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Gender-Stereotyping Theory, Freedom of Expression, and Identity

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GENDER-STEREOTYPING THEORY, FREEDOM OF EXPRESSION, AND IDENTITY

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ABSTRACT

This Article argues that the expressive components of gender-stereotyping theory serve to delink the equality protections afforded by that theory from fixed and predetermined identity categories in helpful and positive ways. Many have viewed American antidiscrimination law as being normatively grounded in the notion that there are certain identities that, because of their stable and immutable characteristics, deserve equality-based protections. Gender-stereotyping theory can help make the normative case for a more pluralistic understanding of equality, one that is grounded in the need to protect the fluid and multiple ways in which gender is performed or expressed rather than focusing, as American antidiscrimination law has traditionally done, on protecting limited categories of essentialized, fixed, and finite identity categories. In short, gender-stereotyping theory, properly understood, offers a practical way of articulating and implementing a theory of equality that does not depend on the existence of a limited number of privileged identities. A proper understanding of gender-stereotyping theory—one that focuses on how expressive performances of gender and sexuality identities may trigger responses by defendants that are motivated by sex stereotypes—can help antidiscrimination law move away from the notion that plaintiffs must identify according to certain fixed, stable, and predetermined categories in order to succeed in their equality claims.

* Distinguished Professor of Law and Judge Frederick Lacey Scholar, Rutgers Law School. I would like to thank Timothy Zick for inviting me to participate in the Symposium and for encouraging participants to think about the intersectionality of constitutional rights. I do not believe I would have written this Article in the way that I did had I not been encouraged by Tim and his impressive body of scholarship to think harder about the intersection of equality and free speech rights. I also would like to thank Jessica Clarke, Katie Eyer, and Sonia Katyal for comments and suggestions that helped me clarify some of my claims. Any factual or analytical errors that may remain are my responsibility alone. This Article is dedicated to David Lopez, Rutgers Law School Co-Dean and former general counsel of the Equal Employment Opportunity Commission, for his decades-long advocacy on behalf of equal opportunities in America's workplaces.

Issues related to equality and free expression intersect and interact in diverse and multifaceted ways. Sometimes free speech and equality protections can work synergistically so that the recognition of one set of rights can expand the scope of the other set. For example, as the respective histories of the civil rights and LGBT rights movements show, the successful assertion of free speech rights can help to advance and promote equality causes.[1] At the same time, incorporating equality principles into free speech doctrine—by, for instance, requiring the government to treat speakers equally regardless of their viewpoints—helps provide robust protections for free expression.[2]

But the relationship between free speech and equality is not only one that helps to expand or protect rights. It is sometimes the case that the assertion of free speech rights can *restrict* equality rights, and vice versa.[3] For example, the Supreme Court in *R.A.V. v. City of St. Paul* held that promoting equality objectives by penalizing group-based hate speech can sometimes impermissibly restrict freedom of expression.[4] The Court has also made clear, especially in the context of LGBT equality claims in cases such as *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[5] and *Boy Scouts of America v. Dale*,[6] that the government's authority to promote equality is sometimes limited by the free speech and association rights of defendants in discrimination cases.[7]

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[1] For an exploration of how the civil rights movement used the Free Speech Clause to help attain its equality objectives, see TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 139–40 (2018). For an early assessment of how the NAACP used free speech claims to advance racial equality goals, see generally HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1966). For an exploration of how LGBT rights activists, in the years before and after the Stonewall riots, relied on rights to free speech and association, which were the only rights available to them at the time, to begin making the case for equal treatment under the law, see CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 15–149 (2017).

[2] For a classical exploration of how the Free Speech Clause incorporates considerations of equality, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 65–68 (1975).

[3] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 378 (1992).

[4] *Id.* at 391–92.

[5] 515 U.S. 557 (1995).

[6] 530 U.S. 640 (2000).

[7] *See id.* at 654–58, 661 (upholding constitutional right of the Boy Scouts to exclude an openly gay scoutmaster volunteer); *Hurley*, 515 U.S. at 574–75 (upholding the constitutional right of the organizers of the Boston St. Patrick's Day parade to prohibit an LGBT group from marching under its own banner). I explore the implications of these two cases for the intersection of free speech and equality principles in BALL, *supra* note 1, at 197–213.

At the same time, the Supreme Court's refusal to recognize a constitutional right shielding discrimination in commercial contexts from the application of antidiscrimination laws in cases such as *Hishon v. King & Spaulding*[8] and *Newman v. Piggie Park Enterprises, Inc.*,[9] illustrates how equality claims can sometimes limit associational and other rights under the First Amendment.[10]

This Article explores additional ways in which equality and expressive rights interact with each other by paying particular attention to gender-stereotyping theory.[11] The notion that gender stereotyping constitutes a form of sex discrimination under both the Equal Protection Clause and Title VII of the Civil Rights Act of 1964 has been widely recognized since the 1970s.[12] The Supreme Court discussed the principle at length in its 1989 ruling in *Price Waterhouse v. Hopkins*.[13] The plaintiff in *Price Waterhouse*, Ann Hopkins, applied for a partnership position at the accounting firm where she had worked for several years.[14] At the time, the firm had 662 partners, only 7 of whom were female.[15] Of the 88 individuals who applied for partnership positions alongside the plaintiff, she was the only woman.[16] More than half of the applicants became partners, but not Ms. Hopkins.[17] The partners who denied her the promotion deemed her to be insufficiently feminine and therefore essentially not qualified for the new position.[18] As the Court explained, "One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'"[19] Another partner provided

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[8] 467 U.S. 69 (1984).

[9] 390 U.S. 400 (1968).

[10] *Hishon*, 467 U.S. at 78 (noting that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections" (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973))); *Newman*, 390 U.S. at 402 n.5 (deeming the claim by a business that it had a constitutional right to discriminate on the basis of race to be "patently frivolous").

[11] *See* discussion *infra* Parts I–II.

[12] For an exploration of the origins of the gender-stereotyping principle in the Supreme Court's equal protection jurisprudence, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 87–90 (2010). For a discussion of how the principle was a widely accepted feature of statutory sex discrimination law at both the federal and state levels in the 1970s and 1980s, before the Supreme Court decided *Price Waterhouse v. Hopkins*, see Brief of Emp't Discrimination Law Scholars as *Amici Curiae* in Support of the Emps. et al. at 7–15, Bostock v. Georgia, 139 S. Ct. 1599 (2019) (No. 17-1618).

[13] 490 U.S. 228 (1989) (plurality opinion). Although the principal *Price Waterhouse* opinion was joined by only four justices, its understanding of gender stereotyping as a form of sex discrimination is now recognized as well-established legal doctrine. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 156 (2006).

[14] *Price Waterhouse*, 490 U.S. at 233.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 235.

[19] *Id.* (citations omitted).

what the Court characterized as "the *coup de grace*: in order to improve her chances for partnership, [he] advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[20] The Court concluded that the employer had violated Title VII of the Civil Rights Act of 1964 because:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 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.[21]

Since the Supreme Court held in *Price Waterhouse* that gender stereotyping is a form of sex discrimination under Title VII, some LGBT plaintiffs have successfully raised statutory and constitutional sex discrimination claims based on the idea that defendants violate equality protections when they discriminate against individuals because of their refusal to conform to traditional gender expectations and stereotypes.[22] The advent of these cases, along with the Supreme Court's taking up of questions related to whether and how Title VII protects LGBT individuals from discrimination,[23] makes it a particularly opportune time to explore, as I do in this

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[20] *Id.* (citation omitted).

[21] *Id.* at 251 (internal quotations and citations omitted).

[22] *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (holding that the district court "correctly determined that [the transgender plaintiff] was fired because of her failure to conform to sex stereotypes"); Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–22 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (holding that sexual orientation discrimination is a form of impermissible gender stereotyping under Title VII); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (concluding that same-sex sexual orientation "represents the ultimate case of failure to conform to [gender] stereotype[s]" and that "the line between a gender nonconformity claim and one based on sexual orientation . . . does not exist at all"); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that, under the Equal Protection Clause, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) ("There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not."); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a 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."). *But see* Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x. 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (holding that sexual orientation discrimination does not constitute discrimination because of sex under Title VII).

[23] *See* Bostock v. Clayton Cty. Bd. of Comm'rs, 139 S. Ct. 1599 (2019) (granting certiorari);

Article, the intersection between gender-stereotyping theory, expressive rights, and questions of identity.

My principal contention is that the *expressive components* of gender-stereotyping theory can serve to delink the equality protections afforded by that theory from finite and predetermined identity categories in helpful and positive ways. Many have viewed American antidiscrimination law as being normatively grounded in the notion that there are certain identities that, because of their fixed and immutable characteristics, deserve equality-based protections.[24] Gender-stereotyping theory can help make the normative case for a more pluralistic understanding of equality, one that is grounded in the need to protect the fluid and multiple ways in which gender is performed or expressed rather than focusing, as American antidiscrimination law has traditionally done, on protecting limited categories of essentialized, fixed, and finite identity categories.[25] In short, gender-stereotyping theory, properly understood, offers a practical way of articulating and implementing a theory of equality that does not depend on the existence of a limited number of privileged identities. A proper understanding of gender-stereotyping theory—one that focuses on how expressive performances of gender and sexuality identities may trigger responses by defendants that are motivated by sex stereotypes—can help antidiscrimination law move away from the notion that plaintiffs must identify according to certain fixed, stable, and predetermined categories in order to succeed in their equality claims.

American antidiscrimination law generally seeks to provide a level playing field by prohibiting the privileging of certain identities over others (e.g., "white" over "black," "male" over "female," and, in some jurisdictions, "straight" over "gay/lesbian/bisexual").[26] But by hewing closely to an identity taxonomy that is grounded in fixed, finite, and predetermined categories, American antidiscrimination law also

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R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (granting certiorari); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (granting certiorari). This Article went to press before the Supreme Court issued its rulings in these cases.

[24] *See infra* notes 93–102 and accompanying text.

[25] *See* discussion *infra* Part IV.

[26] It is possible, of course, to describe American antidiscrimination law in many different ways. To choose one prominent example, such law can be understood as requiring, above all else, "blindness" as to certain traits, such as race and gender. *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 11 (2000) (internal citation omitted) ("American antidiscrimination law typically requires employers . . . to make decisions as if their employees did not exhibit forbidden characteristics, as if, for example, employees had no race or sex. This is what underwrites the important trope of 'blindness' that 'has played a dominant role in the interpretation of antidiscrimination prohibitions.'"). But even if such a description is correct, it is difficult to disagree with the proposition that the primary normative motivation behind, for example, the Civil Rights Act of 1964 and more recently enacted state and local laws prohibiting discrimination on the basis of sexuality was to address persistent discrimination against racial and sexual minorities, respectively. Even if American antidiscrimination law calls for "blindness" as to certain traits, it does so in the service of addressing and mitigating discrimination against traditionally marginalized identity groups.

ends up privileging those who fall into recognizable categories (e.g., those who identify as *either* "male" or "female," *either* "straight" or "gay, lesbian, bisexual," or *either* "cisgender" or "transgender") over those who do not. This leaves individuals whose racial, gender, and sexuality identities cannot be pigeonholed into such categories vulnerable to the harms engendered by discrimination. A growing number of individuals, especially young ones, are increasingly recognizing the fluidity of gender and sexuality categories.[27] For some of these individuals, even identities that question binarisms (such as "bisexuality" and "transgender" identities) may be unduly restrictive because they may insufficiently account for the extent to which gender and sexuality identities are fluid and malleable (and not just nonbinary).[28] A proper understanding of gender-stereotyping theory can provide antidiscrimination protections to those who express their gender or sexuality outside of the traditional male/female, straight/LGB, or cisgender/transgender rubrics.

It may seem odd to describe identities such as "female," "gay/lesbian/bisexual," and "transgender" as privileged. These identities are clearly not privileged when compared to "male," "straight," and "cisgender" identities, respectively. But they are privileged when compared to gender and sexuality identities that are not (yet) easily categorizable or recognizable because such identities may reject, for example, the notion of defining sex/gender through considerations of who is "male" and who is "female" or the notion that sexual orientation should be determined exclusively through the *gender-based* attractions, both physical and emotional, of sexual partners. These identities might apply to individuals, for example, who are gender fluid, gender nonbinary, gender queer, asexual, pansexual, or polyamorous, as well as to those for whom there is no socially recognizable identity that translates into a definable category and for whom there is therefore no "identity label" as of yet.[29]

It is not my contention that gender-stereotyping theory is the only way of articulating a more pluralistic understanding of equality that accounts for the variability, fluidity, and malleability of identity categories and therefore the only theory that offers the potential of discrimination protection to a broader swath of identities.[30]

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[27] *See infra* notes 278–81 and accompanying text. This Article generally focuses on gender and sexuality categories rather than racial ones. *But see infra* notes 123–38 and accompanying text (discussing the courts' privileging of so-called immutable racial traits over perceived discretionary racial ones). For an exploration of the practical and normative implications of fluidity in racial identity categories, see Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243 (2014). For an exploration of the ongoing discrimination faced by multiracial individuals, see TANYA KATERÍ HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION (2018).

[28] *See infra* notes 278–81 and accompanying text.

[29] *See infra* notes 278–81 and accompanying text. Although some gender nonbinary or gender fluid individuals identify as transgender, some find the latter either too restrictive or nonapplicable to them. *See infra* notes 278–81 and accompanying text.

[30] For a recent effort to articulate an understanding of antidiscrimination principles that offers protection to individuals heretofore left unprotected through legally mandated accommodations of a wide variety of identities that depart from those that are currently protected,

Instead, I focus on gender-stereotyping theory for three reasons. First, the theory has been widely embraced as a matter of legal doctrine; although, as is true of many legal doctrines, important disagreements remain as to its proper scope and application, it is now generally accepted that gender stereotyping constitutes discrimination "because of sex."[31] This doctrinal acceptance means that there are potential practical benefits to exploring, as I do in this Article, the extent to which gender-stereotyping principles can lessen the privileging of fixed, finite, and predetermined identity categories.[32]

Second, the theory's expressive components make it particularly well-suited to promote a form of equality pluralism that is more expansive than has traditionally been provided by American antidiscrimination law and its generally rigid and deterministic focus on protecting a limited number of seemingly stable, unchanging, and immutable identities.[33] Finally, questions related to identity categories have been particularly salient in ongoing disputes involving the intersection of gender-stereotyping theory and LGBT equality claims.[34]

It is important to add that the conception of gender-stereotyping theory that I articulate in this Article, which seeks to delink the equality protections afforded by that theory from distinct identity categories, is normative rather than descriptive.[35] My claim is not that legal doctrine, as it currently stands, requires that gender-stereotyping theory be understood in the way that I present it here. Instead, my argument is that a proper understanding of the theory, which accounts for its crucial expressive components, can help to delink the equality protections afforded by that theory from finite, predetermined, and seemingly immutable identity categories in helpful and positive ways.

The Article proceeds as follows. Part I explains how the concept of gender as performance, a central component of gender-stereotyping theory, allows claims brought under that theory to advance not only equality objectives, but ones associated with expressive rights as well.[36] This attribute of gender-stereotyping theory is important because it means that it can protect gender performance or expression even in instances in which the Free Speech Clause does not apply because of a lack of state action. Part II explains why the viability of gender-stereotyping claims should not depend on whether plaintiffs identify according to fixed, finite, and predetermined sex, gender, and sexuality categories.[37] It also explores the problematic ways in which a plaintiff's inability or unwillingness to self-identify as a sexual minority or as a transgender person might lead some courts to fail to recognize that the policies or practices under

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see generally ZACHARY KRAMER, OUTSIDERS: WHY DIFFERENCE IS THE FUTURE OF CIVIL RIGHTS (2019).

[31] *See supra* notes 12–13 and accompanying text.

[32] *See* discussion *infra* Part IV.

[33] *See* discussion *infra* Part I and Section II.A.

[34] *See* cases cited *supra* note 22.

[35] *See infra* Section II.A.

[36] *See infra* Part I.

[37] *See infra* Section II.A.

challenge constitute forms of impermissible gender stereotyping.[38] Part III looks to how some courts have applied free speech principles in gender-nonconforming cases and critiques their linking of free speech rights to the existence of particular and fixed sex, gender, and sexuality identities.[39] Finally, Part IV explores how an understanding of gender-stereotyping theory that emphasizes its expressive components can, consistent with free speech principles, foment the flourishing of a multiplicity of forms of gender expression regardless of whether they are linked to or arise from or are consistent with certain seemingly stable and predetermined identities.[40]

I. GENDER-STEREOTYPING THEORY AND FREE EXPRESSION

Gender-stereotyping equality principles have *expressive* implications. The fact that government agencies, under the command of constitutional equal protection guarantees, and that private entities, under the command of sex antidiscrimination statutes, are prohibited from treating employees and others differently based on how those individuals, in effect, perform their gender, provides gender-nonconforming individuals not only with equality protections, but also with freedom of expression protections as well.[41]

The idea of gender as performance was conceived and developed by the feminist theorist Judith Butler.[42] In her highly influential book, *Gender Trouble: Feminism and the Subversion of Identity*, Butler argues that gender is constituted entirely through actions that have particular social meanings.[43] As she explains, "[T]he action of gender requires a performance that is *repeated*. This repetition is at once a reenactment and reexperiencing of a set of meanings already socially established . . . ."[44] For Butler, gender is not a stable identity; instead, "[G]ender is an identity tenuously constituted in time, instituted in an exterior space through *a stylized repetition of acts*."[45] In other words, there is nothing to gender that stands apart from how it is performed and from how that performance is understood as culturally cognizable markers of particular identities with specific social meanings.[46]

Society constantly assigns meanings to, and repeatedly polices the boundaries of, gender actions or performances.[47] As Butler explains:

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[38] *See infra* Section II.B.

[39] *See infra* Part III.

[40] *See infra* Part IV.

[41] KRAMER, *supra* note 30, at 30 ("*Price Waterhouse v. Hopkins* provides the antidote to compelled conformity. It smooths a path for people to be themselves fully and openly. The promise of *Price Waterhouse v. Hopkins* is a legal means *to make yourself visible*." (emphasis added)).

[42] *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1st ed.1990).

[43] *See id.* at viii–ix.

[44] *Id.* at 140.

[45] *Id.*

[46] *Id.* at 140–41.

[47] *Id.* at 139–40.

> Discrete genders are part of what "humanizes" individuals within contemporary culture; indeed, we regularly punish those who fail to do their gender right. Because there is neither an "essence" that gender expresses or externalizes nor an objective ideal to which gender aspires, and because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all.[48]

The social construction of gender is occluded by what appear to be given, natural, and essentialized gender identities. But Butler insists that there are no such identities.[49] As she puts it, "There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."[50]

For example, we may think that when we see someone in drag, the (female) drag is the performance that is constructed on top of the true and underlying (male) body. But Butler posits that *both* of these gender identities are socially constructed because neither is "more real" than the other.[51] The phenomena of drag, like the existence of intersex and transgender people,

> question[s] the *reality* of gender . . . [and] put[s it] into crisis: it becomes unclear how to distinguish the real from the unreal. And this is the occasion in which we come to understand that what we take to be 'real,' what we invoke as the naturalized knowledge of gender is, in fact, a changeable and revisable reality.[52]

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[48] *Id.*

[49] *Id.* at 24–25.

[50] *Id.* at 25; *see also* Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 435 (2017) ("[G]ender, according to Butler's account, is not something natural, tangible, or fixed, but constitutes a sort of expression that is deeply intangible and suffused through with cultural regulation and social norms rather than biological imperative.").

[51] BUTLER, *supra* note 42, at xxiii (2d. ed. 1999).

[52] *Id.*; *see also id.* at 175 ("In imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency."). Butler in later work more explicitly expanded on the notion of performativity to include not just "gender," but also "sex" as manifested in the contestability of the material human body and its meanings. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 2 (1993). As she explains, "[T]he fixity of the body, its contours, its movements [is] fully material, but materiality [should] be rethought as the effect of power, as power's most productive effect." *Id.* Butler adds that "'[s]ex' is, thus, not simply what one has, or a static description of what one is: it [is instead] one of the norms by which the 'one' becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility." *Id.* Katherine Franke critiques the disaggregation of "sex" from "gender" in antidiscrimination law and policy. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex*, 144 U. PA. L. REV. 1, 1–3 (1995). For extensive explorations of the role of performance in constituting racial, gender, and sexual

Butler distinguishes between gender expression and performance.[53] She rejects the concept of gender expression that is *not wholly contained within the notion of gender performance* because such a concept suggests it is possible to manifest something real or essentialized about gender that is found outside of its expression.[54] An account of gender as acts of (repeated) performances is more accurate and helpful because it reflects the absence of an underlying natural, fixed, or given identity.[55] As Butler explains,

> The distinction between expression and performativeness is crucial. If gender attributes and acts, the various ways in which a body shows or produces its cultural signification, are performative, then there is no preexisting identity by which an act or attribute might be measured; there would be no true or false, real or distorted acts of gender, and the postulation of a true gender identity would be revealed as a regulatory fiction.[56]

It is important to keep in mind that, from Butler's perspective, everyone is constantly performing *a* gender. (It would be incorrect, under Butler's paradigm, to say *their* gender because that would suggest that gender expresses some underlying or fixed reality.[57]) Gender, in other words, is defined by its performance—one that cannot be escaped or avoided.

The concept of "performing" can conjure images of actors following scripts in ways that sets the performers apart from routine daily life. But the concept of gender "performance" is both more complicated and mundane than "acting." As Sonia Katyal explains,

> At its most basic level, performance theory actively distances itself from the idea of a clear delineation between the performances of life and the performances of art, and argues instead that everyday life and activities both capture and enable elements that bear a stark resemblance to theatrical rendition and

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orientation identities, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865–75, 900–05, 919–23 (2002).

[53] BUTLER, *supra* note 42, at 140–41.

[54] *Id.*

[55] *Id.* at 141 ("That gender reality is created through sustained social performances means that the very notions of an essential sex and a true or abiding masculinity or femininity are also constituted as part of the strategy that conceals gender's performative character and the performative possibilities for proliferating gender configurations outside the restricting frames of masculinist domination and compulsory heterosexuality.").

[56] *Id.*

[57] *Id.* at 140–41.

> expression. The terms "performance" and "performativity[ ]" . . . apply to an admittedly wide range of behavior—from the most sophisticated and stylized of rituals to the most mundane of cultural behavior.[58]

The gender performances of most people on most occasions go unnoticed and unquestioned because they fail to challenge or destabilize social expectations of how gender is supposed to be performed according to certain body and physiological types.[59] But that apparent consistency between gender performances and gender expectations does not make the meanings of the performances any less socially constructed or policed.[60] What is different about the gender performances of most people when compared to those of many intersex or transgender individuals, for example, is that the latter can highlight the instability and contestability of gender and, as such, question its coherence in ways that the former may not. As a normative matter, Butler persuasively argues, laws and norms that demand gender coherence demean and oppress their subjects.[61]

Understanding gender as acts of performance has free speech implications. Some scholars have argued that gender performance is a form of expression protected by the Free Speech Clause and that, therefore, the government is constitutionally restricted

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[58] Katyal, *supra* note 50, at 436–37 (footnote omitted).

[59] Jeffrey Kosbie explains this point well when he notes that:

> Most of us constantly use our behavior, mannerisms, appearance, speech, and activities to prove that we are male or female. . . . By wearing a suit and tie, men avoid "failing" at their gender performance. Social norms tell us that wearing a suit and tie is masculine. Because gender structures our whole society, most people are not aware of how they actively participate in communicating gender.

Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 201–02 (2013).

[60] Butler makes this point as follows:

> According to the understanding of identification as an enacted fantasy or incorporation, . . . it is clear that coherence is desired, wished for, [and] idealized . . . . [The] acts, gestures, [and] enactments [that constitute gender] . . . are *performative* in the sense that the essence or identity that they otherwise purport to express are *fabrications* manufactured and sustained through corporeal signs and other discursive means.

BUTLER, *supra* note 42, at 136.

[61] JUDITH BUTLER, UNDOING GENDER 4–6 (2004). In writing about intersex individuals, Butler notes that "[t]he norms that govern idealized human anatomy . . . work to produce a differential sense of who is human and who is not, which lives are livable, and which are not." *Id.* at 4. For its part, the medicalization of transgender individuals and the diagnostic criteria for gender dysphoria diagnoses "impose[ ] a model of coherent gendered life that demeans the complex ways in which gendered lives are crafted and lived." *Id.* at 5. Butler adds that "intersex and transsex . . . both challenge the principle that a natural dimorphism should be established or maintained at all costs." *Id.* at 6.

in its ability to regulate the gender nonconformance of transgender individuals.[62] Jeffrey Kosbie explains that gender nonconformity is expressive conduct protected under First Amendment doctrine "because speakers and listeners understand the conduct as communicative."[63] He then argues that "state suppression of gender nonconformity violates core values underlying freedom of speech."[64] Kosbie explains that:

> Dress, appearance, and other conduct communicate gender within a social context that defines some behavior as "masculine" and other behavior as "feminine." When the state regulates gender nonconformity, it is not merely regulating conduct. By singling out dress and appearance that deviates from these gender norms, the state [also] suppresses communication of gender nonconformity.[65]

While Kosbie emphasizes government *suppression* of messages expressed by transgender individuals through their gender nonconformance, Taylor Flynn focuses on government-*mandated* messages.[66] Flynn argues that when the state enforces gender norms in ways that require individuals to publicly identify with a particular gender over their objections it constitutes a form of compelled speech prohibited by the Free Speech Clause.[67] For example, when the government insists that transgender public employees or public school students present themselves according to what is expected given the sex they were assigned at birth regardless of how they identify according to gender, it forces them to express themselves in ways they do not wish to do so. As Flynn puts it, "An understanding of gender as expressive . . . helps capture an often unarticulated, yet central aspect, of the harm enforced conformity inflicts on trans persons—compelled expression of the state's gender message over their profound objection."[68] In protecting transgender individuals from state oppression, Flynn "urge[s]

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[62] Kosbie, *supra* note 59, at 193–94.

[63] *Id.* at 204.

[64] *Id.* at 193.

[65] *Id.* at 193–94 (footnotes omitted); *see also* Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 131 (2015) ("[A] transgender student's outward expression of gender, as conveyed through dress, hairstyle, and even restroom use, is undoubtedly intended to convey a message to outsiders about a gender non-conforming student's gender identity. . . . [B]ecause fitting in and being accepted are so vital to a youth's well-being, there can be no doubt that a transgender student's expressive conduct is intended to, and actually does, convey a particularized message.").

[66] *See* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 467 (2009).

[67] *Id.* at 467 ("The focus of this Article is on compelled expression over an individual's objection, which is of particular concern given the state's role as enforcer. Not only does the state have sole authority to legally categorize people by sex, but it also uses those categories as the basis for distributing rights and goods, such as marriage and its associated benefits, over which it maintains a monopoly of power.").

[68] *Id.* at 466.

an increased use of expression-based challenges [in transgender rights cases] both because expression captures an important element of the harm to trans individuals and because it properly directs attention to the role of the state in enforcing a selective message about sex and gender."[69] Whether the government is suppressing gender-nonconforming expression or mandating gender-conforming speech, it does so in the service of a particular viewpoint—that gender is a binary and immutable human trait.[70]

Scholars such as Kosbie and Flynn have helpfully explained the ways in which free speech claims can be used to supplement equality claims on behalf of transgender individuals.[71] But there has been an insufficient recognition in the literature of how the equality principles that serve as the foundation of gender-stereotyping theory *themselves protect expression without the need to rely on distinct free speech principles*. In other words, the equality doctrine of gender-stereotyping theory contains within it "built-in" protections for expression. When antidiscrimination law prohibits employers and others from relying on gender stereotypes to treat gender-nonconforming individuals differently from gender-conforming persons, it accords those individuals a certain degree of freedom to perform or express their gender as they deem best.[72]

For example, when the U.S. Court of Appeals for the Eleventh Circuit ruled that the government employer in *Glenn v. Bumbry* violated the transgender plaintiff's rights under the Equal Protection Clause by impermissibly relying on gender stereotypes to terminate her employment,[73] the court implicitly recognized that the application of equal protection principles provides gender-nonconforming individuals with the right to express their gender at work in ways that limit a government employer's discretion to penalize them for that expression.[74] The problems for the plaintiff Vandiver Elizabeth Glenn started when she began the process of socially transitioning genders in advance of gender-confirmation surgery.[75] As part of that process, Glenn went to work on Halloween, a day in which the employer allowed employees "to come to work wearing costumes," dressed in traditionally female clothes.[76] The head of the office deemed Glenn's choice of clothing inappropriate "'[b]ecause he was a man dressed as a woman and made up as a woman.'"[77] The plaintiff's boss also claimed that "'it's unsettling to think of someone dressed in

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[69] *Id.* at 478–79.

[70] When the government mandates that transgender individuals express their gender according to the sex they were assigned at birth, "[t]he state is enforcing a selective message, which this Article refers to as 'the ideology of the binary.' Unsurprisingly, it reflects the prevailing view: there are two (and only two) distinct sexes with congruent gender identities, fixed by nature and immutably different." *Id.* at 466 (footnote omitted).

[71] *See id.* at 503; Kosbie, *supra* note 59, at 191–92.

[72] Glenn v. Bumbry, 663 F.3d 1312, 1321 (11th Cir. 2011).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1314.

[76] *Id.*

[77] *Id.*

women's clothing with male sexual organs inside that clothing,'" while adding "that a male in women's clothing is 'unnatural.'"[78] The Court of Appeals, in ruling for the plaintiff, held "that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."[79] In doing so, the court not only provided the transgender plaintiff with protection against discrimination, but it also implicitly recognized that the Equal Protection Clause provided her with the freedom to express or perform her gender at work in ways that she deemed appropriate despite her employer's objections.[80]

One of the consequences of equality cases such as *Glenn* is that they indirectly afford expressive rights to employees. Under the reasoning of *Glenn* and similar rulings,[81] employers are not permitted to penalize gender-nonconforming individuals for the ways in which they perform their gender at work.

The fact that gender-stereotyping theory protects the expressive interests of gender-nonconforming individuals is important for at least two reasons. First, the proscription against gender stereotyping demanded by civil rights statutes prohibiting sex discrimination protects the expressive interests of private-sector employees, tenants, and customers (among others), individuals who would not be protected by the Free Speech Clause because of a lack of state action.

Even if scholars such as Kosbie and Flynn are correct (as I believe they are) that transgender (and other gender nonconforming) individuals can benefit from bringing claims under the Free Speech Clause to supplement equality claims, that benefit, as a doctrinal matter, is limited to those who are in a position to challenge *state* action. This is because the Free Speech Clause, of course, does not limit the discretion of private actors in the absence of state action.[82] But the "built-in" protections for expressive

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[78] *Id.*

[79] *Id.* at 1320.

[80] *See id.*

[81] *See* sources cited *supra* note 22.

[82] *See, e.g.*, Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972) ("[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only."). There are two exceptions to the state action rule (the public function exception and the entanglement exception), neither of which seems particularly relevant to our subject matter. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 571 (5th ed. 2017). Although the text of some state constitutional free speech provisions might be interpreted as not requiring state action, state courts have generally followed the federal constitutional rule mandating that such action be present before deciding whether there has been a constitutional violation. *See* David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. 1, 34 (1998) ("[S]tate constitutions have little viability as sources of speech protections for private employees. State courts that have considered this argument have uniformly rejected it, thereby creating an abundance of persuasive case law for other courts that may encounter the issue in the future.").

interests that are part of a gender-stereotyping theory of equality affords expressive rights to individuals without having to rely on constitutional free speech protections.

For example, when the self-described effeminate gay male plaintiff in *Prowel v. Wise Business Forms, Inc.*, sued his private employer under Title VII after he was terminated, he could not have supplemented his equality claim with a free speech challenge because of the lack of state action.[83] Nonetheless, when the U.S. Court of Appeals for the Third Circuit held in *Prowel* that a gay plaintiff can proceed with a gender-stereotyping claim,[84] it implicitly afforded gender-nonconforming individuals in private workplaces with protections related to how they perform or express their gender that they could not have received under the First Amendment.

It bears noting that the plaintiff in *Prowel* centered his equality claim on the ways in which his gender expression diverged from that of other male employees at the manufacturing plant where he worked.[85] As the court explained,

> In stark contrast to the other men at [the plant], Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit"; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder [machine] with "pizzazz."[86]

The *Prowel* court concluded that the plaintiff had made sufficient allegations to raise a material issue of fact to permit a jury to decide whether the private employer had fired him because of other employees' negative responses to how he expressed himself in gender-nonconforming ways.[87] In doing so, the court by necessity *rendered that expression legally protected in the private workplace*, albeit under equality rather than free speech doctrine.[88]

It is worth noting, in a slight aside, that in cases that *do* involve state defendants acting in their capacity as employers, an equality-based gender-stereotyping claim also provides a benefit to plaintiffs not available under free speech doctrine. In free

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[83] 579 F.3d 285, 287 (3d Cir. 2009) ("Prowel identifies himself as an effeminate man and believes that his mannerisms caused him not to 'fit in' with the other men at [work].").

[84] *Id.* at 292 ("There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.").

[85] *Id.* at 286–87.

[86] *Id.* at 287.

[87] *Id.* at 292.

[88] *Id.*

speech cases involving public employees, the Supreme Court has called for the application of a balancing test that weighs the interests of government employees, in their capacities as citizens, to speak on issues of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[89] In contrast, in equal protection cases involving gender classifications, the Court requires the application of intermediate scrutiny, which demands that the government "establish that [such] classifications . . . serve important governmental objectives and must be substantially related to achievement of those objectives."[90] Everything else being equal, therefore, a public employee plaintiff who expresses their gender in nonconforming ways is more likely to succeed in a gender-equality claim, which places the burden on the government to satisfy intermediate scrutiny, than in a free speech claim that calls for the balancing of both sides' interests.

The advantage of an equality claim over a free speech one may be even stronger if the claim is brought under Title VII as opposed to the Equal Protection Clause. This is because if intentional sex discrimination is proven under the statute, that is usually the end of the analysis and the plaintiff prevails.[91] In contrast, under the Equal Protection Clause, intentional discriminatory conduct on the basis of sex does not lead to a finding of a violation if the government can meet its burden of establishing the existence of a substantial governmental interest.[92]

In any event, the first important implication of the ways in which the equality-based gender-stereotyping theory protects freedom of expression relates to the availability of that protection regardless of whether the defendant is a state actor. The second important implication is that the expressive components of gender-stereotyping theory help to delink its equality protections from the existence of fixed, finite, and predetermined identity categories. As I explore in the remainder of the Article, this delinking of equality from such categories is beneficial because it allows for a more expansive and capacious understanding of equality than one that seeks, first, to classify and then, second, to protect individuals according to rigid and preset categories of sex, gender, and sexuality identities.

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[89] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[90] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[91] *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) ("If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination [under Title VII] is proved." (quoting Lewis v. Smith, 731 F.2d 1535, 1537–38 (11th Cir. 1984))). *But see* 42 U.S.C. § 2000e-2(e)(1) (2018) (providing that Title VII "is not violated in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

[92] *Glenn*, 663 F.3d at 1321 (citation omitted) ("If this were a Title VII case, the analysis would end [with the finding of intentional discrimination]. . . . However, because [the plaintiff's] claim is based on the Equal Protection Clause, we must, under heightened scrutiny, consider whether [the defendant] succeeded in showing an 'exceedingly persuasive justification.'").

II. GENDER-STEREOTYPING THEORY AND IDENTITY CATEGORIES

The concept of identity has been a double-edged sword for progressives. On the one hand, the notion of fixed identities helps with organizing and mobilizing as individuals come together around perceived shared racial, gender, or sexuality traits (among others) to collectively pursue political and legal objectives. Some of the most important social movements in the United States of the last century—from the civil rights to the women's rights to the LGBT rights movements—were organized around shared traits—from skin color to assigned sex to sexual orientation—that were understood by movement members and others to constitute defining or essential characteristics of individuals.[93] A focus on distinct identities has led, among other things, to the enactment of hundreds of federal, state, and local laws prohibiting discrimination on the basis of traits that are understood to define or determine those identities.[94] As Zachary Kramer succinctly puts it, "Civil rights law is in the business of identity. No area of law cares more about who a person is than civil rights law. Indeed, the entire enterprise rests on the idea that certain identities deserve special protection against discrimination."[95]

On the other hand, the prioritization of identity categories has engendered certain paradoxes and created certain limitations. For example, it is somewhat paradoxical to claim that particular traits are central to individuals' ability to define themselves while at the same time contending that those same traits should be deemed largely irrelevant for the purpose of setting public policies. In addition, left critics have objected to the ways in which identity politics essentialize racial, gender, and sexual orientation identities by viewing them as natural or predetermined, that is as existing independently of social contexts and understandings.[96] As many left theorists have noted, the boundaries of identity categories are themselves subject to much contestation.[97]

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[93] For an exploration of the role of twentieth century social movements centered on notions of identity, see, for example, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002).

[94] *See generally id.*

[95] KRAMER, *supra* note 30, at 39.

[96] Judith Butler has been one of the most important and influential critics of identity politics. As Sonia Katyal notes,

> Antidiscrimination advocates, [Butler] argued, subverted many of the interests of their movement by relying on clearly demarcated categories of gender, sex, or sexuality. Thus, instead of normalizing or essentializing same-sex sexual desires or conduct into categories that suggest that they are fundamental, immutable aspects of human identity, which is the traditional strategy of lesbian and gay rights activists, Butler argued that gay rights advocates should seek to challenge, rather than replicate, the concept of gender altogether.

Katyal, *supra* note 50, at 437–38 (footnote omitted).

[97] *See, e.g.*, *id.* at 399 ("An account of gender performance suggests that gender is not something tangible, or fixed, but constitutes a sort of expression that is intangible, borderless, and suffused through cultural regulation and social norms rather than 'biological' imperative.").

From this critical perspective, racial, gender, and sexuality categories and understandings are nothing more than the byproduct or representation of that contestation. Left critics repeatedly remind us that while identity politics depend on the stability, continuity, and universality of identity traits, those identities are social constructions that are malleable, fluid, and contestable.[98]

Critics have also complained that identity-based conceptions of what norms such as justice and equality demand have tended to articulate and defend understandings of identities that are largely binary (e.g., individuals are either people of color or white, female or male, transgender or cisgender, and gay/lesbian or straight) and fixed (i.e., individuals do not shift from one identity to another).[99] And yet, the sorting of individuals into pre-existing, binary, and fixed categories can help to make the normative case for antidiscrimination protection.[100] A basic version of that argument is as follows: "X and Y (e.g., gay and straight) are two identities associated with trait Z (e.g., sexual orientation). Smith was born with Y identity. Government officials, private employers, and landlords traditionally prefer those with X identity. Therefore, the law should protect Smith from discrimination on the basis of trait Z." Once there is a normative consensus that discriminating on the basis of certain traits is wrong because those attributes are thought to be both essential to people's identity and largely beyond their control, then the argument for discrimination protection on the basis of those traits seems clear and is largely accepted across the political spectrum.[101]

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[98] *See, e.g.*, Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 89 (2008) ("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.").

[99] *See, e.g.*, Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 52 (2003) ("One of the effects of establishing and maintaining categories of difference and identity is to make these differences (of one's identity) concrete rather than fluid. Thus differences become abstracted from their context of shifting social relationships. Another effect is to make these identities appear natural and immutable."); *see also* KRAMER, *supra* note 30, at 66 ("From top to bottom, civil rights law is nothing more than a rigid system of boxes. To find shelter in the law, victims of discrimination must fit themselves into a box. The boxes are discrete and defined, fixed and unbending. Each box houses a trait, and the existence of the box means that the trait receives protection against discrimination.").

[100] *See, e.g.*, ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 80–81 (2018) ("The recognition of the importance of equality as a basic constitutional value, in part, is about fundamental fairness. It is wrong to treat a person differently from others similarly situated—especially if it is on the basis of immutable characteristics like race, sex, or sexual orientation—without a sufficient reason.").

[101] *See, e.g.*, Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992) ("Many people, at least when first asked, respond that basing discrimination on immutable traits such as race or gender is what makes discrimination wrong.").

At the same time, the notion that the traits that define people's most important identities are largely binary and fixed elides crucial complicating factors. For example, the existence of multiracial, intersex, bisexual, gender fluid, gender nonbinary, and transgender individuals (among others) shows that many individuals fall along continuums of race, sex/gender, and sexual orientation that resist easy, simplistic, and rigid "either/or" categorizations. While the prioritization of a finite number of agreed identities sometimes helps to attain a modicum of protection from discrimination for some individuals, such prioritization also reinforces and strengthens binary and essentialized understandings of identities in ways that render other stigmatized individuals invisible and unprotected under the law.[102]

This part of the Article explores questions of identity as they relate to gender-stereotyping theory. Section II.A explains why the viability of gender-stereotyping claims should not depend on whether plaintiffs identify in ways that fall under fixed, finite, and predetermined sex, gender, and sexuality identity categories.[103] Section II.B explores the problematic ways in which a plaintiff's inability or unwillingness to self-identify as a sexual minority or as a transgender person might lead some courts to fail to recognize the existence of impermissible gender stereotyping.[104]

A. The Non-essentiality of Identity Categories in Gender-Stereotyping Theory

One of the crucial attributes of gender-stereotyping theory is the way in which it can, when properly understood, delink equality and antidiscrimination protections from the existence of seemingly natural and pre-existing identity categories. This

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[102] Jessica Clarke has helpfully distinguished between "old immutability" claims grounded in the idea that certain traits are morally blameless (and therefore improper bases for discrimination) and "new immutability" claims based on the notion that some personal characteristics, "while entailing some degree of choice, ought not be blameworthy." Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 10 (2015) (footnote omitted). Clarke argues that:

> [T]he new immutability's focus on valued traits leaves out many stigmatized identities—identities that might have the strongest claims to protection precisely because judgments based on them are superficial and perpetuate systemic subordination. . . . Even worse, to argue a trait is fundamental to personality is to bolster the argument that it cannot change.

Id. at 11 (footnotes omitted).

Clarke adds that:

> The new immutability's protections for "personhood" exclude the most stigmatized, and its underlying premises reinforce stereotypes. Practically, the new immutability fails to give courts a principled basis for distinguishing between those traits that deserve protection and those that do not. It cannot justify transformative interventions into discriminatory social practices, and it invites conflicting equality claims.

Id. at 12.

[103] *See* discussion *infra* Section II.A.

[104] *See* discussion *infra* Section II.B.

delinking is possible because how plaintiffs identify according to particular sex, gender, and sexuality identities should not be dispositive in assessing the viability of a gender-stereotyping claim. For example, Ann Hopkins, the female plaintiff in *Price Waterhouse* who was turned down for the partnership position because her bosses deemed her to be insufficiently feminine,[105] did not have to allege anything related to her sexuality or gender identity in order to prevail in her antidiscrimination case. In other words, the fact that Hopkins, as far as the litigation was concerned, presented herself as a cisgender and heterosexual person did not prevent her from winning her case.[106] Hopkins should have prevailed *regardless* of her sexual orientation and gender identity. This is because gender-stereotyping theory, properly understood, focuses on the assumptions that defendants make based on how individuals perform their gender without requiring that plaintiffs fit into certain pre-existing identity categories. As long as defendants impermissibly take into account the ways in which plaintiffs express their gender, plaintiffs are entitled to antidiscrimination protection regardless of how they identify according to gender or sexuality markers.[107]

It could be argued that even if Hopkins would have prevailed regardless of whether she identified as lesbian, straight, or bisexual, on the one hand, or cisgender or transgender on the other, how she identified according to sex categories (man or woman) was a crucial aspect of her discrimination claim. After all, the accounting firm's partners deemed her unqualified for the promotion because they believed she was too masculine for a *woman*.[108] But it is not at all clear that being a woman was crucial to Hopkins's claim; it is likely that had Hopkins self-identified as a man after having been assigned the female gender at birth, the partners would have denied him the promotion because they would have deemed him to be "too feminine" for a man.[109]

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[105] *See supra* notes 13–21 and accompanying text.

[106] Ann Hopkins provided her life story, and her perspective on her career and lawsuit against Price Waterhouse, in ANN BRANIGAN HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).

[107] *See* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 318 (2011) ("When a court considers a gender-stereotyping claim, the court should judge the claim based not on the plaintiff's identity, but on whether the alleged discrimination was motivated by stereotypical gender expectations.").

[108] *See supra* notes 19–21 and accompanying text.

[109] The ruling in *Barnes v. City of Cincinnati* supports the idea that gender-stereotyping claims should not depend on whether the plaintiff identifies as a man or as a woman. 401 F.3d 729 (6th Cir. 2005). Barnes was a transgender police officer who was denied a promotion to sergeant. *Id.* at 733. After Barnes sued on gender-stereotyping grounds, the defendant claimed that the plaintiff lacked standing under both Title VII and the Equal Protection Clause because, inter alia, the officer "was not a member of a protected class." *Id.* at 737. The U.S. Court of Appeals for the Sixth Circuit rejected that argument by noting that the plaintiff was in fact "a member of a protected class—*whether as a man or a woman*." *Id.* at 739 (emphasis added). The same court has made clear in other rulings involving Title VII claims brought by transgender plaintiffs that the viability of a gender-stereotyping claim does not depend on whether the

In the end, Hopkins should have prevailed in her Title VII claims regardless of whether she identified as a man or a woman, or as straight or lesbian or bisexual or queer, or as cisgender or transgender because her expressed gender nonconformance, as perceived and understood by the male partners who decided not to grant her the promotion, did not depend on her self-identification according to any of those identity categories.[110]

It is worth adding that Hopkins should have prevailed in her gender-stereotyping claim even if she had identified as gender nonbinary, that is as *neither* male nor female. This is because it is likely that the partners would have responded in gender stereotypical ways to someone who expresses their sex/gender in ways that reject the very categories of "man" and "woman." Stereotypical understandings of gender categories—the idea that there are certain attributes, talents, and interests that are distinctly male and others that are distinctly female—are premised on the foundational notion that *everyone should fit into one of the two categories*. If Hopkins was denied a promotion because she was a "masculine woman," then it is reasonable to assume that she also would have been denied the promotion if she had expressed her sex/gender in ways that purposefully rejected the very categories of "man" and "woman."[111]

The performative aspects of gender-stereotyping theory help highlight the crucial distinction between, on the one hand, how a defendant in a discrimination case

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plaintiffs, for purposes of the litigation, identify as male or female. *Compare* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2008) (upholding gender-stereotyping claim by transgender plaintiff who was socially transitioning from male to female and who identified as male for purposes of the litigation), *with* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572–74 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (upholding gender-stereotyping claim by transgender plaintiff who was socially transitioning from male to female and who identified as female in the lawsuit).

[110] *Cf.* Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (concluding, in upholding a gender-stereotyping claim, that it did not "matter[ ] for purposes of Title VII liability whether the [defendant] withdrew its offer of employment because it perceived [the plaintiff] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual").

[111] Jessica Clarke has noted that the Obama Administration "explicitly extended" the "logic" that discrimination against someone who is transgender is a form of sex discrimination because it constitutes gender stereotyping to include "protection for nonbinary gender identity [by] promulgating regulations that clarify that '[sex] stereotypes can include the expectation that individuals will consistently identify with only one gender.'" Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 924 (2019) (quoting 45 C.F.R. § 92.4 (2017) (defining sex stereotypes in Department of Health and Human Services regulations interpreting the Affordable Care Act)). In her article, Clarke provides a revelatory exploration of bias against gender-nonbinary individuals. *Id.* at 910–13. As Clarke explains, "[N]onbinary people may encounter mistreatment for a variety of reasons, including disbelief in nonbinary identity, erasure of nonbinary experiences, dehumanization of those who do not fit conventional gender categories, concern that nonbinary people will undermine traditional gender roles, and politicization of nonbinary identity in a time of increasing polarization." *Id.* at 910.

perceives a plaintiff's gender expression and, on the other, whether a plaintiff self-identifies according to predetermined and easily recognizable sex, gender, and sexual orientation categories.[112] In this sense, identity matters not because it has any intrinsic, fixed, or immutable meaning, but because it might affect the ways in which the defendant imbues the gender performance with certain gender-based assumptions regarding attributes, talents, and interests. Gender-stereotyping theory, properly understood, focuses on the assumptions that defendants make based on how individuals perform their gender without requiring that plaintiffs self-identify according to certain seemingly stable, unchanging, and predetermined sex, gender, and sexuality categories.[113]

It is important to emphasize that to claim that plaintiffs in gender-stereotyping cases do not have to identify according to certain fixed, finite, and predetermined sex, gender, and sexuality markers *does not mean that how they identify is necessarily irrelevant to the claim*. The concept of gender as a performance includes within it both the notion of a "performer" and that of an "audience." In other words, as Butler makes clear, gender performance always takes place within particular social contexts that give the performance its meaning.[114] For this reason, the sex, gender, or sexual orientation identity of the gender-stereotyping claimant might be relevant to the discrimination claim because it might color the ways in which the defendant attached meaning to the plaintiff's gender performance. For example, the fact that an employer knows that an employee self-identifies as a lesbian woman or as a transgender man can be an important aspect of the gender-stereotyping claim given that the negative employment decision may have been made because some employers have certain stereotypical gender expectations centered on notions such as that a lesbian is not "a real woman" because of her attraction to other women or that a transgender man is not "a

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[112] The Supreme Court has explained that what matters in disparate treatment cases under Title VII is a defendant's "*motives*, regardless of the state of the actor's knowledge." EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015). What ultimately matters, in other words, is *why* a defendant made an adverse employment decision vis-à-vis the plaintiff and not *what* the defendant knew about the plaintiff. This meant, in the religious discrimination case of *Abercrombie & Fitch*, that the fact that the prospective employer did not know that the plaintiff engaged in a religious practice that needed to be accommodated was irrelevant as long as the need for a religious accommodation was one of the reasons for the adverse employment decision. As the Court explained,

> Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Id.

[113] *See* Katyal, *supra* note 50, at 435 ("[T]he performative dimensions of gender suggest that, instead of thinking of gender as a type of fixed identity, one should view it as more akin to intellectual property—permeable, unfixed, malleable, and ultimately expressive.").

[114] *See supra* notes 44–52 and accompanying text.

real man" because he has "female chromosomes" and was assigned the female sex at birth. But the important point, for our purposes, is that in order to succeed with the gender-stereotyping claim, the plaintiff should not have to identify according to fixed, finite, and predetermined sex, gender, and sexuality categories.

To put it differently, the fact that the plaintiff in *Glenn v. Bumbry* identified as transgender[115] and that the plaintiff in *Prowel v. Wise Business Forms, Inc.*, identified as gay[116] (to focus on two cases discussed in Part I) undoubtedly helped both individuals make out their gender-stereotyping claims.[117] The ways in which the plaintiffs' supervisors and co-employees understood their gender performances were colored by the plaintiffs' gender identity (transgender) and sexual orientation (gay), respectively.[118] But the crucial point is that, given the plaintiffs' *acts* of gender nonconformance in their workplaces, they should have prevailed *regardless* of whether they identified in ways that allowed, first, employers and, later, courts to place them into easily recognizable identity categories.

Although the ascribed meanings of gender performances might be colored by the ways in which plaintiffs self-identify, what ultimately should matter is the extent to which defendants engage in gender stereotyping in response to those performances rather than whether the plaintiffs fall into certain fixed, finite, and predetermined identity categories.[119] If the gender performances in question trigger sex-based discriminatory motives on the part of employers, it should not matter whether those performances are linked to widely recognized identities. This understanding of gender-stereotyping theory allows employees and others to receive equality protections for expressing their sex, gender, and sexuality in ways that fall outside of traditional identity categories. In doing so, it potentially provides protection for individuals who, for example, refuse to identify along the male/female, straight/LGB, or cisgender/transgender axes. Gender-stereotyping theory, in other words, allows for variability and malleability in expressing identities outside of those traditional rubrics. I return to this point in Part IV.[120]

An understanding of gender-stereotyping theory that, by emphasizing its expressive components, seeks to render particular predetermined identities as non-essential to the claim—as opposed to an understanding of the theory that makes its applicability dependent on particular categories of self-identification—also helps avoid a seemingly intractable problem: how to distinguish between performances that are "true" manifestations of an underlying identity and those that are not. Writing about the limits of

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[115] 663 F.3d 1312 (11th Cir. 2011).

[116] 579 F.3d 285 (3d Cir. 2009).

[117] *See supra* notes 72–80, 83–88 and accompanying text.

[118] *See supra* notes 72–80, 83–88 and accompanying text.

[119] I say "should" because some courts, after *Price Waterhouse*, refused to allow LGBT plaintiffs to proceed with gender-stereotyping claims on the ground that Title VII does not prohibit discrimination on the basis of either sexual orientation or gender identity. *See infra* notes 141–44 and accompanying text.

[120] *See infra* Part IV.

prioritizing *identity* performance in antidiscrimination law, Gowri Ramachandran explains the problem as follows:

> The fact that identity performance is so contextual and complex makes it hard, if not impossible, to formulate legal rules for protecting identity performance under the traditional equality-based rubrics of antidiscrimination law. To do so would require isolating which identity performances constitute the performance of a protected identity category and which do not. . . . This is a task that is not only difficult, but one that risks turning good intentions into racist or sexist essentialist assertions. Deciding which actions do and do not "count" as part of a protected identity will inevitably privilege the claims of those who behave in conformance with dominant group norms over the claims of those who are dissenters: Painting a red dot in the center of my forehead would most likely "count" as a performance of my ethnicity and gender (South Asian woman), but dyeing my hair red would most likely not "count." This trades the orthodoxy of assimilation for the orthodoxy of identity politics.[121]

An expressive understanding of gender-stereotyping theory that seeks to disconnect the theory from whether the claimant seeking its protection has performed their gender in ways that match particular and recognizable identities (such as "female" or "gay" or "transgender") renders irrelevant the question of whether the performance is linked to or arises from or is consistent with predetermined identities. What matters is how the performance is understood by others given the social context in which it takes place, rather than whether it represents or manifests a "true identity" that is separate or independent from the performative acts that constitute the identity in question.[122]

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[121] Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 23–24 (2006) (footnotes omitted).

[122] Taylor Flynn has noted the delinking of antidiscrimination protections from identity categories that comes with viewing the gender nonconformance of transgender individuals through a free speech as opposed to equality lens. Flynn, *supra* note 66, at 485. As she puts it, "Because First Amendment claims are predicated on the expression of views rather than directly based in identity, there is at least less of a doctrinal (as opposed to pragmatic) drive to prove the underlying 'truth' or reality of one's views" than in equality cases. *Id.* But, as I argued in Part I, the expressive components that are *internal* to gender-stereotyping theory by themselves encourage that delinking without needing to rely on free speech doctrine as an independent basis for protection. *See supra* notes 71–81 and accompanying text. As I noted there, the internal expressive components of gender-stereotyping theory have important practical implications because they provide some protection for expression in the private sphere that cannot be provided by the First Amendment because of the state action requirement. *See supra* notes 82–86 and accompanying text.

This aspect of gender-stereotyping theory can help ameliorate—though not, on its own, completely overcome—a perennial limitation of American antidiscrimination law, that is the way in which it seeks to distinguish between those aspects of identity that are immutable—and therefore "true" and seemingly worthy of protection—and those that are chosen—and therefore discretionary and purportedly unworthy of protection.[123] As Kenji Yoshino points out in his exploration of the concept of forced assimilation of racial, gender, and sexuality identities that requires individuals to "cover" those identities, the emphasis on immutability serves to occlude prejudice against the ways in which individuals express or perform their identities.[124] One of the cases that Yoshino relies on to defend his thesis is *Rogers v. American Airlines*, in which a federal court refused to find that an employer violated Title VII's proscription against racial discrimination when it prohibited employees from wearing all-braided hairstyles.[125] After an African-American employee who wanted to wear braids at work sued the employer, the court concluded that the grooming policy did not violate Title VII.[126] In doing so, the court distinguished between characteristics that are immutable (such as "natural hair growth") and those that are "easily changed" (such as hair braids).[127] Because the court deemed the braids to fall under the latter category and the choice of hairstyle to be of minor importance, it concluded that the employer's hair policy did not constitute discrimination under Title VII.[128]

In 2016, thirty-five years after *Rogers*, the U.S. Court of Appeals for the Eleventh Circuit in *EEOC v. Catastrophe Management Solutions* relied on the same reasoning to reject a discrimination claim brought by the Equal Employment Opportunity Commission against an employer that rescinded a job offer to an African-American candidate after she refused to cut her dreadlocks.[129] The court held that "Title VII prohibits discrimination based on immutable traits, and the proposed amended complaint does not assert that dreadlocks—though culturally associated with race—are an immutable characteristic of black persons."[130] The court proceeded to explain that while Title VII prohibits discrimination on the basis of "black hair texture (an immutable characteristic)," the statute does not prohibit discrimination on the basis of "black hairstyle" because it is not immutable.[131]

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[123] There is an extensive literature critiquing the role of immutability in American equality law. *See, e.g.*, Clarke, *supra* note 102; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

[124] Yoshino explores the issue of covering extensively. *See generally* YOSHINO, *supra* note 13; Yoshino, *supra* note 52.

[125] 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981).

[126] *Id.* at 232.

[127] *Id.*

[128] *Id.* ("[A]n all-braided hairstyle . . . is not the product of natural hair growth but of artifice.").

[129] 852 F.3d 1018, 1032, 1035 (11th Cir. 2016).

[130] *Id.* at 1021.

[131] *Id.* at 1030.

These cases reflect the extent to which a focus on immutability leads to troubling distinctions that have nothing to do with what should matter most in a disparate treatment case: whether the defendant improperly took the protected trait into account in making the decision subject to challenge. Indeed, one of the problems with the reasoning of cases such as *Rogers* and *Catastrophe Management Solutions*, as Yoshino succinctly points out, "is that it scants the performative dimension of race."[132] The courts' approach allowed them to dismiss the discrimination claim without grappling with *why* the employers applied their grooming policies in ways that prohibited African-American employees from wearing their hair in a manner that expressed their racial heritage in particular ways.[133] Rather than focusing on the employer's motivations and understandings triggered by the plaintiffs' racial performances, the courts made questionable distinctions based on the purported differences between racial performances that arise from immutable characteristics (such as those associated with "black hair texture") and those that purportedly do not (such as those associated with braids).[134] Trying to distinguish between "true" performances of underlying immutable characteristics (such as wearing "black hair texture" in the form of an Afro)[135] and "discretionary" performances that lack a sufficiently close connection to immutable characteristics would seem to be a paradigmatic example of a fool's errand.[136]

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[132] Yoshino, *supra* note 52, at 892.

[133] Yoshino perceptively argues that:

> What's frustrating about the *Rogers* opinion, and what's flawed about the Title VII jurisprudence generally, is that it does not force [the employer] to answer [the] question [of why it prohibited the wearing of hair braids at work]. Instead, the court only looked at Rogers's capacity to conform. Once the court determined that she could assimilate, it assumed she could do so, without regard to the legitimacy of the demand for assimilation.

YOSHINO, *supra* note 13, at 136. It bears noting that Yoshino's notion of forced assimilation through employer-mandated coverings of identity performances is in some ways the reverse of what is at issue in many gender-stereotyping cases: In instances of forced covering, employees are penalized for performing their identities in ways that are *both* (1) consistent with and emanate from their identities and (2) socially stigmatized. In contrast, in the traditional gender-stereotyping case, the stigma attaches as a result of the employees' *refusal* to perform their gender in ways that society believes are consistent with and emanate from their identities. *Id.* at 158. In other words, and to put it simply, the plaintiff in *Rogers* was penalized for being "too black," while the plaintiff in *Price Waterhouse* was penalized for being "insufficiently female." *See id.* at 136; Yoshino, *supra* note 52, at 892. Yoshino refers to the latter as "reverse-covering demands." YOSHINO, *supra* note 13, at 155, 158.

[134] *Catastrophe Mgmt. Solutions*, 852 F.3d at 1030.

[135] The court in *Catastrophe Management Solutions* noted that while a prohibition on dreadlocks does not violate Title VII, a prohibition on Afros does. *Id.* (first citing Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (en banc); then citing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981)).

[136] As Camille Gear Rich has argued,

> The courts' focus on the biological/voluntary distinction is fundamentally unprincipled and illogical, as the discriminatory animus in cases involving

Courts in the hair-braiding cases and similar rulings,[137] unlike what is called for by a proper understanding of gender-stereotyping theory, have focused on the extent to which the challenger's racial or gender performances are grounded in immutable characteristics (e.g., Afro vs. braids) without bothering to *expand* the analytical lens to include the crucial question of how an employer *understands, responds, and gives meaning* to those performances. It seems to me that a proper understanding of gender-stereotyping theory can help courts avoid the perilous exercise of trying to distinguish between performative acts that, on the one hand, appear to judges to truly reflect a plaintiff's underlying fixed, predetermined, and immutable identity and, on the other, performances that do not. This is because gender-stereotyping theory, properly understood, asks judges to do precisely what the courts refuse to do in cases such as *Rogers* and *Catastrophe Management Solutions*: focus on the social meanings of the performances, and how they might lead defendants to adopt stereotypical understandings of the plaintiffs' protected traits, rather than on whether the performances represent or manifest "true" and "immutable" identities that are separate or distinct from the performative acts that constitute those identities.[138]

Professor Kimberly Yuracko has criticized what she deems to be a libertarian reading of gender-stereotyping theory, one that

> requires protection for all forms of gender expression—those that are stereotypical, atypical, and idiosyncratic; those that are persistent; and those that are transient. Under this view, gender becomes

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> so-called biological racial or ethnic traits and voluntary, performed racial or ethnic traits operates identically. In these two kinds of cases, the employer discriminates against the employee because she has triggered a cultural code associated with a low-status race or ethnic group. In both types of cases, the employer sanctions the employee because of a fear of *racial or ethnic presence*: The employee's appearance reminds the employer of the employee's minority status and her potential to disrupt the current cultural hegemony of the workplace.

Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1141–42 (2004); *see also* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1365 (2008) ("Throughout American history, skin color has been used to determine an individual's race, but it has not served as the sole marker of one's race. Distinguishable physical markers signifying 'whiteness' and 'non-whiteness' generated the creation of a hierarchical social system based on race and color, whereby whiteness represented the superior status and non-whiteness the inferior.").

[137] *See, e.g.*, Austin v. Wal-Mart Stores, 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998) (upholding employer's sex-specific grooming standard as it relates to hair length because "hair length is not an immutable characteristic, for it may be changed at will"); *see also* Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 805 (Iowa 2003) (upholding employer's firing of male employee because he wore an ear stud after noting that "[w]earing an ear stud is not an immutable characteristic").

[138] *See generally Catastrophe Mgmt. Solutions*, 852 F.3d 1018; *Rogers*, 527 F. Supp. 229.

> whatever people say it is. As gender becomes solely a matter of self-identification, the distinction between gender and personal idiosyncrasy becomes one of mere nominalism, and all conduct becomes potentially entitled to protection.[139]

A critic of my understanding of gender-stereotyping theory could make a similar claim by arguing that if the equality protection at issue is unmoored from stable, distinct, and predetermined identity categories, then any claim of gender expression by any person becomes protected. But that would not be the case because, under my proposed analysis, the key is whether the defendant understands, responds, and gives meaning to the expressive performances *in gender stereotypical ways*. If the plaintiff's expression, to use Yuracko's terms, is so "atypical," "idiosyncratic, and "transient" that it does not trigger gender stereotypical responses by the defendant, then no liability would attach.[140] The requirement, in equality cases, that there be a gender stereotypical response to the plaintiff's expressive gender performance limits the number of cases in which liability will attach.

Until relatively recently, most courts that grappled with the question of whether sexual minorities and transgender individuals could bring gender-stereotyping claims were so focused on seemingly fixed and predetermined identities that they

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[139] Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 770–71 (2013) [hereinafter Yuracko, *Soul of a Woman*]. Yuracko raises the same concern in KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 143–45 (2016).

[140] Yuracko, *Soul of a Woman*, *supra* note 139, at 770. The existence of gender stereotyping would also not lead to discrimination liability if there was no differential treatment of employees. This addresses another of Yuracko's concerns: that an expansive understanding of gender-stereotyping theory that broadly protects gender expression would prohibit, for example, a law firm from requiring its litigators to be "aggressive" and elementary schools from requiring its teachers to be "nurturing" because the former trait is a stereotypically male one and the latter a stereotypically female one. *See id.* at 773 (using these examples and others to argue that "[p]rohibiting employers from requiring conduct that is traditionally gendered would force employers to restructure jobs so as to fit employees' preferred gender expressions—such accommodations would be costly and, in some cases, impossible"). But employers' application of these personality requirements would not violate gender-stereotyping theory as long as the requirements applied equally to all employees. This means that while a law firm, for example, could require that all of its litigators be "aggressive," it could not require its female litigators (but not its male lawyers) to be "aggressive" while also evincing traits whose expression is traditionally associated with femininity. Furthermore, if the gender-nonconformance claim, in a case involving the government as employer, is grounded in free speech considerations as opposed to equality ones, the balancing of the employee's expressive interests against the legitimate interests of the public employer called for by *Pickering* would limit the number of cases in which plaintiffs prevail. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). In addition, to the extent that the free speech claim is based on expressive conduct, the doctrinal requirement that the expressed message be understood by others will also serve to limit the number of successful claims. *See infra* note 249 and accompanying text.

nonsensically concluded that the assertion of such identities *precluded* the raising of viable gender-stereotyping claims. For example, the U.S. Court of Appeals for the Second Circuit reasoned in a Title VII case from 2005 that "[w]hen utilized by an *avowedly homosexual plaintiff*, . . . gender-stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."[141] The U.S. Court of Appeals for the Sixth Circuit made a similar point when it warned in 2006 that "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."[142]

Rather than focusing on the extent to which the defendants might have impermissibly assigned meaning to the plaintiffs' gender performances in stereotypical ways, these courts focused only on the plaintiffs' asserted identities.[143] They then relied on those identities to conclude that the gender-stereotyping claims represented nothing more than efforts to gain antidiscrimination protection for LGBT-identifying individuals from sources of law, such as Title VII, that do not explicitly proscribe discrimination on the basis of sexual orientation or gender identity.[144] This reasoning leads to the following strange (and identity-driven) result: while *straight cisgender* individuals are free to raise a gender-stereotyping claim in trying to establish that the employer discriminated "because of sex," LGBT individuals are precluded from raising the same claim *because of the ways in which they self-identify*. The effect of this reasoning is to make open LGBT individuals, in effect, the only people in the United States who are precluded, seemingly as a matter of law, from bringing a gender-stereotyping claim.

More recently, however, courts have tended to reject the notion that the mere self-identification of plaintiffs as sexual minority or transgender individuals renders their sex discrimination/gender-stereotyping claims nonviable.[145] As the U.S. Court of Appeals for the Third Circuit put it in the *Prowel* case from 2009, the defendant

> cannot persuasively argue that *because* [the plaintiff] is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion

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[141] Dawson v. Bumble & Bumble, 398 F.3d 211, 218–19 (2d Cir. 2005), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (emphasis added) (internal citation omitted); *see also* Oiler v. Winn-Dixie Louisiana, Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002) (rejecting gender-stereotyping claim brought by transgender plaintiff).

[142] Vickers v. Fairfield Med. Ctr., 452 F.3d 757, 764 (6th Cir. 2006). The Sixth Circuit has recently questioned the continued viability of *Vickers* on this point. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 580 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[143] *Vickers*, 452 F.3d at 764.

[144] *Id.*

[145] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004).

> that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.[146]

The court proceeded to explain that as long as a reasonable jury could conclude, based on the evidence presented, that harassment or discrimination occurred "because of sex," it was impermissible to reject the plaintiff's gender-stereotyping claim as a matter of law because of his sexual orientation.[147]

Rather than focusing the judicial lens on the purportedly "disqualifying" nature of some plaintiffs' identities, courts in some of the more recent cases have tended to look to how those identities are socially understood from a gender-stereotyping perspective.[148] As the U.S. Court of Appeals for the Seventh Circuit reasoned that in *Hively v. Ivy Tech Community College of Indiana*, a 2017 Title VII case involving a lesbian plaintiff,

> Viewed through the lens of the gender non-conformity line of cases, [the plaintiff] represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. . . . [The plaintiff's] claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).[149]

The U.S. Court of Appeals for the Second Circuit made a similar point in 2018 when it concluded in *Zarda v. Altitude Express, Inc.*, a Title VII case involving a gay man, that

> [a]pplying *Price Waterhouse*'s reasoning to sexual orientation, [means] that when, for example, "an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but takes no such action against women

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[146] Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009).

[147] *Id.*; *see also Smith*, 378 F.3d at 575 ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.").

[148] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc); *see also* Zarda v. Altitude Express Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[149] 853 F.3d 339, 346.

> who are attracted to men, the employer "has acted on the basis of gender."[150]

What mattered to these courts was the ways in which employers (and the broader society) *assign gender stereotypical meanings to the plaintiffs' identities*.[151] This emphasis does not render the identities irrelevant, but it does make clear that what ultimately matters is how employers imbue those identities with certain stereotypical gender meanings rather than the "immutable" or "true" characteristics of those identities.

It could be argued that cases such as *Zarda* and *Hively* undermine my argument that gender-stereotyping theory can lessen the importance of identity categories in antidiscrimination law since the cases can be understood to stand for the proposition that *anyone* who identifies as gay or lesbian, and who has been treated unequally by an employer on that basis, can make out a successful Title VII claim because of the gender stereotyping that inevitably impacts sexual minorities.[152] But, as I have noted, my argument is not that identity considerations should be irrelevant in assessing the viability of a gender-stereotyping claim. Instead, I contend that plaintiffs should not have to identify according to a finite number of fixed and predetermined identity categories in order to bring a successful gender-stereotyping claim. The appellate courts' rulings in *Zarda* and *Hively* are consistent with my understanding of gender-stereotyping theory because they focus on the social meanings ascribed to the identities in question.[153]

It will be up to the Supreme Court to decide whether the claims accepted by courts in cases such as *Zarda* and *Hively* manifest correct understandings of Title VII's ban on discrimination "because of sex."[154] But regardless of how the Court rules on that question of statutory interpretation, the cases illustrate the ways in which a proper understanding of gender-stereotyping theory—one that focuses on how expressive performances of gender and sexuality identities may trigger responses by defendants that are motivated by sex stereotypes—can help antidiscrimination law move away from the notion that plaintiffs' must identify according to certain fixed, stable, and predetermined categories in order to succeed in their equality claims.

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[150] 883 F.3d 100, at 120–21 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (alteration in original)).

[151] *See, e.g.*, *id.* at 157; *Hively*, 853 F.3d at 346.

[152] *See, e.g.*, *Zarda*, 883 F.3d at 128; *Hively*, 853 F.3d at 347.

[153] *See Zarda*, 883 F.3d at 120–21; *Hively*, 853 F.3d at 344–46.

[154] The Supreme Court has granted certiorari in *Altitude Express Inc. v. Zarda*, to decide whether discrimination on the basis of sexual orientation constitutes discrimination "because of sex" under Title VII. 139 S. Ct. 1599 (2019) (granting certiorari); *see also* Bostock v. Clayton Cty., Ga., 139 S. Ct. 1599 (2019) (same). The Court has also granted certiorari in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, a case that raises the question of whether Title VII prohibits discrimination against transgender individuals based on either their status as transgender people or on gender-stereotyping grounds under *Price Waterhouse*. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019).

B. Majority/Minority Identities and the Viability of Gender-Stereotyping Claims

Some of the recent LGBT Title VII cases show how the fact that a plaintiff is LGBT may help courts recognize gender stereotyping engaged in by defendants.[155] But, unfortunately, the opposite may also be the case: some judges might equate a plaintiff's *lack of self-identification* as a sexual minority or as a transgender person with the absence of a viable gender-stereotyping claim. In other words, while the fact that plaintiffs, under some of the recent cases noted above, identify as lesbian, gay, bisexual, or transgender might help them make out a successful gender-stereotyping claim because such identification explains how and why defendants assigned stereotypical meanings to the gender performances in question,[156] the fact that other plaintiffs identify (or seem to identify) as straight and cisgender might lead some judges to fail to recognize the existence of impermissible gender stereotyping.

This failure of seeing may in part help to explain the troubling outcome in the infamous case of *Jespersen v. Harrah's Operating Company, Inc*.[157] In that case, the employer (Harrah's, a Las Vegas casino) had recently instituted a grooming policy that required female bartenders to wear makeup while on the job.[158] The plaintiff objected to the new requirement, pointing out that she had successfully worked at the casino as a bartender for many years without wearing any makeup.[159] The makeup requirement was part of a broader grooming policy that had some components that applied equally to men and women, and others that depended on the employee's gender.[160] All of the casino's "Beverage Service Personnel," for example, were prohibited from having "faddish hairstyles or unnatural [hair] colors."[161] But only male bartenders were prohibited from having hair "extend below [the] top of [the] shirt collar" and "ponytails."[162] Female bartenders, unlike male ones, were required to have their hair "teased, curled, or styled every day you work."[163] In addition, male bartenders were prohibited from wearing makeup, while female ones were required to do so.[164]

The plaintiff found the makeup requirement to be offensive and unnecessary, and she eventually left her job.[165] She later sued arguing that the employer's makeup requirement for women violated Title VII because it constituted impermissible sex stereotyping.[166] A majority of the U.S. Court of Appeals for the Ninth Circuit, sitting en

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155 *See Zarda*, 883 F.3d at 119–22; *Hively*, 853 F.3d at 340–46.
156 *See Zarda*, 883 F.3d at 119–22; *Hively*, 853 F.3d at 342–46.
157 444 F.3d 1104 (9th Cir. 2006) (en banc).
158 *Id.* at 1107.
159 *Id.* at 1106–07.
160 *Id.* at 1107.
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.* at 1108.
166 *Id.*

banc, rejected the notion that a condition of employment that required women to wear makeup constituted illegal gender stereotyping.[167] The court distinguished *Price Waterhouse* by reasoning that in that earlier Supreme Court case, "[i]mpermissible sex stereotyping was clear because the very traits that [Hopkins] was asked to hide were the same traits considered praiseworthy in men."[168] The Ninth Circuit explained that "Jespersen's claim . . . materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."[169] The court added that in order to prevail, Jespersen would have to prove that the grooming policy imposed an undue burden on women as a class that it did not impose on men.[170] The court concluded that summary judgment for the employer was appropriate after it refused to take judicial notice of the fact that women have to spend more time and money in order to comply with a makeup requirement than men have to spend in keeping their hair short.[171]

The *Jespersen* ruling has been subject to withering criticism in law reviews.[172] The court simply could not get itself to accept the seemingly obvious proposition

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[167] *Id.* at 1111–12.

[168] *Id.* at 1111.

[169] *Id.* at 1113.

[170] *Id.* at 1110.

[171] *Id.* at 1111 ("Having failed to create a record establishing that the [grooming] policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact.").

[172] *See, e.g.*, Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1134 (2006) (contending that *Jespersen*'s "unequal burdens analysis, which allows appearance codes that equally burden men and women . . . . invites silly and utterly subjective comparisons"); Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 90 (2006) (noting that *Jespersen* "reflects the blinders on many contemporary courts regarding the impact of sex-differentiated dress requirements on female employees" (footnotes omitted)); *see also* Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 210–11 (2007) ("[T]he court . . . did not consider the possibility that by subjecting only women to this socially-derived ritual, the employer was enforcing, and the court was sanctioning, a type of physical branding or differentiation of female employees that serves to reinforce both the male behavioral norm and the traditionally dominant role enjoyed by men (and the correspondingly subordinate position ascribed to females) in the market place." (footnote omitted)). For an early and cogent critique of employers' regulation of employees' appearance, see Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992). Klare argued that:

> [O]fficial appearance standards denigrate cultural and religious diversity and enforce conformity to white, heterosexual, Christian images of beauty and proper grooming. The rules and standards both exploit and repress female sexuality and punish women who depart from (largely) male-created expectations about proper female behavior and roles. Perhaps the central social function of appearance regulation is to maintain the sexual subordination of women to men.

Id. at 1398.

that when employers demand that female employees abide by certain expectations of how women should perform their gender, including how they should powder their faces and color their lips in ways that traditionally have been associated with proper femininity, they engage in *precisely* the type of gender stereotyping that *Price Waterhouse* proscribes.[173] As one of the dissents explained,

> Harrah's regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah's. The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive . . . to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex.[174]

Taylor Flynn has argued that the result in cases such as *Jespersen* is explained by what she calls the "pink on pink" phenomenon:

> The impediment for the court, I argue, is that make-up wearing for women is so ubiquitous—such a part of the background—that its coerced expression, along with its power to objectify, are rendered invisible. As the dissent noted, "If you are used to wearing makeup—as most American women are—this may seem like no big deal." The majority appears unable to conceptualize make-up wearing as subordinating precisely because it is something that many of their wives, daughters, sisters, mothers (or, if female, perhaps themselves) wear routinely. The majority, in effect, is trying to read pink lettering against a pink background.[175]

As Flynn notes, "It may at first seem paradoxical that gender claims (whether based in equality or expression) by non-trans plaintiffs at times fare worse than those by persons who are trans-identified."[176] But that result makes sense once we understand

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[173] *See Jespersen*, 444 F.3d at 1104, 1115.

[174] *Id.* at 1116 (Pregerson, J., dissenting).

[175] Flynn, *supra* note 66, at 501 (quoting *Jespersen*, 444 F.3d at 1117–18 (Kozinski, J., dissenting) (footnotes omitted)).

[176] *Id.* at 500. In making an argument that overlaps somewhat with Flynn's "pink on pink" theory, Jennifer Levi asserts that the failure of discrimination claims in cases such as *Jespersen* is explained by

that a plaintiff's self-identification as transgender (or as a sexual minority) might avoid or lessen the blinding effects of the "pink on pink" phenomenon by encouraging courts to probe more rigorously an employer's motivations for making negative employment decisions against gender-nonconforming individuals and to inquire further about the harmful consequences of those decisions on marginalized minorities.

It is important in this regard to emphasize that Jespersen did not raise issues related to her sexual orientation or gender identity in her lawsuit.[177] As a result, it is reasonable to believe that the court perceived her to be both straight and cisgender. But if Jespersen had identified as a lesbian or as a transgender person, it is entirely possible that a majority of the court would have been more open to recognizing the ways in which the makeup requirement impermissibly was grounded in gender stereotyping.[178] In other words, if Jespersen had identified as a lesbian or a transgender employee, such an identification, by itself, would likely have raised questions about (1) the employer's understandings of what it means to be a "true woman"; (2) whether and, if so, why Jespersen met or failed to meet those understandings; and (3) the harmful impact of the understandings on distinct minorities.[179]

> "the collective hunch theory." Under this theory, even if there are some individuals harmed by certain gender-based requirements, courts refuse to conclude that the imposition of gender-based requirements could be actionable, particularly when imposed on non-transgender individuals. The collective hunch is that gender requirements, especially those concerning dress and appearance, are acceptable, and should survive challenge in most circumstances.

Levi, *supra* note 172, at 93. *Jespersen* is only one of several cases in which courts have upheld the legality of sex-differentiated grooming standards. *See, e.g.*, Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (dismissing a challenge to a policy that prohibited men, but not women, from having long hair); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755–56 (9th Cir. 1977) (holding that requiring male, but not female, employees to wear ties was not sex discrimination under Title VII); *see also* Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for both men and women).

[177] *See Jespersen*, 444 F.3d at 1104.

[178] It is telling, in this regard, that when the U.S. Court of Appeals for the Sixth Circuit was confronted with a transgender plaintiff's sex stereotyping claim in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, it explicitly rejected the defendant's contention that the reasoning in *Jespersen* should lead the court to rule against the plaintiff. 884 F.3d 560, 574 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (citing *Jespersen*, 444 F.3d at 1113) (rejecting "the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not 'impede [an employee's] ability to perform her job'").

[179] Jennifer Levi argues that successful transgender rights cases "reflect[ ] the fact that the courts could imagine the specific harm a transgender litigant might experience from forced conformity to gender norms." Levi, *supra* note 172, at 101–02 (footnote omitted). Levi posits that transgender equality claims are less threatening to judges than those raised in cases such as *Jespersen* "because courts have been able conceptually to marginalize the impact of their decisions to a minority community (of transgender persons), [making it] easier for them to allow

That this is the case is reflected in the fact that courts in recent years have increasingly accepted the notion that discrimination against LGBT individuals constitutes a form of per se impermissible gender stereotyping. In the context of transgender plaintiffs, for example, the U.S. Court of Appeals for the Sixth Circuit has explained that "discrimination against a plaintiff who is a 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."[180] The same court in a later case added that "[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender nonconformity, and we see no reason to try."[181]

Although we will never know for sure, it is possible that had Jespersen identified as a lesbian or as a transgender person, the Ninth Circuit judges who voted to deny her claim might have been more attuned to the employer's efforts to use gender-based grooming standards as a means of policing gender performances and boundaries in ways that violated *Price Waterhouse*. In other words, a challenge to a mandatory, gender-based grooming policy brought by a self-identified lesbian or transgender plaintiff, for example, might have led a majority of the court to recognize the employer's makeup requirement for what it was: a misguided and illegal effort to force female employees to abide by stereotypical understandings of how women in a hospitality job must perform their gender in order to please customers.

Part of the problem with challenges to sex-differentiated grooming policies brought by seemingly cisgender and straight plaintiffs is that courts seem to believe that there is no group-based harm.[182] As the *Jespersen* court explained, "The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."[183] According to the court, in other words, the employer's makeup requirement did not violate Title VII

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some small incursion into widely-held beliefs about the fundamental differences between men and women." *Id.* at 103–04.

[180] Smith v. City of Salem, 387 F.3d 566, 575 (6th Cir. 2008).

[181] *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 576–77; *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–21 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) ("Applying *Price Waterhouse*'s reasoning to sexual orientation, we conclude that when, for example, 'an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'" (alteration in original) (citation omitted)); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017) (en banc) ("[T]he line between a gender nonconformity claim and one based on sexual orientation . . . does not exist at all."); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.").

[182] *See, e.g.*, *Jespersen*, 444 F.3d at 1112.

[183] *Id.*

because it did not negatively affect the plaintiff *as a member of a class* (i.e., as a woman), but *as an individual* who had a "subjective" objection to the requirement.[184]

There are at least three problems with this reasoning. First, as Jennifer Levi has pointed out, Title VII does not require the showing of a group-based harm when the challenged policy, on its face, treats individuals differently according to their sex.[185] Such cases represent the paradigmatic form of sex discrimination because *but for* the plaintiff's sex, they would not have been subjected to the policy in question.[186]

Second, the conclusion that there is no group-based harm is entirely dependent on how the court defines the group in question. By dismissing Jespersen's objections as idiosyncratic—as the majority put it, the case was "limited to the subjective reaction of a single employee"—the court assumed that most women do not believe they would be harmed by such a requirement and that, therefore, most female employees would not object to being forced to wear makeup as a condition of employment.[187]

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[184] As the court explained,

> We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

Id.

[185] Levi explains this point as follows:

> In a classic dress code case, such as *Jespersen*, the plaintiff loses her job for refusing to comply with a dress code that requires her to conform her outward appearance to a certain standard simply because she is a woman. Under the most straightforward analysis of discrimination, firing this employee because she failed to conform her outward appearance is termination "because of sex"—had she been a man, she would not have been fired. Few, if any, logical leaps need be made to understand the claim or how it fits within Title VII's direct evidence model.

Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 376 (2008) (footnotes omitted).

[186] It is interesting to note, on the question of "but for" discrimination, that some courts in Title VII cases involving LGBT plaintiffs have accepted the claim that discrimination on the basis of gender identity and sexual orientation constitutes *both* impermissible gender stereotyping and so-called per se discrimination on the basis of sex. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 571–78 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); Zarda v. Altitude Express, 883 F.3d 100, 116–24 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); Schroer v. Billington, 577 F. Supp. 2d 293, 303–08 (D.D.C. 2008); *see also* Baldwin v. Foxx, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641,*5, *7 (July 15, 2015) (concluding both that "sexual orientation is inherently a 'sex-based consideration'" and that "sexual orientation discrimination is also sex discrimination because it necessarily involves discrimination based on gender stereotypes").

[187] *See Jespersen*, 444 F.3d at 1113.

But assuming arguendo that the court's presumption was correct, there are still some women, even if they are in a minority, who would, like Jespersen, object to being forced to wear makeup as a condition of employment—a makeup requirement would negatively affect *that group of women*. As Levi explains, "[F]or persons like Darlene Jespersen, whose employers' expectations of how they should look and act depart from their internalized sense of how they should look and act, the harms associated with gender-based dress codes are quite severe."[188]

Third, and most importantly for our purposes, *the expressive components* of gender-stereotyping theory make the search for a group-based harm unnecessary. This is because, as explored further in the next section, showing that a defendant burdened the plaintiff's expressive interests does not require, either as a matter of doctrine or logic, that the plaintiff first demonstrate that they belong to a particular identity group.[189] The crucial point for our purposes is the following: an employer's gender-based policies or practices may constitute impermissible gender stereotyping under Title VII regardless of how a particular plaintiff challenging them identifies according to sex, gender, and sexuality markers.

It may seem odd to say that how Jespersen identified according to sex, in particular, should not have determined the lawsuit's outcome given that the main question to be decided was whether the employer discriminated "because of sex."[190] But that indeed would have been the case. Let's suppose Jespersen had identified as a man. If the employer agreed with that self-identification, then it would not have required Jespersen to wear makeup (the requirement only applied to women) and there would have been no litigation. But if the employer had disagreed with Jespersen's self-identification as a man and considered him to be a woman, it would have required him to wear makeup, a requirement that would have raised the same issues of gender stereotyping as Jespersen's actual lawsuit. In the end, therefore, what matters is the extent to which the employer was motivated by gender stereotyping given how Jespersen performed her gender without the aid of makeup rather than whether she identified according to certain predetermined identity categories, including those related to sex.[191]

The degree of gender stereotyping behind the employer's makeup requirement in *Jespersen* remained precisely the same regardless of whether it was applied, for example, to a self-identified female heterosexual cisgender employee or to a female lesbian transgender worker. The focus of the analysis should be on the purpose and effect of the policy, and how it may reflect impermissible gender stereotyping, rather than on whether the person challenging the policy falls under one or more specific and predetermined identity categories.

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[188] Levi, *supra* note 185, at 367.

[189] *See* discussion *infra* Part III.

[190] *Jespersen*, 444 F.3d at 1114 (Pregerson, J., dissenting) (quotations omitted).

[191] *See supra* notes 108–11 and accompanying text (explaining why the outcome in *Price Waterhouse* would have been unaffected if the plaintiff had self-identified as a man rather than a woman, or as neither).

III. GENDER-NONCONFORMING SPEECH AND IDENTITY

It is in some ways not surprising, given the central role that identity-based claims play in American antidiscrimination law, that courts in equality gender-stereotyping cases have prioritized the existence or non-existence of particular sex, gender, and sexual orientation identities. This focus on identity has helped some LGBT plaintiffs in some cases.[192] But it has also unfortunately served to obscure viable (if not compelling) gender-stereotyping claims in cases such as *Jespersen*.[193]

It is perhaps more surprising to find a similar judicial emphasis on particular identities in free speech disputes involving gender nonconforming expressive conduct.[194] Perhaps this emphasis is explained by the fact that these cases implicate not just questions of free speech, but usually also ones related to equality and discrimination against LGBT individuals.[195] But regardless of the reason, a judicial prioritization of particular identity categories, as I explore in this Part, is as problematic and unnecessary in assessing the viability of free speech/gender-stereotyping claims as it is in assessing that of equality/gender stereotyping ones.

Like many teenagers who identify as female, fifteen-year-old Pat Doe liked to attend school wearing clothes and fashion accouterments associated with the female gender.[196] However, administrators at her public school in Brockton, Massachusetts, objected to her doing so because they deemed her to be a boy given that she had been assigned the male sex at birth.[197] School officials prohibited Doe from attending school while wearing "any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs."[198] According to the administrators, Doe's wearing of so-called girls' clothing and fashion accouterments was "disruptive or distractive to the educational process."[199] Doe sued the school district in state court claiming, inter alia, that it had violated her rights to free speech and to be free from gender discrimination as guaranteed by the state constitution.[200]

In deciding whether to grant the plaintiff a preliminary injunction that would permit her to attend school wearing the clothing and accouterments of her choice while the lawsuit was pending, the trial court in *Doe v. Yunits* held that Doe was likely to prevail in her free speech claim.[201] In doing so, the court concluded that the case raised issues of symbolic speech (sometimes referred to as expressive conduct).[202] The threshold question in such cases is whether the symbolic acts at issue constitute

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192 *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. Of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).
193 *See supra* notes 157–92 and accompanying text.
194 *See infra* notes 196–237 and accompanying text.
195 *See infra* notes 196–237 and accompanying text.
196 Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Sup. Ct. Oct. 11, 2000).
197 *See id.* at *4–5.
198 *Id.* at *2.
199 *Id.* at *1.
200 *Id.* at *2.
201 *Id.* at *3–5.
202 *Id.* at *3.

"speech" within the meaning of constitutional protections.[203] Following Supreme Court precedents interpreting the First Amendment, the *Doe* court noted that "[s]ymbolic acts constitute expression if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message."[204] For the court the answer to that question was a clear "yes" *because of the plaintiff's gender identity*.[205] After pointing out, in the ruling's first paragraph, that Doe had "been diagnosed with gender identity disorder," the court explained that the

> [p]laintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but *a necessary symbol of her very identity*.[206]

What is puzzling about the court's reasoning is not that it found the plaintiff's gender identity relevant to the question of whether she intended to express herself in ways that were likely to be understood by others at the school; clearly, the fact that the plaintiff was transgender was relevant to both her expressive intent and to how her expression was understood by others.[207] Instead, what is puzzling about the court's reasoning is that it suggests that the plaintiff's transgender identity was, in effect, a necessary element of her claim.[208] The court seems to have concluded that *but for* the plaintiff's transgender identity, the wearing of the gender-nonconforming clothes would have been nothing more than a "personal preference" and therefore not protected speech.[209]

But there is no logical or doctrinal reason why, for example, a cisgender heterosexual male student who wears "female clothing" in order to question gender-related social norms and expectations should be denied free speech protections because he does not identify as transgender (or as gay). It may very well be that both the intent and the message behind the wearing of what is perceived to be gender-nonconforming clothing is more clear when the plaintiff is transgender. But that does not mean that only certain individuals, depending on their gender identity, can use clothing to express constitutionally protected messages. To put it differently, there are cases that fall between using clothing to express merely a "personal preference" (which may

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[203] *Id.*
[204] *Id.* (citations omitted).
[205] *Id.*
[206] *Id.* at *1, *3 (emphasis added).
[207] *Id.* at *3.
[208] *Id.*
[209] *See id.*

not be constitutionally protected speech)[210] and those involving transgender individuals. Those cases might involve not only cisgender students, but also gender-nonbinary students who do not identify as transgender or as *either* male or female. In this context, there is no reason to limit the free speech protections to those who identify in certain predetermined ways.[211] How individuals identify according to sex, gender, and sexuality categories should not preclude them from raising viable free speech challenges to policies and practices that require them to perform or express their gender in certain stereotypical and socially privileged ways.

It is true, of course, that some students might wear gender-nonconforming clothing to school to try to be funny or to cause disruption rather than to convey a particularized message. But what should distinguish protected from unprotected speech in this context is the intent of the speaker, and the extent to which the message is likely to be understood by others, rather than whether the speaker, for example, identifies as male or female or cisgender or transgender or gender nonbinary. In other words, what should matter is the content of the expression, and how it is understood by others, rather than the identity categories of the person engaging in the expression.

The U.S. Court of Appeals for the Second Circuit also failed to recognize a continuum of possible expressive circumstances related to how individuals communicate gender-related messages through how they dress in *Zalewska v. County of Sullivan*.[212]

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[210] *See* Karr v. Schmidt, 460 F.2d 609, 613–14 (5th Cir. 1972) (holding that "for many, the wearing of long hair is simply a matter of personal taste or the result of peer group influence" and is therefore not protected speech under the First Amendment); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507–08 (1969) (citations omitted) (noting that speech protected by the First Amendment involving a prohibition against students wearing black armbands to protest the Vietnam War was different from cases "relate[d] to [the] regulation of the length of skirts or the type of clothing, to hair style, or deportment").

[211] The question of what role speaker identity should play in determining the scope of free speech protections is a complicated one. For example, the Supreme Court, in explaining its highly controversial ruling in *Citizens United v. FEC*, which struck down campaign financing limits imposed on corporations and unions, stated that "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." Citizens United v. FEC, 558 U.S. 310, 350 (2010). But, as Justice Stevens pointed out in his dissent, the Court

> in a variety of contexts [has] held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.

Id. at 420–21(Stevens, J., dissenting) (footnotes omitted).

The general question of what role speaker identity should play in determining the scope of free speech rights is beyond the scope of this Article. My point here is simply that how individuals identify according to sex, gender, and sexuality categories should not preclude them from raising viable free speech challenges to policies and practices that require them to perform or express their gender in certain stereotypical and socially privileged ways.

[212] 316 F.3d 314 (2d Cir. 2003).

The female plaintiff in that case, who preferred to wear skirts to work, challenged her public employer's policy of requiring all employees to wear a uniform that included pants.[213] The employer claimed that the uniform was meant to "project an overall positive appearance for the County" and that pants were safer on the job than skirts because the latter might get caught on work-related equipment.[214] In rejecting the free speech claim, the court concluded that "the ordinary viewer would glean no particularized message from appellant's wearing of a skirt rather than pants as part of her uniform."[215] In doing so, the court distinguished *Doe v. Yunits* on the ground that "the plaintiff's dress [in that case] was an expression of his *clinically verified gender identity*."[216]

Zalewska is another example of the inability of some courts to recognize free speech rights in matters related to dress and expressive conduct unless the plaintiff identifies—or is "clinically" identified—in certain ways.[217] This is problematic because, as in *Jespersen v. Harrah Operating Co., Inc.*,[218] the court allowed the absence of a requisite identity to blind it from the fact that when an employee is required to abide (or prohibited from abiding) by gender-specific expectations, there may very well be an underlying viable free speech (or equality) claim regardless of how the plaintiff identifies.[219]

To put it differently, *Zalewska* is another example of Flynn's "pink on pink" phenomenon.[220] The fact that skirts are traditionally worn by women served to occlude from the court the fact that the plaintiff's wearing of skirts, when all employees were *required* to wear pants, was a form of gender nonconformity, the prohibition of which, at the very least, merited scrutiny under the First Amendment.[221] As Flynn explains, "Zalewska, like Jespersen, sacrificed her job rather than conform to a gender

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[213] *Id.* at 317.

[214] *Id.*

[215] *Id.* at 320.

[216] *Id.* (emphasis added).

[217] *Id.*

[218] 444 F.3d 1104 (9th Cir. 2006).

[219] *See* Flynn, *supra* note 66, at 502 ("The facts of *Zalewska* . . . belie the notion that the employee's message was not understood. Zalewska's initial objection—combined with her special order of a skirted uniform and her subsequent refusal to return it, followed by her suspension for insubordination—leaves little doubt that her message was clearly communicated and understood."); Jessica A. Moldovan, Note, *Authenticity at Work: Harmonizing Title VII with Free Speech Jurisprudence to Protect Employee Authenticity in the Workplace*, 42 N.Y.U. REV. L. & SOC. CHANGE 699, 740 (2019) ("In a workplace context where skirts were forbidden, Zalewska represented the nonconformist the First Amendment typically protects.").

[220] *See* Flynn, *supra* note 66, at 501 (arguing the result in *Jespersen* was a result of the "pink on pink" phenomenon).

[221] *See* Moldovan, *supra* note 219, at 740 ("In *Zalewska*, the Second Circuit allowed traditional gender norms to influence its analysis—Zalewska's dress was somehow less communicative because women typically wear skirts—while also ignoring that this position placed Zalewska as an outsider in her specific work environment.").

presentation at odds with her identity. The difference in outcome from *Yunits* is that Pat Doe's gender identity was easy for the court to 'read' because it stands out in contrast to the background norm."[222]

The crucial role that a specific identity category played in the success of the free speech claim in *Yunits* stands in contrast to the failure of such a claim in *Youngblood v. School District of Hillsborough County*, a case that also involved a public school student's challenge to a gender-based clothing policy.[223] The plaintiff in *Youngblood* was a female seventeen-year-old high school senior who showed up for her yearbook photograph session wearing a jacket, shirt and tie, only to be informed that:

> A decades-old [school] policy requir[ed] all female students, without exception, to wear a revealing, scooped neck drape for their senior portraits. The drape is made of silky material and is furnished to each female student by the company hired to take the senior photos. Wearing the drape requires a female student to bare her neck, shoulders, and a portion of her chest.[224]

In contrast, the school allowed male students to "wear regular business or professional attire, namely, a white shirt and dark jacket and tie of their choosing[,]" an option that obviously did not require them to expose either their shoulders or portions of their chests.[225] "Forced to choose between dressing in girls' clothing or having no picture in the yearbook, Youngblood chose the latter."[226]

Youngblood sued in federal court arguing that the school abridged her rights to free speech and discriminated against her on the basis of sex.[227] In making her First Amendment claim, Youngblood contended "that she has a constitutionally protected right to express her view that female students are entitled to equal dignity, freedom, and respect and should not be required to conform to archaic gender stereotypes as a condition of participating in school activities."[228] But unlike Doe, who emphasized her transgender status and her "gender identity disorder" diagnosis throughout the

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[222] Flynn, *supra* note 66, at 502.

[223] Youngblood v. Sch. Bd. of Hillsborough Cty., No. 8:02-cv-1089-T-24MAP (Fl. Dist. Ct. Sept. 24, 2002).

[224] Appeal on Behalf of Appellant/Plaintiff Nicole Youngblood of a Final Order of the Dist. Court for the Middle Dist. of Fla. at 2, Youngblood v. School Bd. of Hillsborough Cty. (11th Cir. May 2, 2003) (No. 02-15924-CC) [hereinafter *Youngblood*, Appeal of Final Order].

[225] *Id.*

[226] Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 7 (Paisley Currah et al. eds., 2006). Another high school in the same district had required graduating female students to wear skirts or dresses under their graduation gowns, but decided to allow them to choose to wear pants after two female students threatened to sue. Marilyn Brown, *Change in Graduation Rule Suits Seniors Just Fine*, TAMPA TRIB., May 24, 2002, at 1.

[227] Currah, *supra* note 226, at 10.

[228] *Youngblood,* Appeal of Final Order, *supra* note 224, at 18.

litigation, Youngblood's attorneys did not raise an identity-based claim other than to explain that their client was a young woman who liked to wear "masculine" clothes.[229] In doing so, the attorneys explained that Youngblood "preferred boyish clothing and has had a masculine demeanor. Nicki was a tomboy in grade school and continues to be a masculine or, as some might term it, 'mannish' woman."[230] As Paisley Currah notes, "Youngblood's advocates were not able to describe her long history of gender nonconformity as a medical condition or even as an identity, as Doe's attorneys had done, respectively, with their reliance on Doe's GID [gender-identity disorder] diagnosis and her 'transgender status.'"[231]

It seems clear that, despite Youngblood's inability to check the transgender identity box, her insistence in wearing so-called male clothing sent a particularized message questioning gender roles and expectations. As her attorneys explained,

> [I]t is precisely because permitting her to appear in the yearbook without wearing a drape would be understood by others to communicate a particularized message (that women do not have to conform to gender stereotypes) that the Defendants would not allow her to do so, based on their countervailing belief that women should conform to gender stereotypes and their desire to silence her opposing point of view.[232]

It also seems clear that Youngblood's message of questioning gender expectations and stereotypes was understood by others, as reflected in the fact that the school went so far as to publish the yearbook without including her picture or even her name.[233] The school, in other words, preferred to leave Youngblood out of the yearbook altogether rather than include a photograph of her in gender-nonconforming clothing.[234]

From a free speech perspective, Youngblood and her message that women should not be forced by public school officials to abide by gender stereotypes through mandated gender-conforming clothing were literally silenced and erased through her exclusion from the yearbook.[235] And yet, the court rejected the First Amendment claim

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[229] Currah, *supra* note 226, at 10.

[230] *Youngblood*, Appeal of Final Order, *supra* note 224, at 2–3.

[231] Currah, *supra* note 226, at 10. Although Youngblood identified herself as a lesbian to the press, her legal filings did not refer to either her sexual orientation or her gender identity. *See* Marilyn Brown, *Gay Teen Sues School Over Yearbook Photo*, TAMPA TRIB., June 20, 2002, at 1.

[232] *Youngblood*, Appeal of Final Order, *supra* note 224, at 21.

[233] Currah, *supra* note 226, at 7. The school district's attorney, in a statement to the press, seemed to concede that Youngblood's expressed interest in wearing a shirt and tie for the yearbook picture did, in fact, send a message that was understandable by others. As the attorney put it, "[t]he administration did not feel the yearbook was the place to make those kinds of statements. The next year, you might have 10 boys dressing as girls and vice versa." Melanie Ave, *A Portrait of Conflict*, ST. PETERSBURG TIMES, Jan. 25, 2002, at 1B.

[234] Currah, *supra* note 226, at 7.

[235] *Id.*

concluding that there was "no constitutionally protected right involved" because "the right to wear a particular type of clothing for senior portraits does not inherit the protection of the First Amendment."[236] As Currah notes, the different outcomes in *Yunits* and *Youngblood* "suggest why, in cases that could be articulated either way, transgender rights advocates often rely on more seemingly fixed categories such as transgender or gender identity than on concepts apparently less anchored to identity categories, such as gender expression."[237]

It bears noting that the court in *Yunits* not only prioritized the plaintiff's transgender identity when analyzing the free speech aspects of the case, but it also did the same when addressing the question of whether the application of the school's gender-based clothing policy to the plaintiff constituted discrimination because of sex.[238] The court, for purposes of the preliminary injunction, answered that question in the affirmative because the application of the school's sartorial policy revealed impermissible gender stereotyping.[239] In rejecting the school's contention that "gender-specific school dress codes have been upheld in the face of challenges based on gender discrimination and equal protection because the codes serve important governmental interests," the court emphasized that it could not "allow *the stifling of plaintiff's selfhood* merely because it causes some members of the community discomfort."[240]

As it did when assessing the plaintiff's free speech claim, the court here reasoned that the viability of her equality claim based on gender nonconformance depended on the way in which she self-identified as a transgender person.[241] It is reasonable to assume, given the court's reasoning, that the school's exclusion of a non-transgender student for wearing gender-nonconforming clothing would not have constituted sex discrimination because it would not have been an effort to stifle the "plaintiff's selfhood."[242] But, as with the free speech issue, there is no logical or doctrinal reason to conclude that a school's gender-based sartorial policy reflects impermissible gender stereotyping *only* when applied to transgender students.

A similar unfortunate and unnecessary judicial prioritization of particular identity categories can be found in a gender-nonconforming speech case, *McMillen v. Itawamba County School District*, that raised issues of sexual orientation rather than gender identity.[243] Mississippi school officials in *McMillen* prohibited a self-identified lesbian high school senior from bringing her girlfriend (also a student at the school) to the prom as her date; at the same time, administrators made it clear that the two young

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[236] Youngblood v. School Bd. of Hillsborough Cty., No. 8:02-cv-1089-T-24MAP (Fl. Dist. Ct. Sept. 24, 2002), at 5, 8.

[237] Currah, *supra* note 226, at 13.

[238] Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *6–7 (Mass. Super. Ct. Oct. 11, 2000).

[239] *Id.*

[240] *Id.* at *7 (emphasis added).

[241] *Id.* at *6.

[242] *Id.*

[243] 702 F. Supp. 2d 699, 701 (N.D. Miss. 2010).

women would be permitted to attend the prom if they chose male dates.[244] Officials also prohibited the plaintiff from wearing a tuxedo to the prom, explaining that "only boys were allowed to wear tuxedos."[245]

The plaintiff sued in federal court alleging that the school violated her First Amendment rights.[246] After being presented with a motion for a preliminary injunction that would allow the plaintiff to bring a same-sex date to the prom while wearing a tuxedo as the lawsuit was pending, the court concluded that there was a substantial likelihood that she would succeed on the merits.[247] In addressing the sartorial question in particular, the court noted that "Constance [the plaintiff] requested permission to wear a tuxedo, or even pants and a nice shirt, to her prom with the intent of communicating to the school community her social and political views that women should not be constrained to wear clothing that has traditionally been deemed 'female' attire."[248]

One would think that the evidence regarding the plaintiff's purpose of expressing a particular viewpoint through her clothing (and through the bringing of a same-sex date to the prom) would be enough to at least satisfy the intent requirement that courts traditionally demand before deeming expressive conduct to be protected speech under the First Amendment.[249] But that was not enough for the court.[250] Instead, the court proceeded to point to the *plaintiff's identity as a lesbian* as an additional crucial factor in establishing the protected nature of her speech.[251] As the court explained,

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[244] *Id.* School officials informed the plaintiff that she and her girlfriend "could attend with two guys as their dates but could not attend together as a couple." *Id.*

[245] *Id.*

[246] *Id.* at 702.

[247] *Id.* at 702–05.

[248] *Id.* at 704.

[249] The *McMillen* court noted that:

> The United States Supreme Court has held that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Id. (internal reference and quotations omitted).

The court in *Fricke v. Lynch*, concluded that the bringing of a male date to the prom by a *gay male* student constituted expressive conduct protected by the Free Speech Clause. 491 F. Supp. 381, 385 (D.R.I. 1980) ("I believe Aaron's testimony that he is sincerely—although perhaps not irrevocably—committed to a homosexual orientation and that attending the dance with another young man would be a political statement. While mere communicative intent may not always transform conduct into speech, [it is] clear that this exact type of conduct as a vehicle for transmitting this very message can be considered protected speech." (citations omitted)). Given the fact that the *Fricke* court emphasized the relevance of the plaintiff's sexual orientation to his free speech claim, it is fair to ask whether it would have been prepared to uphold the First Amendment claim had the plaintiff identified as a heterosexual or if he had not self-identified according to distinct sexual orientation categories at all. *See id.*

[250] *McMillen*, 702 F. Supp. 2d at 702–03, 706.

[251] *Id.* at 705.

> The record shows Constance *has been openly gay since eighth grade* and she intended to communicate a message by wearing a tuxedo and *to express her identity* through attending [the] prom with a same-sex date. The Court finds this expression and communication of her viewpoint is the type of speech that falls squarely within the purview of the First Amendment.[252]

It seems clear from this reasoning that the plaintiff's self-identification as a lesbian played a critical role in rendering her proposed expression constitutionally protected. Such reasoning is not problematic so long as there is a clear understanding, which the court's ruling failed to articulate, that no particular sexual orientation identity should be a required component of successfully making out an expressive conduct claim based on gender nonconformance. A cisgender female straight or a gender nonbinary asexual student (only two of many possible examples) who wants to bring a female date to the prom and to wear a tuxedo in part to challenge conventional gender understandings and expectations should receive the same type of free speech protection that the court in *McMillen* was prepared to provide the lesbian plaintiff in that case.[253] What should ultimately matter is the message that the expressive conduct sends, and how it is understood by others, rather than how the speaker identifies according to particular and distinct, sex, gender, and sexuality identity markers.

IV. LOOKING BEYOND FIXED IDENTITY CATEGORIES

The last two parts of the Article have argued that a proper understanding of gender-nonconformance law, in both its equality aspects[254] and free speech components,[255] should not make particular identities essential elements of viable claims. While I have sought to de-emphasize the link between equality protections and distinct identity categories, other scholars, in exploring the intersection of free speech and equality as it pertains to LGBT rights claims in particular, have done the opposite.[256] For example, Nan Hunter, in an important law review article published in 2000, has

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[252] *Id.* (emphasis added).

[253] The court ultimately decided not to issue a preliminary injunction requiring the school to allow the plaintiff to attend the school-sponsored prom with the date and clothing of her choice because a group of parents had already organized a "private prom" to which all students at the school had been invited to attend. According to the court, the availability of the private prom made it unnecessary for it to order that the plaintiff be included in a school-sponsored prom before the culmination of the litigation. *Id.* at 706.

[254] *See* discussion *supra* Part II.

[255] *See* discussion *supra* Part III.

[256] *See, e.g.*, Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. REV. 1 (2000) [hereinafter Hunter, *Expressive Identity*]; Nan Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993) [hereinafter Hunter, *Identity, Speech, and Equality*].

argued that many late-twentieth century sexual orientation (and race) discrimination cases were grounded in notions of *expressive identity*.[257] Hunter explained that:

> Expressive identity is a product of identity politics, an outgrowth of a series of equality claims. These claims are made, often by and through law, not on behalf of a voluntarist group that expresses an ideology, but on behalf of a group defined by an identity which is itself expressive. A new equality discourse has shifted from understanding race and other characteristics as simply inborn fortuities to seeing them as socialized meanings of communities and groups.[258]

According to Hunter,

> Identity claims in law arise not merely from a social context in which a particular group shares a certain history, culture, or status. Underlying that kind of identity is a shared viewpoint, not a set of opinions or a viewpoint specific to any particular topic or issue, but "view-point" in a more literal, basic sense: a shared point of view(ing), a shared position from which one's views emerge.[259]

Hunter proceeded to analyze several important LGBT rights cases, including ones from the 1970s in which gay student groups at public universities challenged their institutions' refusal to recognize them.[260] Hunter also explored the implications of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, in which a unanimous Supreme Court used the First Amendment to shield the private organizers of the Boston St. Patrick's Day parade from the application of a sexual orientation anti-discrimination law that would have required them to permit an LGBT group to march under its own banner.[261] As Hunter sees it, these cases revolved around the push by sexual minorities for equal treatment through demands for rights to express their identity (which, for Hunter, entails the expression of a shared mode of viewing).[262]

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[257] *See generally* Hunter, *Expressive Identity*, *supra* note 256.

[258] *Id.* at 4–5; *see also* Hunter, *Identity, Speech, and Equality*, *supra* note 256, at 1696 ("Notions of identity increasingly form the basis for gay and lesbian equality claims. Those claims merge not only status and conduct, but also viewpoint, into one whole. . . . Identity politics has led to identity speech.").

[259] Hunter, *Expressive Identity*, *supra* note 256, at 5.

[260] *Id.* at 32–34 (exploring cases such as Ratchford v. Gay Lib, 434 U.S. 1080 (1978); Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); and Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974)).

[261] *Id.* at 18.

[262] *Id.* at 18–22, 32–34.

According to Hunter, particular identities play a crucial role not only within equality cases, as is largely recognized, but also "in governing the interplay between equality and expression."[263] This is because

> [a] myriad of social forces (including the law itself) produces our conceptions of what constitutes a distinctive identity. Individuals who share the characteristics of a status that is socially devalued also share the point of view(ing) implicated in that social location. An equality claim framed by that kind of minoritized identity communicates, by its very articulation, a message of dissent from the social devaluation of the identity. Such a challenge is an expressive identity claim.[264]

More recently, Jeffrey Kosbie, in explaining how free speech principles can help protect transgender individuals from the harms engendered by discrimination, has emphasized identity considerations that are unique to transgender individuals.[265] For Kosbie, free speech principles are relevant to many instances of discrimination against transgender individuals because "dress and appearance communicate core aspects of identity."[266] Kosbie adds that "[c]ases built on a free speech theory can complement antidiscrimination law, emphasizing the relationship between identity and appearance."[267] Kosbie posits, for example, that transgender individuals have a free speech right to use bathrooms that match their gender identity because bathroom use plays an important role in determining how individuals form or craft their gender identities.[268] As Kosbie explains, "Trans people often very consciously choose to use a particular restroom in order to define and express their identity. Their masculinity or femininity is constituted through the very act of using the restroom."[269]

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[263] *Id.* at 54.

[264] *Id.*

[265] Kosbie, *supra* note 59, at 192–93.

[266] *Id.* at 192.

[267] *Id.* at 251–52 (footnote omitted); *see also id.* at 197 ("Autonomy includes a core concern with freedom to choose how we express our identity.").

[268] *Id.* at 243.

[269] *Id.* at 235–36 (footnote omitted). Danielle Weatherby makes a similar point when she notes that "the manner in which a transgender student chooses a restroom designated for a particular sex expresses her unique gender identity." Weatherby, *supra* note 65, at 120. Writing about bathroom access from the context of free speech in schools, Weatherby explains that

> [w]hile scholars and judges define [free speech] values differently, the majority agree that the First Amendment protects a person's right to *express her identity*, even when the government or, in this instance, other children are uncomfortable with that identity. At the essence of a transgender student's behavior is her attempt to be *recognized for her own, unique identity*.

Id. at 126–27 (emphasis added).

The insights of scholars such as Hunter and Kosbie help explain why courts in equality and free speech gender-nonconforming cases have relied on identity considerations to rule in favor of LGBT litigants.[270] These courts properly recognized that part of what was at issue in the cases was the rights—whether grounded in considerations of equality or free speech, or a combination of the two—of sexual minorities and transgender individuals to express their identities.[271] This Article does not question that reasoning. But it does question the *limiting* of the protections afforded by gender-stereotyping equality theory and by free speech principles in gender-nonconforming cases to certain identity or status-based claims. I believe this questioning is necessary for both conceptual and practical reasons. Rejecting the idea that certain identities are, in effect, essential elements of gender-stereotyping equality claims or of gender-nonconforming free speech cases avoids the problem, identified by critics of identity politics, of deploying rights arguments in ways that replicate and essentialize socially constructed identities by presenting them as somehow natural, fixed, and binary.[272]

The rejection can also, as a practical matter, help to expand the scope of antidiscrimination protections beyond a finite and predetermined list of easily recognizable and therefore privileged identity categories.[273] An understanding of gender as a form of expressive performance, rather than as a reflection of an underlying identity that is distinct from that performance, helps to push antidiscrimination law beyond a mere concern with protecting seemingly fixed, stable, and natural understandings of sex/gender identity categories.[274]

Once gender is viewed through the lens of performative expression rather than through that of fixed, finite, and predetermined identities, the normative case for a more expansive form of gender pluralism becomes stronger. Once we shift lenses,

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[270] *See generally* Hunter, *Expressive Identity*, *supra* note 256; Kosbie, *supra* note 59.

[271] *See generally* Hively v. Ivy Tech Cmty. Coll. Of Ind., 853 F.3d 339 (7th Cir. 2017); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2008), *cert. granted*, 139 S. Ct. 1599 (2019); Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

[272] *See supra* notes 93–102 and accompanying text.

[273] I have argued elsewhere that the LGBT rights movement, having achieved the goal of marriage equality, should redirect its objectives in ways that seek the recognition of and protection for gender and sexual fluidity and variability as opposed to distinct identities such as "gay," "lesbian," and "transgender." *See* Carlos A. Ball, *A New Stage for the LGBT Movement*: *Protecting Gender and Sexual Multiplicities*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 163 (Carlos A. Ball ed., 2016).

[274] As Sonia Katyal explains,

> [W]ith the advent of *Price Waterhouse v Hopkins* and its progeny . . . the law of sex discrimination has moved, appreciably so, toward a focus on gender performance. Such accounts of gender performativity move gender from a set of cultural expectations to an intangible form of expression, a performance that is not natural or fixed but mutable, highly expressive, and transitory.

Katyal, *supra* note 50, at 436 (footnotes omitted).

the ultimate objective becomes not to encourage a limited number of marginalized identities to come out into the open, but instead becomes, consistent with First Amendment principles, to foment the flourishing of as many forms of gender expression as possible regardless of whether they are linked to or arise from or are consistent with certain identities such as "female" or "gay" or "lesbian" or "transgender." In the end, it is the *expressive implications* of gender-stereotyping theory that helps, when properly understood and applied, to delink the equality protections at issue from the existence of particular identities. Viewed from this perspective, gender-stereotyping theory can help to expand equality protections by refusing to privilege some sex, gender, and sexuality identities over others.

The fact that gender-stereotyping theory, properly conceived, holds that it is for individuals and not for others (including government officials and employers) to determine how they should perform their gender, makes it easier for individuals to express their gender in fluid and multiple ways. As we have seen, a proper understanding of gender stereotyping does not look for the expression of particular and predetermined identities in order to offer them protection; instead, it permits individuals to perform their gender and sexuality identities (whatever they may be and however expressed) without fear that state actors and private employers, for example, will penalize them for their expression.[275] In short, the expression-protective component of gender-stereotyping theory, when properly understood and applied, facilitates a form of gender and sexuality pluralism that is significantly more expansive than that heretofore provided by traditional American antidiscrimination law and its rigid and deterministic focus on protecting a limited number of fixed identities.[276]

Taylor Flynn has contended that expression-based claims offer potential legal protection to a broad category of transgender individuals because, she argues, while equality protections have been largely limited to individuals who have been "diagnosed" as transgender, free speech principles can do more by protecting transgender individuals who resist the medical model of gender identity.[277] In my view, the expressive implications of gender-stereotyping theory go further: they allow for the theory to protect not only transgender individuals, regardless of whether they embrace or reject a medical model of gender identity, but also gender-nonconforming or gender-variant individuals who do not identify as transgender, or who identify as gender nonbinary, or who refuse to identify according to gender at all.

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[275] *See* discussion *supra* Section II.A.

[276] *See* Katyal, *supra* note 50, at 491 (noting that an identity-based antidiscrimination model "overlooks the reality of gender expression altogether: that it can be fundamentally different, and broader, than gender identity alone, and that it encompasses a panoply of behaviors that are—in fact—far more pluralistic regarding expression than identity itself").

[277] Flynn, *supra* note 66, at 468 ("[W]hile equality claims tend to rely almost solely on a medical model of gender identity, expression claims are also suited to non-medicalized claims by trans persons, especially those for whom dissent from traditional norms is integral to their gender identity."); *see also id.* at 485 ("My normative aspiration is for advocates to pursue expression claims both within and outside of a medical model.").

The expressive and performative components of gender-stereotyping theory, which help de-emphasize distinct and fixed identities, are particularly salient given that a growing number of Americans, especially young ones, are increasingly recognizing the fluidity of gender and sexuality categories.[278] For some of these individuals, even identities that question binarisms (such as "bisexuality" and "transgender" identities) may be unduly restrictive because they may insufficiently account for the extent to which gender and sexuality categories are fluid and malleable (and not just nonbinary).[279] This openness to gender variability is reflected, for example, in the fact that Facebook in 2014 started offering its users *more than fifty* gender-identity options, including gender-neutral, androgynous, bi-gender, intersex, gender-fluid, and transsexual.[280] At around the same time, OKCupid, the online dating service, began

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[278] *See* Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES (Jan. 9, 2013), https://nyti.ms/RGv4Tz (reporting on young people who question the gender binary); *see also* Amy Harmon, *Which Box Do You Check? Some States Are Offering a Nonbinary Option*, N.Y. TIMES (May 29, 2019), https://nyti.ms/2Wc7F49 (reporting on Pew Research survey finding that "[s]ixty percent of the teenagers surveyed told Pew that forms asking about a person's gender should include options other than 'man' and 'woman'"); Hayley Krischier, *Beyond Androgyny: Nonbinary Teenage Fashion*, N.Y. TIMES (Aug. 14, 2019) , https://nyti.ms/2H4pd92) (reporting that for many teenagers, a gender nonbinary look is more suitable and expressive than a binary one); Steven Petrow, *Don't Know What Genderqueer Is? Meet Someone Who Identifies that Way*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/lifestyle/style/don't-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html [https://perma.cc/6AYP-PPJM] (exploring gender nonbinarism). A survey of California adolescents "found that 27 percent of youth ages 12 to 17 in [the state], or about 796,000, are GNC [gender nonconforming]." BIANCA D.M. WILSON, ET AL., WILLIAMS INSTITUTE, CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCOMFORMING ADOLESCENTS IN CALIFORNIA 2 (2017).

[279] The U.S. Court of Appeals for the Sixth Circuit, in a Title VII case involving a self-identified transgender plaintiff, recognized the fluidity of gender identities, analogizing it to the fluidity of religious identities. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). The court explained that

> discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And "religious identity" can be just as fluid, variable, and difficult to define as "gender identity"; after all, both have "a deeply personal[,] internal genesis that lacks a fixed external referent."

Id. at 575 n.4 (quoting Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010)).

[280] Martha Mendoza, *Facebook Offers New Gender Options for Users*, ASSOCIATED PRESS (Feb. 13, 2014), http://www.apnews.com/beaf554bcd6a4df0ab57c628292fcc0b. For a detailed explanation of the many manifestations of and discriminatory responses to nonbinary gender identities, see Clarke, *supra* note 111, at 910–33. For an exploration of a multiplicity of gender understandings that go beyond traditional binarisms, see GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY (Joan Nestle et al. eds., 2002); *see also* Katyal, *supra* note 50, at 403–04 ("Although most individuals presume that [the morphological or biological] model

allowing users to choose not only among more than fifty gender-identity categories, but also started offering sexuality identity choices that include—in addition to the traditional categories of straight, lesbian, gay, and bisexual—asexual, demisexual (sexual attraction driven by emotional attachment), heteroflexible, homoflexible, pansexual (sexual attraction to individuals of any sex or gender identity), queer, questioning, and sapiosexual (sexual attraction driven by the intelligence of potential partners).[281]

The law has been slow to respond to these new expressive manifestations of sex, gender, and sexuality.[282] The most significant response to date has been the recognition by several states of a third gender category.[283] More than a dozen states, including Arkansas, California, Maine, Nevada, and Washington, allow individuals to select "non-binary" or "X" as their sex designation on some official identification documents such as drivers' licenses and birth certificates.[284]

To my knowledge, we do not yet have gender-stereotyping case law involving alleged discrimination against individuals who express their sex, gender, or sexuality outside of the male/female, straight/LGB, or cisgender/transgender rubrics. But given the malleability and fluidity of sex, gender, and sexuality identities expressed by young people in particular, it is only a matter of time before such cases begin to appear in law reporters. When that happens, gender-stereotyping theory, properly understood, can offer the claimants important protection from discrimination.

[of gender] relies on an objective set of criteria, many scholars and scientists have shown that a determination of sex can be far more complicated than the law readily suggests. Not only do countless individuals possess characteristics associated with both sexes, but also many individuals transition from one sex to another, and still other individuals challenge the binary system altogether.").

[281] Emmanuella Grinberg, *OKCupid Expands Options for Gender and Sexual Orientation*, CNN (Jan. 2, 2015), http://www.cnn.com/2014/11/18/living/okcupid-expands-gender-orientation-options/index.html [https://perma.cc/PD3B-WMKJ]. In explaining why some individuals prefer terms such as pansexual and queer over a term such as bisexual, Genny Beemyn explains that

> [t]hey see *bisexual* as implying a binary, and they are attracted to individuals who are outside of a gender binary or identify outside of a gender binary themselves, or they consider bisexuals to be attracted to different aspects of gender in different people, whereas they are attracted to people regardless of gender.

Clarke, *supra* note 111, at 925 (quoting Genny Beemyn, *Coloring Outside the Lines of Gender and Sexuality: The Struggle of Nonbinary Students to be Recognized*, 79 EDUC. F. 359, 360 (2015)).

[282] *See* Clarke, *supra* note 111, at 896–97 (describing U.S. jurisdictions "catching up" with other countries).

[283] Kristin Lam, *More than 7,000 Americans Have Gender X IDs, a Victory for Transgender Rights. Is It a Safety Risk, Too?*, USA TODAY (Aug. 8, 2019), https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001/ [https://perma.cc/6A28-7NQD].

[284] *Id.*; *see also* Zzyym v. Pompeo, 341 F. Supp. 3d 1248, 1261 (2018) (requiring the State Department to issue a passport with a gender marker of "X" to intersex plaintiff).

Paisley Currah notes that while transgender litigants and their lawyers frequently emphasize distinct issues associated with transgender identity as a way of persuading judges to address the discrimination against and silencing of transgender individuals, transgender activism in the legislative arena has emphasized not just the need to protect people on the basis of their transgender status, but more broadly, to protect *all* gender-nonconforming and nonbinary individuals.[285] In other words, the objective has been to seek protections for individuals in ways that allow them to express their gender regardless of whether their identities are unique or shared, or whether they are easily recognizable or not. As one activist explains,

> Generally I'm fighting for the gender variant community, which includes mostly the transgender community. But also anybody who would be perceived as stepping outside society's boundary lines of gender in a strict bigender society of male and female. And as most informed people know, gender is a wide spectrum in how people choose to express it.[286]

Currah explains that his research on the work of activists working on these issues "suggests that there is a commonly held view that while it might be pragmatic to deploy 'transgender' in many advocacy contexts, the legal instantiation of a new identity category—transgender—is not the ultimate goal of the activists who deploy it."[287]

It is interesting to note that many of the bills proposed or passed as a result of this type of activism do not simply add transgender status as a protected class to civil rights laws; instead of only emphasizing issues of identity and status, the measures also seek to protect individuals on the basis of how they perform or express their gender.[288] As Currah notes, "An examination of the actual statutes . . . shows that the language of identity politics has not been imported into the actual laws activists are fighting for and that gender expression is almost always included in these laws."[289] Indeed, when it comes to issues important to the transgender community, "the legislative achievements thus far have, for the most part, explicitly expanded the legal meaning of gender to place gender-noncomforming identities and practices on a continuum of gender, rather than create a new category of a protected class."[290]

The way in which accounting for issues of performance and expression serves to reduce the relevance of distinct identity categories is reflected, for example, in the proposed congressional bill, known as the Equality Act, which would amend several federal civil rights statutes by explicitly prohibiting discrimination on the basis of

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[285] Currah, *supra* note 226, at 22.
[286] *Id.*
[287] *Id.*
[288] *Id.* at 23.
[289] *Id.*
[290] *Id.* at 6.

sexual orientation and gender identity.[291] The bill defines the latter as follows: "The term 'gender identity' means the gender-related identity, *appearance, mannerisms, or other gender-related characteristics* of an individual, regardless of the individual's designated sex at birth."[292]

This broad definition of gender identity makes clear that the objective is to provide antidiscrimination protection not only to those who identify as transgender ("gender-related identity"), but also to "appearance, mannerisms, or other gender-related characteristics" that may be disconnected from, or go beyond, fixed and recognizable gender identities of potential discrimination plaintiffs.[293] As called for by a proper understanding of gender-stereotyping theory, the Equality Act's definition of "gender identity" seeks to unmoor the antidiscrimination protection from any particular identity category.[294] *All* gender-nonconforming or gender-variant individuals, regardless of whether they identify as transgender, would be protected by federal antidiscrimination law if Congress enacts the Equality Act.[295]

Unfortunately, the proposed Equality Act's definition of "sexual orientation" is not nearly as capacious—it defines that term to cover only three distinct sexuality identities: "homosexuality, heterosexuality, [and] bisexuality."[296] This narrow definition of sexual orientation, which tracks the one contained in almost all existing state civil rights laws that prohibit discrimination on the basis of sexuality, excludes the many individuals—including asexuals, the polyamorous, and others—who do not exclusively view, understand, or express their sexual identity through the lens of gender-based attraction.[297]

It is interesting to think about why the statutory definition of "sexual orientation" in civil rights laws remains tethered to distinct identity categories in ways that the definition of "gender identity" is not. This question merits a more rigorous exploration than I can provide here, but one reason may be that more people are recognizing notions of fluidity, variability, and malleability in matters related to gender than they are in those associated with sexual orientation; it may be that the push for transgender equality has led some to reconsider the gender binary in ways

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[291] Equality Act, H.R. 5, 116th Cong. (2019).

[292] *Id.* § 1101(a)(2) (emphasis added).

[293] *See id.*

[294] *See id.*

[295] In May, 2019, the House of Representatives approved the Equality Act, but there was little chance that the Republican-dominated Senate would do the same. Arthur S. Leonard, *U.S. House of Representatives Approves Equality Act in Largely Party-Line Vote*, LGBT LAW NOTES, June 2019, at 3.

[296] *See* Equality Act, § 1101(a)(5).

[297] *See* Ball, *supra* note 273, at 166–67. For a discussion of asexuality, see, for example, Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014). For a discussion on polyamory, see, for example, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461 (2011).

that the push for sexual orientation equality has not (yet?) led them to question the notion that everyone is either heterosexual, on the one hand, or lesbian, gay, or bisexual, on the other. In other words, the increased visibility of transgender individuals (and, to a lesser extent, of intersex people)[298] may have led to a greater questioning of gender categories as fixed and given identities than the greater visibility of lesbians, gay men, and bisexuals has led to the questioning of stable, predetermined, and binary sexuality identities. It may be that activists have been more successful in challenging the idea of gender as a fixed and binary characteristic than they have been in doing the same for sexual orientation. It remains to be seen whether activism under the purposefully pluralistic umbrella of "queer rights" may eventually lead to more expansive and fluid definitions of "sexual orientation" in civil rights laws and in the broader society.

Mary Anne Case has raised the concern that the definition of "gender identity" in measures such as the Equality Act is so broad that judges may find it obscure or confusing.[299] Case's point is well taken and suggests that if the definition becomes part of federal antidiscrimination law, advocates will have to explain to courts how such a definition is consistent with the theory of gender stereotyping under Title VII that judges are already familiar with, one that, when properly understood, disconnects questions of sex discrimination from whether a plaintiff's sex, gender, and sexuality identities fall into a finite and predetermined list of identity categories. It is my hope that the arguments presented in this Article will help advocates—especially in cases involving individuals who identify outside of the male/female, straight/LGB, or cisgender/transgender axes—to persuade employers, policymakers, and courts, that gender stereotyping can constitute impermissible discrimination—and by, extension, impose harm—regardless of how the claimant identifies according to sex, gender, and sexuality markers.

Given the central role that distinct and fixed identity categories has played in crafting American antidiscrimination law and policy, it likely will be impossible, as a practical matter, to completely exclude the idea of finite and predetermined identity considerations from the enactment, interpretation, and implementation of civil rights laws for the foreseeable future. But the expressive implications of gender-stereotyping theory show that it is possible to provide individuals with actual and meaningful antidiscrimination protection regardless of how they identify according to certain sex, gender, and sexuality markers.

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[298] I say "to a lesser extent" because, while society is paying more attention to intersex individuals, they do not seem to have reached the level of social visibility currently enjoyed by transgender individuals as a class. For a discussion of intersex individuals generally, see JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS (2012).

[299] Mary Anne Case, *Legal Protections for the 'Personal Best' of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1366 (2014).

CONCLUSION

For better and for worse, issues of group identity have been inextricably linked to American antidiscrimination law and policy. A clear understanding of how gender-stereotyping theory protects expressive interests, such as the one I have attempted to provide in this Article, allows us to see how that theory can promote equality in ways that are delinked from the existence of any given identity. It is the expression-protecting components of gender-stereotyping theory that allow for the articulation and implementation of a more pluralistic conception of equality than one that is tethered to a finite list of privileged identities. The delinking of equality from fixed identity categories encouraged by gender-stereotyping theory shows that there is no essential or intrinsic relationship between, on the one hand, affording antidiscrimination protection and, on the other, the identity categories that have been so central to American equality law up until now.