

NOTES

THE USE OF GENDER-LOADED IDENTITIES IN SEX-STEREOTYPING JURISPRUDENCE

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In 1989, the Supreme Court held that Title VII protects against discrimination on the basis of sex stereotypes. Since then, sex-stereotyping jurisprudence has developed to protect many people who are discriminated against because of their failure to conform to a wide array of stereotypes about appropriate behavior and appearance for a particular sex. However, the judiciary has denied significant portions of the population protection from discrimination based on sex stereotypes by using a victim's nonconformity to a particular stereotype to define a "gender-loaded identity," and then finding that discrimination on the basis of that identity class is not discrimination based on sex or sex stereotypes. Thus although the law is clear that discrimination based on one's failure to conform to stereotypes about appropriate clothing for a particular sex is in violation of Title VII, when a discrimination victim is classified as a crossdresser or transvestite most courts have found that such discrimination is permissible because it is based on transvestitism and not sex or sex stereotypes. Similar gender-loaded identities include the classifications of lesbians and gay men, who are defined based on their failure to conform to sex-specific stereotypes about appropriate sexual partners, and the classification of transsexuals, who are defined based on their failure to conform to many sex-specific stereotypes about appropriate behavior, appearance, and identity. This Note argues that the judiciary's use of these gender-loaded identities is unjustified and obscures most courts' analyses of sex-stereotyping claims.

In *Schwenk v. Hartford*,¹ the Ninth Circuit upheld a sex discrimination claim brought by a male-to-female transsexual² under a Title VII analysis.³ The court relied on Title VII's prohibition against dis-

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¹ 204 F.3d 1187 (9th Cir. 2000).

² Transsexuals do not identify with the sex they were assigned at birth. They may have undergone medical sex reassignment surgery (postoperative), may wish to change their anatomical birth sex in the future (preoperative), or may not wish to undergo any medical procedures at all (nonoperative). For those who transition in any manner from male to female, this Note will use the term "transsexual woman" or "male-to-female transsexual." Similarly, a person who transitions from female to male will be termed "transsexual man" or "female-to-male transsexual."

³ Title VII of the Civil Rights Act of 1964 prohibits employment practices that discriminate against individuals on the basis of race, color, religion, national origin, or sex. 42

crimination based on sex stereotypes,⁴ arguing that “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”⁵ The discrimination in this case was based on the victim’s “assumption of a feminine rather than a typically masculine appearance or demeanor.”⁶ More specifically, the victim failed to act in the way expected of someone perceived as a man; she was impermissibly discriminated against because she did not conform to sex stereotypes, such as the stereotypes that “men” do not wear makeup or dresses or prefer the pronoun “she.”⁷

Schwenk is an atypical sex discrimination case. Indeed, it was the first to reject years of precedent that held that transsexuals, as a class, could not be protected under Title VII.⁸ However, the basis of the discrimination against *Schwenk* was sex stereotypes, and discrimination on the basis of expected behavior or expression is characteristic of virtually every act of sex discrimination. Notably, a discrimination victim’s “sex,” which normally refers to a person’s genital or chromosomal characteristics,⁹ is usually imperceptible to a sex discriminator. Rather, almost all sex discrimination results from assumptions a discriminator makes about the victim’s sex based on the victim’s level of conformity to sex-specific stereotypes of appropriate behavior and external appearance. As Katherine Franke argues, “[I]t is almost ludi-

U.S.C. § 2000e-2(a)(1) (2000). Although the *Schwenk* court interpreted the case under Title VII case law, the plaintiff had sought damages under the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981 (2000), which was subsequently invalidated. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress did not have authority to enact this section under Commerce Clause or Fourteenth Amendment).

⁴ See *infra* Part I.B.

⁵ *Schwenk*, 204 F.3d at 1201-02; see also *infra* Part I.

⁶ *Id.* (noting that “‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender” and that “the terms ‘sex’ and ‘gender’ have become interchangeable”).

⁷ See *infra* note 33. This Note uses the pronoun “she” for male-to-female transsexuals and the pronoun “he” for female-to-male transsexuals.

⁸ See *infra* note 45 and accompanying text.

⁹ The law assumes that there are two unambiguous sexes, male and female. Sex is generally thought to be a biologically fixed characteristic upon which a socially constructed gender is built. Gender pertains to “cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say gender is to sex as feminine is to female and masculine is to male.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). The most common basis for sex classification relies on distinctions in genitalia or chromosomal characteristics, although gonadal sex, internal morphological sex, external morphological sex, hormonal sex, phenotypic sex, assigned sex, and sexual identity may all be factors in determining one’s legal sex. See generally Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 278-79 (1999) (arguing that in any person, it is likely, but not necessary, that factors be congruent, and that chromosomal configuration is not ultimate determinant of gender, but merely first in series of forks, each of which lead in either male or female direction).

crous to maintain that sex discrimination, sexual identification, or sexual identity takes place on the level of biology or genitals.”¹⁰ Rather, almost all claims of sex discrimination are grounded in normative sex stereotypes and conformity to these stereotypes that “transform[s] a vagina into a she.”¹¹ Thus, “[b]iology and genitals . . . operate as false proxies for the real rules of both gender attribution and sexual identity in our culture.”¹²

Although courts historically have failed to make this observation, cursorily attributing most sex discrimination to the victim’s genitalia, modern sex discrimination jurisprudence recognizes that some discrimination based on sex stereotypes is, indeed, sex discrimination.¹³ Thus, in 1989, the Supreme Court held that an employer who discriminated against a woman because she did not wear makeup or dress femininely had engaged in sex discrimination in violation of Title VII.¹⁴

The theoretical implications of the protection by sex discrimination law of those who do not conform to stereotypes associated with their sex (gender nonconformers) are far reaching. Virtually any discrimination that would not have occurred but for the victim’s biological sex may be characterized as sex discrimination. For example, the employer who discriminates against women who do not wear dresses or makeup, while not applying the same rule to men, is engaging in sex discrimination, because the discrimination would not occur but for the victims’ sex. Conceivably, the employer who discriminates against men, but not women, who *do* wear dresses and makeup also is

¹⁰ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 40 (1995) (citation omitted).

¹¹ *Id.* at 39-40. Gender norms and stereotypes that code for sex involve virtually all aspects of a person’s behavior and appearance, even including characteristics such as chest size and body hair. See, e.g., Louise M. Antony, *Back to Androgyny: What Bathrooms Can Teach Us About Equality*, 9 J. Contemp. Legal Issues 1, 7 (1998) (noting, for example, that in absence of shaving and grooming to conform to sex stereotypes, “ethnicity might turn out to be a better predictor of overall hirsuteness than gender” and concluding that it takes social effort to bind oneself into single gender category).

¹² Franke, *supra* note 10, at 40. Franke argues that this flaw in sex discrimination jurisprudence

not only produces obvious absurdities at the margin of gendered identity, but it also explains why sex discrimination laws have been relatively ineffective in dismantling profound sex segregation in the wage-labor market, in shattering ‘glass ceilings’ that obstruct women’s entrance into the upper echelons of corporate management, and in increasing women’s wages, which remain a fraction of those paid men.

Id. at 2 (citations omitted).

¹³ See *infra* Part I.B.

¹⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* is discussed in detail in Part I.B, *infra*.

engaging in sex discrimination, because the discrimination would not occur but for the victims' sex.¹⁵ Yet courts consistently have held that the latter form of discrimination is of a different and more permissible sort than the former. Unlike the woman who does not wear dresses, the man who does wear dresses is defined as a crossdresser or transvestite; discrimination against such a man is not considered discrimination because of sex, but discrimination based on transvestitism.¹⁶

This Note argues that such a distinction is untenable, and will use the term "gender-loaded identity" to refer to labels such as "cross-dresser" that define people based on a failure to conform to sex stereotypes, and are in turn used to deny such people sex discrimination protection.¹⁷ For example, the label "lesbian" is gender-loaded because it describes women who do not conform to the stereotype that women are attracted only to men,¹⁸ and the label "transsexual" is gender-loaded because it describes those who do not conform to the stereotype that all who are assigned a female sex at birth identify with women and all who are assigned a male sex at birth identify with men.¹⁹ This Note argues that judicial employment of such gender-loaded identities unnecessarily has complicated the analysis of cases where a victim is discriminated against because of her failure to conform to sex stereotypes, and oftentimes results in a failure to protect these victims. Part I begins by discussing the nature of gender-loaded identities as necessarily based on sex stereotypes—focusing in particular on the stereotypes underlying classifications of people as cross-dressers or transvestites, homosexuals, and transsexuals—and then analyzes Supreme Court sex-stereotyping precedent that arguably bars all discrimination based on a failure to conform to sex stereotypes. Part I then analyzes sex discrimination claims brought by plaintiffs who are defined by gender-loaded identities. Part II examines recent transsexual discrimination cases and identifies three growing judicial trends that sometimes protect transsexual victims; nevertheless, this Part concludes that each of these approaches is inadequate and underinclusive, because each fails fully to account for discrimination based on sex stereotypes. Part III then describes the judiciary's reluctance to recognize sex discrimination claims brought by cross-dressers and nonheterosexuals, and analyzes how courts have used gender-loaded identities to evade awarding sex discrimination protection that otherwise would be available to these plaintiffs. Finally, this

¹⁵ See *infra* Part I.A.

¹⁶ See *infra* Part III.

¹⁷ See *infra* notes 21-27 and accompanying text.

¹⁸ See *infra* notes 28-30 and accompanying text.

¹⁹ See *infra* notes 31-33 and accompanying text.

Note concludes by searching for a normative explanation for the inconsistent treatment of those with gender-loaded identities in sex discrimination law.

I

DISCRIMINATION BASED ON SEX IS DISCRIMINATION BASED ON SEX STEREOTYPES

Although most courts have not attempted precisely to define sex discrimination, it normally is thought to occur when a person is treated in a particular manner “because of” his sex, an idea that at minimum is thought to indicate that the person would not have received such treatment “but for” his sex.²⁰ The Supreme Court has noted:

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.²¹

Thus, an employer engages in sex discrimination if the employer refuses to hire a woman simply because she is a woman, because women generally are thought to be incapable of performing a particular task, or because the woman in question is thought to act in a manner only appropriate for men.²² Each case has been defined as sex discrimination because the applicant would have been hired had she been a man. Section A of this Part focuses on the third such form of discrimination, based on behavior thought to be inappropriate for a particular sex, and analyzes how this behavior sometimes defines a gender-loaded identity. Next, Section B looks at how the Supreme Court has dealt with discrimination based on gender nonconformity in the absence of gender-loaded identities.

²⁰ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-42 (1989) (arguing that although plaintiff need not prove that sex was but-for cause of discrimination to prevail under Title VII, “if she does so, she prevails”).

²¹ *Id.* at 240.

²² Discrimination based on behavior thought to be inappropriate for a particular sex was held to constitute sex discrimination in *Price Waterhouse*, see *infra* Part I.B. Mary Anne Case argues:

[*Price Waterhouse*] marked the third generation of sex-stereotyping cases in the courts. Briefly stated, the first generation focused on the assumption that an entire sex conformed to gender stereotypes; the second on the assumption that individual members of the sex did; the third on individuals penalized because their gender behavior did not conform to stereotypical expectations.

Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 37 (1995).

A. *Sex Stereotypes as a Basis for Gender-Loaded Identities*

American courts repeatedly have found that employment discrimination against women based on behavior or attributes that are not punished in men is sex discrimination; thus, the employer who refuses to hire women (but not men) who do not wear makeup is engaging in sex discrimination.²³ A seemingly parallel example is that of the employer who refuses to hire men (but not women) who wear dresses or makeup, or who engage in sexual activity with other men. The man in a dress and the man who is thought to be sexually attracted to men would have been hired *but for their sex*, i.e., if they had been women. Yet virtually every court confronted with this issue has held that discrimination against such men is not sex discrimination.²⁴

The man who wears dresses and makeup is not described as engaging in the same activity as a woman who wears dresses and makeup, but is rather described as engaging in the completely different activity of "crossdressing," an activity that defines the man as a "crossdresser" or "transvestite."²⁵ Discrimination against the crossdresser (based on his nonconformity to stereotyped gender norms about what clothing is appropriate for men) is then found not to be "sex discrimination," but rather discrimination directed at an unprotected class.²⁶ Sex discrimination protection available under the "but for" test is easily escaped by superimposing a gender-loaded identity classification—one that defines the victim based on nothing more than nonconformity to a particular gender-role stereotype.²⁷

Similarly, courts and legislators have defined the man who is sexually attracted to men, or who engages in sexual activity with other men in a manner acceptable for women, as gay or homosexual.²⁸ As with the classification of the crossdresser, the classifications of gay men and lesbians allow courts to escape the application of a uniform standard on all sexes by defining equivalent behavior differently for each sex, thus punishing those who do not conform to stereotypes of

²³ See *infra* Part I.B. Judicial protection of such victims generally has been limited to claims brought under statutory proscriptions against sex discrimination, such as Title VII. An analysis of sex-stereotyping claims in the context of constitutional equal protection is beyond the scope of this Note.

²⁴ See *infra* notes 86-89 and accompanying text.

²⁵ See *infra* Part III.

²⁶ See *infra* notes 91-92 and accompanying text.

²⁷ For example, crossdressers by definition are those who do not conform to gender-role stereotypes about appropriate dress for a particular sex.

²⁸ See *infra* notes 93-115 and accompanying text.

their sex.²⁹ Although a proper “but for” sex discrimination analysis compares sex and holds all other factors constant,³⁰ classifications such as “crossdresser” and “homosexual” allow courts to compare not just sex, but sex and conformity to stereotypes associated with that sex.

A “but for” analysis of sex discrimination claims seems wholly inapplicable, however, when dealing with discrimination against transsexuals, which normally entails discrimination against an activity possible for members of only one sex.³¹ This is because the complicated process of transitioning into a woman is very different from the

²⁹ Specifically, this includes the stereotypes that all men are sexually attracted only to women, and all women are sexually attracted only to men. Other commentators have refuted the argument that an employer who discriminates against a gay employee “simply because he or she does not like homosexuals” or because “other employees or business associates would be uncomfortable working with ‘immoral sodomites’” is not discrimination on the basis of sex stereotypes. See, e.g., Geoffrey S. Trotier, *Dude Looks Like a Lady: Protection Based on Gender Stereotyping Discrimination as Developed in Nichols v. Azteca Restaurant Enterprises*, 20 Law & Ineq. J. 237, 266-67 (2002). Trotier argues:

The employer is operating under the gender stereotype that all male employees are virtuous and morally suitable for employment, and that their virtue and morality are connected to their comportment with behavior dictated by the male gender monolith. The employer is also assuming that the homosexual applicant is promiscuous, basing this assumption on the applicant's inability to fulfill the monolithic gender stereotype due to his sexual orientation: because the homosexual is attracted to people of the same sex, he or she does not fulfill the monolithic stereotype of opposite-sex sexual attraction. Furthermore, the employer is assuming that the homosexual applicant's failure to fulfill the gender stereotype with regard to sexual orientation will cause him to fail to fulfill the gender stereotype of a man as virtuous and moral. It is this last assumption of the employer that provides the homosexual with the necessary nexus between behavior and gender stereotype to receive Title VII protection. The employer in this scenario has constructed a gender stereotype that he or she refuses to allow the applicant to fulfill, thus discriminating against the homosexual “because of . . . sex.”

Id. (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1988)) (footnote omitted).

³⁰ See, e.g., Laurence R. Helfer, *International Decisions*, 93 Am. J. Int'l. L. 200, 202 (1999).

³¹ In this sense, discrimination against transsexuals describes sex discrimination against a subgroup of a particular sex, analogous to pregnancy discrimination. The Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k) (2000), was a legislative response to a history of jurisprudence that refused to recognize pregnancy discrimination as sex discrimination. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that pregnancy discrimination is not sex discrimination under Title VII); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (denying sex discrimination claim pertaining to insurance coverage of pregnancy). The PDA explicitly defines sex discrimination to encompass pregnancy discrimination rather than defining pregnancy as a separately protected category. In the equal protection context, pregnancy discrimination still is not considered sex discrimination or deserving of any heightened scrutiny. Cf. Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 914-16 (2002) (noting that because pregnancy defines biological difference between sexes that justifies differential treatment in equal protection contexts, it “is simultaneously not sex and the fundamental difference between the sexes”).

equally complicated process of transitioning into a man.³² Yet the conflated perception of transsexual women as being the same type of people as transsexual men implicitly underlies the law's gender-loaded classification of transsexuals. What is important is that all of these classifications could not function without reference to one's assigned sex, and that they are gender-loaded because they are defined by non-conformity to stereotypes about sex.

This similarity between the classification of crossdressers, homosexuals, and transsexuals based on sex underscores the similarity of the discrimination engaged in against the members of these classes. All such victims are punished through a classification system that often legitimizes discrimination based on nonconformity to certain sex stereotypes: Those assigned male at birth are punished for their failure to conform with traditionally masculine gender norms, and those assigned female are punished for their failure to conform with traditionally feminine gender norms.³³ Because the particular form of gender nonconformity engaged in by such victims labels them with gender-loaded identities, judicial protection of such victims is thought to require explicit antidiscrimination legislation barring discrimination based on sexual orientation, transsexualism, or transvestitism; legislation barring discrimination merely based on "sex" is not considered sufficient. In contrast, those who do conform to gender norms, and those whose gender nonconformity does not define a gender-loaded identity,³⁴ do not receive any classifying label other than "male" or "female." As discussed in the following Parts, the presence or absence of gender-loaded identity classifications in sex discrimination cases are often determinative of the ruling; the next Section describes a sex-stereotyping analysis that does not employ such a gender-loaded identity.

³² This difference becomes quite easy to understand when one compares the medical and physical procedures undertaken by postoperative transsexual women with those undertaken by postoperative transsexual men.

³³ Stereotypes of masculine behavior and appearance do not include wearing traditionally feminine clothing or makeup, having medical chest augmentation or construction of female genitalia, engaging in sexual activity with males, preferring the pronoun "she," or identifying as a woman. Stereotypes of feminine behavior and appearance do not include having facial hair, having male genitalia, having once had male genitalia, engaging in sexual activity with other females, preferring the pronoun "he," or identifying as a man.

³⁴ For example, although stereotypes of feminine behavior do not normally include aggressive behavior, aggressive women have not received an identity classification that courts have used to deny them sex discrimination protection. See, e.g., *infra* notes 38, 43-44 and accompanying text.

B. *The Supreme Court's Sex-Stereotyping Jurisprudence*

In *Price Waterhouse v. Hopkins*, the Supreme Court acknowledged for the first time that sex discrimination entails more than stereotype-based discrimination against men and women as groups, but also discrimination based on an individual's failure to conform to the stereotypes associated with these groups.³⁵ The *Price Waterhouse* plurality found that requiring a woman to “‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry’” in order to improve her chances of promotion constituted impermissible sex discrimination under Title VII.³⁶ The Court observed that it was “beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,”³⁷ and emphasized that “if an employee's flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.”³⁸

³⁵ 490 U.S. 228 (1989).

³⁶ See *id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (1985)).

³⁷ *Id.* at 251.

³⁸ *Id.* at 256. The *Price Waterhouse* plurality also discussed, in a single sentence, an additional theory that made discrimination against Hopkins illegal because it placed Hopkins in a “Catch-22” situation. Under this theory, discrimination against one who fails to conform to gender norms is illegal only if conforming to those norms is incompatible with one's employment success. The court thus stated that an “employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” *Id.* at 251. While the Court may have discussed this double bind to highlight the additionally severe nature of discrimination based on employment-related sex stereotypes, it is inconsistent to interpret this as limiting the holding of *Price Waterhouse*, because Ann Hopkins certainly could have worn makeup, had her hair styled, and worn jewelry without sacrificing her employment qualifications.

Kenji Yoshino argues that although the Catch-22 analysis “recognizes that women may be differently situated from other groups in having the dominant group consistently impose seemingly contradictory demands upon them. . . . What is ‘intolerable’ in these cases is not that the demands are contradictory, but rather that *either* demand is made at all.” Yoshino, *supra* note 31, at 918-19. Further, since the Court said that “‘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,’” a Catch-22 analysis of stereotype-based discrimination is plainly underinclusive. *Price Waterhouse*, 490 U.S. at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))); see also *Case*, *supra* note 22, at 45 (“[I]f Hopkins's success had not depended on her display of masculine characteristics, but *Price Waterhouse* had still required her to behave more femininely simply because this was expected in a woman—the firm would still have been treating Hopkins differently from a similarly situated man, taking her sex into account in violation of Title VII.” (citations omitted)).

Justice O'Connor's concurrence, as the opinion concurring on the narrowest ground, is controlling.³⁹ While the concurrence did not focus on the plurality's sex-stereotyping analysis, but rather on the allocation of the burden of persuasion and Title VII's causation requirement, her argument could not stand on its own without accepting the argument that discrimination based on sex stereotyping violates Title VII. She acknowledges that Ann Hopkins "had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision."⁴⁰ According to Justice O'Connor, this was all Ann Hopkins could and should be required to prove to satisfy her burden of persuasion under Title VII. The burden of proof then shifted to Price Waterhouse, who failed to prove that it did not substantially rely on an "illegitimate criterion"⁴¹ in making its employment decision. Again, Ann Hopkins only proved that the "illegitimate criterion" used by Price Waterhouse was one of conformity to sex stereotypes, not sex alone. Thus, although Justice O'Connor criticizes the plurality for its misunderstanding of Title VII's causation requirement, she relies on the plurality's sex-stereotyping analysis in holding that Price Waterhouse's conduct nevertheless violated Title VII.⁴² Although this reading of *Price Waterhouse* should have made sex stereotyping relevant in all future Title VII sex discrimination claims, the following Parts show significant confusion among the lower courts over *Price Waterhouse*'s application when a court can use a gender-loaded identity to describe a discrimination victim.

II

JUDICIAL TREATMENT OF DISCRIMINATION AGAINST THE GENDER NONCONFORMITY OF TRANSSEXUALS

Transsexuals are by definition people who fail to conform to stereotypes about how those assigned a particular sex at birth should dress, act, or identify. Interestingly, a hypothetical identification of Ann Hopkins as transsexual does not seem significantly to alter the

³⁹ See, e.g., *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (noting that where no opinion earns majority, holding of Court is that position taken by Justice or Justices who concurred in judgment on narrowest ground).

⁴⁰ *Price Waterhouse*, 490 U.S. at 272.

⁴¹ *Id.* at 274.

⁴² Justice O'Connor argues that if sex plays a benign role in an employment decision, such as when a reference to a "lady candidate" is made, the employment decision cannot be said to be made because of sex, but she reiterates that in this case Ann Hopkins should receive Title VII protection because she proved that Price Waterhouse substantially relied on sex stereotypes in making an employment decision. *Id.* at 277.

circumstance of her discrimination case, since “the impression that Hopkins conveys in [her] narrative is that she is, in stereotypical terms, male-identified.”⁴³ Yet such a classification often destroys a sex discrimination claim even though the victim’s experience may mirror that of Hopkins. Courts repeatedly have held that discrimination against such extreme gender nonconformers is of a different and permissible sort. They justify these findings by classifying the gender nonconformist plaintiff as transsexual and arguing that discrimination against them is not based on their sex. The results of such gender-loaded classifications are inconsistent with the logic underlying *Price Waterhouse*, and are analogous to classifying Hopkins as “butch” and claiming that discrimination because someone is “butch” is not based on sex.⁴⁴ All such classifications legitimize discrimination based on nonconformity to gender-role stereotypes by formalizing the nonconformity into an unprotected classification.

Until recently, almost all courts refused to protect transsexual discrimination victims under sex discrimination legislation, arguing that transsexuals as a class were not statutorily protected.⁴⁵ *Under-*

⁴³ Yoshino, *supra* note 31, at 907 (“Describing her childhood, Hopkins speaks of herself as a tomboy. She recounts that she ‘had to take home economics’ because ‘only the boys could take shop,’ and that she brought home a ‘D’ because she ‘ironed on the wrong side of the ironing board.’” (quoting Ann B. Hopkins, *So Ordered: Making Partner the Hard Way* 6 (1996))).

⁴⁴ Commentators have described decisions that uphold discrimination against transsexuals as being

as prejudicial to post-operative transsexuals as would be a decision upholding discrimination against women solely because they had undergone voluntary abortions. A woman may require an abortion to prevent a possible psychological disorder. Dismissal of a woman from her employment on the basis of the abortion would appear to violate Title VII. Similarly, a post-operative transsexual who undergoes sex-change surgery does so for relief from a real and natural psychological condition.

Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 *Am. J.L. & Med.* 53, 62 (1987). A significant difference between abortion and transsexualism is that abortion does not connote a gender-loaded identity.

⁴⁵ Until the Ninth Circuit’s decision in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the Seventh, Eighth, and Ninth Circuits had all held that discrimination because one is a transsexual is not discrimination because of sex. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not protect transsexuals); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (holding that Civil Rights Act does not protect transsexuals); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (finding that Title VII does not protect transsexuals). For commentary on the history of unsuccessful discrimination claims brought by transsexuals, see generally Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 *Denv. U. L. Rev.* 1321 (1998); Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition Of Their Sex*, 7 *Wm. &*

*wood v. Archer Management Services*⁴⁶ offers a typical example of this view and demonstrates that resistance to protecting transsexuals from discrimination has outlasted the Court's *Price Waterhouse* ruling. In *Underwood*, the court held that a transsexual woman did not have a sex discrimination claim under the District of Columbia Human Rights Act.⁴⁷ The court did not consider that discrimination against people with transsexual identity could be based on their failure to conform to gender norms associated with their perceived sex; and the court did not cite *Price Waterhouse*, but rather, it suggested that the victims' classification as transsexual rids the court of any responsibility to analyze the discrimination in terms of sex or sex stereotypes.

This Part focuses, however, on the small number of courts that have begun to recognize that discrimination against a transsexual person can constitute sex discrimination. Many of these courts fail to recognize the root of this discrimination as one based on sex stereotypes; these courts first struggle with how to categorize the discrimination victims before them, and then attempt to determine whether the victims were in fact discriminated against on the basis of that cate-

Mary J. Women & L. 133 (2000); Richard F. Storrow, Naming the Grotesque Body in the "Nascent Jurisprudence Of Transsexualism," 4 Mich. J. Gender & L. 275 (1997); Taitz, *supra* note 44; Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 3 (1995); D. Douglas Cotton, Note, *Ulane v. Eastern Airlines: Title VII and Transsexualism*, 80 Nw. U. L. Rev. 1037 (1986); Marvin Dunson III, Comment, Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law, 22 Berkeley J. Emp. & Lab. L. 465 (2001); Kristine W. Holt, Comment, Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence, 70 Temp. L. Rev. 283 (1997); Kristin R. Rowland, Note, Amorphous Employment Discrimination Protection for Transsexuals: *Doe v. Boeing*, 4 Temp. Pol. & Civ. Rts. L. Rev. 361 (1995).

⁴⁶ 857 F. Supp. 96 (D.D.C. 1994).

⁴⁷ Despite citing the rules issued jointly by the District of Columbia Office of Human Rights and the District of Columbia Commission on Human Rights which defined "sex" as the "state of being male or female and conditions associated therewith . . . includ[ing] the state of being a member of a sub-group of one sex," *id.* at 98 (quoting D.C. Mun. Regs. tit. 4, § 599), the court reasoned that there was

no indication that any discrimination took place on account of her being a woman or a condition associated therewith. Ms. Underwood fails to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against because of her status as a transsexual—that she transformed herself into a woman—but alleges no facts regarding discrimination because she is a woman.

Id. Although the court did not consider that transsexual women could be a subgroup of women, other courts have. See, e.g., *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391, 396 (Sup. Ct. 1995) ("In the complaint plaintiff alleges that he is now a male based on his identity and outward anatomy. Being a transsexual male he may be considered part of a subgroup of men. There is no reason to permit discrimination against that subgroup under the broad antidiscrimination law of our City.").

gory.⁴⁸ Unfortunately, these initial victim classifications by the court, which may even agree with the victim's identity, are often fatal to the discrimination suit: If the court's classification does not agree with the victim's sex as perceived by the discriminator, the court cannot then identify discrimination based on nonconformity to stereotypes of that sex. However, these inconsistencies can be eliminated by allowing gender nonconformist victims of discrimination to state claims under any protected sex classification. Thus, if a male-to-female transsexual is perceived as a male by a sex discriminator, the discrimination may have resulted from the victim's failure to conform to stereotyped masculine gender norms; if the same person is considered female by the discriminator, the discrimination may have resulted from the victim's failure to conform to stereotyped feminine gender norms.⁴⁹

The following discussion summarizes three recent judicial approaches⁵⁰ that afford some protection to victims in transsexual discrimination cases decided after *Price Waterhouse*,⁵¹ but argues that these approaches cannot be reconciled with *Price Waterhouse* and do not accurately account for the nature of discrimination suffered by transsexuals. As a result, they fail to protect transsexuals from many forms of discrimination on account of their gender nonconformity and are of limited value as precedent in cases of discrimination against gender nonconformers who are not transsexual.⁵²

⁴⁸ See e.g., *Rentos v. Oce-Office Sys.*, No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060, at *16-17 (S.D.N.Y. Dec. 23, 1996) ("The question that has perplexed the courts (and probably the layperson as well) is what is the sex or gender of a transsexual, both preoperatively and postoperatively? This is part of the dilemma inherent in [a] defendant's demand that [a] plaintiff definitively identify the protected class in which she claims membership."). Commentators have argued that in most legal systems

courts merely decide, on an ad hoc basis, the sexual identity of post-operative transsexuals and other legal consequences of a sex-change. These judicial decisions are based on rigid principles of common law and the personal views of judges toward transsexualism and homosexuality, as well as the fear that recognition of the post-operative patient's new sex will open the flood-gates to a tide of single-sex marriages.

Taitz, *supra* note 44, at 57.

⁴⁹ See *supra* note 33 and accompanying text.

⁵⁰ This includes cases decided under Title VII and those decided under parallel state and local statutes.

⁵¹ The Supreme Court most recently defined a transsexual as "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (Charles B. Clayman ed., 1989)). This perception of transsexualism as a legitimate condition may in part account for its increasing level of protection under sex discrimination laws.

⁵² A notable exception is *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), discussed *supra* in notes 1-8 and accompanying text.

A. *Requiring Disparate Treatment of Male and Female Transsexuals*

One recent judicial trend is to extend sex discrimination protection to transsexuals only if transsexual men are treated differently from transsexual women. For instance, in *James v. Ranch Mart Hardware*,⁵³ the court held that the plaintiff, a male-to-female transsexual, could not state a claim under Title VII or the Kansas Act Against Discrimination unless her employer fired her “for being a male transsexual when it would not have fired her for being a female transsexual.”⁵⁴ According to the court, only unequal discrimination against transsexuals was actionable. Despite the uncontested fact that the discrimination was motivated by clothing and appearance that the employer felt was inappropriate for the plaintiff’s perceived sex, the court did not mention *Price Waterhouse* or its implications. Rather, the court stated that if the plaintiff was discriminated against “as a male, then this case must be viewed in the reverse discrimination context. . . . [This] becomes a question whether the plaintiff has shown the ‘existence of “background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.”’”⁵⁵ The court found that the plaintiff could not allege that her employer discriminated against males, and thus “failed to show membership in a protected class under Title VII.”⁵⁶ This claim is quite surprising in light of *Price Waterhouse*’s protection of individual gender nonconformers, as Ann Hopkins was not forced to prove that Price Waterhouse discriminated against all women, but only that it discriminated against her for not conforming to her employer’s stereotypes of appropriate behavior and appearance for women. The label “transsexual” should not—but in this case does—change the analysis.

More recently, in *Rosa v. Park West Bank & Trust Co.*,⁵⁷ the First Circuit held that a bank’s refusal to issue a loan application to “a biological male . . . dressed in traditionally feminine attire” unless he “went home and changed”⁵⁸ may have constituted sex discrimination under the Equal Credit Opportunity Act (ECOA),⁵⁹ but only if the

⁵³ 881 F. Supp. 478 (D. Kan. 1995).

⁵⁴ *Id.* at 481 n.4.

⁵⁵ *Id.* at 481 (quoting *Landon v. S.W. Bell Telecomms., Inc.*, Civ. A. No. 91-2310-V, 1992 WL 193656, at *3 (D. Kan. Jul. 28, 1992) (quoting *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981))).

⁵⁶ *Id.*

⁵⁷ 214 F.3d 213 (1st Cir. 2000).

⁵⁸ *Id.* at 214.

⁵⁹ The Equal Credit Opportunity Act (ECOA) prohibits discrimination “with respect to any aspect of a credit transaction[,] on the basis of race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a) (2000).

bank treated “a woman who dresses like a man differently than a man who dresses like a woman.”⁶⁰ The court conceived of a similarly situated person not as a woman dressed like the plaintiff (in a blouse and skirt) but as a woman dressed “like a man.” Despite the fact that the court interpreted the ECOA under Title VII case law and explicitly cited to *Price Waterhouse*,⁶¹ the court here required more than discrimination resulting from a failure to conform to stereotyped gender roles. The court required discrimination against those perceived as men, but who failed to conform to stereotyped masculine gender roles, to be more severe than discrimination against those perceived as women, but who failed to conform to stereotyped feminine gender roles.⁶² Thus, both the *James* and *Rosa* courts would sometimes allow discrimination against transsexuals for nonconformist appearance to be actionable as sex discrimination, but only if the plaintiffs could prove that transsexual men and transsexual women are not equally discriminated against for their failure to conform to stereotypes of their perceived sex.

B. Classifying the Victim With Their Self-Identified Sex

In *Dobre v. AMTRAK*,⁶³ a male-to-female transsexual claimed sex discrimination under Title VII, based on her identification with women. The court cited precedent decided before *Price Waterhouse*, arguing that “[t]he term ‘sex’ . . . is not synonymous with the term ‘gender’[, which] refers to an individual’s sexual identity.”⁶⁴ While an understanding of *Price Waterhouse*’s underlying logic would have

⁶⁰ 214 F.3d at 215-16. The implied permissibility of equally applied discrimination may be compared to the Court’s analysis of interracial marriage proscriptions. Cf. *Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting “notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations”).

⁶¹ “Indeed, under *Price Waterhouse*, ‘stereotyped remarks including statements about dressing more “femininely” can certainly be evidence that gender played a part.’” *Rosa*, 214 F.3d at 216 (quoting *Price Waterhouse*, 490 U.S. at 251).

⁶² The *Rosa* court further argued that if the plaintiff had been denied the loan application because the bank discriminator “thought he was gay,” the plaintiff could have no legal recourse whatsoever. *Id.* at 216. Thus the court implies that recourse under sex discrimination law is not accessible if the discriminator can demonstrate a belief that all men who fail to conform to masculine gender roles are homosexual. More importantly, the decision fails to account for the fact that discrimination against minority sexual orientations is itself discrimination based on sex stereotypes. See *supra* notes 22-30 and accompanying text. The court ignored the actual level of discrimination based on nonconformity to sex stereotypes and instead condoned discrimination based on sexual orientation. At the same time, the court proscribed discrimination based on biological sex. Interestingly, both sexual orientation and biological sex were imperceptible to the discriminator.

⁶³ 850 F. Supp. 284 (E.D. Pa. 1993).

⁶⁴ *Id.* at 286 (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977)).

required the court to extend Title VII protection to those without stereotypical gender, and conceivably to those without stereotypical sexual identities,⁶⁵ the court instead stated that “neither the plaintiff’s memorandum of law nor the Court’s independent research has disclosed any case broadening Title VII so as to prohibit an employer from discriminating against a male because he wants to become a female.”⁶⁶

Even though the court described the plaintiff as a male who wanted to become a female, it assumed that the plaintiff was a female for the purposes of the motion and stated that

even when viewed in the most favorable light, the allegations in the complaint do not support a claim that the plaintiff was discriminated against as a *female*. . . . [T]he acts of discrimination alleged by the plaintiff were not due to stereotypic concepts about a woman’s ability to perform a job nor were they due to a condition common to women alone. If the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become a female.⁶⁷

The court, in refusing to construe this as discrimination against a woman for failing to conform to AMTRAK’s image of what a woman should be, is right in suggesting that such a claim does not truly describe the discrimination. Rather, the discrimination was likely based on a belief that the plaintiff was a man who failed to act like one: She did not conform to the stereotype that all who are classified as male at birth grow up to identify with men or look “like men.”⁶⁸ Here, the *Dobre* court’s classification of the discrimination victim with her self-identified sex was fatal to her discrimination claim.

⁶⁵ Katherine M. Franke has said that

sexual identity—that is, what it means to be a woman and what it means to be a man—must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms that at once enable and constrain a degree of human agency and create the background conditions for a person to assert, *I am a woman*. To say that someone is a woman demands a complex description of the history and experience of persons so labeled.

Franke, *supra* note 10, at 3-4.

⁶⁶ *Dobre*, 850 F. Supp. at 286.

⁶⁷ *Id.* at 287.

⁶⁸ *Dobre*’s suggestion that the plaintiff would have a claim as a man who failed to conform to gender norms brings into focus the problem with forcing plaintiffs to claim that they are either male or female to state a claim. Transsexuals may be discriminated against because they are perceived as both, and should state claims in the alternative depending on how they are perceived in the eyes of the discriminator. To hold otherwise creates a third sexual category that is neither recognized nor protected by the law. Cf. *Romer v. Evans*, 517 U.S. 620, 650 (1996) (Scalia, J., dissenting) (“[T]he Constitution ‘neither knows nor tolerates classes among citizens’. . . .” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896))).

A growing number of cases are both classifying transsexuals with their self-identified sex and finding discrimination on the basis of that sex. This is exactly the analysis a court should take when the discriminator perceives the plaintiff as belonging to her self-identified sex. However, when the court's classification of a transsexual with her self-identified sex does not correlate with the victim's sex as perceived by the discriminator, the court is unable accurately to analyze the discrimination at issue. In such cases the courts may reach the proper result, but their analyses fail to recognize discrimination based on sex stereotypes; as a result, these decisions have virtually no value as precedent to nontranssexuals with gender-loaded identities who are similarly discriminated against based on a failure to conform to sex stereotypes.

In *Doe v. Yunits*,⁶⁹ for example, the court held for the plaintiff, a male-to-female transsexual student with a medically diagnosed gender identity disorder, who was suspended by her school for using the female restroom and "would not be permitted to enroll if she wore any girls' clothing or accessories."⁷⁰ The facts indicated that the school saw the plaintiff as male and was punishing her for her failure to conform to stereotypes of appropriate male clothing and bathroom choice. However, even though the plaintiff argued that the school's actions "constitute sex discrimination because defendants prevented plaintiff from attending school in clothing associated with the female gender solely because plaintiff is male,"⁷¹ the court rephrased the issue, claiming that "[s]ince plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear."⁷² The court held that if the answer to this question was no, the plaintiff was being discriminated against because of the sex she was assigned at birth.⁷³

What if the plaintiff did not *identify* as female? Because the *Doe* court did not analyze the discrimination in terms of sex stereotypes, its analysis would seemingly allow the school to proscribe a non-transsexual man from wearing a skirt, or otherwise failing to conform to stereotypes of how male students should act. The court makes this

⁶⁹ No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Oct. 11, 2000).

⁷⁰ *Id.* at *5.

⁷¹ *Id.* at *18. A more precise statement would allege discrimination because the plaintiff was prevented from wearing clothing associated with women solely because the plaintiff was *perceived* as male.

⁷² *Id.* at *19.

⁷³ *Id.* Had the school perceived the plaintiff as female, the court's analysis would be congruous to a theory that the plaintiff was discriminated against for failure to conform to the stereotype that women cannot be classified as male at birth. However, there is no evidence of this in the case, and the court did not discuss sex stereotypes in its decision.

clear in a footnote distinguishing precedent that allowed a school to prevent students dressed in clothing “of the opposite gender” from attending the prom in order to protect “community norms.”⁷⁴ Even though the “community norms” being violated were none other than stereotyped gender norms, the court would infringe upon these norms only in the extreme case where they resulted in “the stifling of plaintiff’s selfhood,” concluding that because the Constitution “‘neither knows nor tolerates classes among citizens[.]’ . . . [P]laintiff in this case is likely to establish that the dress code . . . even though it is gender-neutral, is being applied to her in a gender discriminatory manner.”⁷⁵ A true intolerance of classes among citizens would not permit a “gender-neutral” dress code that defines gender-specific appropriate dress. Although the court decision ultimately protected the plaintiff and represented a significant victory for transsexual activists,⁷⁶ its analysis was improper because it did not describe the discrimination as based on the plaintiff’s perceived sex, and its logic fails to protect other victims of discrimination based on sex stereotypes who do not go so far as to reject their sex assigned at birth.

C. Distinguishing “Gender Discrimination” and “Sex Discrimination” Statutory Language

A third trend in recent transsexual discrimination cases is to find that transsexuals are protected under statutory language forbidding “gender discrimination,” but not under language forbidding “sex discrimination.” These cases cannot be reconciled with *Price Waterhouse*’s protection of gender nonconformity under Title VII’s “sex” discrimination language. In *Maffei v. Kolaeton Industries*,⁷⁷ for example, the court held that a transsexual man did have a sex discrim-

⁷⁴ Id. at *19 n.5. The court further distinguishes this case from Massachusetts precedent decided after *Price Waterhouse* that explicitly denied sex discrimination protection to transvestites, stating that:

[T]he case at hand differs from *LaFleur*, where the plaintiff claimed she was discriminated against in the employment context because she was a transvestite, because the instant plaintiff is likely to establish that defendants have discriminated against her on the basis of sex by applying the dress code against her in a manner in which it would not be applied to female students.

Id. at *20 n.2 (citing *LaFleur v. Bird-Johnson Co.*, 1994 Mass. Super. LEXIS 20 (Nov. 3, 1994)). However, transvestites are by definition people who wear clothing considered “inappropriate” to their biological sex, and discrimination against them is necessarily an application of a stereotyped dress code that would not be applied to persons of the “appropriate” biological sex wearing the same clothing.

⁷⁵ Id. at *21 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting)).

⁷⁶ Indeed, the case was one of the first to hold that a transsexual plaintiff may be categorized with her self-identified sex and claim discrimination based on her birth sex.

⁷⁷ 626 N.Y.S.2d 391 (Sup. Ct. 1995).

ination claim under New York City law, but not under Title VII. Here, an employer who considered the plaintiff “an exemplary employee”⁷⁸ prior to his sex change treated him differently afterwards: The employer “began to degrade and humiliate him at the office . . . called him names, stripped him of his duties, ostracized him from the rest of the employees and in the presence of the office manager stated that plaintiff was ‘immoral and what [he] did was amoral.’”⁷⁹ The discrimination clearly occurred when the employee visibly began not to conform to female sex stereotypes, stereotypes that do not allow women to appear and act masculine or to identify with men. Yet the court did not consider the implications of *Price Waterhouse* on the coverage of transsexuals under sex discrimination law, instead choosing to follow earlier precedent that denied recourse under Title VII to transsexuals as a class.⁸⁰

Nevertheless, the court found such federal cases “unduly restrictive”⁸¹ and used the fact that New York City law used the word “gender” rather than “sex” to find that transsexuals were protected at the local level. The court cited dicta from *Dobre v. AMTRAK*,⁸² which stated that although transsexuals cannot be protected under Title VII, “the result would be different if instead [of ‘sex’] the term ‘gender’ had been used.”⁸³ Yet *Price Waterhouse* itself uses the word “gender” in interpreting Title VII, claiming that “gender must be irrelevant to employment decisions”⁸⁴ and that “[i]n 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 be, has acted on the basis of gender.”⁸⁵ It follows that an employer who acts on the basis of a belief that a woman must not appear masculine or identify with men, or that a man cannot have been classified as female at birth, is also acting on the basis of gender. Thus, even this victory for the transsexual plaintiff did not grasp that discrimination against transsexuals should not require gender as a new category of protection. Rather, as was the case in *Price Waterhouse*, the discrimination against the plaintiff’s failure to conform to sex stereotypes was based on behavior and appearance that the discriminator did not think was

⁷⁸ *Id.* at 392.

⁷⁹ *Id.*

⁸⁰ *Id.* at 394. This is representative of the vast majority of transsexual discrimination cases, in that there is no refutation of the argument that such discrimination is based on sex stereotypes because the notion is never considered or analyzed.

⁸¹ *Id.*

⁸² 850 F. Supp. 284 (E.D. Pa. 1993).

⁸³ *Maffei*, 626 N.Y.S.2d at 395.

⁸⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

⁸⁵ *Id.* at 250.

appropriate for a particular "sex."⁸⁶ The court's formalistic requirement of "gender" discrimination language is unnecessary and, as discussed in the following Part, threatens to leave unprotected those, such as crossdressers and homosexuals,⁸⁷ who may not conveniently fit into a new statutorily protected category but who nonetheless are discriminated against for their failure to conform to sex stereotypes.⁸⁸

III

THE APPLICATION OF SEX-STEREOTYPING JURISPRUDENCE TO CROSSDRESSERS AND NONHETEROSEXUALS

Gender nonconformity far less extreme than transsexual identity, but that still defines a gender-loaded identity, is the basis of widespread discrimination that repeatedly has been found permissible by courts notwithstanding *Price Waterhouse*. This is particularly evident when the gender nonconformers are men: Employment policies that require male employees to adhere to dress, jewelry, and hair length standards not imposed on women all repeatedly have been upheld in the face of sex discrimination challenges.⁸⁹ Theorists argue that this

⁸⁶ Interestingly, a later case followed *Maffei* in holding that a transsexual victim of discrimination could have recourse under the New York State Human Rights law but not under federal law, despite the fact that state law uses the word "sex." The court did not discuss that the *Maffei* court based its holding on the use of the word "gender" in the city law. See *Rentos v. Oce-Office Sys.*, No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 23, 1996).

⁸⁷ In this case sexual orientation was already a protected category under New York City law. There have been repeated failed political attempts to create an explicit federal cause of action for employees who suffer discrimination on the basis of their sexual orientation. See, e.g., Employment Non-Discrimination Act (ENDA) of 2001, H.R. 2692, 107th Cong. (2001); ENDA of 2001, S. 1284, 107th Cong. (2001); ENDA of 1999, H.R. 2355, 106th Cong. (1999); ENDA of 1999, S. 1276, 106th Cong. (1999); ENDA of 1997, H.R. 1858, 105th Cong. (1997); ENDA of 1997, S. 869, 105th Cong. (1997); ENDA of 1996, S. 2056, 104th Cong. (1996); ENDA of 1995, H.R. 1863, 104th Cong. (1995); ENDA of 1995, S. 932, 104th Cong. (1995); ENDA of 1994, H.R. 4636, 103d Cong. (1994); ENDA of 1994, S. 2238, 103d Cong. (1994). This Note argues that such a law should be unnecessary because discrimination on the basis of sexual orientation necessarily is discrimination based on sex stereotypes. See *supra* notes 22-30; *infra* notes 93-115 and accompanying text.

⁸⁸ The court even makes such categorizations explicit, stating that:

A transsexual is not homosexual in the true sense as the latter seek sexual gratification from members of their own sex Not to be confused with transsexuals are transvestites, who are persons content with their own sex and are heterosexual, but who dress as members of the opposite sex for sexual arousal.

Maffei, 626 N.Y.S.2d at 393. For the purposes of sex discrimination protection, individuals within each of these groups in some way do not conform to stereotypes of their sex and must be protected under the logic of *Price Waterhouse*.

⁸⁹ Even though the Court has never suggested that Title VII or constitutional protections should be applied differently to men and women, and despite *Price Waterhouse's* extension of sex discrimination protections to women who are not feminine, the law con-

disproportionate exclusion of men from sex discrimination protection is due to a devaluing of everything feminine and the fact that

[t]oday women are seen as able to do all that men do and then some, whether the additional ability is pregnancy, intimacy, or wearing a dress. There remains a residual femininity inaccessible to males, while masculinity is reduced to defining itself only by what it is not: it is not feminine.⁹⁰

Thus it is far more acceptable, in terms of gender norms, for a woman to dress in traditionally male clothing than it is for a man to dress in traditionally female clothing. The man in this example is more easily dubbed a “crossdresser” or “transvestite,” an identity classification built on stereotypes about appropriate dress for a particular sex, and one that has not warranted protection under Title VII. One court that recently faced a Title VII claim brought by a nontranssexual man, who was indisputedly fired for wearing “female” clothing outside the workplace, argued that “this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male

tinues to deny such protections disproportionately to men who are not masculine. See, e.g., *Rathert v. Vill. of Peotone*, 903 F.2d 510, 516 (7th Cir. 1990) (holding that reprimand of male police officers disciplined for wearing ear studs while off duty was rationally related to preventing loss of respect for police); *Bedker v. Domino's Pizza*, 491 N.W.2d 275, 277 (Mich. Ct. App. 1992) (upholding disparate hair-length standards, stating “for the most part . . . title VII protection does not encompass those characteristics not inherently immutable . . . [and] that have no significant effect upon the employment opportunities afforded one sex in favor of the other”); *Lockhart v. Louisiana-Pacific Corp.*, 795 P.2d 602, 602 (Or. Ct. App. 1990) (upholding rule allowing females, but not males, to wear “facial jewelry while on the job”); *Case*, supra note 22, at 49 (“[I]nformed legal academics opine even after *Hopkins* that ‘discrimination against male job applicants who appear “effeminate” is generally lawful, as is employment discrimination against cross-dressers.’” (quoting Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 *New Eng. L. Rev.* 1395, 1420 (1992))); cf. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (upholding appellant’s Title VII claim that he was discriminated against for being feminine, but restricting its ruling, stating, “[W]e do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.”).

⁹⁰ *Case*, supra note 22, at 35. Interestingly,

the case of the effeminate man would be a peculiar one in which to argue for an exception from the equal protection of men, because the very characteristics for which he is being penalized are those associated with women, the subordinated group the statutory language was principally designed to protect. If women were protected for being masculine but men could be penalized for being effeminate, this would, in my view, send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued although masculine qualities may not.

Id. at 47.

employee.”⁹¹ Yet the court’s argument is undercut by its own description of the plaintiff’s off-duty clothing as “female”—clothing stereotypically associated with a particular sex, and not considered “sufficiently masculine.” The court’s use of the gender-loaded identity classifications “crossdresser” and “transgendered” allow it to evade Title VII so easily when it strikes down the disparate treatment claim, stating that “[w]hile there were women working for the defendant who wore jeans, plaid shirts, and work shoes while working in the warehouse or in refrigerated compartments, there is no evidence that they were transgendered or that they were cross-dressers, i.e., that they impersonated men and adopted masculine personas.”⁹² The reference to women crossdressers used an identity class built on nothing more than sex stereotypes about (in)appropriate clothing for women to negate the plaintiff’s sex-stereotyping claim. A more appropriate comparison group would be women who dressed as the plaintiff had (in traditionally women’s clothing), thus making clear that the discrimination resulted from the plaintiff’s sex and his failure to conform to his employer’s stereotypes of appropriate clothing for that sex.

Courts are even more hesitant to grant sex discrimination protection when employment discrimination stems from stereotyped notions about appropriate sexual attractions and interactions. The Supreme Court’s unanimous extension of Title VII’s protection to same-sex harassment⁹³ is of little use to many male plaintiffs, because the harassment they experience all too commonly involves insinuations of their sexual attraction to other men,⁹⁴ which is seen as discrimination

⁹¹ *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. Sept. 16, 2002).

⁹² *Id.* at *36.

⁹³ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (1998); cf. *Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997). The court in *Doe* noted,

Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles. . . . [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.

Id.

⁹⁴ The Seventh Circuit has noted that “it is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets; one need only browse the federal reporters to see that the two routinely go hand in hand,” and because there is

a considerable overlap in the origins of sex discrimination and homophobia, . . . it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like “fag,” for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.

and harassment based on sexual orientation—an identity class courts have not protected under Title VII. In *Spearman v. Ford Motor Co.*,⁹⁵ for instance, coworkers harassed and created a hostile work environment for the appellant because they suspected that he was gay, including as support the stereotyped observation that the appellant looked at men “like a man would look at a woman.”⁹⁶ The appellant argued that “vulgar and sexually explicit insults and graffiti of his harassers were motivated by ‘sex-stereotypes’ because his co-workers perceived him to be too feminine to fit the male image at Ford.”⁹⁷ Nevertheless, the Title VII claim was summarily dismissed, because “harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”⁹⁸ As virtually all other courts faced with the issue have done, the Seventh Circuit does not consider that sexual attraction toward a particular gender may be a stereotyped gender norm.⁹⁹ The idea is easily avoided, because those who fail to conform to this particular sex stereotype are classified as homosexuals, a class not seen as protected under Title VII.¹⁰⁰ Thus the *Spearman* court was able to state that “coworkers directed stereotypical statements at [the appellant] to express their hostility to his perceived homosexuality,

City of Belleville, 119 F.3d at 593 & n.27. Nevertheless, the court in this case felt the need to distinguish as inactionable discrimination based solely on sexual orientation (i.e. discrimination based on the identity classifications defined by nonstereotypical sexual preference) in contrast to a “mixed motive” case where the discrimination was based on both sexual orientation and more traditionally recognized sex discrimination.

⁹⁵ 231 F.3d 1080 (7th Cir. 2000), cert. denied, 532 U.S. 995 (2001).

⁹⁶ Id. at 1082.

⁹⁷ Id. at 1085.

⁹⁸ Id. at 1084. See also *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003) (holding that, under *Spearman*, Title VII relief was not available to heterosexual plaintiff who alleged discrimination based on his perceived homosexuality); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (“Sexual orientation is not a classification that is protected under Title VII; thus homosexuals are not members of a protected class under the law.”).

⁹⁹ See also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“Title VII does not proscribe harassment simply because of sexual orientation.”). In *Higgins* the appellant fruitlessly identified sexual attraction to men as a “culpable trait” for which men, but not women, were punished, and argued that “he was harassed because he failed to meet his co-workers’ stereotyped standards of masculinity and that, therefore, he was harassed [because of sex.]” Id. Similar rulings by the Second, Third, Sixth, and Ninth Circuits are discussed *infra* notes 102-15 and accompanying text.

¹⁰⁰ An even clearer example of this phenomenon is in *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 713-14 (E.D. Tex. 2000), where the court titled the first subheading in its Title VII discussion, “Whether Mims belongs to a protected class.” Id. at 713. The plaintiff was perceived as homosexual (though in this case he was not), and because “[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act,” the court perfunctorily stated that the plaintiff could not make out a *prima facie* case under Title VII. Id. at 714.

and not to harass him because he is a man.”¹⁰¹ Had the word “homosexuality” in the prior sentence been replaced by “attraction to men”—a trait suitable for women—the gendered double standard would have been clearer.

The Second Circuit also rejected the conception of sexual orientation as a gender norm in *Simonton v. Runyon*,¹⁰² stating that *Price Waterhouse*’s protection of those who do not conform to gender-role stereotypes “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.”¹⁰³ Again, despite the court’s implication that sexual attraction toward men is not itself stereotypically feminine,¹⁰⁴ a proper analysis of this case would note that the plaintiff’s harassment stemmed from the discriminator’s perception that the plaintiff failed to conform to the stereotype that men should only be sexually attracted to women.

Similarly, in *Dillon v. Frank*,¹⁰⁵ the Sixth Circuit denied relief to a plaintiff who claimed he “was subjected to such stereotyping in that he was not deemed ‘macho’ enough by his co-workers for a man, and that . . . verbal abuse resulted from this stereotyping.”¹⁰⁶ The court superimposed the unprotected category “homosexual” on the plaintiff and stated that he

cannot escape our holding, and those of the other circuits, that homosexuality is not an impermissible criteria on which to discriminate with regard to terms and conditions of employment. Dillon’s co-workers deprived him of a proper work environment *because* they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII.¹⁰⁷

¹⁰¹ *Spearman*, 231 F.3d at 1085-86.

¹⁰² 232 F.3d 33 (2d Cir. 2000).

¹⁰³ *Id.* at 38.

¹⁰⁴ This is evident in the court’s claim that “we have no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.” *Id.*

¹⁰⁵ No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).

¹⁰⁶ *Id.* at *15.

¹⁰⁷ *Id.* at *22. The court went on to say that plaintiff could not state a sex-based harassment claim unless he could show that “a lesbian would have been accepted” or a “woman known to engage in the disfavored sexual practices would have escaped abuse.” *Id.* at *27. The “disfavored sexual practices” to which the court is referring include nonconformity with the stereotype that women should choose men as sexual partners, made evident by the court’s gender-loaded reference to lesbians.

In applying *Price Waterhouse*, the court claimed that there was no evidence that the plaintiff's coworkers "justified their outrageous behavior based on, or accompanied it with remarks indicating, a belief that his practices would be acceptable in a female but unacceptable in a male."¹⁰⁸ The court obviously defined these practices as "homosexual sex," a gender-loaded concept, rather than "sex with men," a gender-neutral comparison that would have made clear that such practices in fact would be acceptable in a female.¹⁰⁹

Even the Ninth Circuit, the only circuit to protect transsexuals under a *Price Waterhouse* sex-stereotyping analysis,¹¹⁰ has failed to do the same in the context of sexual preference. However, in *Nichols v. Azteca Restaurant Enterprises*,¹¹¹ the court did find that a man who was subjected to a "relentless campaign of insults, name-calling, and vulgarities," including being referred to as "'she' and 'her'" as well as "'faggot' and a 'fucking female whore,'"¹¹² could claim sex discrimination under Title VII as a man who is discriminated against for acting too feminine.¹¹³ Notably, the court did not once mention a gender-loaded identity classification such as "gay" or "homosexual," or the concept of sexual orientation in its decision, despite harassment apparently aimed at the plaintiff's sexuality.¹¹⁴ Instead, the court focused precisely on the sex stereotyping at play. Less than a year later, however, the Ninth Circuit did allude to the *Nichols* plaintiff as

¹⁰⁸ *Id.* at *28.

¹⁰⁹ The Third Circuit offers a similarly telling example. In *Bibby v. Philadelphia Coca Cola Bottling Co.*, the court made explicit that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender," that "'a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex,'" and that "once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus." 260 F.3d 257, 262-65 (3d Cir. 2001) (quoting *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997)). Nevertheless, despite harassment including coworker remarks such as "'everybody knows you're gay as a three dollar bill,' 'everybody knows you're a faggot,' and . . . 'sissy,'" the court concluded that there was no claim that the plaintiff "was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave," because the "claim was, pure and simple, that he was discriminated against because of his sexual orientation." *Id.* at 259-60, 264.

¹¹⁰ See *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), discussed *supra* in notes 1-6 and accompanying text.

¹¹¹ 256 F.3d 864 (9th Cir. 2001).

¹¹² *Id.* at 870.

¹¹³ *Id.* at 874.

¹¹⁴ The court did not refer to the plaintiff as gay or homosexual even though it cited the comments of coworkers that referred to the plaintiff as a "faggot" and derided him for failing to have sexual intercourse with a female waitress. *Id.* at 870, 874.

being gay when it made clear that harassment “motivated by hostility based on sexual orientation is . . . irrelevant” to a Title VII claim.¹¹⁵

CONCLUSION

The labels “homosexual,” “transvestite,” “crossdresser,” and “transsexual” are often fatal to sex discrimination claims when they are used to describe the victims—even when the victims suffer discrimination because of their gender nonconformity. This Note questions why lawyers and judges so often fail to protect such victims under statutes interpreted to bar discrimination based on sex stereotypes. One explanation is that the judiciary simply is prejudiced against homosexuals, transvestites, crossdressers, and transsexuals. While this may be true, the fact that many plaintiffs defined by gender-loaded identities fail to state discrimination claims in terms of sex stereotypes indicates that something more is at play.¹¹⁶ Perhaps the particular sex stereotypes in question are so deeply ingrained in our culture that conformity to them is considered a fundamental part of what it means to be a woman or man—so that those who do not conform to them no longer can be considered simply female or male. Instead these nonconformers acquire new identities, which like most cultural identities carry great meaning and significantly define the sense of self of those who identify with them.

Yet the cultural significance of these identities should not allow courts to ignore the fact that they are *gender-loaded* identities: They define people based on their perceived sex and nonconformity to stereotypes of that sex. Thus, even though stereotypes pertaining to sex-appropriate dress, sexual identity, or sexual partners have been legitimized through a social classification system that defines certain groups by nonconformity to sex stereotypes, the legal¹¹⁷ and social identities

¹¹⁵ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (Pregerson, J., concurring). The plurality did go further than most courts, in that it protected the appellant-victim on the theory that severe or pervasive physical contact of a sexual nature (i.e., with body parts clearly linked to the victim’s sexuality, such as his crotch and anus) satisfies a Title VII sex harassment claim “without regard to the sexual orientation—real or perceived—of the victim.” *Id.* at 1067-68. Still, victims do not receive such strong protections from non-physical harassment or discrimination.

¹¹⁶ In part, this may be because some courts hold plaintiffs to a particular category of protection, and do not allow them to develop litigation strategies in which they can attempt to prove the motivation of the discriminator using theories that are independent from a court-imposed identity. See *supra* note 47 and accompanying text; note 99 and accompanying text.

¹¹⁷ As alternative sexual orientations and, to a lesser degree, transsexualism, are increasingly gaining political, judicial, and medical validation, they are slowly being added to the laundry list of classes against which discrimination is deemed statutorily impermissible. Yet their inclusion in antidiscrimination jurisprudence and legislation should not define the

constructed on top of these stereotypes should not justify treating discrimination based on these stereotypes differently than discrimination based on other sex stereotypes. All such discrimination is discrimination because of sex.¹¹⁸

exclusion of all other classes of people defined by gender nonconformity that provokes functionally equivalent discrimination. While these legislative attempts to protect lesbian, gay men, and transsexual discrimination victims should be applauded, they should not mask the fact that discrimination against these victims is discrimination based on sex.

¹¹⁸ Understanding sex discrimination as based on stereotypes about appropriate norms, behavior, and appearance for a particular sex is thus more precise and inclusive than our current identity-based framework. Even in the case of discrimination against women and men who conform to most or all sex stereotypes, it is more precise to describe the discrimination as based on conformity to sex stereotypes rather than to describe as based on sex alone. It is sex stereotypes that allow the sex discriminator to classify the victims with a particular sex, an assumption that goes unconfirmed in all but those few cases where the discriminator is aware of the victim's genital or chromosomal characteristics. See *supra* notes 9-13 and accompanying text.