or simple resistance: It begins to look like power . . . [W]henever activists invoke identity in ways that transform it, they may approach and even cross the dangerous line . . . between advocacy and coercion; they may interpellate subjects just as invidiously as Althusser’s imagined cop in the street.

By creating a dominant script whereby legal protection is primarily delegated to those who only slightly challenge sex/gender norms, increasingly mainstream conceptions of transgender rights exclude those who refuse to reaffirm these norms either explicitly or implicitly.

It may be argued that this coercive script writing is unlikely to occur within the transgender movement due to the sheer diversity of litigants demanding recognition from courts and legislatures. Confronted with such diffuse and pronounced diversity, it would be impossible for a narrowly constructed script to accommodate the sheer variety of experiences presented in these legal fora. Preliminarily, this assessment is empirically suspect, as it is less than clear that a diverse body of plaintiffs is actually demanding conceptually diverging legal protection. Furthermore, this argument is theoretically suspect, as it assumes that legal victories will not be experienced differentially. So long as certain argumentative strategies yield victory, as in Doe, while others yield defeats, as in Youngblood, a dominant script, or at the very least a narrow set of scripts, is bound to emerge as dominant within the transgender legal movement. Where transgender plaintiffs are forced to choose between (1) disingenuous reaffirmation of gender norms accompanied by remedial compensation and (2) political integrity accompanied by continued social and economic hardships, it is unreasonable to assert that a substantial portion of this already socially

118. Halley, supra note 81, at 118.
119. Id.; see Spade, supra note 7, at 36 (“I think it is important that . . . attorneys working on [transgender] claims understand themselves to be determining not just the rights of a single plaintiff, but impacting a broad set of gender transgressive people who may differ from the plaintiff in question in essential ways.”).
120. See Currah, Transgender Rights Imaginary, supra note 75, at 719 (“While each individual transgender rights case might advance a particular narrative about what biological sex is and how it is related to gender, collectively the advocacy efforts already reflect a multiplicity of transgender experiences and portray transgender people in a wide diversity.”).
121. See Vade, supra note 47, at 296 (“There is virtually no case law or regulation that recognizes transgender people’s self-identified gender.”).
disenfranchised population would have any choice but to accede to the former.\footnote{122} If a transgender movement is expected to avoid capitulation to existing gender norms and launch a long-term reconstructive project, it must avoid the creation of dominant strategies that perpetuate these norms.

\section*{2. Argument \#2: Protection for the Most Afflicted}

Perhaps the strongest justification for employing sex- and identity-based strategies is that they nevertheless provide much-needed remedies to individuals who suffer most under prevailing gender norms.\footnote{123} Theoretical gender concerns aside, trans plaintiffs are often victims of violent hate crimes and perpetual economic disenfranchisement due to lack of employment protection. Even if the strategies critiqued above do hinder reconstruction of gender norms, they provide much-needed resources to flow at last to trans persons and other gender non-conformists where they had for decades been denied. Even if gender identities are culturally contingent, it does not follow that the discrimination flowing from such identities is experienced as anything less than brutally “real.”\footnote{124} Therefore, it could certainly be argued, the first concern of lawyers representing gender-variant clients should be eliminating and remedying the “real” discrimination experienced by their clients rather than convincing society about the “reality” of the gender identities it constructs.

Although protecting the human dignity of trans people is undeniably a noble goal for the legal profession, it is imperative to recognize that this goal is distinct from a commitment to a reconstruction of the norms that undermine the dignity of gender-variant people. When lawyers represent transgender people, they not only represent them in the formal lawyer-client sense, but also in the broader meaning of representation. As Janet Halley explains:

\begin{quote}
Movement advocates enact two different meanings of the term \textit{representation}. They . . . represent subordinated groups both in that they function as agents sent by the group on some mission for material change, and in that they manage the discursive rendering of the group . . . . Lawyers not only have special power to affect the goals and strategies of social groups—they can do things that alter the social definition of the group itself.\footnote{125}
\end{quote}

Moreover, there is good reason to believe that the transgender movement’s legal goal of zealously representing its specific clients’ material interests hinders the potential representation of transgenderism in a broader reconstructive project.\footnote{126}
It must be remembered that the objects of subordination are never in a position of exteriority in relation to such subordination; they are the very products of the oppressive norms which they resist.\footnote{See Michel Foucault, The History of Sexuality: An Introduction (Volume 1) 95 (1978).} By seeking legitimacy \textit{from} the very system that serves to oppress transgenderism, transgender people seek legitimacy \textit{within} that system of subordination. If transgender advocates posit themselves primarily as agents of their aggrieved clients and can satisfy their clients through modest expansion of legal sex/gender norms, those sex/gender norms appear capable of accommodating transgenderism despite their continued coercive effects. In such circumstances, where both defenders and opponents of the status quo believe that the existing social structure has the potential for satisfactory notions of justice, the hegemony of this structure is at its most powerful and enduring.\footnote{See Robert W. Gordon, Some Critical Theories of Law and Their Critics, in The Politics of Law 641, 647-48 (Quintin Hoare & Geoffrey Nowell-Smith eds., 1971).} By conceding to claims of injustice through only slight superstructural shifts in the existing order, the underlying social structure maintains its legitimacy because it is perceived as “approximately just.”\footnote{Id. at 647; see Farrell, supra note 83, at 699-700 (arguing that formal sex equality rhetoric is part of “‘preservation-through-transformation,’ in which underlying ideology is preserved by transforming the discourse on an issue to adapt to changing social norms.”) (quoting Reva B. Siegel, Why Equal Protection No Longer Protects: Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1113 (1997)).} If advocates of a potentially radical social movement wish to uproot and supplant a fundamentally unjust and repressive social order, they must be able both to imagine and commit to a more liberatory existence. The remedial concessions this commitment may require might be inconsistent with many lawyers’ conceptions of their representative roles, but the transgender movement must nonetheless confront this dilemma in structuring its ultimate goals.